Neutral Citation Number: [2023] EWHC 46 (KB)

Case No: M22Q651/F05YM066

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
HIGH COURT APPEAL CENTRE MANCHESTER
ON APPEAL FROM THE MANCHESTER COUNTY COURT

Heard at: Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2023

Before:

MRS JUSTICE FARBEY

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Between:

RICHARD ARTHERN	**Appellant/ Claimant**
- and -	
RYANAIR DAC	**Respondent/ Defendant**

- -
- -

Sarah Prager (instructed by **Irwin Mitchell LLP**) for the **Appellant/Claimant** appeared remotely by video link
Christopher Loxton (instructed by **Kennedys Law LLP**) for the **Respondent/Defendant** appeared remotely by video link

Hearing date: Tuesday 13 December 2022

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Approved Judgment

This judgment was handed down remotely at 2:00pm on Monday 16 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MRS JUSTICE FARBEY:

Introduction

1. This is an appeal, brought with the permission of Heather Williams J, against the order of HHJ Evans sitting in the County Court at Manchester on 20 July 2022. In her order, the judge dismissed the appellant's claim for damages under the Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999 ("the Montreal Convention").

2. The claim arose from an injury suffered by the appellant when he fell to the floor on board an aeroplane operated by the respondent airline. The Particulars of Claim stated that the incident was an "accident" and that the appellant was entitled to compensation in accordance with article 17(1) of the Montreal Convention. Article 17(1) states:

> "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."

3. Before me, Ms Sarah Prager (who did not appear below) appeared for the appellant. Mr Christopher Loxton appeared for the respondent (as below). I am grateful to both counsel for their focused and helpful submissions.

4. By virtue of CPR 52.21(1), this appeal is not a rehearing but is limited to a review of the judge's decision. The appeal stands to be allowed only if the judge's decision was (a) wrong; or (b) unjust because of a serious procedural or other irregularity (CPR 52.21(3)).

Factual background

5. On 12 December 2017, the appellant sustained an injury during the course of a flight from Manchester to Hamburg. As to the circumstances which gave rise to the incident, the appellant's evidence at trial was essentially unchallenged and was entirely accepted by the judge. She recorded his evidence as follows:

> "…it was very cold on the morning of the flight… It was wet on the ground, perhaps from ice or from freezing fog, which was also present. The flight was delayed. [The appellant] was told at the airport that the reason for the delay was because the aeroplane had to be de-iced. Once that had been done, the passengers walked across the tarmac to get to the aeroplane. They did not board from a boarding bridge. A short time into the flight, he got up to use the toilet and he slipped near to the toilet door. He told me that he noticed after he fell that his clothes were wet, and that he had slipped on what in his witness statement was described as a large amount of fluid on the floor… He was not sure whether the liquid was just water alone – it seemed to him to be a mixture of de-icer and water, which made a kind of slushy substance that was similar to wallpaper paste.

> He said the effect upon him of stepping on it was as though he had stepped on black ice."

6. The respondent called no oral evidence but relied on a witness statement from Ms Megan Doyle (the respondent's Inflight Safety, Security, Regulatory and Compliance Manager) who gave hearsay evidence derived from the written accident report completed by one of the cabin crew who had assisted the appellant when he fell. Ms Doyle indicated that, as the result of wet and snowy conditions, passengers had brought some moisture into the cabin on their shoes as they embarked. The aeroplane had steps for entering the plane at the front and the rear. Both entrances were near the toilets. The floor had quickly become wet as the passengers boarded.

7. In a key passage of her witness statement, Ms Doyle explained:

> "6. When conditions outside of the aircraft are wet, moisture can be walked into the cabin by passengers when they embark the aircraft. This is normally very limited and quickly dries…
>
> 7. It would not be usual for cabin crew members to mop or clean the floor in these circumstances or during the course of a flight (unless there is a spillage of some kind)."

8. The judge found that the appellant had slipped on liquid that was a mixture of de-icing fluid and water (or ice) which had been tracked into the cabin by passengers on the soles of their feet while they were entering the plane. The de-icing of the plane and the subsequent tracking of liquid into the cabin were both "specific events." She went on to describe the principal issue that arose under article 17(1) in the following terms:

> "21. The real issue here, then, is whether it is an unexpected or unusual event that on cold and icy days where the aeroplane has to be de-iced and the passengers are walking to the aircraft across the tarmac, they track water and ice and de-icing fluid into the cabin. Is that no part of the usual, normal and expected operation of the aircraft, or is it exactly what one would expect on such a day?
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> 22. Mr Kennedy [who was then counsel for the appellant] submits that [it] is not part of the usual and expected operation of the aircraft for there to be water and de-icing fluid tracked into the cabin, because Ms Doyle's evidence is that when moisture is present outside and is tracked into the cabin, usually it is very limited and dries very quickly. He submits that it follows that it is unusual then for liquid still to be present after the aeroplane has taken off and the passengers may move around.
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> 23. It is not, it seems to me, the continuation of the liquid being on the ground, its failure to evaporate, which is the 'event' here. The event which I must consider is the depositing on the floor of the de-icing fluid. Mr Kennedy submits that the depositing of such volume of fluid, and its slipperiness, is such…that it is unusual having regard to Ms Doyle's evidence."

9. Having approached the issues in this way, the judge held:

> "25. I am mindful of the fact that there is no direct evidence from the Defendant on the particular point of de-icing fluid being tracked into the cabin. Nonetheless it seems to me to be a matter of common sense, and such common knowledge as I am entitled to rely upon, that it is not in the scheme of things unusual or unexpected in cold weather for aeroplanes to have to be de-iced before travel, and so it is not unusual or unexpected for there to be de-icing fluid present on the tarmac and, from there, tracked into the cabin in exactly the same way that water can be tracked into the cabin. In my judgment the objective passenger would not view this as unusual or unexpected for the same reasons as I do not find it unusual or unexpected."

10. The judge took into consideration that the liquid had not dried quickly:

> "The fact that Ms Doyle says that any liquid tracked into the cabin usually dries very quickly does not lead, it seems to me, inexorably to the conclusion that the presence of a liquid that does not dry quickly is unusual or unexpected within the meaning of the authorities, or an accident within the meaning of the Convention. On many days, when it is sunny, when it is raining, when the weather is not freezing, there will be no need to de-ice the aeroplane. But the fact that something happens only on a minority of days, even a tiny number of days each year, does not mean that it is unusual or unexpected…."

11. She considered what the reasonable passenger would expect:

> "Knowing that this was an icy day, where the floor was wet, where the aeroplane was de-iced on the tarmac before the passengers walked across the tarmac to board the aeroplane, the reasonable passenger with ordinary experience of commercial air travel would not in my judgment find the presence of such fluid on the floor close to where people enter the aeroplane to be unusual or unexpected. The fact that the Claimant says there was quite a lot of it does not seem to me to make a difference, given that whilst Mr Arthern was not sure how many passengers there were on the flight, he certainly gave the impression that it was quite a number rather than just a handful."

12. Having concluded that the appellant's injury had not been caused by an unusual or unexpected event, the judge rejected the claim that the appellant's fall constituted an accident within the meaning of article 17(1). The appellant had failed to establish that the respondent was liable to compensate him. The claim was dismissed.

Legal framework

The Montreal Convention

13. The Montreal Convention applies to the international carriage of persons, baggage or cargo by aircraft for reward (article 1(1)). As set out in its recitals, the Convention was intended to modernise the provisions of the Warsaw Convention which it replaced; and it aims to ensure protection of the interests of consumers in international air travel while maintaining "equitable compensation based on the principle of restitution."

14. As may be seen from the language of article 17(1), no liability for bodily injury will arise unless the injury was caused by an "accident." In considering the concept of "accident" in the context of the present case, it seems to me that there are two critical touchstones. First, article 17(1) omits any requirement of negligence on the part of the airline. Those steeped in the common law tradition must set aside the concept of negligence and consider whether injury was caused by something having the characteristics of an "accident" within the meaning of the Convention.

15. The omission of any requirement of negligence reflects the balance struck under the Convention between the competing interests of passengers and airlines in the interests of certainty and uniformity (*Barclay v British Airways* [2008] EWCA Civ 1419, [2010] QB 187, para 14, per Laws LJ citing *Morris v KLM Royal Dutch Airlines* [2002] UKHL 7, [2002] 2 AC 628, para 66, per Lord Hope of Craighead). On the one hand, a passenger may be compensated for injury without the need to prove negligence. On the other hand, even clear causative negligence on the part of a carrier will not entitle the passenger to a remedy if the conditions of article 17 are not satisfied (*In re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495, para 3). Ms Prager very properly accepted that it can be no part of the appellant's case that the respondent was negligent not to have cleaned up the liquid in order to avoid slipping. Sympathy for the appellant - which the judge expressed and which I reiterate - cannot prompt the court to consider questions of negligence.

16. Secondly, in determining the scope of "accident", it is important that the courts of signatory states should try to adopt a uniform interpretation of the Montreal Convention's provisions (*In re Deep Vein Thrombosis Group Litigation*, para 1). In that endeavour, assistance can and should be sought from relevant decisions of the courts of other Convention countries; but the weight to be given to them will depend upon the standing of the court concerned and the quality of the legal analysis (*In re Deep Vein Thrombosis Group Litigation*, para 11). The international nature of the Convention, and the balance it seeks to strike between the interests of passengers and the interest of airlines, ought not to be distorted by a judicial approach in a particular case designed to reflect the merits of that case (*In re Deep Vein Thrombosis Group Litigation*, para 11).

17. In considering claims for compensation under the Montreal Convention, the judicial task is to apply the language of the Convention to the facts of the case (*In re Deep Vein Thrombosis Litigation*, para 12). In considering the language of the Montreal Convention, authorities on the Warsaw Convention are "just as valuable" (*Barclay*, para 6).

Key cases

18. Both parties agreed that the seminal authority on the meaning of "accident" in article 17(1) is *Air France v Saks* 470 US 392, a decision of the United States Court of Appeals for the Ninth Circuit which concerned the similar provision of article 17 of the Warsaw

Convention. It has been described as "the leading case on article 17 of the Warsaw Convention, no less applicable to article 17(1) of the Montreal Convention" (*Barclay*, para 6).

19. The Court considered whether a passenger rendered permanently deaf in one ear had had an accident when she suffered pressure and pain in her ear as an aircraft came into land. The aircraft's pressurisation system was operating normally. O'Connor J delivered the opinion of the Court, emphasising that the Court's responsibility was to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties" (p.399). She held (at p.399) that an accident must comprise something more than an injury: "it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone" (emphasis in the original). Routine travel procedures that produce an injury "due to the peculiar internal condition of a passenger" fall outside the definition (p.405). Liability arises:

> "only if a passenger's injury is caused by an unexplained or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries" (p.405).

20. Conversely:

> "…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…"

21. The Court observed that any injury is the product of a chain of causes. A passenger need establish only that "some link in the chain was an unusual or unexpected event" (p.406).

22. The approach in *Saks* – and the concept of an "unusual" or "unexpected" event - has been considered by the courts of England and Wales on a number of occasions. Lord Scott of Foscote in the *Deep Vein Thrombosis Group Litigation* observed at para 23 that *Saks* had established two important requirements of an article 17 accident:

> (1) An event which is no more than the normal operation of the aircraft in normal conditions cannot constitute an accident; and
>
> (2) The event that has caused injury must be something external to the passenger.

23. Lord Mance observed (at para 69) that an accident has three aspects: (1) an event which was (2) unexpected or unusual and (3) external to the passenger. In the context of the balanced compromise at which article 17 aims, there is nothing incoherent about a standard of liability determined by current expected airline practice (para 79). To regard an event as an accident if an airline and its crew have acted in accordance with usual and expected practice would be artificial (para 80).

24. In *Barclay*, the court held (at para 35) that an accident is:

> "a distinct event, not being part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger."

25. In that case, the passenger had slipped on a plastic strip embedded in the floor of the plane. The court observed that she had had contact with the plane in its normal state (para 30). All that had happened was that the passenger's foot came into contact with the inert strip, and she fell. She had had a personal reaction to the normal operation of the aircraft. In those circumstances, there had been no accident (para 36).

26. There was discussion before me about whether an accident was an event that was both "unusual" and "unexpected" or whether either of those two descriptions would suffice. The point was confronted in *Ford v Malaysian Airline Systems Berhad* [2013] EWCA Civ 1163, [2014] 1 Lloyd's Rep. 301. Aikens LJ (with whom Leveson and Maurice Kay LJJ agreed) held at para 21:

> "… there could be a distinction between an event which is 'unexpected' and one which is 'unusual'. Although an event which is 'unexpected' is likely to be 'unusual', an event which is 'unusual' is not necessarily one that is totally 'unexpected'. However, I accept that in many cases an event that is 'unusual' will be one that is also 'unexpected'."

27. As Lord Scott said in the *Deep Vein Thrombosis Group Litigation*, para 14, the question whether an event is unusual or unexpected should be assessed from the viewpoint of the passenger:

> "…it is important to bear in mind that the 'unintended and unexpected' quality of the happening in question must mean 'unintended and unexpected' from the viewpoint of the victim of the accident. It cannot be to the point that the happening was not unintended or unexpected by the perpetrator of it or by the person sought to be made responsible for its consequences. It is the injured passenger who must suffer the 'accident' and it is from his perspective that the quality of the happening must be considered."

28. The test is not however a subjective one: it is the standpoint of an ordinary, reasonable passenger that counts (*Moore v British Airways PLC*, United States Court of Appeals for the First Circuit, April 29, 2022, p.15). I agree with Mr Loxton that the ordinary, reasonable passenger must be regarded as a person with experience of commercial air travel and with reasonable knowledge of established or common airline practice.

29. In *Carmelo Labbadia v Alitalia (Societa Aerea Italiana S.p.A)* [2019] EWHC 2103 (Admin), [2019] 2 C.L.C. 283, the claimant had slipped and fallen down the aircraft steps when disembarking in Milan in snowy conditions. The steps were uncovered and did not have the protection of a canopy. Reviewing the key legal principles, Margaret Obi sitting as a Deputy High Court Judge held:

> "It follows that to determine if there has been an 'accident' requires consideration of whether there has been an injury (i)

> caused by an event; (ii) that is external to the claimant, and (iii) which was unusual, unexpected or untoward rather than resulting from the normal operation of the aircraft."

30. It was common ground before me that this distillation of the principles in the case law was a correct one. In that case, the use of uncovered stairs without the stairs being cleared of snow and ice did not comply with the airport's operating manual and was therefore not the "normal operation of the aircraft" (para 41). The event (consisting of acts and omissions of the airline) was unexpected and unforeseen from the claimant's perspective because he had no reason to expect that the stairs would be slippery from compacted snow. The event was also external to the claimant, such that the criteria for an accident were met.

31. As Mr Loxton submitted, the unusual or unexpected event in *Labbadia* was not the snowy conditions: The Deputy Judge found that the poor weather conditions did not constitute an event but simply a state of affairs. In any event, there was nothing unusual or unexpected about adverse weather in Milan during February (para 40). It was the deviation from industry practice that converted an event into an accident because the deviation was not part of the normal operation of the aircraft (para 41).

32. The grounds of appeal before me do not contend that the judge was wrong to conclude that the "events" in the present case were the de-icing of the plane and the subsequent tracking of liquid into the cabin. The wintry weather conditions outside was merely a state of affairs.

33. I was also directed to the judgment of the Court of Justice of the European Union ("CJEU") in *GN v ZU (administrator in insolvency of Niki Luftfarht GmbH)* (Case C-532/18) [2020] 1 WLR 3059 which concerned a six-year-old child who had suffered scalding when her father's cup of hot coffee tipped over from his tray table on board a flight between Spain and Austria. The CJEU defined an "accident" as "an unforeseen, harmful and involuntary event" (para 35) and ruled that it is not a condition of liability that injury should arise from a hazard typically associated with aviation (para 44). I do not regard this case as particularly advancing either party's arguments in the present appeal.

34. In *JR v Austrian Airlines AG* (Case C-589/20), the CJEU considered a case in which a passenger had fallen on a mobile stairway while disembarking an aircraft. There was no ascertainable reason for the fall. The CJEU ruled that a situation in which, for no ascertainable reason, a passenger falls on a stairway set up for the disembarkation of passengers constitutes an accident, including where the air carrier concerned has not failed to fulfil its safety obligations. In so far as the judgment forms part of international law about the Montreal Convention, I have considered it. However, I do not regard it as having high persuasive value because the reasoning is brief. The judgment does not demonstrate the same degree or quality of reasoning as (in particular) the domestic appellate courts in the cases that I have cited above. Ms Prager did not seek to maintain that it should carry equal weight.

The appellant's submissions

35. Although the grounds of appeal (which were not settled by Ms Prager) raise a number of points, Ms Prager focused her oral submissions on the judge's approach to the

evidence. She submitted that, on the evidence, the judge was wrong to conclude that the appellant had not suffered an accident within the meaning of article 17(1). The judge had not properly applied the law to the facts of the case. There was no evidence to contradict the appellant's evidence – which the judge had accepted – that there was a large quantity of fluid on the floor. Ms Doyle's evidence confirmed that moisture tracked into the cabin in wet conditions "is normally very limited and quickly dries." The implication is that, conversely, it is not normal for more than very limited moisture to accrue in the cabin. A large quantity of fluid that did not dry quickly must by implication be unusual or unexpected.

36. Ms Prager submitted that the appellant's evidence had described what had actually happened. Ms Doyle's evidence had described what usually happened – which was not the same thing. The judge in considering all the facts ought to have concluded that the presence of a large quantity of de-icer and other liquid on the floor of the plane - which had not dried by the time the seat belt signs were switched off and passengers were allowed to move around the plane – was unusual or unexpected from the point of view of a reasonable and objective passenger.

37. Ms Prager drew attention to the analysis in the *Barclay* case that an accident cannot arise from the normal state of affairs in the cabin of the plane. The normal state of affairs reflected the permanent features of the operation of the plane whereas in the present case the appellant's fall was caused by something that came and went (the tracking of liquid on the floor). That lack of permanence was indicative of something unusual or unexpected in the sense of not being part of the usual, normal and expected operation of the aircraft.

38. For these reasons, while identifying the right legal test, as derived from the case law, the judge had not properly applied that test to the facts of the case and had reached a conclusion that was unreasonable and not open to her. The appeal should be allowed to the extent that the appellant's claim against the respondent should succeed on liability and I should remit the assessment of damages to the court below.

The respondent's submissions

39. Mr Loxton submitted that the judge had directed herself correctly in law and had applied the correct legal principles to the facts as found. The burden lay on the appellant to prove that he had suffered an accident. He had called no evidence to prove that, objectively viewed, the presence of de-icing fluid on the floor near the toilet, after passengers had walked across tarmac to get onto the plane having been warned about de-icing in freezing cold weather, was unusual or unexpected. The judge had given careful and adequate reasons for her decision. The appeal should be dismissed.

The respondent's evidence

40. There was some dispute between the parties as to why Ms Doyle's evidence was brief and why she did not deal specifically with the presence of de-icer (as opposed to rain or snow) in the cabin or with normal operating procedures in cold wintry weather. Mr Loxton said that the respondent's evidence was filed in response to the Particulars of Claim which had not mentioned these matters but had simply referred to wet flooring. Ms Doyle had dealt with the wetness of the floor in general terms as nothing else had arisen from the accident report on which her evidence was based.

41. Ms Prager said that the respondent should have known that the appellant's case included the presence of de-icer from reading the appellant's witness statement. Ms Doyle had not attended for cross-examination on de-icing procedures because the respondent had taken the view that her attendance would be disproportionate. Although the appellant carried the legal burden of proof, the evidential burden lay on the respondent who had knowledge of its own operating procedures and industry practices in icy weather.

Analysis and conclusions

42. It would be tempting to regard the build-up of liquid as hazardous and then to infer that the hazard was an accident; but that is not the approach of any of the judicial formulations from which I have derived assistance. I have heeded the cautionary note sounded by Lord Scott at para 12 of the *Deep Vein Thrombosis Group Litigation* that judicial formulations of the characteristics of an article 17 accident should not be treated as a substitute for the language of the Convention. Nevertheless, the grain of the case law since *Saks* runs deep and focuses on injury caused by an event that is "unusual" or "unexpected". It would in my judgment be unprincipled (and carry the risk of undue judicial subjectivity) if I were to adopt an approach that was not consistent with existing judicial exposition of the concept of an accident. That is particularly so when the domestic appellate cases are binding on me.

43. Having considered the authorities, I have reached the view that the judge applied the correct legal principles to the facts that she found. Her factual findings are rooted in the evidence before her. She was alert to the issues in dispute and considered with care whether the appellant had suffered an "accident" within the meaning of article 17(1). She made her own assessment of whether the requirements of an "accident" were met with which this court will be slow to interfere on appeal.

44. There may be gaps in Ms Doyle's evidence to the extent that it does not deal with the normal operation of the aircraft when there has been de-icing. I do not know what, if anything, is in the respondent's operating procedures about icy as opposed to rainy weather conditions. It is not, however, the function of this court to fill the gaps. It would be wrong for this court to become involved in whether it was the appellant's failure to amend his Particulars of Claim or the respondent's failure to bring Ms Doyle to court that is the source of the gaps. Those procedural matters fell to be dealt with during the course of the proceedings below. There is no appeal ground, and Ms Prager made no oral submissions, to the effect that the appeal should be allowed on grounds of procedural error or other unfairness.

45. The judge stated expressly that she was "mindful of the fact that there was no direct evidence from the [respondent] on the particular point of de-icing fluid being tracked into the cabin" (see para 25 of the judgment, cited above). She was nevertheless entitled to use the orthodox forensic tools of direct factual findings on, and inference from, the evidence that was supplied to her.

46. The judge considered both aspects of the evidence that Ms Prager emphasised before me, namely the large amount of fluid on the floor and the fact that it did not quickly dry. As to the amount of fluid, the judge relied on the number of passengers who boarded the plane. She was entitled to conclude that it would not be unusual or unexpected, from the viewpoint of a reasonable passenger, that a large amount of liquid

was tracked into the cabin by the numerous passengers. There are no grounds to interfere with her reasoning.

47. Ms Prager sought to persuade me that Ms Doyle's evidence implied that liquid that did not dry quickly was unusual or unexpected. In my judgment, the judge was entitled to reach the view that such a conclusion was not inexorable – i.e., that no such implication arose - in cold weather when de-icing had taken place.

48. Standing back, I am not persuaded that the grounds of appeal seek anything other than the substitution of my judgment of what is "unusual" or "unexpected" for that of the judge. There is no traction in that approach: it would in effect amount to a rehearing and not a review. Accordingly, despite Ms Prager's attractive submissions, this appeal is dismissed.