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Mistakes on a plane

What is an accident? Asela Wijeyaratne & Mark Welbourn examine a return to orthodoxy under the Montreal Convention on air passenger liability

IN BRIEF

- This article considers the recent High Court decision of *Arthern v Ryanair DAC* in which the court examined the aviation liability regime under the Montreal Convention.
- By contrast to recent decisions of the High Court and the Court of Justice of the European Union, it is considered that this decision represents a return to an orthodox interpretation of the Convention, in respect of the meaning of the term '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 of or injury to passengers. The Montreal Convention is the successor to the Warsaw Convention, which opened for signature in 1929.

While 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 US 243 (1984), citing conference minutes), the purpose of the Montreal Convention was to provide a 'modernised uniform liability regime for international air transportation' (Letter of Submittal, 1999 WL 33292734).

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.'

Arthern v Ryanair

In the recent decision of *Arthern v Ryanair DAC* [2023] EWHC 46 (KB), the High Court (Mrs Justice Farbey, on appeal from Judge Evans in the Manchester County Court) provided further guidance on the interpretation of the word 'accident', which is a term of art under the Montreal Convention. The claim arose from an injury suffered by Mr Arthern when he fell to the floor on board a flight operated by Ryanair. The findings of fact below were that Mr Arthern had slipped on a mixture of de-icing fluid (which had been applied to the aircraft prior to the flight) and water (or ice) which had been tracked into the cabin on the soles of the feet of passengers on embarkation.

Article 17 does not require negligence on the part of the carrier. As Lord Scott observed in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2005] All ER (D) 129 (Dec), the omission from Art 17 of any requirement of negligence reflects the inflection point in the balance struck under the Convention between the competing interests of passengers and carriers. Negligence on the part of the carrier is not required to be alleged or proven. However, there is no entitlement to a remedy if the conditions of Art 17 are not satisfied.

> *"Article 17 does not require negligence on the part of the carrier"*

Farbey J provided a useful review of the relevant authorities. The starting point for the analysis is 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, Justice O'Connor 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.'

In *Re Deep Vein Thrombosis*, the House of Lords held that, following *Saks*, for the purposes of Art 17(1):

a. an event which is no more than the normal operation of the aircraft in normal conditions cannot constitute an accident; and
b. the event that has caused the injury must be something external to the passenger.

Similarly in *Barclay v British Airways plc* [2008] EWCA Civ 1419, [2008] All ER (D) 207 (Dec), the court held, applying *Saks*, 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'.

Applying the above framework, Farbey J upheld the finding of Judge Evans that there was no accident in the circumstances of this case: '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.' It was found that 'the objective passenger would not view this as unusual or unexpected'.

Restating the orthodox?

Arthern can be considered to be a restatement of the orthodox interpretation of the requirements of Art 17 of the Montreal Convention. It can be contrasted

with three other recent decisions in which the interpretation of the word 'accident' was somewhat less consistent with prevailing authority: *Labbadia v Alitalia (Societa Aerea Italiana SpA)* [2019] EWHC 2103 (QB), [2019] All ER (D) 24 (Aug); *GN v ZU* (2020) C-532/18; and *JR v Austrian Airlines AG* (2022) C-589/20.

In *Labbadia*, a passenger was on a flight from London Heathrow to Milan Linate in February 2015. The aircraft landed in poor weather conditions. As the passenger disembarked from the rear of the aircraft, he fell headfirst from aircraft stairs, sustaining bodily injury as a result. The deputy High Court judge Margaret Obi 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 that the injury to Mr Labbadia was caused by an accident.

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

GN v ZU is a decision of the Court of Justice of the European Union (CJEU) from December 2019. GN, who was six years old at the time, travelled with her father on a flight from Mallorca to Vienna. During the flight, GN's father was served a hot cup of coffee which, after it was placed on the tray table in front of him, tipped and spilled onto GN, causing her burn injuries. The court was asked to consider if there had been an 'accident' within the meaning of the Montreal Convention.

The opinion of the advocate general approached the interpretation of the Convention on a number of different bases and considered a number of leading cases, including *Saks*. The advocate general recommended that an accident must be interpreted as an event 'which is sudden or unusual and has an origin external to the person of the passenger concerned… without it being necessary to examine whether the event is attributable to a hazard typically associated with aviation or directly concerned with aviation'. The judgment of the CJEU was rather more limited in its analysis of the prevailing jurisprudence. It placed weight on what was described as the 'ordinary meaning' of the concept of 'accident' as an event which was 'unforeseen, harmful and involuntary'. It was therefore said to apply to 'all situations on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger'. In failing to distinguish the term 'accident' from normal aircraft operations and the passenger's own internal reactions to them (and in not making reference to the relevance of acts/omissions of carriers), the CJEU's definition did not sit comfortably with orthodox jurisprudence and placed a marker for the subsequent over-broad application of the liability in cases such as *JR v Austrian Airlines*.

> *"The judge found that the poor weather conditions were not an 'unexpected or unusual' event"*

JR is a CJEU decision from June 2022. In that case, JR fell from a mobile stairway while disembarking an aircraft at Vienna Airport. At the time of her fall, JR was holding a handbag in one hand and carrying her son with her other arm. There was 'no ascertainable reason' why she fell. The CJEU held that: 'Article 17(1) of the Montreal Convention must be interpreted as meaning that a situation in which, for no ascertainable reason, a passenger falls on a mobile stairway set up for disembarkation of passengers of an aircraft and injures himself or herself constitutes an 'accident' within the meaning of the provision.' The CJEU went on to find that 'the fact that that passenger was not holding the handrail of the stairway at the time of his or her fall may constitute proof of negligence… which caused or contributed to the damage suffered by him… and to that extent, exonerate the air carrier concerned from its liability to that passenger'.

The approach of the CJEU in *JR* is far removed from the leading interpretation in *Saks* (which was not even cited by the court). It was appropriate in those circumstances that Farbey J found in *Arthern* that: '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 I have cited above.'

Slips & trips

Unlike *Labbadia*, *GN* and *JR*, *Arthern* is more readily reconcilable with County Court cases, such as:

- *Cannon v My Travel Airways Limited* (8 July 2005, Judge Caulfield), where a slip following disembarkation on a ramp to the airport building made wet by rain 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';
- *Kedgley v Britannia Airways* (1 September 2004, Recorder White), where a slip on water in the vicinity of a cabin toilet was not unexpected or unusual and a failure to clean it up was not an event; and
- *Jelfs v British Airways* (26 February 2014, Judge Moloney), where icy slush walked inside a terminal was held to be usual and expected.

It also sits more comfortably with US cases such as *Vanderwall v United Airlines* (80 F.Supp 3d 1324), *Rafailov v El Al Israel Airlines Ltd* (SDNY 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.

The judgment in *Arthern* can in the above circumstances be considered a useful restatement of the orthodox interpretation of Art 17 of the Montreal Convention, and a marker that the courts will not readily find contraindicative cases (even from high appellate jurisdictions) to be of significant persuasive value, where they lack quality of reasoning. **NLJ**

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