3 HARE COURT

Travel & Aviation Newsletter

February 2025

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3 Hare Court

We continue to have a strong reputation in personal injury and travel litigation, as well as in civil fraud, commercial litigation, employment, insolvency, international work including arbitration, financial services, professional negligence, property and construction litigation and all manner of public, administrative, and constitutional law practice, incorporating civil liberties and human rights.

Members are ranked as leading specialists in the Legal 500, Chambers & Partners and Who's Who Legal in personal injury, travel, insolvency, civil fraud, administrative and commercial law, amongst others, and we are a top tier set for travel.

We provide specialist advice and representation at all stages of the litigation process, including pre-action, drafting pleadings, skeleton arguments and schedules, undertaking ADR, and providing advocacy at interlocutory hearings, trials and inquests – from fast-track cases to the most substantial and complex claims, from major commercial disputes to catastrophic and fatal accidents.

Claims in which we are involved frequently have a cross-border element; whether arising from an overseas accident or contractual dispute or involving foreign parties. We are uniquely placed to assist with such matters, where there are implications for the duty and standard of care, where jurisdiction and the choice of law are in issue and where direct actions are brought against overseas defendants or insurers. Chambers has established links to the travel industry, and we are an ABTA partner. Members of Chambers are admitted as barristers in overseas jurisdictions and are fluent in many languages including Dutch, French, German, Hindi, Italian, Punjabi, Spanish, Swahili and Urdu.

For further information please view our website or contact us at Marketing@3harecourt.com or 020 7415 7800 for further information.

Foreword

Welcome to our latest Travel & Aviation newsletter. As ever, better late than never!

In this edition:

- **Christopher Loxton** and **Nicole Pearson** offer analysis of the extraordinary circumstances defence in 'Flying into uncertainty'.
- **Mike Nkrumah** gives heart to practitioners mispleading direct rights of action with the Court of Appeal's decision in Alton v PZU in 'Polish up your pleadings'.
- **Anna Gatrell** takes us 'Up in the air', addressing turbulence claims under the Montreal Convention.
- **Tabitha Hutchison** leads us through the never less than thrilling world of fixed costs in gastric claims in 'Sick of costs?'
- Whilst **Katharine Bailey** covers the new intermediate track in 'Battle of the bands'.
- **Daniel Goldblatt** channels Shakespeare in 'Not single spies but in battalions', looking at tactical applications for disclosure in cases involving fundamental dishonesty.
- **James Hawkins** considers the rules surrounding witness statements where English is not the witness's first language in 'In your own words'.
- And **Katherine Deal KC**, considers claims under the rail convention, COTIF, in 'All Aboard'.

Katherine Deal KC

Editor, Head of Personal Injury and Travel Law Group

Contributors to this Issue

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James Hawkins

James Hawkins specialises in personal injury, travel law and professional negligence claims. James regularly undertakes work with a foreign element, including accidents which have occurred abroad, illness claims, Athens Convention claims and claims against foreign insurers. James also appears at inquests, including inquests involving issues as to the medical cause of death and the standard of care and treatment received at hospital. He has particular recent experience of cases where death has resulted from anaphylaxis.

Christopher Loxton

Christopher undertakes court, drafting and advisory work in a wide variety of matters relating to aviation and travel law, including: Insurance disputes. Hull damage claims, carriage by air disputes involving EU regulations, Warsaw and Montreal Conventions, and associated passenger, cargo, baggage, delay and denied boarding claims. Personal injury, fatality, and discrimination claims. Regulatory and compliance issues. Package Holiday (including holiday sickness) claims, Regulation (EU) 1177/2010 claims. International carriage by road and sea claims, including under Athens Convention and the Convention on the Contract for the International Carriage of Goods by Road (CMR).

Mike Nkrumah

Mike Nkrumah specialises in personal injury and travel law litigation, representing both claimants and defendants. Mike has experience in all three tracks, from the small claims track to the multi-track. He has gained significant experience in dealing with road traffic accidents occurring in Europe, including in claims for hire / loss of use and fatal accidents. In addition, he has experience of dealing with package tour claims, holiday sickness claims and public liability claims.

Daniel Goldblatt

Daniel Goldblatt has a broad and busy practice ranging from multiparty Commercial Court disputes to constitutional law appeals in the Privy Council. He has particular experience in contract and trust disputes, civil fraud, insolvency, aviation and travel law, and public and constitutional law. He is also developing a practice in international arbitration and mediation. Daniel has experience acting and advising in travel and aviation law disputes. He primarily acts for airlines and tour package holiday providers.

Katharine Bailey

Katharine is regularly instructed in matters involving the Package Travel Regulations, the Montreal Convention, and the Athens Convention. Katharine's caseload covers trials, interim applications, and costs and case management conferences. Katharine also represents various airlines in passenger claims for compensation under the EU Denied Boarding Regulations (EC Regulation 261/2004). She also maintains a busy paperwork practice in this area, drafting advices (e.g. on jurisdictional and procedural points, local standards/expert evidence, or quantum), pleadings, and schedules of loss.

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Anna Gatrell joined Chambers in October 2024, following successful completion of her pupillage. She accepts instructions in all of Chambers' core practice areas, with a particular focus on commercial work and travel law.

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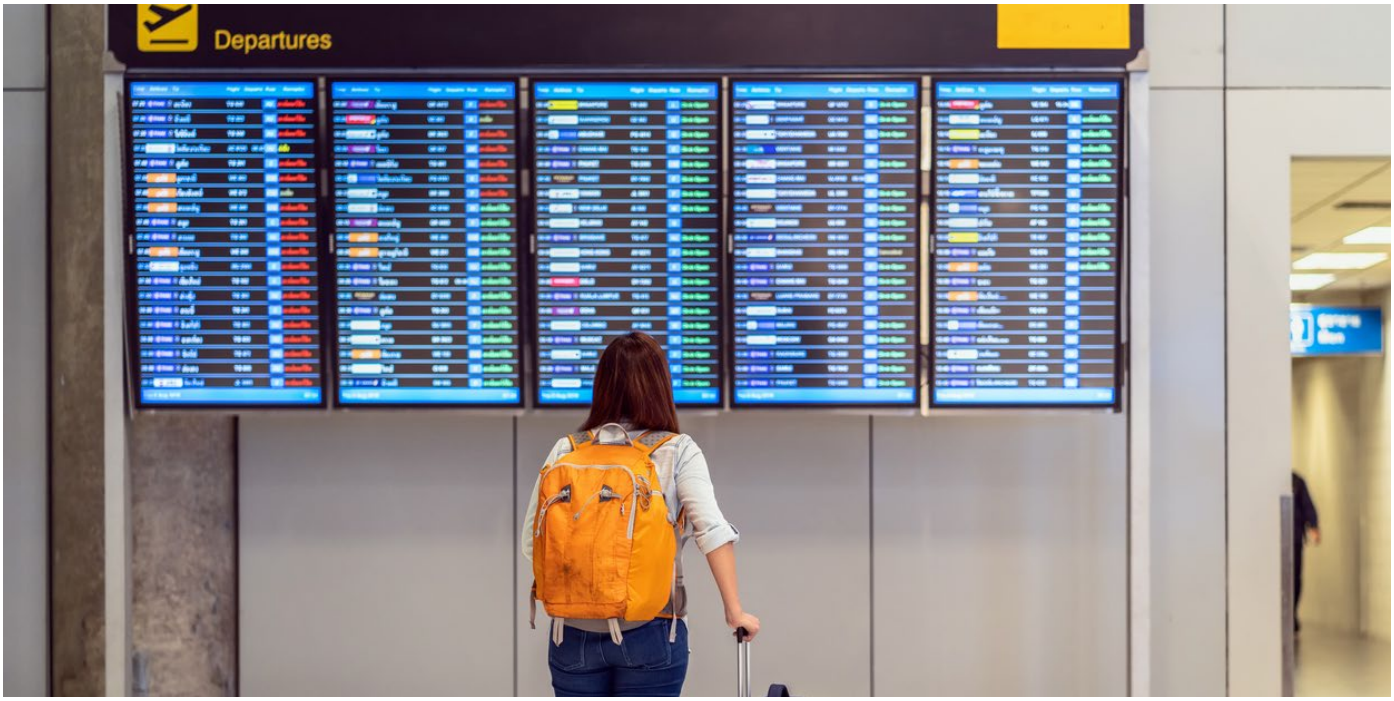
Nicole Pearson - Pupil

Nicole Pearson is our 2024-2025 pupil. Nicole's Pupillage commenced on 7 October 2024.



Flying into uncertainty: The shifting skies of 'extraordinary circumstances'

Introduction

Are courts continuing with a pro-consumer approach to airline compensation cases, or has there been a shift to a more pro-airline approach? In this article, Christopher Loxton and Nicole Pearson look at the recent updates on what constitutes "extraordinary circumstances" under article 5(3) of Regulation (EC) No. 2004/261 ('the Regulation'). In particular, they focus on three recent decisions relating to staff absence and aircraft defects: Lipton v BA Cityflyer [2024] UKSC 24, Matkustaja A v Finnair Oyj (C-385/23) and D. S.A. vs P. S.A (C-411/23).

The defence under article 5(3) of the Regulation excludes air carrier's liability to pay compensation if they prove a flight cancellation, or arrival delay of 3 hours or more, is"caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".

Recital 14 provides examples as to what might be considered an "extraordinary circumstance", citing "political instability", "meteorological conditions incompatible with the operation of the flight concerned", "security risks", "unexpected flight safety shortcomings", and "strikes that affect the operation of an operating air carrier". Yet even within these examples, there is no automatic presumption that such circumstances are in fact extraordinary, and therefore the courts are required to make a case-by-case assessment, determining, per the CJEU in, Wallentin-Hermann, Case C-549/07 at [17]:

a) whether the relevant event is inherent in the normal activity of the carrier (what Lord Lloyd-Jones at para 149 of Lipton called the "inherency" test), and
b) whether the carrier has a requisite degree of control in relation to the occurrence of that event and its consequences.

While case law has previously suggested a general distinction between events whose origins are 'internal' (therefore, inherent), and those whose origin is 'external' to the operating air carrier, recent cases have suggested that even that distinction is fraught with exceptions and nuances.

Staff Absences: Lipton v BA Cityflyer [2024] UKSC 24

The recent decision in Lipton v BA Cityflyer ('Lipton') is key reading for practitioners wishing to advise clients on their prospects of bringing or defending a compensation claim for flight cancellation/delay.

In finding that a pilot taken ill shortly before a flight departure did not constitute an extraordinary circumstance, the Supreme Court considered the following factors to be relevant:

1) Extraordinary circumstances should be given ordinary meaning in everyday language, and interpreted as being outside the "mundane" [161] and [166];
2) Staff illness is "commonplace" for any business and something which occurs on a "daily basis" [161];
3) A pilot, because of his role, is "as much part of the operating system" as the mechanical components of the aircraft [165];
4) Pilots are governed by rules outside of operating hours (for example, not being able to consume alcohol in the 24 hours before a flight), and it therefore does not matter that he or she fell ill off-duty [170];
5) The purpose of the Regulation is to provide a standardised level of compensation, and therefore the vast bulk of claims ought to be able to be determined on paper [171]; and
6) Excessive granular examination of fact is undesirable given the likely impracticalities and difficulty of doing so in the context of illness [172].

Following recent decisions narrowing the scope of staff absences due to industrial action, the Supreme Court's decision appears to be a further stark warning to airlines that absence of staff is rarely likely be considered an extraordinary circumstance.

By appearing entirely disinterested in the reason of the illness [172], the Court appears to be confirming that the conclusion would have been the same even if the pilot's absence had been wholly unpredictable. Similarly, although attention was draw to a pilot's professional obligations in the 24 hours proceeding the flight [170], the Court made clear its view would not have changed had the illness occurred at any other time prior to the flight's departure. In other words, whether a pilot is ill with a cold, or a rare tropical disease contracted on holiday, ought not, to make a difference.

The Supreme Court's decision chimed with a 2023 CJEU's decision of TAP Portugal v Flightright GmbH (Joined Cases C-156/22 to C-158/22) [2023] Bus LR 875, in which a co-pilot tragically and unexpectedly passed away shortly before the flight's departure. This event left the entire crew too shaken to operate the flight and a replacement crew has to be sourced. Yet the CJEU held that the event was inherent in the normal exercise of the carrier's activities.

It remains to be seen whether staff illness attributedly solely to a third party or external event, for example a crew member being given food poisoning through corporate espionage or by a disgruntled former employee, could be said to escape the confines of the Lipton and TAP Portugal v Flightright decisions. In recent years, the CJEU has found seemingly commonplace circumstances to be extrodinary where they have an "external origin" and/or are attributable to the acts of a third party:- whether as a result of foreign object debris on a runway (as in Germanwings GmbH v Pauels (C-501/17)); the presence of petrol on a runway resulting in its closure (Moens v Ryanair (C 159/18, 26 June 2019); diversion of an aircraft as a result of an unruly passenger onboard (LE v Transport Aéreos Portugueses SA (C 74/19); the sudden and unexpected failure of an airport refuelling

system (KU, OP, GC v SATA International – Azores Airlines SA ((C-308/21); or the lack of airport staff responsible for the loading of passenger baggage (Touristic Aviation Services Limited v Flightright GmbH (C-405/23).

Technical failures: Matkustaja A v Finnair Oyj (C-385/23) & D. S.A. v P. S.A (C-411/23)

The recent decisions in respect of technical failures equally raise their own set of dilemmas. In June 2024, the CJEU handed down two important decisions in relation to technical failures: Matkustaja A v Finnair ('Finnair'), which involved a flight cancellation due to a technical failure as a result of a latent defect in design in what was described as "the first worldwide occurrence in relation to the particular type of aircraft", and D. S.A. vs P. S.A ('D.S.A'), based on similar facts, but with the nuanced difference that the airline had be warned by of the defect before the flight's departure.

In both instances, the CJEU found in favour of the carrier, placing particular emphasis on the fact the that the carrier had no power to identify and remedy the latent defect in design, and therefore could not be considered to have "exercised control" in the scenario (Finnair [34]). The Court also confirmed that it did not matter at what time the link between the failure and hidden design defect is detected, as long as the defect existed at the time of the cancellation/delay of the flight (Finnair [37]) and the carrier had no means to correct it (D.S.A [40]).

In the judgments, the CJEU laid out the circumstances which must be present for a technical fault to be considered "extraordinary circumstances":

1) A third party confirms that a failure, both unexpected and unprecedented, was caused by a hidden manufacturing or design defect in a new model of aircraft (Finnair [30];)
2) The failure affects all aircraft of the same type (Finnair [31]);
3) That failure impinges on flight safety (Finnair [31]); and
4) The carrier had no power to identify and remedy the latent defect in design (Finnair [34], D.S.A [40]).

Although on the face of it, Finnair and D.S.A appear to leave some hope for airlines facing technical difficulties, though in reality the threshold for counting such defects as "extraordinary" within the meaning of article 5(3) remains extremely high.

However, the decision in D.S.A leaves open the question of whether there may be circumstances, even when a hidden manufacturing defect is identified, where air carriers will consider to have had enough time to remedy the defect in design. Though it was noted by the CJEU that "reasonable" measures for the purpose of article 5(3) were not to be interpreted in this context as requiring a back-up fleet of aircraft on standby at short notice [47].

Interestingly, and in stark contrast to the Supreme Court's aim of providing a standardised approach, and avoiding county courts embarking on detailed fact-finding exercises, the decision in D.S.A went so far as to urge national courts to take into account the commercial realities of airline operations [50] in deciding what measures were reasonable to take in the particular circumstances. The decision therefore raises questions as to the extent to which such an approach would be followed in UK courts moving forward.

Key Takeaways

Despite the number of additional questions raised, practitioners should bear the following key points in mind in relation to extraordinary circumstances:

- Although there may be some limited scope in situations where staff illness was caused by an identifiable third-party, as a general rule, staff illness falls outside the scope of "extraordinary circumstances";

- The timing of when the staff member fell ill is unlikely to ever be relevant;
- Aircraft defects generally remain firmly within the scope of "ordinary" circumstances;
- Airlines face a high bar to proving a design defect constitutes an extraordinary circumstance, requiring the defect to be proven, hidden, widespread (affecting all aircraft of the same type), and serious;
- The burden is on the carrier to obtain the required confirmation from the manufacturer or other third-party that the technical failure in question resulted from a model-wide defect.

Recent decisions have generally represented good news for claimants seeking compensation and bad news for airlines who continue to face challenging operating and regulatory conditions.

An additional 'loser' in the recent string of cases appears to be national courts. The decisions in Lipton, D.S.A and Finnair are difficult to reconcile. Whilst for technical defects, courts are urged to embark on a fact-finding exercise as to the cause of the defects and the realities of a carrier's operations, Lipton confirmed that such exercised must not be carried out for employee absences, a distinction which seems all the more arbitrary given the equivalence repeatedly drawn between staff members and technical parts themselves. Whether courts in the UK will refrain or engage in detailed fact-finding exercises in light of Lipton remains uncertain. What is certain, however, is the journey towards consistency and uniformity remains a long and winding one.

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Polish up your pleadings!

The claim arose out of a road traffic accident on the M20 motorway that occurred on 12th September 2017 and was for damages in respect of personal injury and consequential losses, limited to £13,500. I adopt the past tense because the claim has now in fact been compromised, therefore, the judgment of the Court of Appeal was the final act in this particular drama.

Background

The Defendant was a Polish insurer who issued a policy of motor insurance in respect of the vehicle which caused the material road traffic accident – breach of duty was conceded. The claim was issued by a Claim Form dated 17th September 2020. Initially, the claim was, wrongly, brought against Defendant's UK Green Card Correspondents, InterEurope A.G. The Claimant successfully applied by an application dated 15th March 2021 for permission to substitute PZU S.A. as the defendant in the proceedings. That application was granted by Deputy District Judge Murphy's Order dated 23rd April 2021. There was no challenge to that Order.

Prior to Deputy District Judge Murphy's Order dated 23rd April 2021, a Defence, dated 2nd March 2021, was filed making clear the Claimant's error as to naming and pointing out that, in any event, the claim as constituted disclosed no cause of action because Regulation 3 of the European Communities (Rights against Insurers) Regulations 2002 on which the Claimant was relying did not apply in the specific circumstances of this case, whether as against PZU S.A. or their Green Card Correspondents. Further, and for the avoidance of doubt, it was pointed out that there was no viable of cause of action pleaded by the Claimant.

Whilst the Claimant had sought (and obtained) permission to amend the claim to name PZU S.A. as the defendant, her solicitors took no action to amend the cause of action relied upon by the

Claimant to in order to found her claim despite being on notice of the point.

1st instance

The Defendant duly made an application to strike out the claim pursuant to CPR r.3.4(2)(a) on the same basis, namely that the claim as pleaded was defective and failed to disclose a cause of action. Deputy District Judge Pithouse heard the application, which proceeded on the basis of concessions made by counsel for the Claimant that the pleaded case of action was unviable; and also that the hearing was only to deal with the strike out application.

The Claimant sought to argue that she *might* have open to her a cause of action in Polish law. No evidence of Polish law was put before DDJ Pithouse and the height of the Claimant's position (based on a bare (unevidenced) assertion) was that "[t]he overwhelming *likelihood* is that the law of Poland permits direct actions against liability insurers in the circumstances of this accident". The Claimant's position was that a unless order should be made against her, thus giving her an opportunity to apply to amend.

DDJ Pithouse acceded to the Defendant's application to strike out the claim and he so ordered.

Appeal to the Circuit Judge

On appeal, His Honour Judge Parker reversed DDJ Pithouse's Order on the basis that he considered that it was outside of DDJ Pithouse's discretion to strike out the claim. In reaching this conclusion he found that DDJ Pithouse failed to: (i) consider whether striking out the claim was a proportionate response to the Claimant's failings, (ii) give the Claimant a chance to put the defective pleading right as advocated by Tugendhat J in Kim v Park [2011] EWHC 1781 (QB), and (iii) address the possibility of making an unless order (as contended for by the Claimant).

In essence, Judge Parker held that striking out the claim was a too draconian sanction and disproportionate in the circumstances. He was also influenced by the fact that breach of duty for the accident had been conceded by the Defendant. Further, he followed the decision in Kim v Park, in which Tugendhat J stated:

"… where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

In considering whether the Claimant would be in a position to advance a cause of action against the Defendant he noted that the Defendant did not positively assert that no cause of action was available to the Claimant in the circumstances. He considered the latter point significant. Judge Parker was unable to identify any prejudice occasioned to the Defendant by the dilatory conduct of the Claimant's solicitors – he noted that the conduct of the Claimant's solicitors was "deeply unimpressive". Having reached the conclusion that DDJ Pithouse's Order was "plainly wrong", Judge Parker was entitled to exercise the decision afresh.

By the time the appeal was determined the Claimant had applied to amend the Particulars of Claim to advance her claim pursuant to Article 822(4) of the Polish Civil Code. Judge Parker directed that the Claimant's application to amend and the Defendant's application to strike the claim out would be considered at a further hearing (not before himself) by a circuit judge or a recorder.

Appeal to the Court of Appeal

The Defendant appealed. Popplewell LJ, giving the judgment of the Court at [2024] EWCA Civ 1435, held that Judge Parker was entitled to interfere with original order of DDJ Pithouse. He did not consider that DDJ Pithouse's judgment was easy to follow, but he was satisfied that DDJ Pithouse was: (i) wrong to doubt that the Claimant could plead an effective cause of action against the Defendant, (ii) wrong to doubt that there was a lack of conviction on the Claimant's part to pursue an application to amend the claim, and (iii) wrong not to take account of the balance of prejudice to the parties.

The Court of Appeal held that it deciding whether a pleading could be cured by amendment it was necessary to ask whether a pleading could be advanced which had a real prospect of success. Popplewell LJ made clear that this did not mean that the Claimant in this case had to show she would be bound to succeed, but rather that she had an arguable claim. He held that on the facts of this case, there was material from which it was "overwhelmingly likely" that the Claimant could advance a pleading that would succeed. The Court of Appeal was impressed by the likelihood of there being a provision in Polish law that would give a direct right of action against a motor insurer because of Poland's obligation to implement the Sixth Motor Insurance Directive. It was unnecessary for the particular provision in Polish law to be articulated for the purpose of assessing whether there was reason to believe that the defect in pleading could be rectified. Still less was it necessary to adduce evidence of Polish law at this stage.

It is evident that the Court of Appeal relied on the fact that the Defendant, a Polish insurer, did not assert that there was no basis for a direct claim against it at all (and its reluctance to do so is no doubt because of the Directives, with which any travel practitioner is well acquainted whether versed in Polish law or not). Still further, Popplewell LJ noted that the Claimant's assertions about the possibility of a direct claim against the Defendant arising in Polish law, "*was not met by the suggestion that there was no such claim under Polish law*". This, he held, should have led DDJ Pithouse to "*have drawn what we take to be the obvious inference that there was most unlikely to be an issue about the direct claim existing under Polish law once it was pleaded*".

Perhaps somewhat troubling for those acting on behalf of foreign defendants, Popplewell held that CPR r.1.3 (the parties' duty to assist the court in furthering the Overriding Objective) should have meant that it was "*incumbent on PZU to make clear whether it challenged what was said in paragraph 17 of Mr Rowley's skeleton about what Polish law must provide, and to admit it if it was not challenged, a matter which PZU as a Polish motor insurer would have known without having to undertake any inquiries*". Popplewell LJ correctly noted that CPR r.1.3 cannot be interpreted as requiring a party to assist its opponent, however, the writer (who acted for PZU before the Court of Appeal) maintains that it cannot be right that a foreign party is under a duty to challenge unevidenced assertions. It is a fundamental evidential principle that he who asserts must prove. The need for a foreign party to challenge unevidenced assertions of foreign law is of real concern and potentially creates an unlevel playing field.

The Court of Appeal noted that there had been some argument before DDJ Pithouse as to whether a cause of action arising out of Polish law "arises out of the same facts or substantially the same facts" as the unamended claim for the purposes of s.35 of the Limitation Act 1980 and CPR r.17.4(2). The Court of Appeal did not

purport to decide this issue, this issue being unnecessary to its disposal of the appeal. Further, and perhaps more importantly, the Court of Appeal heard no argument on this point; commentators suggesting the point was decided may want to revisit the judgment and specifically paragraph 33!

It is true to say that the Popplewell LJ doubted whether the fact a new cause of action arose from Polish law would offend either s.35 of the Limitation Act 1980 or CPR r.17.4(2). Popplewell LJ offers the opinion that foreign law, although treated as a special kind of fact, is "*in substance, part of the identification of the legal, rather than factual, basis for a claim*". In other words, the requirement to treat foreign law, for pleading and evidential purposes, as 'facts' does not make foreign law averments 'facts' for the purpose of CPR r.17.4(2) or s.35 of the Limitation Act 1980, which is the genesis of CPR r.17.4(2).

Popplewell LJ's obiter remarks are consistent with the obiter remarks of the Vice Chancellor in Latreefers Inc. and v Hobson [2002] EWHC 1586 (Ch). He suggested in that decision that the requirement to treat foreign law for the purpose of pleading as 'facts' did not mean that they were 'facts' in the sense envisaged by either s.35 of the Limitation Act 1980 or CPR r.17.4(2). The Vice Chancellor's comments were obiter dicta as he found in Latreefers that the proposed amendments, in Liberian law in that case, arose out of facts put in issue by the defences filed in that action in any event. It is difficult to fault Popplewell LJ's obiter comments on the relationship of foreign law and s.35 of the Limitation Act 1980 or CPR r.17.4(2) as it is difficult to sustain an argument that foreign law is *actually* a matter of fact.

In this case the new cause of action relied upon by the Claimant is a cause of action in Polish law. More precisely, it *appears* to be a Polish law provision that provides a direct right of action against a civil liability insurer providing cover in respect of compulsory insurance, namely motor insurance. There is no question that, in principle, the Claimant was able to rely on such a direct right of action on the basis of Article 18 of Regulation (EC) 867/2007 ("Rome II"), which provides that an injured party may rely on a direct right of action against a civil liability insurer where either the applicable law or the law governing the insurance contract permits such a direct right of action. Here, whilst the applicable law, namely English law, does not permit such a direct right of action, the Claimant would have been able to rely on any direct right of action that arises in Polish law, that being the governing law of the insurance contract.

For the avoidance of doubt, Brexit does not affect the position because the effect of Article 66.2 of the Withdrawal Agreement is that Rome II will apply to any accidents that occurred prior to the end of the transition or implementation period (exit day). The accident here occurred well before exit day.

Whilst the Court of Appeal benevolently suggests that an unevidenced assertion which is to the effect that there is a direct right of action in a foreign law is enough to see off a strike out application, this does not mean that those representing claimants should not properly consider whether a direct right of action actually arises in the circumstances. A useful starting point where there is any doubt would be to make enquires with the MIB or an appropriately qualified foreign lawyer.

Over the years I have seen a number of cases like the present be struck out often with a show cause order against the solicitors who acted for the claimant(s). This decision will hearten those caught out by pleading a claim against a foreign insurer. However, it would be dangerous to

assume that strike out can be avoided in all circumstances. It must be noted that Alton was a case in its infancy in case management terms, the position might have been different if the claim had reached trial or a trial date was looming.

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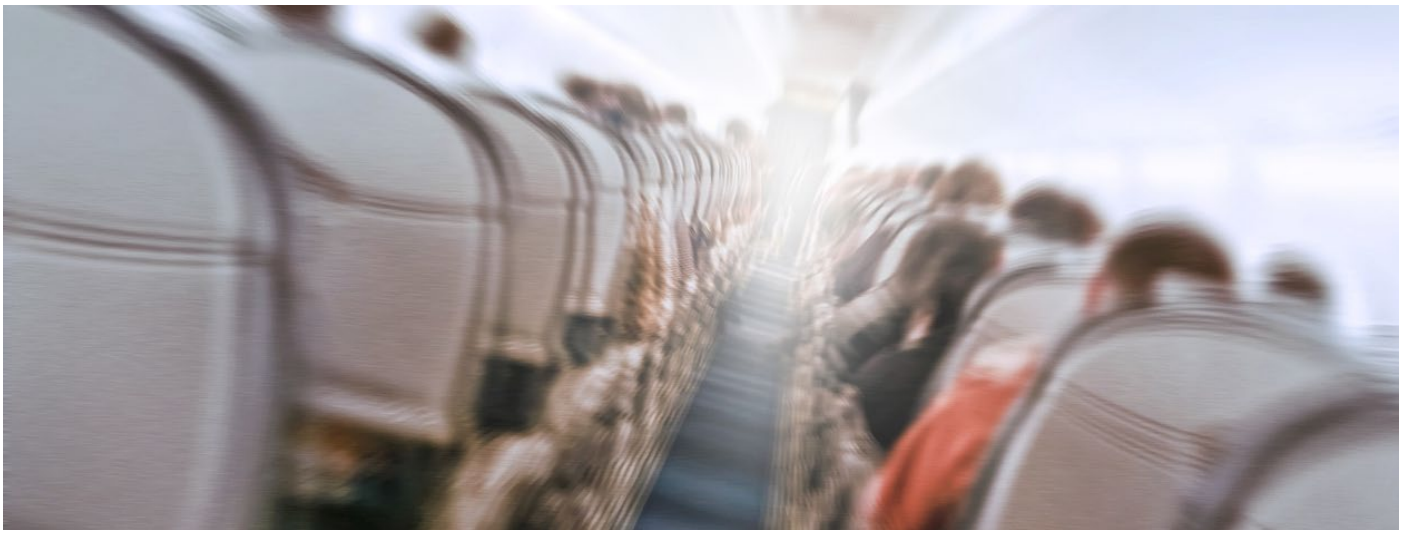

Up in the air?

In the past year, flight turbulence has been brought into focus, largely given the prominence of Singapore Airlines SQ321 from London Heathrow to Singapore Changi in May 2024. A Boeing 777-300ER encountered 19 seconds of severe turbulence, leaving more than 100 passengers and crew requiring hospital assistance. One British passenger died.

The incident is not the only one newsworthy over the past few months. In November 2024, turbulence on a Lufthansa flight from Buenos Aires to Frankfurt left 5 passengers and 4 crew injured and, in January 2025, United Airlines Flight UA613 from Lagos to Washington Dulles encountered severe turbulence. Nearly 40 passengers and crew were injured, 6 seriously.

Despite this, there is no clear consensus as to the damages which may be recoverable when turbulence impacts a flight.

Readers are likely familiar with the applicability, scope, and exclusivity of the Montreal Convention ("the Convention"), which applies to many aviation claims, but the following provisions are particularly relevant as regards this article:

Article 17(1)

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.

Article 20

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage…

Article 21

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party

The phrase "accident" as referenced in Article 17(1) takes us out of the typical remit of the tortious duty, breach, and causation questions. Under the Montreal Convention, an "accident", has been defined an "*unexpected or unusual event or happening that is external to the passenger.*" Such a definition is to be applied flexibly but an incident will not be deemed an accident "*when an injury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft.*" (Air France v. Saks [1985] 470 US 392).

Turbulence is, in many ways, a normal and expected operation of the aircraft. How, then, could it be an "accident"?

It is not possible to say, as a blanket rule, that turbulence will/will not constitute an accident. In Future v. Hawaiian Airlines Inc (a 2022 case in the Hawaii District Court), the Court ruled on the Defendant's application for summary judgment (the test being whether there was the "absence of a genuine issue of material fact"). The Defendant had argued that the turbulence could not be an "accident". The Defendant highlighted that there was nothing unexpected about turbulence preceded by a warning.

The Court found that such matters were always going to be fact specific – it was not the case that turbulence – even if light - would always be "*exempt from the definition of accident.*"

The Court also commented on flaws in the Defendant's argument that the Plaintiff's failure to fasten his seatbelt was an internal reaction to the turbulence, highlighting (amongst other things) that damage to the aircraft itself occurred.

It seems probable that turbulence severe enough to cause injury will be deemed an accident, presuming there is nothing specific about a passenger's individual state such as to render a reaction to turbulence in particular. If categorisations about the strength of turbulence are required, parties may wish to refer to the Appendices of EU Regulation 923/2012 (much of which is now assimilated law) for broad definitions as to what constitutes moderate, and severe turbulence.

Assuming then, that an Airline finds itself in a position where turbulence has been, or may be deemed, to constitute an "accident." Might it be exonerated as a result of passengers' contributory negligence? There is rather a dearth of case law regarding turbulence, certainly within this jurisdiction, but three interesting decisions arise.

In Chisholm v. British European Airways [1963] 1 Lloyd's Rep 626, the plaintiff had gone to visit the bathroom when the aircraft suddenly dropped in altitude. She was thrown across the floor and sustained a fractured ankle. The plaintiff

accepted there had been a general warning of adverse flying conditions and an announcement that passengers should fasten their seat belts, but that nobody had warned her specifically to remain in her seat, or of the risk if she did not.

The issue here was not in relation to the flying or routeing of the aircraft but instead the actions taken by the cabin crew when it became clear the aircraft would experience turbulence. Evidence given by one of the Defendant's witnesses addressed their safety policies but also highlighted that crew did not wish to go too far in emphasising the potential severity of turbulence so as not to alarm the more apprehensive passengers. The Court ultimately found no negligence on the part of the Defendant, allowing full exoneration of its liability under what was then Article 21.

By way of slight contrast, in Goldman v. Thai Airways International Ltd (1981) 170 ER 266, the Court took the view that "*to say that a person who takes his seat belt off during some time throughout a very long flight… in order to go to the lavatory or to go back and talk to some friend that he has got two or three rows back in the aircraft, or whether he has got cramp in his legs and wants to stretch, is acting in a contributory negligent manner seems to me to be an impossibility.*"

That said, Claimants may wish to bear in mind that the Defendant in Goldman successfully appealed (albeit not on that precise point).

Outside the jurisdiction, in 2019, and more in keeping with Chisholm, the 11th Circuit Court of Appeal upheld the finding of a US jury. In Quevedo v Iberia lineas Aereas (811 Fed Appx 559), the plaintiff had been found 99% contributorily negligent for failing to fasten her seatbelt – despite a recommendation from crew that passengers kept their seatbelts fastened at all times. The Airline had a policy in place to ensure seatbelts were checked (and, if necessary, to wake passengers or move their clothing for confirmation) but in this case, the passenger's seatbelt had appeared buckled and tightened. Turbulence hit, and the passenger was severely injured, as was a member of cabin crew who unbuckled himself in an attempt to secure the passenger. Perhaps of particular relevance when the finding of contributory negligence was made was the fact that the only two injured were the plaintiff and member of cabin crew not wearing their seatbelts.

Contributory negligence will always be a matter of degree. It seems rather a common-sense approach, as the first-instance Judge noted in Goldman, that a passenger on a long-haul flight might occasionally leave their seat. However, a passenger remaining in their seat without their seatbelt secured may be deemed contributorily negligent, and particularly so if a warning about turbulence had been made during the flight.

If Airlines are found liable in some respects, they will wish to limit their liability as much as is possible under the Convention. As of December 2024, Article 21 has been amended so carriers shall not be able to limit liability for proven injury below 151,880 SDRs (approximately £159,460 at the time of writing). For damages over and above that, Airlines in turbulence claims may well wish to rely on Article 21(2).

One factor which may be relevant is the type of turbulence in question. That arising from thunderstorms, or wake turbulence from other aircraft, should be easier to predict and, where possible, avoid. In contrast, clear air turbulence ("CAT") can be unexpected not just in its presence, but its severity. Airlines wishing to rely on this may, however, need to accept that running an argument about the 'unexpected'

nature of CAT might be deemed a concession as to the existence of an 'accident.' In any event, expert evidence will be needed in showing the type and severity of turbulence, especially if an Airline hopes to show it was unavoidable.

Airlines may also seek to ensure that appropriate announcements are given in safety briefings prior to and during the flight. Additionally, policies should be in place so that seat belt signs are switched on as necessary, and crew members take steps to check passengers' compliance.

Airlines in this jurisdiction may also wish to bear in mind that it seems to remain unlikely that damages for pure psychiatric injury are recoverable (notwithstanding the CJEU decision in BT v. Laudamotion GmbH (C-111/21) which, notably, took place after exit day). Anxiety from a bumpy flight, nerves due to an elevated heart rate, or PTSD from seeing other passengers injured during turbulence, as standalone injuries, ought not to be recoverable. Similarly, even for passengers who suffered bodily injury, damages for psychiatric harm should not be awarded if such psychiatric harm flows from the accident and not the injury itself.

More guidance may be provided by the Courts in due course, not least as it is thought turbulence will become more commonplace over the coming years. Passengers should be sure to comply with in-flight safety briefings to avoid findings of contributory negligence slashing an award for damages. Airlines will need to take steps to, at the very least, ensure they cannot be deemed negligent, but ideally to avoid turbulence as much as is possible.

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Sick of costs?

Background

A special approach has been taken to gastric illness ('GI') claims since it was established in the case law in *Kempson & Kempson v First Choice Holidays* (2007) and *Wood v TUI Travel Plc* [2017] EWCA Civ 11 that food or drink contaminated with bacteria in sufficient quantity to cause illness cannot be considered to have been "fit for purpose" or of "satisfactory quality" under ss4 and 13 of the Supply of Goods and Services Act 1982. This is not a "strict liability" regime, as confirmed in *Wood v TUI,* but it does set GI claims apart from other package travel claims in terms of what a claimant is required to establish.

Since 2018, the costs associated with GI claims have also been dealt with distinctly from those in other package claims.

GI claims were brought into the scope of the fixed recoverable costs ('FRC') regime in Part 45 of the Civil Procedure Rules by operation of the Civil Procedure (Amendment No.2) Rules 2018 (SI 2018/479) at the same time as the Pre-action Protocol for Resolution of Package Travel Claims ('the PT Protocol') came into force, on 7 May 2018. Despite its broad title, the PT Protocol deals only with claims for damages for gastric illness contracted during a package holiday, and only with claims valued up to £25,000.

That development was against the backdrop of a 500% increase in GI claims between 2013 and 2016 (as reported by ABTA) and a government consultation which sought to reduce the number of "unmeritorious" claims and to control costs. The new approach brought costs in GI claims in line with those in public liability cases.

Under the new FRC regime, however, which came into effect on 1 October 2023 by SI 2023/572, GI claims (as well as claims which no longer continue under the RTA or EL/PL Pre-Action Protocols) are bundled up with other fast track claims in Section VI of Part 45 of the CPR: "fixed costs in the fast track". Because GI is a form of personal injury, whether a claim falls under the old or the new scheme will depend when the cause of action accrued, rather than when the claim was issued.

The costs regime

Where the cause of action accrues before 1 October 2023

The rules can be found under Part 45x in the White Book, the FRC figures at 45.29E and Table 6D and the disbursements at rule 45.29I. The below is a ready reckoner:

Stage of Claim		**Recoverable fixed costs**
Settlement agreed prior to Part 7 proceedings being issued	Value: at least £1,500 but not more than £5,000	£950 plus 17.5% of damages
	Value: more than £5,000 but not more than £10,000	£1,855 plus 10% of damages over £5,000
	Value: more than £10,000	£2,370 plus 10% of damages over £10,000
Claim settled on or after the date of issue but before the date of allocation		£2,450 plus 17.5% of damages
Claim settled on or after the date of allocation but before the date of listing		£3,065 plus 22.5% of damages
Claim settled on or after the date of listing but prior to the date of trial		£3,790 plus 27.5% of damages
Claim disposed of at trial		£3,790 plus 27.5% of damages and the relevant trial advocacy fee (between £500 and £1,705: see section D of table 6D).

The Court may **only** allow a claim for the disbursements listed under rule 45.29I, which include medical records, expert reports as provided for in the relevant protocol, and court fees.

Where the cause of action accrues on or after 1 October 2023

Where a claim is allocated to the fast-track (usually for claims valued between £10,000 and £25,000) it will also be assigned to one of four complexity bands. The full new allocation and costs scheme is covered more comprehensively in Katharine Bailey's article, but it is likely that most GI claims, which fall under the PT Protocol, will come under Band 2 of the fast-track.

The new Section VI of CPR Part 45 will apply "to any claim which would normally be or is allocated to the fast track" (rule 45.43). It matters not which protocol applies (apart from when considering disbursements: see below). Rule 45.44 provides

that the only costs allowable in such claims will be the FRC in Table 12 (in the Practice Direction to Part 45) and the disbursements in section IX of Part 45.

This means the following costs will be awarded in any GI claim (or indeed any other claim) which falls under complexity band 2 of the fast-track:

Stage of Claim		**Recoverable fixed costs**
Settlement agreed prior to Part 7 proceedings being issued	Value: not more than £5,000	The greater of £681 or £124 plus 20% of damages
	Value: more than £5,000 but not more than £10,000	£1,342 plus 15% of damages over £5,000
	Value: more than £10,000	£2,374 plus 10% of damages over £10,000
Claim settled on or after the date of issue but before the date of allocation		£1,445 plus 20% of damages
Claim settled on or after the date of allocation but before the date of listing		£2,374 plus 20% of damages
Claim settled on or after the date of listing but before trial		£3,303 plus 20% of damages
Claim disposed of at trial		£3,303 plus 20% of damages and the relevant trial advocacy fee (between £619 and £2,168: see section D of table 12).

Rule 45.59 under Section IX deals with disbursements for Section VI claims. Rule 45.59(a) limits the disbursements allowed in claims started under the RTA and EL/PL Protocols to a finite list which reflects the one in Part 45x. Contrastingly, "in any other" Section VI claim, apparently including gastric illness claims, the winning party will be able to recover "any disbursement which has been reasonably incurred, other than a disbursement covering work for which costs are already allowed in Section VI."

How the court will determine "reasonably incurred" in this context remains to be seen, but it is a reminder to those defending such claims to keep a close eye on disbursements and to cooperate with claimants where possible, particularly given the extensive expert evidence that might be required in claims of this nature.

Conclusion

Unlike previously, the application of FRC to the package travel world will not be limited to GI claims. No need, then, for the Government to reconsider the specific proposal it initially made

in 2018: "to extend fixed recoverable costs to all package personal public liability claims in the fast track." At the time, the decision was made not to do so because:

"the case was not made out to cover non-GI claims at this stage. In particular: there is no evidence of a serious problem with other package PI PL claims; different circumstances pertain in different types of claim, not least the application of the Athens Convention (for cruise claims) and the Montreal Convention (for aviation claims), which potentially give rise to unforeseen consequences in applying a new PAP. As the Association of Personal Injury Lawyers put it, an extension to include all types of package holiday PI claims represented a 'cure that goes much further than the identified malaise'."

The report noted, however, that there would "be an opportunity to reconsider the appropriate rates in any consultation on Sir Rupert Jackson's recommendations to extend FRC more widely: the Government is considering the way forward on his report." That "way forward" has brought us to the new Part 45.

To adopt the language in the Government's report, which in turn quoted APIL, will the new "cure" root out all the "malaise" affecting cross-border personal injury claims? That will become clearer as newer claims fall to be determined, namely those where the cause of action accrued after 1 October 2023.

One might wonder, however, whether the application of FRC really deters fraudulent claims. It has no impact on the damages available to claimants. The answer must be, therefore, that it depends largely on claimant solicitors. The SRA have previously issued specific warnings to solicitors in relation to holiday sickness claims; particularly the need to properly investigate the facts and evidence (https://www.sra.org.uk/solicitors/guidance/conduct-disputes/, particularly Case Study 1). Of course, the disapplication of QOCS for fundamental dishonesty remains a strong deterrent. Claimant solicitors should continue to advise their clients carefully of that risk and the personal liability they might face as a result.

The latest ABTA numbers on the increase in gastric illness claims cover the years 2013 to 2016. It is hoped that new data will soon be available to show the effects of the new scheme.

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The intermediate track – Battle of the bands

From October 2023, the fixed recoverable costs ("FRC") regime was extended across the fast track to a new Intermediate Track for the so-called 'simpler' cases valued up to £100,000. The aim of the new Intermediate Track is to improve access to justice by better striking the balance between efficient case management and greater costs certainty/proportionality. So, just over a year later, what do we know so far about the Intermediate Track?

The two most recent Quarterly Civil Justice Statistics Reports paint an interesting picture (for those litigators not on-the-edge-of-your-seat-excited about the extended FRC regime, I use the term 'interesting' here in its loosest sense, obviously):

- According to the Q2 April to June 2024 report, since the introduction of the new FRC regime only 135 claims had by that point been allocated to the Intermediate Track. To contextualise that figure, in Q2 30,000 money and damages claims were allocated to track; 7,600 to the Fast Track and 1,700 to the Multi-Track.
- In the Q3 July to September 2024 report, no further update is provided as regards the number of claims allocated to the Intermediate Track, however the reader is advised "*these* [Intermediate Track] *cases are expected to be included in the next publication*". So—watch this space! Also of interest (see earlier parenthetical disclaimer above) is the "*Statistician's comment*", which notes claims received in the County Courts have continued to rise and are at the highest level since Q1 2020.

Overall, therefore, the short point is this: whilst the number of claims litigated in the County Court continues to increase, the use of the Intermediate Track remains relatively low. That is no doubt due to the scope of the track: it applies (subject to certain exceptions) only to PI claims excluding disease where the accident occurred after 1 October 2023, or to disease claims where the Letter of Claim is sent after the same date, or all other claim issued after the same date. So, it is obviously still "early days" as regards ascertaining the pros or cons, or dos or don'ts, about this new track since the vast majority of claims heading towards it remain at the pre-action stage. We of the PI & Travel Team at 3 Hare Court wait with

bated breath to see what the Quarterly Civil Justice Statistics for Q4 hold and what further light those data might cast on the Intermediate Track!

In the meantime, here are three practical and strategic pointers for those who are likely to interact with the Intermediate Track in the future, based on practical (albeit limited) direct experience of the new extended FRC regime.

Prepare early for a battle of the (complexity) bands

It is helpful to bear in mind at the outset (need we remind ourselves!?) of the four Intermediate Track complexity bands and their definitions (see CPR r.26.16):

Complexity band 1	**Complexity band 2**	**Complexity band 3**	**Complexity band 4**
Any claim where—(a) Only one issue is in dispute; and (b) The trail is not expected to last longer than one day, including—(i) personal injury claims where liability or quantum is in dispute; (ii) [road traffic accident related, non-personal injury claims]; and (iii) defended debt claims	*Any less complex claim where more than one issue is in dispute, including personal injury accident claims where liability and quantum are in dispute*	*Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2, including noise induced hearing loss and other employer's liability disease claims*	*Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3, including any personal injury claim where there are serious issues of fact or law*

Every Claimant in a PI dispute wishes to be in the higher complexity bands since those are commensurate with more FRCs. The definitions are similar (especially as between bands 2, 3 and 4). But the Rules do not amplify the bands further, and the White Book Commentary contains no illustrative examples. We all know that where the Court is allocating, it must have regard to the well-known factors at CPR r.26.13(1)[1]. We know also that it is for the Court to assess financial value and in doing so it will *dis*regard any amount not in dispute; claimed interest; costs; contributory negligence; and certain prescribed amounts where a claim is for non-monetary relief (CPR r.26.13(2)).

It is an obvious point, perhaps, but in practice parties must from the earliest stages craft their cases with a close eye on complexity bands. For example, a Defence putting everything into issue might later prove a helpful springboard for a Claimant's case on a higher complexity band. By contrast, if a Defence agrees all non-contentious matters and adopts a pragmatic approach to figures contained in a schedule of loss, that may later mean that, by virtue of CPR r.26.13(2), a more powerful argument can be made in favour of a lower complexity band since the value in dispute will be lower.

A detailed directions questionnaire ("DQ") pays dividends

Although the rules say parties may agree upon a complexity band (CPR r.26.14(4)), this is

(respectfully) wishful thinking. There are obvious tensions between adversaries' positions on allocation. For example, a Claimant would argue the claim's value will exceed £100,000 so as to benefit from the more generous costs regime on the Multi-Track, whilst a Defendant would argue the claim's value is below £100,000 so as to bring the claim within the FRC regime on the Intermediate Track.

DQs are (as ever) of vital importance in this context. They ought to be prepared carefully and with a close eye on the complexity band definitions. If a lower complexity band is sought by a Defendant, for example, the DQ must explain cogently why the claim is a "*less complex*" one and practitioners ought to think proactively about what points can be advanced to meet the other side's arguments. Defendant practitioners should also be wary of Claimants seeking to lay the groundwork for a higher complexity band by reference to a factor such as expert evidence in more than one discipline–that, on its own, ought not to nudge a claim into a higher complexity band. Claimant practitioners should bear in mind, too, that the new FRCs regime reiterates the Court's power to make an order directing the claimant to justify the amount claimed where the Court believes the amount exceeds what the claimant may reasonably be expected to recover (Practice Direction 26 para 14(6)), and Defendant DQs may invite the Court to exercise this power in the event it is thought a claim has been issued at an optimistically value so as to justify a higher complexity band allocation–as such, the claim value must be sufficiently robust and defensible by reference to the pleadings /provisional schedule of loss and DQ.

Pitch perfect Defendant Part 36 Offers

A well-pitched Part 36 offer is a powerful weapon in the litigation arsenal. On the Intermediate Track, an early Defendant Part 36 offer may be a factor the parties bear in mind when considering complexity band allocation.

This is because under the extended FRC regime, if a winning Claimant fails to beat a Defendant's Part 36 offer, then the Defendant is liable for the Claimant's FRC to the stage the claim reached when the relevant period expired, and the Claimant is liable for the Defendant's costs to the trial stage (less the FRC to which the Claimant was entitled). Strategically, therefore, a very well-pitched, early Defendant Part 36 offer could dissuade a Claimant from seeking a higher complexity band since the higher the band the greater the Claimant's liability for costs in the event she fails to beat the Defendant's Part 36 offer at trial.

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[1] CPR r.26.13(1): the financial value, if any, of the claim; the nature of the remedy sought; the likely complexity of the facts, law or evidence; the number of parties or likely parties; the value of any counterclaim or additional claim and the complexity of any matters relating to it; the amount of oral evidence which may be required; the importance of the claim to persons who are not parties to the proceedings; the views expressed by the parties; and the circumstances of the parties

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Not single spies but in battalions: surveillance evidence, specific disclosure and social media

Background

In October 2024, the High Court gave judgment on a defendant insurer's application for several forms of relief against a personal injury claimant, including an urgent injunction requiring the claimant to restore deleted social media posts and refrain from deleting further posts, specific disclosure of photos, videos and messages from various social media accounts, and permission to rely on surveillance evidence.

In Harper v Thomas Cook Airlines (in Liquidation) and another [2024] EWHC 3037 (KB), the claimant had been involved in the emergency evacuation of a Thomas Cook aircraft in 2017. The claimant's case was that she landed heavily while going down a slide, sustaining multiple physical and psychiatric injuries leaving her disabled and unable to work again. Her claim was for over £600,000 in special damages and general damages had yet to be quantified.

The defendant alleged that surveillance evidence taken of the claimant in 2022 and 2023 contrasted starkly with what the claimant had said in her witness statement and various Part 18 questions. The defendant had also noticed apparent deletions of posts from the claimant's Instagram accounts.

Decision

By the time the defendant's application came before the court, the claimant had no doubt sensibly conceded to the admission of the surveillance evidence. However, the judge observed that the surveillance was disclosed 18 months after it was last collected, taking the view that the Claimant had "*nailed her colours to the mast*" and not changed her position since her witness statement in May 2024. Although this did not impact the admissibility of the evidence in this instance, it appears to be implied that lateness may impact costs.

Regarding the application for an injunction, the court applied the American Cyanamid test. The

judge concluded that there was prima facie evidence that potentially disclosable Instagram posts had been deleted, and ordered the claimant to take steps to recover posts by midnight the following day, provide a witness statement setting out her best recollection of which posts had been deleted, and prohibited the claimant from making further deletions between the hearing and trial.

While the claimant was prepared to agree to limited disclosure of her Facebook and Instagram accounts, she refused to disclose anything from her WhatsApp messages. The judge decided that two years' worth of WhatsApp photos and videos should be disclosed, noting apparent inconsistencies between the claimant's witness statement and her Part 18 answers regarding her mobility, as well as the absence of evidence addressing a serious leg injury in a "*pub stampede*" in 2021 and a car accident in 2022. However, in ordering specific disclosure, the judge excluded images or videos taken in "domestic premises" to balance privacy interests.

Comment

The judge's observations about the appropriate time to disclose surveillance evidence appear to conflict with Muyepa v Ministry of Defence [2021] EWHC 2236 (QB), where the defendant was entitled to wait until the claimant had "*fully put his cards on the table*" by serving a final schedule of loss. The judge's position that the claimant had nailed her colours to the mast in her witness statement involves a degree of hindsight and does not account for the possibility that, following further Part 18 questions, her position may have changed by the time she filed her final schedule of loss.

The case demonstrates several important points for practitioners:

- The utility of monitoring claimants' social media accounts, including private Instagram accounts, as these still reveal the total number of published posts.
- The court's willingness to order WhatsApp disclosure, as opposed to merely public social media accounts in personal injury cases involving allegations of dishonesty. WhatsApp's hybrid role as messaging and social platform may influence future applications.
- The tension between a privacy exception for those unrelated to the litigation and the reality that many potentially relevant social media posts may be taken in domestic settings.
- The utility of highlighting the deficiencies in a party's case all in one go to justify wide-ranging disclosure orders. The more the court can see why dishonesty is or may be an issue in this case, the clearer it may be why the evidence is likely to be relevant and proportionate.

As always, the strength of a fundamental dishonesty argument lies in its focussed application. Alleging dishonesty in every case, or even every case where there are suspicions that the claimant may be gilding the lily, weakens its effect. But used judiciously, a careful pre-trial application layering up the battalions of disclosure and surveillance and the claimant's own evidence can greatly increase a claimant's sorrows, particularly given usual funding regimes and CPR 44.16.

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In your own words

Background

Frequently, in overseas injury claims, one (or perhaps both) of the parties seeks to adduce evidence from a witness whose first language is not English. Before getting to the issue as to whether that witness will be able to give oral evidence at trial by video (a topic for another day), there will need to be a suitable written statement for that witness. The experience of a witness statement in English put before the court when it becomes quickly apparent that the witness is unable to speak or read English, is not a happy one. It is important to bear in mind the requirements of the CPR as to how the statements of witnesses in such cases should be prepared.

The requirements are contained in a number of provisions. As a starting point, PD 32 should be considered. Paragraph 18.1 states that a witness statement must, if practicable, be in the witness's own words "and must in any event be drafted in their own language". Paragraph 18.1(5) provides that a witness statement should state the process by which it was made, such as via an interpreter. Paragraph 19.1(6) again makes the point that the statement should be "drafted in the witness's own language". Finally, paragraph 23.2 states that where a witness statement is in a foreign language then the party wishing to rely on it must have it translated and must file the foreign language statement with the court, and a translator must "sign the original statement and must certify that the translation is accurate".

Certain High Court practice guides also contain relevant information. The King's Bench Guide (2024) states, at paragraph 10.62, that: "If a witness is not sufficiently fluent in English to give their evidence in English, the witness statement should be in the witness's own language and a translation provided". The latest edition of the Chancery Guide (2022; but updated December 2024) refers to paragraph 3.3 of PD 57AC "when considering the language in which to draft any witness statement". That Practice Direction emphasises that a witness statement must comply with paragraphs 18.1 and 18.2 of PD 32,

but clarifies that "for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination) if required, and is not limited to a witness's first or native language".

The wording that is now to be found in the Chancery Guide was found to properly reflect the meaning of paragraph 18.1 of PD 32 in Afzal v. UK Insurance Ltd [2023] EWHC 1730 (KB). That is to say, the language of a witness statement can be any language in which the witness is sufficiently fluent to give oral evidence. In Afzal, Freedman J allowed an appeal from a decision in a County Court trial refusing permission to rely on a witness statement drafted in English; although the claimant in that case spoke both English and Urdu, the County Court judge considered that the statement was not drafted in the claimant's "own language". Freedman J held that "the Judge was wrong to reach a conclusion that the language of the witness statement had to be the first language of the claimant, and that it was highly relevant that the claimant read, understood, conversed and gave instructions in English. If there were doubts about the proficiency of the claimant as to whether the claimant was sufficiently fluent, then that could have been tested with a view to considering whether the evidence should be excluded. There was no such exercise before the court."

It is not uncommon for a witness to be able to communicate well in English, and possibly be able to provide the details to form a witness statement in English, yet request an interpreter for the purposes of giving oral evidence at trial. In those circumstances, it is suggested that it would be a risk to rely on a witness statement drafted in English. A court may well hold that the statement is not in the witness's own language if, come trial, the witness gives oral evidence through an interpreter.

If the witness's own language is not English, then it is important to follow the other requirements of PD 32. The rules in this regard were held by Garnham J in Correia v. Williams [2022] EWHC 2824 (KB), [2023] 1 WLR 767 to provide "an important discipline for litigants and their advisers and were not lightly to be ignored". In that case, the witness statement was in English but the claimant (a Portuguese national) was "not wholly fluent" and relied on the assistance of a translator. The statement had apparently been read back to the claimant in Portuguese, and a statement to this effect was included along with the statement of truth. However, there was no witness statement written in Portuguese. This was held to be a defect of substance with the result that the statement would not be admitted unless the court gave permission. The High Court found that the trial judge had been entitled to refuse to admit the statement.

One of the reasons for not admitting the witness statement in Correia was that the statement was, in essence, an "account of events drafted by the [claimant's] solicitor, in a language in which the [claimant] was not fluent"; to admit such a statement would pose difficulties in tying the claimant down to that account of events. Arguably, there would remain such difficulties if the statement was originally drafted in English, but then translated (in writing) into the witness's own language for the witness to sign. The Practice Direction requires the "statement" to be in the witness's own language. As seen above, paragraph 23.2 of PD 32 refers to the "original statement" as opposed to the "translation" (although it is perhaps curious why the translator has to sign the original statement, rather than the document which is the result of their translation). Best practice would be for there to be an original document drafted in the witness's own language, with the English version being the translation. It would, however, be a relevant distinction with Correia if there were written statements in both languages, whichever document came first; but it

would probably rely on the judge's discretion as to whether or not the evidence would be admitted.

If there are issues as to compliance with these rules it is undesirable for the point to be left until trial. Sometimes it is unavoidable: in Afzal, the issue seems to have been raised by the County Court judge herself, although possibly after it had been intimated that counsel for the defendant would ask questions about the claimant's level of English. In the recent case of Berresford v. Shah [2024] EWHC 3500 (KB), there was a late application to exclude a witness statement for failure to comply with these rules, the application being made less than 3 clear days before the trial commenced. The judgment does not go into detailed reasons why the judge had ruled at the start of the trial that permission would be given for the statement to be relied upon, but the judge does note that: "There was no explanation for the application being so very late other than it was a point that had been noted by counsel when she was instructed for the purpose of attending trial".

In a case involving not an overseas accident but almost exclusively foreign witnesses, Yordanov v Vasilev & others [2024] EWHC 1496 (KB) the English insurer defendant had served statements in English from two Bulgarian witnesses, both of whom, as it transpired, needed to give their oral evidence via an interpreter. The statements had been prepared in England and then provided to the witnesses in translation but neither statement gave any details of how they had been taken and the translation was not (originally) certified. The Bulgarian insurer of the other driver took the point in correspondence that the statements fell foul of the ratio in Correia, making no application itself to exclude. A couple of days before trial the English insurer made an application denying any lack of compliance but in any event seeking relief under CPR 3.9. Annabel Darlow KC, sitting as a deputy, accepted the Bulgarian insurer's point that the statements were not compliant, that the various defects were of substance rather than form, before granting the English insurer relief from sanctions given the importance of their evidence to the court and the prejudice if they were not admitted.

It could well be the case that courts will be alive to parties trying to achieve a tactical advantage by waiting until close to trial to argue that a statement should be excluded, notwithstanding that a failure to comply with the rules would have been apparent for some time (certainly in Yordanov the Judge made a general 'costs in the case' order in relation to the evidential improprieties and efforts to regularise them). Such a factor is likely to be relevant to the court's discretion. But it would also be fair to say that parties relying on statements from witnesses whose own language may not be English should be conscious of the rules and the importance of complying with them, rather than taking a chance as to whether an opponent notices any defect and is inclined to take the point.

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All aboard!

Travellers' enthusiasm for travel in a post-Covid world is matched only by lawyers' enthusiasm for the opportunities that offers. Claims brought against air carriers and cruise lines are part of the everyday diet for those of us common and garden travel law practitioners.

Whilst the UK may appear an island, below the surface lurks a connection to our European cousins even Brexit could not sever. The Channel tunnel rail link opened between London and Paris in November 1994 and this coming May will mark the 30th anniversary of the start of a full daily service on Eurostar, offering international carriage by rail between the UK and France and Belgium, as well as onwards connections to numerous other countries.

However long before that, when international rail travel from the UK was but a pipe dream, the United Kingdom was a signatory to the 1980 Berne Convention on the International Carriage by Rail (COTIF), which provided a set of uniform rules for the international carriage of passengers and luggage by rail between or through the territories of State Parties. The most recent version, including Appendix A, known as 'CIV', which applies to the carriage of passengers, dates back to 2006. These uniform rules, which cover carriage of goods, dangerous goods, infrastructure and much else besides passengers, now apply across most of Europe, the Mahgreb and even the Middle East, with most of the appendices (including the CIV) covering international rail travel from Norway down to Tunisia and from Morocco across to Iraq.

From 2009 the EU introduced Regulation 1371 of 2007 (which is now retained law), although any conflicts between EU law and COTIF / CIV are a matter for another day. Practically speaking, though, international carriage by rail for British passengers will involve a leg on Eurostar (wherever the point of departure or disembarkation) and certainly Eurostar's current conditions of carriage specifically refer to CIV.

CIV provides a regime for personal injury claims. A rail carrier is liable to a passenger (without limit since English law does not provide a national limit lower than 175,000 units of account) for the loss or damage resulting from the death of, personal

injuries to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used, see Title IV, Chapter I. There are the 'usual' defences familiar to aficionados of package travel regulations, and contributory negligence can be relied on by the carrier.

A few points of note: First, it is not an exclusive regime. So where an accident happens in the course of any of the operations of embarking on an aircraft, a passenger's only right of recourse is against the air carrier (and if the air carrier can escape liability for any reason, there is no other route to claim), that is not the case with rail accidents. If the CIV does not provide a remedy, there is no bar to pursuing the carrier via another route, if one can be found by application of the relevant governing law, or indeed to pursuing anyone else who might be in the frame.

Secondly, unlike the air conventions, where the battle to obtain compensation for psychiatric injury is still raging (and the effect of the CJEU's ruling in the Laudamotion reference in 2022 on the English courts remains untested) , CIV expressly provides for 'personal injuries or any other physical or mental harm', see article 26. So no need to establish physical damage to the brain or to try and shoehorn in a physical consequence of the trauma.

Thirdly, it applies to 'accidents'. Does that convey the same meaning as the air conventions, either as applied by US Supreme Court in Air France v. Saks (1985) 470 US 392 as covering 'an unexpected or unusual event or happening that is external to the passenger' (thereby excluding an ear injury caused by normal depressurisation), the Court of Appeal in Barclay v BA [2008] EWCA Civ 1418 ("a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger") or indeed as developed by the CJEU ("an unforeseen, harmful and involuntary event", without the requirement either for externality, a connection between the hazard and aviation, or a connection between the 'accident' and the operation or movement of the aircraft, Niki Luftfahrt C-532/18)? Well, partly. The wording of article 26 is instructive, "The carrier shall be liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an accident **arising out of the operation of the railway** and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used." So the accident must arise out of the operation of the railway to be a 'convention accident', without any requirement that the event was outside the usual operation of the train. Thus a passenger falling over and breaking an arm as the carriage sways in the ordinary motion of the train, or falling from the steps down from the carriage door at the platform would seem to be covered. But someone having a heart attack somewhere under the Channel would not have a remedy against the carrier because that has no connection with the operation of the railway, whilst someone sustaining ear damage because of the normal change of air pressure going through the tunnel might do.

Fourthly, case law from air convention states has long since taken a tolerably expansive approach to the temporal and positional scope of the convention, which in its past and current iteration places liability on the air carrier for accidents which caused the death or injury and which took place on board the aircraft or "in the course of any of the operations of embarking or disembarking." 'Any of the operations…' has covered passengers at the departure gate involved in a terrorist attack (Day v TWA 528 F.2d 31), using airbridges (Labbadia v Alitalia [2019] EWHC 2103 (Admin)) and jetways, walking down steps to the apron

(Mather v easyJet [2023] CSIH 8), essentially most parts of the procedures they were required to undertake as a condition of their flight, consistent with the balance struck between consumers and industry ever since Warsaw.

But the same wording does not appear in CIV, where the scope is limited to accidents 'in, entering or alighting from' the railway vehicle, without any reference to 'the operations of…'. In this writer's opinion, both the express wording and the context fairly emphatically rules out a more expansive approach. A passenger en route to the train platform is not, surely, 'entering' the train in any ordinary meaning of the word, even though he is not an entirely free agent at that point because of security or border controls. Whilst there might be a hard to distinguish point on the ramp on the way down from the ticket barrier, for example, where a passenger does get close enough to count as 'entering', even that is probably too wide, in circumstances where the application of the convention co-exists with alternative remedies. So a passenger injured before the point of 'entering' the train is not shut out from a remedy, only from obtaining that remedy from the rail carrier and without a need (if the governing law would otherwise require it) to prove negligence. A passenger injured on the ramp long before entering the train when he slipped on a guard's hat carelessly dropped by the guard employed by the rail company could still sue the rail company, it just would not be a convention claim.

Of course, much of the enthusiasm for pursuing air carriers is to avoid the jurisdictional hassle of suing a foreign airport operator or regional carrier or ground staff, and that rationale is no doubt still there for rail passengers. But the CIV, by contrast with the Montreal Convention, does not provide a rail passenger with the option of suing in the courts for the place of his domicile, unless that is coincidentally the forum provided by the booking conditions or where the railway company is domiciled or has its main place of business. Accordingly, a passenger injured on the Eurostar as it draws into Brussels-Zuid will be able to make use of the English courts; a passenger injured walking up the ramp leading from the platform to passport control at Brussels-Zuid will probably have to fit his claim against whoever occupied the ramp (using the English terminology) through one of the jurisdictional gateways set out in Practice Direction 6B. Nor will the passenger who booked a single contract of carriage from London to Nice be able to sue Eurostar in England for an accident which occurred on the Paris to Nice leg, since Eurostar and the SNCF will be successive carriers and each liable separately to the passenger (under the CIV) for their own leg of the carriage.

Claims under the CIV are rare, as the striking dearth of relevant authority shows, although this may of course be due to sensible use of alternative dispute resolution rendering litigation unnecessary. But rail travel is more ecofriendly than air travel, and St Pancras laughs in the face of check in two hours prior. Who knows, this may just be the age of the train. All aboard!

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