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# **Turbulent Skies: an Update on Montreal Convention Claims**

11<sup>th</sup> July 2024

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## **Let's get one thing out of the way before we start: Article 35(1):**

“The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”

## **The cause of action: 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.”

## General rules of interpretation:

*Wuchner v British Airways, unreported, 3<sup>rd</sup> July 2024:*

- The Convention must be construed uniformly;
- International and domestic authorities are both relevant;
- Cases under the Warsaw Convention are relevant;
- The court cannot alter the balance struck by the Convention between the passenger and the airline merely because it takes a view on 'fairness'.

# The scope of the Convention:

The various theories:

- The control theory;
- The place of safety theory;
- The 'operations of embarking or disembarking' theory.

## Death or bodily injury:

*Morris v KLM Dutch Airlines; King v Bristow Helicopters Ltd* [2002] UKHL 7:

Psychological injury may be compensable “if an injury to the brain of a passenger is found to have occurred...I would apply a simple test; does the evidence demonstrate injury to the body, including in that expression the brain, the central nervous system and all other components of the body?”

## Death or bodily injury:

*Doe v Etihad Airways* 870 F.3d 406 (6<sup>th</sup> Circuit, 30<sup>th</sup> August 2017):

The Claimant was pricked by a hypodermic needle hidden in her seatback pocket.

She developed psychological injuries, namely a fear of developing infectious diseases.

## Death or bodily injury:

“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”.



# Death or bodily injury:

The decision in *Doe*:

The words “in case of” do not mean “caused by”.

The words “upon condition of” mean that the carrier’s liability is conditioned only upon the occurrence of an accident that caused death or bodily injury on the board the aircraft or during embarkation.

## Death or bodily injury:

If a passenger sustains bodily injury on board the aircraft as the result of an accident, the passenger may also recover damages for psychological injury regardless of whether the psychological injury was caused by the bodily injury.

## Death or bodily injury:

*Delaney v Jet2.com* [2019] SC EDIN 13:

The facts: A bus crashed at Tenerife South Airport. Claimant alleged that she suffered psychological and physical injuries.

The claim settled.

Was the cost of obtaining a report from a psychiatrist recoverable?

## Death or bodily injury:

*Delaney v Jet2.com* [2019] SC EDIN 13:

The judgment: It could not be stated with certainty that the Claimant had no claim for psychiatric injury.

There is a 'colourable argument' that the Montreal Convention is more amenable to psychiatric injury than the Warsaw Convention

## Death or bodily injury:

*BT v Laudamotion GmBH* (Case C-111/21):

The left engine exploded during take-off and passengers were evacuated. The Claimant was hurled several metres through the air by a jet blast from the right engine, which had not been shut down.

The Claimant was diagnosed with PTSD.

## Death or bodily injury:

*BT v Laudamotion GmbH* (Case C-111/21):

Questions referred to the CJEU:

- (1) Does the psychological impairment of a passenger, which is caused by an accident and has clinical significance, constitute a 'bodily injury' within the meaning of Article 17(1)?
- (2) If the answer is negative, does Article 29 preclude a claim under national law?

# Death or bodily injury:

## *BT v Laudamotion GmbH* (Case C-111/21):

“The liability of the air carrier can be incurred... only if the aggrieved passenger demonstrates, to the requisite legal standard, by means in particular of a medical report and proof of medical treatment, the existence of an adverse effect on his or her psychological integrity suffered as a result of an ‘accident’... of such gravity or intensity such that it affects his or her general state of health, particularly in view of its psychosomatic effects, and that it cannot be resolved without medical treatment.”

## Accident: turbulence:

- Turbulence may constitute an accident within the meaning of the Convention if it is unusual and unexpected:
- Canadian and American authorities: light of moderate turbulence cannot constitute an accident;
- *Quevedo v Liberia Lineas Aereas de Espana 38 Avi 15,570 (2018)* and Canadian authorities: severe turbulence can be.



## Accident: other events:

- *Ford v Malaysian Airline System [2013] 9 WLUK 617*: medical treatment administered on board the aircraft.
- *Labbadia v Alitalia [2019] 7 WLUK 603*: failure to follow protocols.
- *GN v ZU (Case C-532/18)*: coffee spillages on board the aircraft.
- *Wuchner v British Airways, unreported, 3<sup>rd</sup> July 2024*: spillages in the airport.

# Accident:

*JR v Austrian Airlines (Case C-589-20):*

- Where a passenger falls for no discernible reason, this qualifies as an accident, and a claim under Article 17 of the Montreal Convention may succeed;
- On the other hand, if the airline alleges contributory negligence, it must prove in what way the passenger has negligently caused or contributed to the accident.

# Accident:

## *Arthern v Ryanair DAC [2023] EWHC 46 (KB):*

- The claim arose from an injury suffered by the appellant when he fell to the floor on board an aeroplane operated by the respondent airline.
- C contended this was an accident under Article 17(1).
- The claim was dismissed:
  - The Judge found that the appellant slipped on liquid that was a mixture of de-icing fluid and water which had been tracked into the cabin by passengers.
  - It was not unusual or unexpected for aeroplanes to be de-iced before travel, nor therefore for the fluid to be present on the tarmac and tracked into the cabin.
- The appeal was dismissed.

## **Contributory negligence: 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...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...This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.”

## **Contributory negligence: 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.”

## **Contributory negligence: Article 21:**

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

## **The tension between Articles 20 and 21:**

- Do you calculate damages first, then reduce to account for contributory negligence, and then apply the cap?
- Or do you apply the cap, and then reduce to account for contributory negligence?

## The tension between Articles 20 and 21:

*Wuchner v British Airways, unreported, 3<sup>rd</sup> July 2024:*

- You calculate damages first, then reduce to account for contributory negligence, and then apply the cap.
- The result is that the claimant may recover damages up to the cap, even if (s)he has contributed to the accident.



# Turbulence:

## Limitation and exoneration:

- American authorities: failing to take proper steps to avoid turbulence or to warn of it may be negligent;
- *Chisholm v BA* [1963] 1 Lloyd's Rep 626: switching on the warning light may be sufficient;
- *Karuba v Delta Airlines* 23 Avi 17,470: importance of weather warnings where they show no risk.
- *Powell v Dell-Air Aviation* 74 Cal Rptr 3 (1969): passengers failing to fasten seatbelts tightly enough may be negligent.

## Other defences:

### Examples of pre-Montreal defences:

- Extraordinary weather – such as turbulence, but also electrical storms;
- Criminal acts – but the incident must be *solely* due to the criminal act;
- Unforeseeable occurrences – the more unusual and unexpected, the more likely the event is to be an accident, but if it is unforeseeable, can the carrier be said to be at fault?

## In summary:

Every case is fact sensitive, but:

- The direction of travel *appears* to favour claimants at the moment;
- Not following policies is likely to be enough to establish liability;
- Not having appropriate policies is likely to be enough to establish fault;
- Contributory negligence is considered prior to the application of the limit on liability.

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