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King's Bench Walk

Slips and spills – A Montreal Convention update

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Montreal Convention Update

- ▶ *Di Falco v Emirates (No 2)* [2019] VSC 654 (15 October 2019):
 - ▶ Ms Di Falco was a passenger on an Emirates flight. She was repeatedly refused water and fainted on her way to the toilet, fracturing her right ankle. She argued that she had fainted due to dehydration.
 - ▶ She brought a claim under art. 17(1) of the Montreal Convention arguing that a failure to provide water constituted an “accident”.

Art. 17(1) of the Montreal Convention 1999

- ▶ *“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.”*

Air France v Saks (1985) 470 US 392, 405

- ▶ *“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 a passenger’s injuries.”*

[...]

- ▶ *“Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger.”*

Air France v Saks (1985) 470 US 392, 405

- ▶ *Four criteria when establishing liability:*
 - ▶ *(1) event or happening*
 - ▶ *(2) unusual or unexpected*
 - ▶ *(3) external to the passenger*
 - ▶ *(4) constitutes a link in the causal chain to the claimant's injury*

Di Falco: (1) **Event or happening**

- ▶ “Clearly an omission can amount to an event.” (at ¶40)
- ▶ *Husain v Olympic Airways* (2004) 124 S Ct 1221: failure to move the passenger constituted an accident for the purposes of the Convention
- ▶ *Deep Vein Thrombosis and Air Travel Group Litigation* ([2003] EWCA Civ 1005): “Inaction is the antithesis of an accident”

Di Falco: (2) “Unexpected or unusual” and (3) “external to the passenger”

- ▶ “In my view the requirement that the event be ‘external to the passenger’ means that whether or not it meets this description is measured by **reference to objective standards** of normal aircraft operation, **not by reference to the subjective expectation of the passenger.**” ¶43-44
- ▶ Failure to provide water was not unexpected or unusual because: “the way in which the plaintiff’s requests were dealt with were **in accordance with the usual practice** of attendants and were **not in disregard of or contrary to airline policy.**” ¶45

Di Falco: (2) “Unexpected or unusual” and (3) “external to the passenger”

- ▶ Compare to:
 - ▶ *Air France v Saks*: “unexpected or unusual” and “external” two distinct criteria.
 - ▶ *DVT* : HL found that “unexpected or unusual” is a subjective test (Lord Scott at ¶14).
 - ▶ *Barclay v British Airways Plc*: “externality” is an objective test.

Di Falco: (4) link in causal chain

- ▶ Causation was made out: “some mild dehydration probably was a factor contributing to a fall that had some atypical features of a vasovagal episode and also caused by orthostatic hypotension.” ¶57

Case C-532/18 *GN v ZU*

- ▶ Coffee spilt on GN, a six-year old girl, after being placed on tray table beside her.
- ▶ Austrian Supreme Court referred to the CJEU question of whether this constituted an accident for the purposes of art. 17 Montreal Convention.

Case C-532/18 GN v ZU

- ▶ The carrier's argued that art. 17 only covered hazards typically associated with air travel.
- ▶ Some support for this approach in US and German case law (*Stone v Continental Airlines, Inc* 905 F Supp 823, 827 and *Price v British Airways* (1992) 23 Av Cas 18, 465.), but not in English courts (*Morris v KLM Royal Dutch Airlines* [2002] QB 100).

Case C-532/18 GN v ZU

- ▶ CJEU rejected carrier's argument (at ¶43):
- ▶ *“Article 17(1) of the Montreal Convention must be interpreted as meaning that the concept of ‘accident’ within the meaning of that provision covers all situations occurring on board an aircraft in which **an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation**”*

Case C-532/18 *GN v ZU*

- ▶ Unusual decision:
 - ▶ No consideration of leading authorities on interpretation of Convention, including *Air France v Saks*.
 - ▶ This despite affirming the importance of uniformity when interpreting the Convention (¶32).
 - ▶ CJEU gave its own interpretation of term “accident”: *an unforeseen, harmful or involuntary event*.