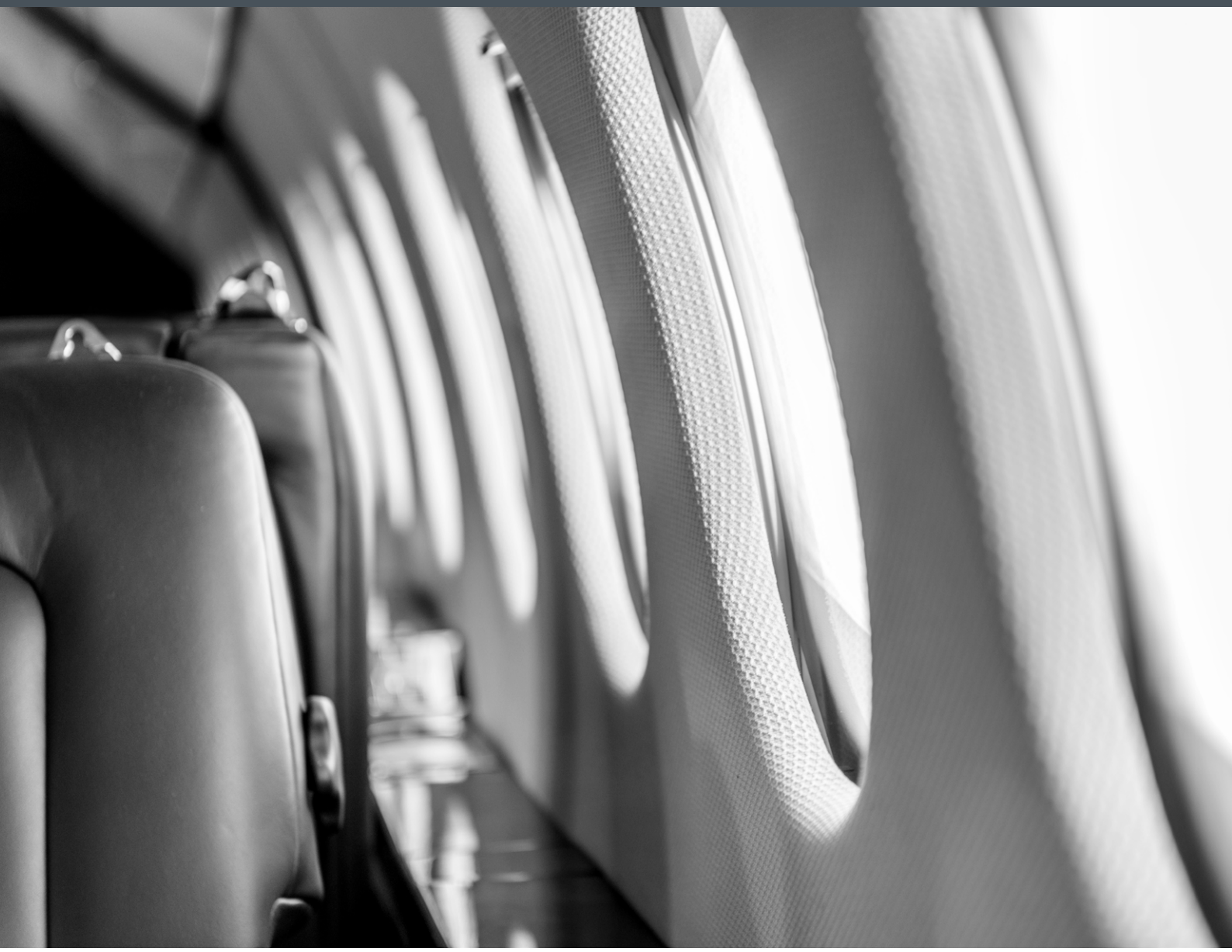

DEFYING CONVENTION?

Giles Kavanagh and Ashleigh Ovland examine whether we have reached the high water mark in relation to the protections offered to airlines by the Montreal Convention, and consider what this means for airlines when choosing which claims to contest.

Unhappy judges

Aviation cases rarely end up in the UK Supreme Court. One exception to this in recent years was *Stott v Thomas Cook*[1]. That case was decided in favour of the airline but the judges were clearly unhappy with the outcome.

1. [2014] UKSC 15

"The Montreal Convention has seen some very significant ratifications recently – as it comes into force in Russia and Indonesia this brings a hugely increased number of passengers within its ambit, perhaps creating many more opportunities for the right test case to come along."

Mr Stott was a wheelchair user, paralysed from the shoulders down. He flew from Zante to London, having requested special assistance in advance.

On boarding, his wheelchair overturned and he fell to the floor. The cabin crew appeared not to know how to deal with the situation. Mr Stott felt extremely embarrassed, humiliated and angry and his wife was also very distressed at the chaotic scenes. To make matters worse the airline, despite promises to the contrary, did not seat him next to his wife, upon whose care he depended to manage his incontinence and help him eat. She had to crouch in the aisle to attend to his personal needs.

Mr Stott was not physically injured but, backed by The Equality & Human Rights Commission, he brought a claim for discomfort and injury to feelings caused by the airline's breach of the UK Disability Regulations. Unfortunately for Mr Stott, a key tenet of the international aviation conventions is that they provide the exclusive basis for any claim made by a passenger for damage suffered in the course of international air travel. The passenger does not have access to any other remedies, whether under the common law or otherwise.

Mr Stott's claim did not satisfy the definition of a Convention claim and so the Supreme Court reluctantly held that it was not able to award any financial compensation to Mr Stott because his claim was precluded by the Montreal Convention.

The judges' comments are striking. Lord Toulson said: *"The embarrassment and humiliation which Mr Stott suffered were exactly what the EC and UK disability regulations were intended to prevent. I share the regret of the lower courts that damages are not available as recompense for his ill treatment and echo their sympathy for him"*

Lady Hale was even more strident. She said: *"Mr and Mrs Stott have both been treated disgracefully... and it is hardly less disgraceful that...the law gives them no redress against the airline."* She described Mr Stott's treatment as cruel, inhuman and degrading and in breach of his human rights. She even questioned whether the same principles would mean that an airline could racially segregate passengers with impunity, indicated that she hoped that the limits of the "apparently adamant" exclusion in Article 29 of the Montreal Convention would be tested in another case.

Mr Stott's lawyers had pushed hard for a referral to the European Court of Justice. If the case had made it there it is quite possible that the notoriously pro-consumer European judges, faced with a very unpleasant set of facts, would have tried hard to rationalise a departure from the constraints of the conventions.

Indeed, in the EU 261 context, both the European and English courts have found ways to for stretch legislation beyond what many believe was intended, to the benefit of the consumer – the CJEU's 2009 *Sturgeon* ruling introduced fixed compensation for delays that was not expressly stated in the Regulation, while the English Court of Appeal ruling on connecting flights in *Gahan* in 2017 arguably extended the reach of EU 261 beyond EU territory.

Finding "a fairer solution"

The US Court of Appeals for the Sixth Circuit has recently taken the opportunity to re-interpret what was thought to be fairly settled convention law in favour of the passenger.

A passenger known by the anonymised name of Jane Doe had the misfortune to prick her finger on a hypodermic needle left in the seat-back pocket on an Etihad flight. She

suffered significant distress as a result of worry that she had contracted HIV or another blood-borne disease. For a year after the incident she was afraid to share food with her child or sleep with her husband. Happily, she was eventually given the all-clear from any injury. However she sued for the mental anguish that she had experienced.

Etihad defended the case, relying on the very well-established aviation convention law principle that no damages are recoverable for mental anguish unless it is caused by bodily injury. Yet the Court of Appeals for the Sixth Circuit described Etihad's defence as a *"curious understanding"* of the law as applied to the facts.

The problem was that the principle had been laid down in cases which related to the Warsaw Convention, but this was a Montreal Convention case. As the relevant wording of the two conventions is materially similar it had hitherto been fairly uncontroversial for courts to be asked to apply Warsaw case law on passenger injury to Montreal cases. However the *Doe v Etihad* court begged to differ, saying *"The Montreal Convention is a new treaty that we interpret as a matter of first impression"* and declaring that the purposes of the two conventions were in fact diametrically completely opposed:

"The Warsaw Convention provided limitations of liability to protect fledgling airlines from litigious passengers; the Montreal Convention provides limitations of liability to protect (still litigious) passengers from the not-so-fledgling airlines"

Seizing upon this perceived difference in purpose, the Court went out of its way to justify what it described as "fairer" solution. It held that, as long as the accident had caused bodily injury of some description, damages for mental injury arising out of the same accident should be recoverable, even if the mental injury was not a direct consequence of the physical injury.

To illustrate this admittedly subtle distinction, consider the following possible outcome of the *Doe v Etihad* court's analysis: two passengers are involved in an emergency landing and evacuated by slide. Both are very frightened. One also bruises his knee while evacuating. The passenger with the bruised knee can recover damages for his fright but the uninjured passenger would not be compensated at all.

Put that way, the Court's use of the word "fair", is perhaps less straightforward than it first seems.

Many commentators suggest that *Doe v Etihad* is an anomalous decision unlikely to gain traction in future cases. However, despite the Montreal Convention having been in force since 2003, the US Supreme Court has never interpreted any of its provisions. Perhaps it will not be too long before another claim, bolstered by the reasoning of the Sixth Circuit, gives the US Supreme Court the chance to shift the prevailing balance between airline and consumer more definitively.

Could aviation conventions be unconstitutional?

Some other countries have historically been more blatant about finding ways to bypass Convention restrictions. Brazilian lower court judges used routinely to ignore Convention limits altogether – particularly in baggage cases – and instead award unlimited damages to passengers on the basis of consumer law. Some progress was recently made there, when a baggage claim against Air France and a delay claim against Air Canada were heard in the Supreme Federal Court, which ruled that convention liability limits and time bar provisions should apply.[2]

However that was not the end of the story. The Brazilian courts did not rule out the recovery of "moral damages" above Convention limits and one judge in the Air Canada case commented that *"if we determined that the Warsaw Convention leaves the consumer wholly exposed then...we would have to declare the Convention unconstitutional"*. This suggests that the Brazilian courts seem to be thinking along the same lines as Lady Hale in *Stott*, and would have little appetite for making a similar ruling.

The Montreal Convention has seen some very significant ratifications recently – as it comes into force in Russia and Indonesia this brings a hugely increased number of passengers within its ambit, perhaps creating many more opportunities for the right test case to come along.

Choose your battles

In cases like *Stott* and *Doe* it is undeniable that the individuals involved suffered terribly and, on a moral level, are deserving of compensation. Therefore, even with the law on the airline's side, if defended in litigation they risk creating problematic law which could have wide-reaching, and perhaps unintended, consequences for the industry as a whole. With the tide on the turn towards the consumer it is now more important than ever for airlines to chose their battles carefully.

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2. See our briefing of November 2017 at http://www.hfw.com/Brazil-International-Conventions-to-prevail-in-international-carriage-by-air-liability-disputes-November-2017

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