RE-EXAMINING THE EXCLUSIVITY PRINCIPLE FOLLOWING *STOTT v THOMAS COOK TOUR OPERATORS LTD*

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The Supreme Court decision in *Stott v Thomas Cook Tour Operators Limited*[1] has focused attention again on the tension between the various strands of travel law (common law, EU law, International Conventions), caused by the exclusivity principles contained in the Conventions, overriding domestic and EU laws designed to protect consumer rights. This article will examine the background to the present position, discuss the issues raised in *Stott*, and whether or not the time has now arrived for a change in the law, to complement legislation that has increased consumer protection but appears in conflict with International Conventions that pre-date those changes.

Air Travel

The Convention that governs international carriage by air for those countries party to it, is now the Montreal Convention 1999, formerly the Warsaw Convention 1929 as amended by The Hague Convention 1955. The Convention is given effect in English law by virtue of the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order.[2]

Liability is governed by Article 17.1 which provides:

> *"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."*

This is a strict liability but subject to certain defences and limitation on liability provisions. The trade-off for the carriers being that limitations would be set on the levels of damages claimed. However, the courts have narrowly interpreted the meaning of 'accident' which must be triggered by an event external to the passenger and be unexpected, for example the House of Lords have decided that deep vein thrombosis is not an 'accident' within the meaning of Article 17.[3] There have been a number of 'slip and trip' claims that have been dismissed due to an overly restrictive interpretation of 'accident' and psychiatric harm or mental injury is not covered. Another extremely important distinction between the Convention and the common law is that the time limit for bringing an action is only two years and not the normal three years for personal injury. If this is missed the claim fails outright.

1. [2014] UKSC 15.
2. Order 2002-SI 2002/263.
3. Re *Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72.

Exclusivity Principle

More controversially under Article 29 any action for damages, *however founded*, whether under the Convention or in contract or tort, can only be brought subject to the conditions and such limits as are set out in the Convention. The issue of exclusivity has been determined by the House of Lords in *Sidhu v British Airways*.[4] In that case action was brought exclusively under the common law for negligence when the claimants on their way to Kuala Lumpur in 1991, via Kuwait, were taken captive by invading Iraqi troops when in the transit lounge in Kuwait. There had not been an 'accident' nor had there been physical, though certainly there was psychological, harm. It was argued the airline should not have allowed aircraft to land in Kuwait at a time of expected conflict. The action was also commenced outside the two year period. The House of Lords held that the Convention's certainty and uniformity would be undermined if the national courts were allowed to provide a residual remedy under the common law that was not a remedy provided for by the Convention and the claim therefore failed. Lord Hope analysed the history, structure and text of the Convention and reviewed the domestic and international case law. He described the Convention as a package which gave to passengers significant rights, easily enforceable, but it imposed limitations. The whole purpose of Article 17 he held, read in its context, was to prescribe the circumstances and the only circumstances in which a carrier would be liable to the passenger for claims arising out of his international carriage by air. To permit exceptions, whereby the passenger could sue outside the Convention for losses sustained in the course of international carriage by air, would distort the whole system.

The principle of exclusivity it has been argued is to prevent a wide range of claims against airlines unless they fall within the substantive scope of the Convention.[5] Quality complaints about the amount of leg room, customer service and noise created by fellow passengers and the standard of food served on board have all been dismissed. In *Gonzor v ITC*[6] the claimant was a wealthy businessman travelling in first class. He complained that his transatlantic flight, which the airline had promised on its website would be a haven of tranquillity, was ruined by a noisy and unruly family with young children sitting in adjacent seats. Since this did not constitute an 'accident' and was not a case of damage or delay, the claim was dismissed. Clearly Article 17 straightjackets death or personal injury claims and can prevent an action in negligence at common law; quality claims for example under the Package Travel Regulations 1992; and claims as we shall see, under disability protection legislation.

In *Hook v British Airways*[7] (a conjoined appeal with *Stott*) the claimant suffered from mobility and learning disabilities and sued BA for damages for injuries to his feelings when failing to make reasonable efforts to meet his seating needs under EC Reduced Mobility Regulations and Civil Aviation disabled person regulations.[8] He argued that an international treaty cannot overrule fundamental European Union law rights. The Court of Appeal rejected this argument and upheld the exclusivity decision of *Sidhu*, confirming that if the Convention did not

4. [1997] AC 430.

5. Saggerson p 514.

6. (2008) Unreported.

7. [2012] EWCA Civ.

8. Regulation (EC)No. 1107/2006 Article 10 Schedule II, and Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 SI 2007/2895, Regulation 9.

provide a remedy in damages, there was no remedy, leading Stevens (2012)[9] to comment that it is a potent reminder of the exclusivity of the Convention regime and of the importance of *Sidhu*. *Stott* alone was taken to the Supreme Court on this point and will be discussed later.

Carriage by Sea

The transport of passengers by sea is governed by the Athens Convention 1974, which is given the force of law in the UK by the Merchant Shipping Act 1995. By Article 3:

> *"The Carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused the damage so suffered occurred in the course of Carriage and was due to the fault or neglect of the Carrier or of his servants or agents acting within the scope of their employment."*

Under the Athens Convention, unlike the Montreal Convention, psychiatric damage is included which as Grant and Mason (2012) point out may be important to passengers affected by the sinking of the *Costa Concordia* in January 2012.[10] Reference is also made to 'incident' which is much wider and obviates the need to straightjacket matters into the qualifying 'accident' definition in the Montreal Convention. Whilst proof of fault is required under this Convention, fault is presumed in a number of situations including shipwreck, collision, stranding, explosion, fire or defect in the ship.

Exclusivity Principle

Again there is a limitation period of two years (Article 16) and, as with the Montreal Convention, the Athens Convention applies to the exclusion of other remedies (Article 14). However, whereas Article 29 of the Montreal Convention provides exclusivity for 'any action for damages, however founded', Article 14 of the Athens Convention applies only to an action for damages 'for the death of or personal injury to a passenger or for the loss of or damage to luggage,' and is not therefore absolute. It is still possible for regulation 15 of the Package Travel Regulations to be argued in a claim against a carrier for a quality complaint (unlike *Gonzor* above for travel by air), or for loss of enjoyment, outside the ambit of the Athens Convention.

Whether regulation 15 is overridden by the exclusivity provisions of the Athens Convention for more substantive claims is open to debate and there are opposing first instance authorities that demonstrate the tension between international Conventions and EU law given force by domestic laws. This is of some considerable importance given the more restrictive limits on not only damages, but also limitation periods that may have been missed. In *Norfolk v MyTravel Group Plc*[11] the claimant brought her claim within three years for personal injury, thus within the period under English law, when she slipped on water in a lift, but outside the two year limit under the Athens Convention. The court held that the claim was time barred and it was dismissed. In contrast a very different view was taken by the court in *Lee and Lee v*

9. At page 6.

10. p384.

11. [2004] 1 Lloyd's Rep. 106.

Airtours Holidays Ltd.[12] The claimants suffered psychiatric illness and the loss of valuables when their cruise ship caught fire and sank. The contract was silent on incorporation of the Convention. The judge held that the limitations in the Athens Convention on damages relating to the lost valuables did not bar their claim to recover the full amount of their loss and that regulation 15 of the Package Travel Regulations provided a *parallel remedy*, despite the exclusivity principle of the Convention it would seem.

Nevertheless, the consensus amongst writers in this area is that the decision in *Lee* (where *Sidhu* had not been brought to the court's attention) was mistakenly decided[13] and that the Conventions do override the Package Travel Regulations. The decision in *Hook* referred to above would tend to support that view. It is arguable though that regulation 15 should run parallel to the Convention for substantive claims. The authority of *Sidhu* was decided before the Package Travel Regulations were brought in. Uniformity of rules for international travel are laudable for the vast majority of stand-alone flights or sea voyages but do they not run a coach and horses through important consumer laws which reflect the sea change of protection afforded by the law now to consumers, which those Conventions pre-date? Harding and Prager (2010) make the valid point that when the Athens Convention was ratified originally in 1974, the travel law landscape looked very different:

> *"The 'package holiday' was still in its infancy, and the desire of the European Parliament for harmonisation and uniformity was not as strongly felt as it is today. When the Package Travel Regulations 1992 came into force, they created a regime which was unashamedly consumer-oriented and which did not, and does not, sit easily alongside the restrictive, pragmatic provisions of the Convention."*[14]

The authors acknowledge that the position has been complicated by the two diametrically opposed first instance decisions of *Lee* and *Norfolk* referred to above. A definitive higher court decision is perhaps needed to clarify this point as regards claims involving the Package Travel Regulations, but as regards similar claims under disability legislation the Supreme Court has now ruled on this, albeit with some interesting observations.

Exclusivity – the current position

The facts of *Stott* are that the paralysed claimant is a permanent wheelchair user. He suffers from incontinence and when travelling by air depends on his wife to manage his incontinence since he cannot move around the aircraft. He also relies on her to help him eat and change his sitting position.

When returning on a flight from Zante, despite having twice been assured prior to departure that he would be sat next to his wife on both flights, this did not happen. Also when entering the aircraft by ambulift his wheelchair overturned and he fell to the cabin floor. Those present appeared not to know how to deal with the situation. Mr Stott felt extremely embarrassed, humiliated and angry. Eventually he was assisted into his aisle seat and his wife sat behind.

12. [2004] 1 Lloyd's Rep. 683.

13. Both the authors Grant and Mason in Holiday Law, and the authors of Saggerson agree.

14. [2010] TLQ 22.

This arrangement caused them considerable difficulties in that it was problematic for Mrs Stott to assist her husband regarding his incontinence, food and movement during the flight. The cabin crew made no attempt to ease their difficulties and made no requests of other passengers to enable the Stotts to sit together. The Recorder at Manchester County Court described the situation as 'a very unhappy experience for them.'

Mr Stott brought a claim under the UK Disability Regulations which set out the enforcement rights in the EC Disability Regulations, for a declaration that the respondent's treatment of him was in breach of its duty under the Regulations in that it had failed to make all reasonable efforts to give his wife a seat next to him, together with damages in particular for injury to his hurt feelings. The recorder made the declaration and would have granted £2,500 as compensation for his hurt feelings if it had been open to him but concluded that he had no power to make such an award, by reason of the Montreal Convention.

The UK Disability Regulations makes it an offence carrying financial penalties for an air carrier to contravene an obligation imposed (Regulations 3 and 4). Regulation 9 also states that a claim by a disabled person or a person with reduced mobility for an infringement of his rights under the EC Regulations may be made the subject of civil proceedings in the same way as any other claim in tort. On appeal it was argued on Mr Stott's behalf that the regulations were not incompatible with the Convention and that rights to ensure equal access to air travel for disabled persons are not areas with which the Convention deals, and therefore those rights and obligations that Union law legislation imposes should not be limited by the Convention. Further that these regulations were akin to the Denied Boarding Regulations[15] which standardise the levels of compensation and assistance in the event of a denial of boarding which are a supplementary form of redress to and are not incompatible with, the Convention.

The Court of Appeal upheld the Recorder's decision as ultimately did the Supreme Court. Lord Toulson held that the claim for damages for the humiliation and distress which Mr Stott suffered related exclusively to events on the aircraft, and his subjection to 'humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention.' The question of whether a claim for damages for breach of equality laws, or more specifically for failure to provide properly for the needs of a disabled passenger should be regarded as outside the substantive scope of the Convention was answered with a resounding if perhaps somewhat reluctant, no. Lord Toulson expressed further that the Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation.

However, the Supreme Court recognised that the underlying problem is that the Convention long pre-dates equality laws which are common today:

> *"There is much to be said for the argument that it is time for the Montreal Convention to be amended to take account of the development of equality rights ... in relation to access for the disabled ... It seems unfair that a person who suffers ill-treatment of the kind suffered by Mr Stott should be denied any compensation."*

15. EU Regulation No 261/2004.

Though Lord Toulson then went on to point out that there are other possible means of enforcement. That it was for the Civil Aviation Authority to decide what other methods of enforcement should be used, including possible criminal proceedings.

Conclusion

What this article demonstrates is that whilst in certain ways the International Conventions which govern the transport of passengers by air and sea, may provide greater assistance to consumers, such as the strict liability provisions in the Montreal Convention, they can also be restrictive. Narrow interpretations of what constitutes an 'accident', limitations on damages, and tighter limitation periods would appear to fly in the face of the wider consumer protection laws epitomised by European and domestic Regulations that post date the Conventions. This sometimes incompatible conflict within the law needs resolving, for in the words of Lady Hale in *Stott*:

> *"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 ... the unfairness of the present position ought to be addressed by the parties to the Convention. Small comfort though it may seem to them, both Mr and Mrs Stott ... have done all a service by exposing a grave injustice to which the international community should now be turning its attention."*

Whether that is so remains to be seen.

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