OUTER HOUSE, COURT OF SESSION

[2022] CSOH 40

PD159/19

OPINION OF LORD UIST

in the cause

COLIN MATHER

Pursuer

against

(FIRST) EASYJET AIRLINE COMPANY LIMITED and

(SECOND) DRK HAMBURG MEDISERVICE gGmbH

Defender

Pursuer: Di Rollo QC, Thornley; Digby Brown LLP
First Defender: McBrearty QC, Pugh; Clyde & Co (Scotland) LLP
Second Defender: Shand QC; DAC Beachcroft LLP

18 May 2022

Introduction

[1] The pursuer ("Mr Mather") was born on 7 June 1965. The first defender ("easyJet ") is a company incorporated under the Companies Acts and has its registered office at Luton Airport. The second defender ("DRK") is the German Red Cross Mediservice, a non-profit organisation based at Hamburg Airport. Both defenders accept that the Court of Session has jurisdiction to hear the present action.

[2] The action went to proof on the issues of liability, limitation of liability and contribution. I heard evidence from Mr Mather; his daughter Jessica Mather; Grant Organ, a

consultant in aviation risk and safety management; Celine McGuigan, easyJet ground customers operations manager at Luton Airport; Dr Petra Schaaff, a German lawyer based in Hamburg with a special interest in private international law; Katherine Howells, an English barrister with a special interest in private international and travel law; Michael Nkrumah, an English barrister specialising in travel law; Frank Kohlstadt, Head of the German Red Cross at Hamburg Airport; and Marcel Hohagen, a German lawyer based in Cologne.

The accident

[3] As a result of injuries suffered in an accident in 2009 Mr Mather was rendered an incomplete T3 paraplegic. Despite that he continued to lead an active life and resumed employment as a project manager and latterly as a self-employed consultant. By May 2017 his work took him abroad almost continuously and he was a regular air traveller. He travelled often from Edinburgh to Hamburg. He booked seat 3D on the easyJet flight EZY 6931 from Edinburgh to Hamburg on 15 May 2017, due to depart from Edinburgh at 18:55. When he booked his flight online he notified easyJet that he required special assistance to embark and disembark the aircraft as he used a wheelchair. At the same time he booked his return flight from Hamburg to Edinburgh for 1 June 2017 at 17:10. Article 29 of the Terms and Conditions, headed "Choice of Law and Jurisdiction", provided as follows:

> "Unless otherwise provided by the Convention or any applicable law, government regulations, orders or requirements;
>
> - These Terms and Conditions and any carriage which We agree to provide You with (in respect of Yourself and/or Your Baggage) shall be governed by the law of England and Wales; and
>
> - Any dispute between You and Us concerning or arising out of such carriage in any way whatsoever shall be subject to the non-exclusive jurisdiction of the courts of England and Wales. 'Non exclusive jurisdiction' means that you

> may bring a claim against easyJet in a jurisdiction outside the courts of England and Wales."

: Article 12.3.6 provided as follows:

> "The provision of assistance through the airport, onto the aircraft, off the aircraft and through the arrivals process at the destination is the responsibility of the relevant Airport Authority."

"Airport Authority" was defined as "the owner and/or operator of an airport at which easyJet operates".

[4] Mr Mather boarded the aircraft in Edinburgh with assistance and without incident. He had his own wheelchair with him. It was in the hold with special tags on it. He was seated in seat 3A. The flight was late in arriving at Hamburg Airport and there was a delay in awaiting assistance personnel to help him out of the aircraft. He was provided by the two assistance personnel with a narrow aisle chair to get from his seat to the door of the aircraft. As his wheelchair was then still in the hold and not available he was transferred by the two assistance personnel to an airport wheelchair at the door of the aircraft. He had his wheelchair cushion and his cabin bag on his lap. One of the assistance personnel pushed the wheelchair between 10 and 20 metres up the ramp of the air bridge towards the terminal building. Mr Mather thought he was being pushed quite briskly. The next thing he was aware of was the wheelchair stopping very abruptly and he landed on his legs on the marble floor just inside the threshold of the airport building. As a result he sustained compound fractures to both legs below knee level. The accident was caused by the front wheels of the wheelchair hitting the raised edge at the point where the air bridge joined the airport building, formed by a narrow metal ramp at the join between the higher and lower floor levels.

[5] In this action Mr Mather sues easyJet for the loss, injury and damage which he sustained as a result of the accident. His claim is based on the terms of the contract of carriage by air entered into between them, as governed by the Montreal Convention 1999 ("the Convention"), incorporated into the law of Scotland by the Carriage by Air Act 1961 as amended by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002/262. The relevant articles of the Convention are as follows:

> "**Chapter III (Liability of the Carrier and Extent of Compensation for Damage)**
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> Article 17 – Death and Injury of Passengers – Damage to Baggage
>
> 1. The carrier is liable for damage sustained in the 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 21 – Compensation in case of Death or Injury of Passengers
>
> 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 limit or exclude 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.
>
> Article 26 – Invalidity of Contractual Provisions
>
> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.
>
> Article 29 – Basis of Claims
>
> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or tort or otherwise, can only

be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30 – Servants, Agents – Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.
2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

Article 35 – Limitation of Actions

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.
2. The method of calculating that period shall be determined by the law of the court seized of the case.

Article 37 – Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question of whether a person liable for damage in accordance with its provisions has a right of recourse against any other person."

Submissions

(i) Submission for Mr Mather

[6] It is asserted in the first instance that the solicitors acting for easyJet admitted liability for the accident in an email dated 17 July 2018, which stated that the admission of liability was intended to be binding. This amounted to a binding, unqualified admission of liability which Mr Mather relied upon and he would suffer prejudice if easyJet were permitted to withdraw the admission of liability made on its behalf. The terms of the email,

written by a solicitor within the firm of solicitors acting for easyJet to a solicitor within the firm acting for Mr Mather was as follows:

> "On behalf of the defenders, I have instructions to admit liability in line with the protocol. It is intended to be binding.
>
> I'll look forward to receiving medical evidence and any other vouching in due course."

[7] The person pushing the wheelchair (Mr Daniel Tobias Heinz) was acting as easyJet's agent in terms of Article 21(2)(a) of the Convention and therefore no limitation of liability applied. The onus of proving that easyJet or its agent was not at fault for the accident rested with easyJet. If the person pushing the wheelchair was not the carrier's agent for the purposes of the Convention (which was denied), the claim against DRK was based on his negligence as its employee. German law was the applicable law in relation to the fault and negligence of DRK. Section 823(1) of the German Civil Code states

> "A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this."

Section 831(2) states

> "A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task"

(ii) Submission for easyJet

[8] In response to the alleged admission of liability all that easyJet averred on record was that the email of 17 July 2018 was referred to for its full terms, beyond which no admission was made, but in oral submissions counsel for easyJet maintained that easyJet was not bound by its pre-litigation admission to accept liability for anything more than that provided for by the Convention. easyJet did not seek to withdraw a pre-litigation admission

of liability. Rather, a similar admission was made by it on record. By the time of the email of 19 July 2018 the solicitors for Mr Mather and those for easyJet had been in correspondence for a matter of months and agreed that this was a claim under the Convention. Mr Mather's solicitors, being specialists in travel law, would have been aware of the limitation provisions and of the involvement of a third party. easyJet accepted that the correspondence was in the language of unilateral obligation, but only to admit liability in terms of the Convention, not to pay damages at any particular level and not to forego any other line of defence provided by the Convention. For example, had the action not been raised within the two year period, the unilateral obligation would not have prevented easyJet from arguing that limitation applied. There was no real prejudice to Mr Mather. If DRK were found to be a third party it is not provided with the protections under the Convention, it would be subject to German law and the action would be timeous. Alternatively, if DRK were an agent of easyJet, the limitation provision under article 21 did not apply and the only issue was contribution between easyJet and DRK.

[9] On the merits of the claim easyJet submit that the accident which befell Mr Mather was not due to its fault or negligence or to the fault or negligence of any of its employees or agents. The accident occurred while Mr Mather was disembarking the aircraft. It was solely caused by Mr Heinz, who was employed by DRK. DRK and (by extension) Mr Heinz were appointed by the operators of Hamburg Airport, who had a duty to provided assistance to travellers who required it, and subcontracted that duty to DRK. DRK was not acting as an agent of easyJet. If the accident was not caused by DRK then, on the basis of the hypothesis of fact advanced by DRK, it was caused by the operators of Hamburg Airport and the liability of easyJet is limited to the equivalent of 113 100 SDR. If easyJet's liability is not so limited the loss, injury and damage to Mr Mather was caused by the fault of DRK and in

that event and as a matter of the law of England and Wales, which failing German law, liability ought to be apportioned between easyJet and DRK. Apportionment of liability in the law of England and Wales is governed by the Civil Liability (Contribution) Act 1978 ("the 1978 Act") , section 1 of which provides that any person howsoever liable to another may recover contribution from any other person in respect of the same damages, regardless of the basis of liability (section 6(1)). The right to contribution does not depend upon the existence of joint and several liability but arises either upon a judgment of the court or a settlement between the parties. Section 2 of the 1978 Act provides that apportionment is to be based on what is just and equitable, which means that consideration of the extent of a person's responsibility "involves both the degree of his fault and the degree to which it contributed to the damage in question" (*Downs v Chappell* [1997] 1 WLR 426 per Hobhouse LJ at p445). The apportionment of liability is subject to a rule that a defendant cannot, by contribution, be required to pay more than he would have been liable to pay the claimant (section 2(3)). The right to contribution ranges from exemption (0%) to complete indemnity (100%) (section 2(2)). Section 10 provides that a claim for contribution must not be brought more than two years from the date on which the right accrues, which is either the date of a judgment in civil proceedings or the date on which a settlement is agreed. At the material time Mr Mather was under the care of DRK, which had been appointed by Hamburg Airport to fulfil their duty to provide assistance to travellers requiring it under Regulation (EC) 1107/2006 (commonly known as "the PRM Regulation") "concerning the rights of disabled persons and persons with reduced mobility when travelling by air". Article 7(6) thereof provides that "on the arrival by air of a disabled person or person with reduced mobility at an airport to which this Regulation applies, the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex 1 in such

a way that the person is able to reach his or her point of departure from the airport as referred to in article 5". Annex 1 lists, among other things, assistance "to disembark from the aircraft, with the provision of lifts, wheelchairs or other assistance needed as appropriate." Article 8(2) provides "The managing body may provide such assistance itself. Alternatively, in keeping with its responsibility, and subject always to compliance with the quality standards referred to in Article 9(1), the managing body may contract with one or more other parties for the supply of the assistance." DRK was fulfilling Hamburg Airport's duty under Article 7(6) at the material time and easyJet believe and aver that it was doing so under article 8(2) of the PRM Regulation. That Hamburg Airport was responsible for assistance on and off the aircraft was reflected in paragraph 12.3.6 of its conditions of carriage, which stated that "the provision of assistance through the airport, onto the aircraft, off the aircraft … is the responsibility of the relevant Airport Authority."

(iii) Submission for DRK

[10] In its response DRK avers that the accident was caused due to fault on the part of Hamburg Airport. Under the terms of the Convention, as well as under German law, it, as well as its employee Mr Heinz, was acting as agent of easyJet at all material times. Moreover, under Article 17 of the Convention, as well as under German law, easyJet was responsible for ensuring the safety of Mr Mather during his disembarkation from the aircraft while on the air bridge and until he was inside the terminal building. easyJet had a duty to ensure that the path from the aircraft to the terminal was safe for use by passengers such as Mr Mather. Under Article 17 of the Convention, as well as under German law, easyJet was also responsible for the acts of the employee of DRK (Mr Daniel-Tobias Heinz) who pushed the wheelchair. Notwithstanding the terms of paragraph 12.3.6 of the conditions of carriage,

the terms of paragraph 16.3.1 made clear that liability for an accident to a passenger in the course of disembarking rested with easyJet. Furthermore, any provisions of the conditions of carriage not in conformity with the Convention were null and void. Regulation (EC) 1107/2006 neither modified nor excluded the liability of an air carrier for an accident to a passenger in the course of disembarkation. The Regulation did not modify the liability regime established by the Convention or limit the obligation upon an air carrier to pay damages.

[11] If Mr Mather sustained loss, injury and damage as a result of fault and negligence on the part of easyJet (which was denied) and if (which was also denied)any liability of DRK to contribute to any damages payable by easyJet has not been extinguished by one or other or both of Article 35 of the Convention and German law, and if(which was also denied) German law did not preclude a right of contribution in the present proceedings on the ground of competency, that loss, injury and damage also having been caused by fault and negligence and breach of duty on the part of easyJet, any liability to Mr Mather in damages should be apportioned between easyJet and DRK according to German law.

[12] If the Convention did not apply to regulate the liability of easyJet and DRK (which was denied) the law applicable to the present dispute was German law, as provided by Article 4(1) of Rome II (Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007).

[13] Under the Convention Mr Mather's right to claim against DRK as agents of easyJet had been extinguished by limitation. The aircraft on which he was travelling arrived at Hamburg Airport on 15 May 2017, the date from which the two year limitation period ran under Article 35 of the Convention. The two year limitation period applied to agents of carriers as well as carriers themselves. The present proceedings were not served on DRK

until 3 June 2020 with the consequence that the claim was barred by limitation and Mr Mather's right of action had been extinguished. DRK and Mr Heinz were acting in the course of their employment with easyJet under German law, having been employed to assist Mr Mather to disembark the aircraft (Articles 29, 30 and 35 of the Convention and section 5(1) of the Carriage by Air Act 1961.

[14] As agent for easyJet DRK was entitled to limit its liability to the amount specified in the Convention.

[15] Under section 241 of the German Civil Code the contract of carriage between Mr Mather and easyJet was subject to an implied term that easyJet would protect his physical integrity. easyJet were therefore liable to him for breach of this implied term.

[16] Section 278 of the German Civil Code, dealing with contractual obligations, provides: "The obligor is responsible for fault on the part of his legal representative, and of persons whom he uses to perform his legal obligation, to the same extent as for fault on his own part." Accordingly, if there was any fault on the part of Mr Heinz (which was denied), easyJet were liable to Mr Mather for any such fault, DRK being a party upon whom easyJet relied to perform its obligation to transport Mr Mather between the aircraft and the gate.

[17] Under section 278, if there was any fault on the part of Mr Heinz (which was denied), easyJet was liable to Mr Mather, DRK being a party upon whom easyJet relied to perform their obligation to transport Mr Mather from the aircraft to the gate.

[18] Section 831 of the German Civil code, dealing with vicarious liability in tort, provides: "A person who uses another person to perform a task is liable to make compensation for the damage that that other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care in selecting the person deployed and in the management of that person, or if

the damage would have occurred even if such reasonable care had been taken." DRK took all reasonable care in the selection of its employee and the monitoring of his activities and his training. Staff had to undergo a reliability check under German law before they could be employed by DRK to assist disabled persons. They underwent training, including as first aiders. Mr Heinz was a trained paramedic. He had received recent training. If DRK did not carry out the selection and training of Mr Heinz with reasonable care (which was denied), the accident would have occurred in any event as adequate selection, training and monitoring would not have prevented the occurrence of this accident, which was caused by the fault and negligence of Hamburg Airport.

[19] Regulation (EC) 1107/2006 could not operate to modify, exclude or limit easyJet's obligations to Mr Mather under the Convention.

[20] German law applied to easyJet's claim against DRK for an apportionment of liability, which was barred by the passage of time under German law. Under section 426(1) of the German Civil Code the right to bring such a claim for apportionment is subject to the standard German limitation period of three years, as provided in section 195 of the Code. That period runs from the end of the year within which the right to make a claim originated. easyJet's claim for apportionment originated at the date of the accident and became barred by the passage of time on 1 January 2021. easyJet did not make a claim for apportionment against DRK in the present case until intimation of a Minute of Amendment on 24 November 2021. Further and in any event, there were other parties who were potentially liable to Mr Mather and who were not convened in the present proceedings, namely, Hamburg Airport (Flughafen Hamburg GmbH) and Mr Heinz. Under German law the right to apportionment between joint wrongdoers was viewed as an entirely separate claim from that which gave rise to their liability to the injured party. Any claim by easyJet under

German law seeking apportionment would have to include Hamburg Airport and Mr Heinz as potential defenders if easyJet sought to achieve full recovery apart from its own share and would have to be the subject of a separate court action. Accordingly, under German law the attempt by easyJet to claim apportionment against DRK in the present action was not competent. Further and in any event, under section 426(1) of the German Civil Code the basic rule is that joint and several debtors are obliged to contribute internally in equal proportions in relation to one another unless the court determines that a different proportion is appropriate. Each debtor is not liable to the other debtors for a share of the other debtors' respective liabilities, but only for its own individual share. Section 426(1) provides that apportionment is permitted only in respect of the principal sum paid by the party seeking apportionment, and not in respect of their legal costs.

[21] If the law of England and Wales was applicable to the issue of contribution (which was denied), the right of one defendant to recover contribution from another defendant or a third party was governed by the Civil Liability (Contribution) Act 1978 ("the 1978 Act"), section 1(1) of which provided that the right to contribution did not arise until a claim was the subject of a bona fide settlement or a judgment entered by the court. Under section 1(6) a judgment given by a foreign court, that is to say a court not in England and Wales, did not create a liability under section 1. As a judgment in the present proceedings would be a foreign judgment section 1 of the 1978 Act would not apply so as to give easyJet a right of contribution against DRK. Further and in any event, section 1(3) of the 1978 Act provides: "A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against

him in respect of the damage was based." The effect of that provision was that if the expiry of a limitation period in respect of a claim that a person or party ("A") had against another ("C") extinguishes any claim that A had against C then no claim for contribution will be available under section 1 of the 1978 Act to a party claiming contribution from C ("B") beyond the limitation period Article 35 of the Convention did not simply bar any remedy that Mr Mather might otherwise have had against DRK, it extinguished it. In these circumstances, if the law of England and Wales fell to be applied to the question of apportionment (which was denied) section 1(3) of the 1978 Act operated to prevent DRK making a contribution under the Act.

The email of 17 July 2018

[22] In my opinion the most that can be taken from this email is an acceptance by easyJet of strict liability for a limited amount of damages in terms of the Convention. It is even questionable if that be taken from it in view of its reference to "the protocol" as no protocol features in this case. The use of the word "protocol" could simply be an error by the author of the email. The issue between Mr Mather and easyJet is not about the principle of liability, which cannot be questioned in view of the terms of the Convention, but about the extent of its liability and whether it should be unlimited. The email says nothing about the extent of liability and therefore is of no assistance to Mr Mather in his claim for unlimited liability. The burden of establishing unlimited liability remains upon him. In my opinion no prejudice accrued to Mr Mather from the content of the email.

Interpretation of the Convention

[23] The full title of the Convention is the Convention for the Unification of Certain Rules for International Carriage by Air. It was agreed in Montreal on May 1999 and given legal force in the United Kingdom under section 1(5)(c) of the Carriage by Air Act 1961 (as amended). Its predecessor was the 1929 Warsaw Convention which was amended at The Hague in 1955. The preamble to the Convention states that its purpose is "to modernise and consolidate the Warsaw Convention and related instruments". Many of the authorities in this area deal with the Warsaw Convention, but it was accepted by the Court of Appeal in *Barclay v British Airways plc* [2010] QB 187 (Laws LJ at para 6) that authorities on the Warsaw Convention are equally referable to the Convention.

[24] An autonomous approach must be adopted to the interpretation of the Convention. The proper approach to the interpretation of the Convention was set out by Lord Hope of Craighead in the House of Lords in *King v Bristow Helicopters Ltd* 2002 SC(HL) 59 at paras 76 to 82 with reference to the Warsaw Convention in the following terms:

> "76. We are concerned in this case with the meaning of words used in an international convention. The Convention must be considered as a whole, and it should receive a purposive construction: *Greene* v *Imperial Airways Ltd* at pp 74-76 per Greene Lj; *Fothergill* v *Monarch Airlines Ltd* at p729 per Lord Diplock. The ordinary and natural meaning of the words used in the English text in part 1 of the schedule provides the starting point. But these words must also be compared with their equivalents in the French text in part ii of the schedule, as section 1(2) of the 1961 Act tells us that if there is any inconsistency in the text the French shall prevail.
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> 77. As the language was not chosen by English draftsmen and was not designed to be construed exclusively by English judges, it should not be interpreted according to the idiom of English law. What one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference. The exercise is not to be controlled by technical rules of English law or domestic precedent. It would not be right to search for the legal meaning of the words used, as the Convention was not based on the legal system of any one of the contracting states. It was intended to be applicable in a uniform way across legal boundaries.

78. In situations of this kind the language used should be construed on broad principles leading to a result that is generally acceptable: see *Stag line Ltd v Foscolo Mango Co Ltd* at p350 per Lord Macmillan; *James Buchanan & Co ltd* v *Babco Forwarding and Shipping (UK) Ltd* at p152 per Lord Wilberforce. But that does not mean that a broad construction has to be given to the words used in the Convention. As Lord Phillips of Worth Matravers MR said … it is not axiomatic that the broad principle of 'general acceptation ' described in these cases militates in favour of a broad rather than a narrow interpretation of the phrase 'any other bodily injury'.

79. It is legitimate to have regard to the *travaux preparatoires* in order to resolve ambiguities or obscurities; *Fothergill v Monarch Airlines Ltd* at p278 per Lord Wilberforce. But caution is needed in the use of this material, as the delegates may not have shared a common view. An expression by one of them as to his own view is likely to be of little value if it was met simply by silence on the part of the other delegates. It will only be helpful if, after proper analysis, the *travaux* clearly and indisputably point to a definite intention on the part of the delegates as to how the point at issue should be resolved.

80. It is legitimate to have regard to subsequent practice in the application of the Convention if this shows that the contracting parties were in agreement as to its interpretation when it was entered into. General guidance to this effect is given, albeit only prospectively, in the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964) , articles 31(1) and 32.

81. In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.

82. … The meaning which is to be given to the words in the Convention is the meaning which was to be attributed to them when the Convention was entered into in 1929. But it must always have been intended that the application of that meaning to the facts would depend on the evidence. …"

Lord Steyn explained the position thus at para 27:

"The purpose of the Warsaw Convention, following the precedent of the earlier Hague Rules governing carriage by sea, was to bring some order to a fragmented international aviation system by a partial harmonisation of the applicable law,. The Warsaw Convention is an exclusive code of limited liability of carriers to passengers. On the other hand, it enables passengers to recover damages even though, in the absence of the Convention and the Act, they might have no cause of action which would entitle them to succeed. It follows from the scheme of the Convention, and

> indeed from its very nature as an international trade law convention, that the basic concepts it employs to achieve its purpose are autonomous concepts. For present purposes the compromise agreed at Warsaw involved the imposition of a form of strict liability on carriers in respect of liability causing death, wounding or bodily injury to passengers in return for the limitations of liability expressed in the Warsaw Convention."

Decisions on the Warsaw Convention

[25] In the case of *Reed* v *Wiser* 555 F.2d 1079 (1977) the personal representatives, heirs and next of kin of none passengers killed when a bomb exploded on an aeroplane brought an action against the corporate officers of the carrier pleading negligent failure to institute or maintain a satisfactory security system. The US Court of Appeals Second Circuit held that the plaintiffs could not recover from the carrier's employees or from the carrier and its employees together a sum greater than that recoverable in a suit against the carrier itself as limited by the Warsaw Convention with its applicable agreements and protocols. The judgment pointed out that (i) the Warsaw Convention was intended to act as an international uniform law and therefore must be read in the context of the national legal systems of all its members; (ii) a treaty, whether construed strictly or liberally, should be interpreted to effectuate its evident purposes; (iii) the purpose of the provision in the Warsaw Convention limiting the carrier's liability for each passenger was to fix at a definite level the cost to airlines of damage sustained by their passengers and of insurance to cover such damage; and (iv) a fundamental purpose of the signatories to the Warsaw Convention , which purpose was entitled to great weight in interpreting that pact, was their desire to establish a uniform body of worldwide liability rules to govern international aviation, which rules would supersede, with respect to international flights, the scores of differing domestic laws, leaving the latter applicable only to internal flights of each of the countries involved.

[26] Other decisions of the US courts were to the same effect. The circumstances of *Johnson* v *Allied Eastern States Maintenance* 488 A 2d1341 (1985) in the District of Columbia Court of Appeals were similar to those of the present case. Mr and Mrs Johnson were booked on an Eastern Airlines flight from Baltimore to Nassau. Their son drove them to Baltimore airport, where they were greeted on arrival by a skycap (airline porter) employed by Allied who offered a wheelchair to Mrs Johnson, a victim of arthritis, as she stepped out of the car. She accepted his offer and got into the wheelchair. The skycap pushed her through the terminal, past the check-in gate and onto a boarding ramp which led to the aeroplane. Halfway down the ramp the wheelchair hit a metal strip and tipped over, throwing Mrs Johnson against the wall and then onto the floor, causing her to break a bone in her foot and suffer various other injuries. Since the action against Allied was not brought until almost three years after the accident Allied moved for summary judgment on the ground that it was barred by the Warsaw Convention's two year limitation provision. It was argued for Mrs Johnson that the Warsaw Convention applied only to actions against carriers and their employees, not to actions against third parties or independent contractors such as Allied. At both first instance and on appeal Allied's motion was granted. The Court of Appeals stated:

> "We find the *Reed* opinion most persuasive. Although the Convention is ambiguous, in that it does not expressly extend its coverage to employees or agents of a carrier, we believe that the purposes underlying the Convention would best be served by a construction which brings under its aegis not only the carrier's employees, as in *Reed*, but also those agents who perform services in furtherance of the contract of carriage. This will ensure that the rules governing international aviation remain uniform and that the liability limitations remain intact, regardless of whom a plaintiff may choose to name as a defendant in a particular case. Other courts have reached the same conclusion. See, e.g, *Baker* v *Lansdell Protective Agency Inc* 590 F Supp 165 (SDNY 1984) (liability limitations in Warsaw Convention applied in action against agent performing security checks at airport); *Julius Young Jewelry Manufacturing Co* v *Delta Airlines* 67 AD 2d 148, 414 NYS 2d 528 (1979) (liability limitations in Warsaw Convention applied in action against independent contractors engaged by airlines to

> perform interline baggage transfer services); *Garlitz v Allied Aviation Service International Corp* 17 AvCas (CCH) 17,238 (NY Sup Ct 1982) (statute of limitations in Warsaw Convention applied in action against independent contractor providing services which the airline itself could have provided).
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> Appellants argue that the test for determining whether the Convention applies should be whether the service provided by the agent (or independent contractor) is essential to the operation of the carrier's business. Given the purposes of the Convention, we cannot agree. We hold instead that the test is merely whether the particular activity of the agent which resulted in injury was in furtherance of the *contract of carriage. In this case that test is easily met. Putting the passenger on the* plane is surely in furtherance of the contract of carriage. If there had been no skycap and no service contract between Allied and Eastern Airlines the airline itself would have had to assist Mrs Johnson in boarding the plane. Since Allied was performing part of the airline's duty under the contract of carriage it is entitled to the same protection no more and no less than the airline would have under the Convention."

[27] In *Vumbuca* v *Terminal One Group Association* 859 F.Supp.2d343 (EDNY 2012) the US District Court for New York held that the defendants, who operated at the terminal for all international flights for various carriers were agents of the carriers. In pointing out that the Warsaw Convention did not define "agent" and that the US Supreme Court had not provided any guidance on the point the court stated as follows at p363:

> "Lower courts have held that an entity is an agent of an air carrier if it "performs services in furtherance of the contract of carriage, and … services within the scope of the Convention that the airline is otherwise required by law to perform"; *In re Lockerbie Air disaster at Lockerbie, Scotland on Dec21 1988,* 776 F.Supp at 714. They have found that the Convention's limits on liability apply to subcontractors which provide airport security, *id* at 714; clean planes, *Waxman*, 13 F.Supp.2d at 515; or facilitate passenger's boarding of the aircraft, *Chutter v KLM Royal Dutch Airlines* 132 F.Supp 611, 613 (SDNY 1955) (holding, in a pre-*Reed* case, that the service company which provided the plane's entrance ramp was covered by the Warsaw Convention because its services were part of the 'contract of transportation'); and also *Johnson* v *Allied Eastern States Maintenance Corp*, 488 A.2d 1341, 1345 (DC 1985) (finding that a skycap company was covered by the Warsaw Convention because putting a passenger on a plane was a service performed in furtherance of the contract of carriage). Convention limits have also been found to apply to air carriers' ground handling agents, *Am. Home Assur.Co* v *Kuehne & Nagel (AG & Co.) KG*, 544 F.Supp.2d 261, 263-266 (SDNY 20080 (holding that the Montreal Convention's two year statute of limitations barred recovery from the ground handling company, since that company was an agent of the air carrier under article 30). By contrast, the Convention does not apply to companies performing terminal maintenance services, as those services are

> 'not flight related' and could affect individuals not covered by the Convention. *Alleyn v Port Authority of New York*, 58 F.Supp.2d 15, 24 (EDNY 1999)."

[28] In *Kabbani* v *International Total Services* 805 F.Supp. 1033 (DDC 1992) the defendant provided baggage search and passenger inspection services by contract to airlines at Dulles International Airport. The plaintiff sought damages from the defendant for negligence and wilful misconduct resulting in the theft of her purse at an airline security checkpoint. The court stated that the question before it was whether an independent contractor, when providing legally required security services to passengers boarding an international flight, was subject to the liability limitations of the Warsaw Convention for baggage thefts. It held that, because the plaintiff's bag was in the defendant's charge at the time of the alleged theft, and because the defendant was acting as the carrier's agent in providing security services the airline otherwise legally would have been required to provide, the Warsaw Convention applied to the circumstances and provided the exclusive remedy.

[29] The case of *Croucher* v *Worldwide Flight Services Inc* 111 F.Supp 2d 501 involved a passenger exposed to fluid in an air sickness bag on a flight from Newark to Seoul. She sued the defendants, who provided ground-handling services to Korean Airlines at Newark Airport, for emotional stress caused by their inadequate cleaning of the aircraft cabin. The court held that the Warsaw Convention applied to claims against agents, contractors and sub-contractors of the air carrier. The court did not limit the extension to agents performing a service obligated by law since that could result in limitation of liability if an air carrier provided food on board which caused illness but not if the airline contracted that service to an agent who provided food causing an illness. The Convention covered agents and employees performing services fundamental or in furtherance of the carriage enterprise and which the carrier itself would be bound to perform even if not technically required to do so

by statute. Thus, the cleaning services provided by the defendant were in furtherance of a contract of carriage and the defendant enjoyed the limitation of liability under the Convention.

[30] *Carroll* v *United Airlines Inc* 325 NJ Super 353 (Superior Court of New Jersey Appellate Division, 3 November 1999) involved a paraplegic passenger on a United Airlines round trip flight from Newark to Japan. He was injured when he fell or was dropped while being disembarked from the plane in Japan. A third party defendant, JSS, a Japanese corporation, was providing wheelchair services to the plaintiff pursuant to a written agreement with United Airlines. JSS had no contacts with New Jersey or any other state in the US but the wheelchair agreement contained an indemnification clause for injuries caused by its negligence to United Airline's passengers, which was the basis for the third party complaint by United Airlines against JSS seeking indemnification. The issue in the case was whether the court had jurisdiction against JSS. At p615 the court stated that the "Warsaw Convention provisions … have been construed to apply to various third parties when they are acting 'in furtherance of carriage'" and at p 616 stated that "JSS, in its disembarking services, clearly is a 'carrier agent'".

[31] *Waters* v *Port Authority of New York & New Jersey* 158 F Supp 2d 415 (DNJ 2001), a decision of the US District Court for New Jersey, involved a claim by a disabled passenger for emotional distress caused by failures of the airlines and ground handling organisation on two international flights. The court found that the Convention provided an exclusive remedy and since there had been neither an "accident" nor "bodily injury" the claim failed. At p 668, under reference to the decision in *Croucher*, the court stated that the term "carrier" as used in the Warsaw Convention included any employees of the carrier, as well as agents and contractors who performed services in furtherance of the contract of carriage.

[32] In *Atlantic Group Merchandising Ltd* v *Distribution by Air Inc* 778 A.2D 607 the New Jersey Supreme Court in its decision of 4 May 2001 stated at pps 389 and 390:

> "This court agrees with the reasoning of Judge Bassler in *Croucher, supra,* that the better and more sensible approach is to extend the protection of the Convention to those agents who perform services 'in furtherance of the contract of carriage'. Thus if DBA (the contractor in that case) is construed as an agent performing services in furtherance of carriage, then it is, in essence, an 'indirect carrier' and as such should enjoy the limitations of liability and coverage afforded by the Convention. It is clear that the Convention was meant to establish 'a uniform body of worldwide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws'. *Reed, supra*, F.2d at 1090. The key question, therefore, is whether using the 'in furtherance of carriage' test, DBA is to be considered a carrier. In determining this, a broad interpretation of the term 'carrier' should be used so as to ensure that the intended purpose of the Convention is not defeated and ensure that international aviation rules remain uniform, and the liability limitations intact regardless of whom a plaintiff may sue."

[33] *McCaskey* v *Continental Airlines Inc* 159 F. Supp. 2d 562 (S.D. Tex 2001) is a decision of the US District Court for the southern district of Texas dated 17 August 2001. One of the defendants sued following the death of a passenger on an international flight was MediAir, a company providing medical advice by radio where medical emergencies occurred during a flight. In determining that MediAir fell under the Convention the court stated at pps 578-579:

> "The Warsaw Convention provides the exclusive means by which a plaintiff may sue a 'carrier' for injuries suffered during international transportation. The Convention, however, does not define what people or entities the term carrier encompasses. This initially left open the question of whether employees and/or contractors providing service for a 'carrier' fell within the Convention's scope.
>
> In *Reed* v *Wiser* … the Second Circuit first addressed this issue. The *Reed* court held that the term carrier includes an airline's employees. … The court expressed particular concern with the possibility that while an injured plaintiff could sue an airline only subject to the limitations of the Warsaw Convention, the same plaintiff could circumvent the Convention by suing airline employees directly. … If such a result were countenanced, the necessary result would be that all airline employees would demand indemnity protection. … This would then subject airlines to precisely the sort of unpredictable, unlimited liability that the Convention sought to curtail.

> Following this decision, courts have generally accepted the principle that airline employee's fall within the scope of the Convention. … Moreover, virtually all courts have recognised that, in at least some instances, independent contractors are covered by the Convention. … Courts, however, have applied two different standards for determining whether a contractor's services fall within the Convention. … Some courts have held, or suggested, that a contractor providing services the airline would otherwise be required by law to provide falls within the Convention. … Most courts, however, have determined, more broadly, that a contractor is also covered by the Convention if its services are provided in furtherance of the contract of carriage."

[34] The only case in the United Kingdom of any assistance on this point is the decision of Morison J in the High Court of Justice on 27 March 2002 in *Philips* v *Air New Zealand Ltd* 2002 WL 347060. The claimant sustained injuries as a result of an accident at Nadi International Airport, Fiji. She had asked for assistance from the airline in advance of her arrival at the airport. She was unfit to carry heavy baggage. Assistance in the form of a wheelchair and helper (Mr Temo) was provided to her. Her helper was employed by Air Terminal Services (Fiji) limited (ATS) and he was wearing clothes which bore his employers' initials. While the claimant was sitting in the chair and being transported upstairs on a moving escalator the chair fell back and she sustained an injury. In setting out his conclusion at para 18 Morison J stated:

> "Accordingly, I am satisfied that Dr Phillips was injured in an accident which occurred in the course of one of the processes of embarkation. Had she brought proceedings in time, she would have been entitled to judgment against the carrier regardless of fault and regardless of whether Mr Temo was someone for whom ANZ were legally responsible. He was their agent, at the very least."

[35] The above series of US decisions and the one UK decision demonstrate, to my mind, that the test for determining whether a part was the carrier or an agent of the carrier was initially taken to be whether the task the party was undertaking was one which the carrier would otherwise be required by law to provide but this has developed into whether the task

was executed in furtherance of the contract of carriage. In my opinion the latter test has now become established as the one which falls to be applied.

Application of the Convention to the facts of the present case

[36] There is no dispute that the event which caused the injury to Mr Mather was an accident which took place in the course of disembarking within the meaning of Article 17(1). The critical issue, so far as the extent of easyJet's liability is concerned, is whether DRK was acting as the agent of easyJet or as a third party.

[37] DRK provided services to Hamburg Airport under a framework agreement which recognised the roles of both the airport and DRK. Appendix A2 provided: "The contractor's staff who provide transport for the disabled on behalf of Hamburg Airport must deal with customers in a professional, individual and sensitive manner." It also provided for a means by which DRK was paid for its services to the airport and for liabilities for services under the agreement. That agreement was in accord with Regulation (EC) 1107/2006 ("the PRM Regulation") which set out the rights of disabled persons and persons with reduced mobility when travelling by air. The relevant provisions for present purposes are articles 7(6) and 8(1) and (2), which provide:

> "7(6). On the arrival by air of a disabled person or person with reduced mobility at an airport to which this Regulation applies the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in in Annex 1 in such a way that the person is able to reach his or her point of departure from the airport …
>
> 8(1) The managing body of an airport shall be responsible for ensuring the provision of the assistance specified in Annex I without additional charge to disabled persons and persons with reduced mobility.
>
> 8(2). The managing body may provide such assistance itself. Alternatively, in keeping with its responsibility , and subject always to compliance with the quality standards referred to in Article 9(1), the managing body may contract with one or

> more other parties for the supply of such assistance. In cooperation with airport users, through the Airport Users Committee where one exists, the managing body may enter into such a contract or contracts on its own initiative or on request, including from an air carrier, and taking into account the existing services at the airport concerned. In the event that it refuses such a request the managing body shall provide written justification."

[38] The Convention imposes strict liability on a carrier in the case of death of or bodily injury to a passenger in return for a limitation of liability. The carrier cannot exclude or limit its liability for damages not exceeding 100 000 Special Drawing Rights, but it may exclude its liability for damages which exceed that amount if it proves that such damage was not due to the negligence or other wrongful act or omission of itself, its servants or agents or was solely due to the negligence or other wrongful act or omission of a third party (Articles 17 and 21). In this action easyJet maintains that its liability is limited because the accident was caused by DRK, which was not its servant or agent but a third party.

[39] In this case there is no suggestion that DRK was under any contractual obligation to provide services to easyJet for disabled passengers or passengers of reduced mobility. DRK was contracted to Hamburg Airport to provide such services. In domestic law terms DRK was an independent contractor to the airport. There is no suggestion that easyJet even had any say in the choice of the airport's contractors. When an aircraft with a disabled passenger or passenger with reduced mobility was about to land at the airport the practice was for easyJet to notify the airport in advance so that the airport could arrange for personnel to attend at the gate to provide assistance to such passengers in disembarking. In countries in which the PRM Regulation applied these services were paid for through a levy on each passenger separate from the landing charge and part of the ticket price.

[40] Adopting the correct approach to the interpretation of the Convention as set out above and applying the test of whether the services provided by DRK to easyJet were in

furtherance of the contract of carriage I have concluded that DRK must be regarded as the agent of easyJet within the meaning of Article 17 of the Convention. It matters not that there was no direct contractual connection between easyJet and DRK or that DRK was the independent contractor to Hamburg Airport. Wat matters is that the services provided to easyJet were in furtherance of the contract of carriage by assisting Mr Mather to disembark the flight. They were also, in terms of the earlier test, services which easyJet would themselves have been required by law to provide had DRK not provided them as they were part of the process of disembarkation.

[41] Moreover, it has, in my opinion been established that the injury which Mr Mather sustained was due to the negligence of DRK in the person of their employee, Mr Heinz. The direct evidence of Mr Mather about the circumstances of the accident is set out above at para [4]. He mentioned that he thought that the person pushing the wheelchair was rushing. Mr Heinz did not give oral evidence, but I heard hearsay evidence from him through the witness Frank Kohlstadt, the head of DRK at Hamburg Airport. Mr Heinz told Mr Kohldstadt that he had used one of their wheelchairs which caught on a rim or ridge and the passenger slipped out. Mr Kohldstadt thought, but did not know for sure, that Mr Heinz had not used that particular air bridge before. Mr Heinz was under a duty when pushing the wheelchair to keep a lookout for obstacles or dangers in its path and not to push it too quickly so as to impede or prevent his seeing any obstacles or dangers. Had he been keeping a proper lookout he could and should have seen the ridge ahead of him and manoeuvred the wheelchair safely over it. It follows that, in terms of Article 21(2)(a) of the Convention easyJet is liable for unlimited damages as it has not proved that the injury to Mr Mather was not due to its own negligence or other wrongful act or omission or that of its

servants or agents. Indeed, Mr Mather has proved that the accident was due to the negligence of its agent, DRK.

[42] The PRM Regulation does not affect the rights of a passenger under the Convention. It gives a disabled passenger or a passenger with reduced mobility a right against the airport (if it is within the European Union) for assistance, but it cannot and does not supersede the Convention. Counsel for easyJet finally accepted that it was not relying on the PRM Regulations as a matter of law, but as something which explained the background circumstances of the accident.

easyJet's claim for contribution against DRK

[43] Article 37 of the Convention provides that nothing in the Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person. The Convention is silent on which law applies to the claim for contribution. It is therefore necessary to determine first of all which law applies to the question of contribution. In this case there are effectively only two options – German law or English law. DRK was not a party to the contract of carriage between Mr Mather and easyJet and are therefore not bound by the choice of law (English law) agreed in the contract. Recital 17 of Rome II, which was the relevant provision governing choice of law, provided as follows:

> "The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively."

Article 4(1) provided:

> "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

Article 15(h) provided that the applicable law governs

> "the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation."

Section 23A (1) and (4) of the Prescription and Limitation (Scotland) Act 1973 provides:

> ""**23A** –(1) Where the substantive law of a country other than Scotland falls to be applied by a Scottish court as the law governing an obligation, the court shall apply any relevant rules of law of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation to the exclusion of any corresponding rule of Scots law.
> (4) This section shall not apply in any case where the law of a country other than Scotland falls to be applied by virtue of any choice of law rule contained in the Rome I Regulation or the Rome ii Regulation."

[44] It follows from these provisions that the law applicable to the question of contribution in this case is German law.

[45] No contribution or apportionment claim was made by easyJet against DRK until intimation of a Minute of Amendment on 24 November 2021. Mr Hohagen gave unchallenged evidence that easyJet's claim for contribution from DRK had to be brought by 31 December 2020 as the standard limitation period under section 199 of the German Civil Code was three years from the end of the year in which the claim arose. Under German law the claim for contribution arose on the date that the accident occurred. It follows that easyJet's claim for contribution from DRK is time-barred.

Decision

[46] I shall

(i) find and declare that easyJet is liable to make reparation to Mr Mather for the loss, injury and damage sustained by him in the accident at Hamburg Airport on 15 May 2017 without limit of liability;

(ii) continue the cause for proof on quantum of damages;

(iii) find and declare that easyJet's claim for contribution from DRK is governed by German law, that that claim is now barred by expiration of the limitation period and assoilzie DRK from the conclusions of the summons and of the claim for contribution by easyJet; and

(iv) reserve meantime all questions of expenses.