IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2019CD00188

BETWEEN	**KERRIKAY CAMERON**	**1ST CLAIMANT**
AND	**BRYAN ROBINSON**	**2ND CLAIMANT**
AND	**TYANNA WEBLEY**	**3RD CLAIMANT**
AND	**CARIBBEAN AIRLINES LIMITED**	**DEFENDANT**

IN CHAMBERS

Miss Amanda Montague instructed by Myers Fletcher & Gordon for the applicant/ defendant

Miss Stephanie Williams instructed by Henlin Gibson Henlin for the respondents /claimants

4 July 2019 and 10 January 2020

Civil procedure - Application for summary judgment – Civil Procedure Rules, 2002, rule 15.2

Civil procedure - Application to strike out claim – No reasonable ground for bringing the claim – Civil Procedure Rules, 2002, rule 26.3(1)

Air Law – Claimants removed from the aircraft - Whether the claim falls under the Montreal Convention – Montreal Convention, articles 1, 2,17 and 29

SIMMONS J

[1] By way of an Amended Notice of Application for Court Orders, filed on January 18, 2019, the defendant/applicant seeks the following orders:

(i) That the matter be transferred to the Commercial Division;

(ii) That the claim against the defendant be struck out;

(iii) Alternatively, that the defendant be granted summary judgment against the claimant;

(iv) Costs to the defendant to be agreed or taxed.

[2] The grounds on which the defendant sought the orders are as follows:

(i) the defendant is a commercial air carrier;

(ii) the claim relates to a contract of international carriage by aircraft for reward and contains question of fact and law which are particularly suitable for decision by a judge of the Commercial Division;

(iii) the Claim Form and Particulars of Claim do not particularize any sustainable cause of action against the defendant.

(iv) The statement of case is an abuse of the process of the court as it discloses no reasonable ground for bringing the claim against the defendant.

(v) The claimants have no real prospect of succeeding on the claim against the defendant by virtue of the **Carriage by Air (Montreal Convention) Act**, 2009

[3] The application was supported by the affidavit of Mr. Ronald Sukhbir, sworn to on July 31, 2018 and filed on August 8, 2018.

[4] Following that, an affidavit was filed by Tawana Bennett, on behalf of the respondent. It was sworn to and filed on March 14, 2019.

BACKGROUND

[5] On 17 August 2016 the claimants who had travelled from the United States to Montego Bay on the defendant's airline boarded the aircraft in preparation for the return leg of their journey. Whilst on board, an incident occurred between the second claimant and one of the defendant's servants or agents which culminated in the removal of the claimants from the aircraft. They were not permitted to re-board and the flight left without them.

[6] In order to complete their travel, the claimants were charged the sum of United States nine hundred and fifteen dollars (US$915.00) which included a sum of United States one hundred and fifty dollars (US$150.00) each to change the ticket date.

[7] They subsequently filed a claim in this court for damages for breach of contract, breach of statutory duty and false imprisonment. They have also claimed aggravated damages and special damages.

AMENDED PARTICULARS OF CLAIM

[8] The Amended Particulars of Claim, state that on the day in question the claimants having been issued with boarding passes for flight BW39, boarded the aircraft which was scheduled to depart at 12:55 p.m.

[9] While on board the second claimant who was experiencing some difficulty in placing his bag in the overhead bin was spoken to in a disparaging and unprofessional manner by a flight attendant, who was at all material times, the servant and/or agent of the defendant. The first and second claimants objected to that kind of treatment and expressed their dissatisfaction. The third claimant it is said, was not involved in that exchange.

[10] They took their seats and were subsequently approached by two servants and/or agents of the defendant identifying themselves only as Mr. Mowatt and Donna. Claiming to be supervisors, the said persons approached the claimants and asked them to accompany them off the aircraft. The claimants complied. They were not permitted to re-board the aircraft which departed without them and were kept inside the airport for approximately two (2) hours.

[11] It was asserted that by reason of the matters aforesaid the defendant was in breach of its contract to return the claimants to Fort Lauderdale as scheduled on August 17, 2016 on flight BW39.

[12] It was also stated that on 17 and 18 August 2016, the defendant in further breach of the contract of carriage, cancelled and/or refused to reissue the claimants' tickets to enable them to return to the United States of America unless they paid the sum of United States nine hundred and fifteen dollars (US$915.00) which included of a penalty fee of United States one hundred and fifty dollars (US$150.00) each. They complied and departed the island on 18 August 2016.

[13] The particulars of the defendant's breach of contract were stated to be:

(i) unlawfully removing the claimants from flight BW39;

(ii) failing to return the claimants to their destination in Fort Lauderdale on flight BW39 as contracted;

(iii) causing the claimants to purchase new tickets to travel to Fort Lauderdale;

(iv) causing the claimants to pay for the tickets to be reissued;

(v) exacting a penalty on the claimants for the reissued tickets.

[14] The particulars of false imprisonment were stated to be as follows:

(i) Detaining the claimants unlawfully after they disembarked and also by a show of authority

(ii) Failing to inform the claimants that they were being detained and thus unlawfully depriving the claimants of their liberty

(iii) Preventing the claimants from re-boarding the aircraft, and returning to Fort Lauderdale on their scheduled fight.

(iv) Subjecting the claimants to acts of intimidation, fear mongering and threats of being placed on a no-fly list.

(v) Obstructing the claimants' freedom of movement within and outside of the aircraft by preventing them from re-entering it.

[15] It was also stated that the defendant's servants and/or agents acted unlawfully in that they acted contrary to regulation 239 of the **Civil Aviation Regulations 2012** (the **Regulations**).

[16] The particulars of breach of contract or statutory duty were stated as follows:

(i) The defendant breached its contract to return the claimants to their destination in Fort Lauderdale on flight BW39 on August 17, 2016;

(ii) The defendant falsely imprisoned the claimants;

(iii) The claimants did not behave in such a manner as to cause malicious or wanton injury to any person or destruction of property in their aircraft;

(iv) The claimants did not intrude, or attempt to intrude forcibly into any area of the aircraft that was designated as prohibited, either by visible notice, or verbally by a crew member;

(v) The claimants made no threatening or false statement while on the aircraft that could make a reasonable person believe that the life of any person on board the aircraft may be in danger;

(vi) No report was made by the said servants and/or agents and no action taken by or against the claimants in relation to any breach of the Civil Aviation Regulations 2012.

[17] It was stated that the defendant's servants and/or agents did the aforesaid acts unlawfully and with the intention of humiliating and/or punishing the claimants for the first and second claimants act of expressing dissatisfaction with the poor quality of service and the abusive and/or disparaging conduct its staff.

[18] It was averred that the act of removing the claimants from the aircraft and thereafter restricting their liberty/movement resulted in humiliation, injury and embarrassment. This compounded by them having to ask for assistance to return to the United States of America.

[19] The particulars of aggravated damages of the first and third claimants were stated as follows:

(i) Threatening the claimants with acts of intimidation arrest and/or placing them on no-fly list;

(ii) Telling the claimants that there is nothing they could do about the treatment meted out to them;

(iii) Threatening to place the claimants on a no fly list;

(iv) Refusing to allow the claimants to travel on flight BW39 as contracted;

(v) Punishing the claimants by causing them to pay for the cost of new transportation including a penalty fee;

(vi) Causing embarrassment and/or distress to the claimants.

[20] The special damages relate to the sums paid by the claimants to change their tickets as well as the penalty fee. The breakdown in relation to each of them is not relevant for the purpose of this application.

THE AMENDED DEFENCE

[21] The defendant in its Amended Defence has denied that any of its servants and/or agents spoke to or acted in a disparaging or unprofessional manner towards any of the claimants.

[22] It has asserted that its actions were justified as the decision to remove the claimants from the flight was made after the first and second claimants became abusive and shouted expletives at the flight attendant. It was also stated that its decision was in accordance with Articles VIII and XII of the General Conditions of Carriage published on the website of the defendant incorporated by reference in the tickets issued for travel.

[23] According to the defendant, the claimants breached the general conditions of carriage by:

(i) failing to comply with the instructions of the crew;

(ii) behaving in a manner to which other passengers may reasonably have objected;

(iii) obstructing the crew in the performance of their duties; and

(iv) conducting themselves on board the aircraft so as to endanger the aircraft or persons or property on board.

[24] The defendant averred that in accordance with Clause XII of the said General Conditions of Carriage it was entitled to take all measures it deemed necessary to prevent continuation of such conduct, including restraint and/or removal of the claimants. The said General Conditions of Carriage also entitled the defendant to refuse to carry the claimants if in the exercise of the defendant's own discretion, it determined that the conduct of the claimant's was such as to cause discomfort or make themselves objectionable to other passengers or if the claimants failed to observe the instructions of the defendant's servants or agents.

[25] The defendant stated that it was entitled to remove the claimants from the aircraft and accordingly was not in breach of contract. According to the defendant it was not obliged to offer a refund to the claimants for their tickets on flight BW39 in accordance with article XI of the General Conditions of Carriage. The defendant also stated that it was within its authority to levy the charges amounting to US$915 and so exercised its discretion having regard to the claimant's conduct while on board and subsequent to deplaning.

[26] It stated further that it was entitled to charge the sum of US$150.00 in respect of each ticket where there was a change to the ticket date or route as this is a term applied in respect of all tickets and not particular to the claimants.

[27] The defendant denied any unlawful restriction of the claimant's freedom of movement save that the claimants were barred from re-entry onto its aircraft and consequently escorted back into the airport.

[28] According to the defendant, at all material times it acted within the lawful scope of its authority and any alleged resulting trauma from the incident (which is denied) is attributable only to the claimants' own abusive and unreasonable conduct on board the flight with other passengers.

[29] With respect to the intimidation alleged by the claimants, the defendant stated that the tort of intimidation has not been made out as the claimants did not have an entitlement to be on the flight and the defendant was entitled to restrict the

claimants from flying and remove them from the aircraft. According to the defendant, it would have done nothing unlawful by placing the claimants on a no-fly list.

[30] The defendant stated that its servants and/or agents acted within the lawful scope of their authority and it denied that any of its servants and/or agents failed to act in accordance with Regulation 239 of the **Regulations** as alleged. It was stated that it is the claimants who breached Regulation 239 of the **Regulations** by making abusive statements on board the aircraft.

[31] The particulars of aggravated damages and special damages were denied on the basis that the defendant was within its authority to charge the sum of US$915 based on the claimants' conduct. The defendant further stated that any embarrassment from being removed from the aircraft would have been occasioned by the claimants' own conduct.

[32] The defendant also relied on Articles 17 and 29 of the **Carriage by Air (Montreal Convention) Act** (the **Act**), and asserted that based on that Act, the claim for false imprisonment, deprivation of liberty, breach of contract, intimidation, fear-mongering, breach of statutory duty, embarrassment, aggravated damages and special damages are not recoverable.

AMENDED REPLY TO THE AMENDED DEFENCE

[33] In their Amended Reply to the Amended Defence, the claimants denied that they behaved in an abusive manner or shouted expletives at the flight attendant during the incident. Consequently, it was stated that their removal from the aircraft was not covered by Articles 8 and 12 of the General Conditions of Carriage. It was also asserted that the said conditions and/or terms of the articles are to be reasonably exercised and the defendant's actions were arbitrary and unreasonable.

[34] The claimants asserted that they:

(i) complied with the instructions of the crew and were themselves seeking and requiring assistance.

(ii) did not behave in a manner to which other passengers could reasonably have objected

(iii) did not obstruct the crew in the performance of their duties and

(iv) did not conduct themselves on board the aircraft so as to endanger the aircraft or persons or property on board.

[35] The claimants asserted that the defendant was not at liberty to charge the sum of US$150.00 in respect of each ticket as the annexed "schedule" of relevant penalties identified as "C" in the Defence did not apply to the circumstances of this case as the change to their tickets was not voluntary.

[36] With respect to the defendant's assertion that the tort of intimidation has not been made out, the claimants state that they are not making a claim in the "tort" of intimidation but reasserting that the actions of the defendant's servants or agents amounted to an abuse of discretion.

[37] The claimants also stated that they are entitled to damages, aggravated damages, special damages and/or any other relief that the court may deem just.

[38] It was stated that the matters complained of occurred after embarkation as well as after the claimants were required to disembark the aircraft and also after it had departed.

APPLICANT'S/DEFENDANT'S SUBMISSIONS

[39] Miss Montague submitted that the claim against the defendant ought to be struck out on the bases that it is an abuse of the process of the court and discloses no reasonable grounds for bringing the claim. In this regard she referred to rule 26.3 of the **Civil Procedure Rules 2002** (**CPR**).

[40] It was also submitted that, in any event, the claimants have no real prospect of succeeding on their claim and therefore summary judgment ought to be granted in its favour[1].

[41] Counsel stated that although the claim has raised several causes of action in contract and tort law and in relation to breaches of statutes, the claim is not sustainable. She then outlined her reasons for so concluding.

The claimants were in international carriage

[42] Miss Montague submitted that the claimants were in international carriage having purchased their tickets and been issued with boarding passes for the flight from Jamaica to the United States. They were therefore subject to the Contract of Carriage as evidenced by their tickets. That contract incorporates the provisions of the **Montreal Convention** (the **Convention**). Counsel stated that that airlines are only liable for injuries suffered by a passenger during "international carriage" which is defined as any carriage in which the place of departure and the place of destination are, by reason of the agreement between the parties, within the territories of two High Contracting Parties[2].

[43] She indicated that the claimants purchased tickets for round trip travel between Jamaica and the United States and were issued boarding passes for the flight from Jamaica back to the United States on August 17, 2016. She stated that the contract of carriage is contained in or evidenced by the ticket which incorporates the carrier's conditions of carriage. Those conditions incorporate the provisions of the **Convention**.

[44] Miss Montague directed the court's attention to ***Phillips v Air New Zealand*** [2002] EWHC 800 (Comm) wherein Morison J said:

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[1] Rule 15.2 of the **CPR**
[2] Article 1(2) of the **Convention**

> *"The Convention applies as soon as the passenger has presented a valid ticket for travel and the ticket has been accepted and a boarding pass issued. In other words, the carriage begins when the passenger has successfully completed the check-in procedure. That is the beginning of the contract of carriage."*

[45] Counsel submitted that the claimants having been issued boarding passes, began the contract of carriage hence making the **Convention** applicable to this incident.

[46] It was also submitted that since the claimants were in round trip (from the United States to Jamaica and back to the United States) in which case the United States would be both the place of departure and the place of destination, the **Convention** governs this incident as both Jamaica and the United States are parties to the **Convention**. She relied on the cases of ***Jones v USA 3000 Airlines*** 2009 WL 330596 and ***Gontcharov v Canjet*** 111 OR (3d) 135 in support of this submission.

The Montreal Convention prevails in Jamaican Law

[47] Miss Montague stated that the **Convention** was incorporated into Jamaican law in 2009 by virtue of the **Act** to which the **Convention** is annexed. She pointed out that section 3 of the **Act** provides that the provisions of the **Convention** have the force of law in Jamaica and in the event of any inconsistency between the provisions of the **Montreal Convention** and any rules relating to international carriage by air, the **Convention** shall prevail.

The Montreal Convention provides the sole remedy to the claimants

[48] Counsel pointed out that the claimants have alleged, at paragraphs 9 to 11 of their Particulars of Claim, that the incident which caused their alleged injuries, namely the removal from the aircraft, took place on board the aircraft.

[49] She stated that the claimants' purported claims against the defendant for false imprisonment, deprivation of liberty, breach of contract of carriage, intimidation, fear-mongering, breach of statutory duty, embarrassment, aggravated damages and special damages are unsustainable in light of article 17 of the **Convention**.

She further stated that the claims amount to an abuse of process and ought to be struck out. She then provided her reasons for so concluding.

[50] Miss Montague stated that the liability of air carriers for injury to passengers while in international carriage is governed by article 17 of the **Convention** and is limited to death or bodily injury due to an accident that occurred either on board the aircraft or whilst the passenger was in the process of embarking or disembarking.

[51] Counsel also directed the court's attention to article 29 of the **Convention** which states that claims in contract or tort may only be brought in accordance with the provisions of the **Convention**. The article also states that punitive, exemplary or any other non-compensatory damages are not recoverable.

[52] Counsel submitted that the **Convention** provides an exclusive cause of action and sole remedy in respect of claims against a carrier arising out of international carriage by air. She argued based on the above provision the claimants are not entitled to proceed at common law outside of the confines of the **Convention** even where the **Convention** leaves them without a remedy. In this regard she relied on ***Sidhu v British Airways plc*** [1997] 1 All ER 193, ***Re: Deep Vein Thrombosis and Air Travel Group Litigation*** [2002] All ER (D) 369 (Dec), ***Vincent Lee Ferguson v Air Jamaica*** [2017] JMSC Civ 27 and ***Janet Morgan v Air Jamaica Ltd*** (unreported), Supreme Court, Jamaica, Claim No. 2007 HCV 02231, judgment delivered 23 January 2009.

[53] Miss Montague stated that although the cases were concerned with interpretation of articles 17 and 24 of the Warsaw Convention, the reasoning can be applied to articles 17 and 29 of the **Convention** which are quite similar.

[54] Counsel submitted that by virtue of the claimants being in international carriage, they are prevented from suing the defendant for false imprisonment, breach of contract or any other breach of municipal law.

[55] She stated that the claimants' claims for false imprisonment, deprivation of liberty, breach of contract, intimidation, fear-mongering, breach of statutory duty, embarrassment, aggravated damages and special damages are therefore not recoverable under the **Convention**.

[56] In the circumstances, it was submitted that the claimants' statement of case ought to be struck out as being an abuse of the process of the court as it discloses no reasonable grounds for bringing the claim.

In any event, the claims under municipal law must fail

[57] Counsel pointed out that the defendant's defence is that the abusive conduct of the first and second claimants warranted the defendant's decision to remove the claimants from the flight.

[58] She submitted that the decision to remove the claimants from the aircraft was within the defendant's authority under Articles VIII and XII of the General Conditions of Carriage which was incorporated by reference in the tickets issued for travel.

[59] Miss Montague further submitted that the General Conditions of Carriage also entitled the defendant to refuse the claimants carriage, if, in the exercise of its discretion, it determined that the conduct of the claimants was of a manner which caused discomfort or was objectionable to other passengers, or if the claimants failed to observe the instructions of the defendant's servants or agents.

[60] Counsel then reminded the court that it is the defendant's case that the second claimant while on board flight BW39 at the Sangster International Airport on August 17, 2016, became abusive and that it was only after the first and second claimants became abusive and shouted expletives at the flight attendant that the decision was made to remove the claimants from the flight.

[61] Miss Montague submitted that the claimants breached the General Conditions of Carriage in that they:

(i) failed to comply with the instructions of the crew;

(ii) behaved in a manner to which other passengers may reasonably have objected;

(iii) obstructed the crew in the performance of their duties; and

(iv) conducted themselves on board the aircraft so as to endanger the aircraft or persons or property on board.

[62] Miss Montague stated that in the circumstances, the defendant was not obliged to offer the claimants refunds for their tickets on flight BW39 in accordance with Article XII of the General Conditions of Carriage. She also stated that the defendant was within its authority to levy the charges complained of and exercised its discretion having regard to the claimants' conduct while on board and subsequent to deplaning.

[63] She stated that the defendant was also entitled to charge the sum of US$150.00 in respect of each ticket where there was a change to the ticket date or route.

[64] Counsel stated that all the other causes of action including the claims for false imprisonment and breach of statutory duty which allegedly flow from the defendant's decision to remove the claimants from the flight must therefore fail. Miss Montague submitted that the defendant acted within the lawful scope of its authority and that any alleged resulting trauma from the incident, which is denied, is attributable only to the claimants' own abusive and unreasonable conduct on board the flight with other passengers.

[65] It was further submitted that, in any event, the claimants have not shown "oppressive or high handed conduct" to warrant an award of aggravated damages. Reference was made to ***Rookes v Barnard*** [1964] UKHL 1 in support of that submission.

The defendant is not liable to the claimants pursuant to Article 17 of the Montreal Convention

[66] Counsel submitted that the question as to when the carriage begins is different from the question as to when Article 17 of the **Convention** comes into effect. She submitted that Article 17 comes into effect where, on the facts, a passenger suffers (i) "bodily injury" as a result of an (ii) "accident", which (iii) "took place on board the aircraft or in the course of any of the operations of embarking and disembarking."

[67] Counsel submitted that the claimants have no reasonable grounds for bringing the claim against the defendant as the incident which took place on board the aircraft did not result in "bodily injury," nor was it "an accident" thereby rendering Article 17(1) of the **Convention** inapplicable.

The incident took place on board the aircraft or in the course of disembarking

[68] Counsel pointed out that the claimants allege that they were approached on board the aircraft and subsequently escorted off the flight. She submitted that this placed the event which caused the alleged injury within the ambit of Article 17 of the **Convention**.

[69] She highlighted the facts of the case of ***Gontcharov v Canjet*** (supra). She stated that the plaintiff, a Canadian resident, purchased a ticket for return travel between Toronto and Puerta Plata, Dominican Republic with the defendant, CanJet Airlines, a Canadian charter airline. On the return trip, the plaintiff had a dispute with members of the flight crew. The plaintiff alleged the dispute was over his denied request for a blanket and his denied request for an increase in cabin temperature. Upon landing at the Toronto airport, the plaintiff was met by police who escorted him off the aircraft and detained him at the airport for questioning. The plaintiff brought an action against the carrier for damages for pain and suffering and infliction of mental distress and for forcible confinement and false imprisonment. He also claimed damages for severe bronchitis as a result of the carrier's denial of his requests.

[70] Counsel stated that the court agreed with ***CanJet*** that the incident which caused the injury "took place on board the aircraft." It was held that:

> *"…the defendant has met the first branch of the test prima facie engaging the Convention. The injury-causing incident occurred on board the aircraft during the flight and in the course of disembarkation and continued during the confinement."*

[71] Miss Montague submitted that, in much the same way, in this case, the event which caused the claimants' injuries began on board the defendant's aircraft and continued while they were disembarking and therefore Article 17 applies.

The claimants were not injured in an "accident"

[72] Counsel submitted that the second question which must be determined is whether the injury causing incident meets the definition of an "accident" within the meaning of Article 17 of the **Convention**.

[73] Miss Montague stated that carriers are only liable under Article 17(1) if the injury was caused by an "accident". She stated that the leading case in relation to the meaning of "accident" in Article 17 is ***Air France v Saks*** 470 US 392 (1985), in this case it was held that:

> *"Liability under Article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft."*

[74] Counsel pointed out that it was further held in ***Saks*** that the "accident" requirement involves an inquiry into the nature of the event which cause the injury rather than the care taken by the airline to avert the injury. Counsel submitted therefore, that there ought not to be any analysis of whether the defendant acted reasonably in the carriage of the claimants for the purposes of Article 17.

[75] It was submitted that the removal of the claimants from the defendant's flight does not fall within the definition of "accident" for the purposes of Article 17.

[76] She then cited the cases of ***Curley v American Airlines Inc*** 846 F Supp 280 (SD NY, 1994), 24 Avi 18, 036 and ***Brandt v American Airlines*** 27 Avi 17, 601 (ND Cal, 2000), ***Dogbe v Delta Air Lines*** 969 F Supp 2d 261 (ED NY, 2013), 35 Avi 18, 788 and ***Glassman-Blanco v Delta Airlines Inc*** 37 Avi 17, 539 (ED NY, 2016).

[77] Miss Montague then submitted that in this case, there is no Article 17 "accident" as there was no usual or unexpected event which was external to the claimant. She stated that the claimant's abusive conduct warranted the defendant's agents' decision to remove the claimants from the flight. It was also submitted, that this decision was within the defendant's own discretion.

[78] She submitted that similarly to the incidents in ***Curley***, ***Brandt***, ***Dogbe*** and ***Glassman-Blanco***, there is nothing unexpected or unusual about a flight attendant or airline agent removing a disruptive passenger from a flight, as this is in accordance with standard aviation practice and to protect the safety of the flight crew and the other passengers.

[79] Counsel stated that even if the court finds that there was an "accident", the next issue is whether there can be recovery as the claimants allege false imprisonment and other psychological injuries, not bodily harm, in respect of the incident.

The claimants have not suffered bodily injury

[80] Counsel stated that the claimants' pleadings are not specific, but mention false imprisonment, deprivation of liberty, breach of contract, intimidation, fear-mongering, breach of statutory duty, embarrassment, aggravated damages and special damages.

[81] She pointed out that Article 17 of the **Convention** provides that the carrier is only liable in cases of "bodily injury or death of the passenger."

[82] She stated that the claimants' pleadings broadly encompass psychological and general damages, none of which relate to bodily injury. She submitted that it is clear from the case law that psychological damages without accompanying bodily harm are not recoverable under the **Convention**. Reference was made to ***Gontcharov v Canjet*** (supra) and ***Sidhu v British Airlines*** (supra) in support of that submission. The court's attention was also directed to ***Eastern Airline v Floyd*** 499 U.S. 530 (1991) and ***Morris v KLM***; ***King v Bristow Helicopters*** [2002] UKHL 7.

In any event, punitive, exemplary or any other non-compensatory damages are not recoverable.

[83] Counsel submitted that, in any event, Article 29 provides that in any action pursuant to the **Convention**, punitive, exemplary or any other non-compensatory damages shall not be recoverable. She again relied on the case of ***Gontcharov v Canjet*** (supra). Miss Montague contended that the claims for embarrassment and aggravated damages therefore are unsustainable and therefore ought to be struck out. She stated that although these cases dealt with the interpretation of article 24 of the **Warsaw Convention,** article 29 of the **Convention** is essentially in the same terms and as such they are applicable to the interpretation of that provision.

In any event, the carrier is exonerated in cases of wrongful acts of the passenger.

[84] Counsel stated that though it is submitted that there is no "accident" and the claimants did not suffer "bodily injury" in this case, if the court finds that Article 17 of the **Convention** applies, the liability of a carrier is capped at "100,000 Special Drawing Rights." In this regard, the court's attention was directed to Article 21 of the **Convention**. Miss Montague stated that this amounts to approximately US$135,000/JM$17,000,000. She contended that if damages arising under Article 17 are "not due to the negligence or other wrongful act or omission of the carrier or its servants or agents," then carriers are not liable over that amount.

[85] It was argued that, in addition, the Convention exonerates carriers from liability in cases where the damage is caused by the wrongful act or omission of the passenger. Reference was made to Article 20, of the **Convention** in support of that submission.

[86] In the circumstances it was submitted that if the negligence or wrongful act or omission of the injured party actually caused the injury in question, then the court shall wholly or partially exonerate the carrier[3].

[87] Counsel argued that in this case it was the claimants' wrongful acts, namely their abusive and disruptive conduct, which caused their removal from the flight and their alleged loss. It was submitted that they are therefore not entitled to recover under the **Convention** based on Articles 20 and 21. Miss Montague contended that under the same reasoning, they would not be able to recover at all even if the **Convention** did not apply because of the exclusivity clause in Article 29.

[88] In concluding Miss Montague submitted that:

> (i) The municipal law is inapplicable in this case as the **Convention** provides the sole cause of action by which the claimants may seek redress;
>
> (ii) The defendant is not liable to the claimants under Article 17 of the **Convention** as the claimants did not suffer "bodily injury", nor were they involved in an "accident"; and
>
> (iii) In the circumstances, the claimants have no real prospect of succeeding in their claim against the defendant. Alternatively, their statement of case ought to be stuck out on the bases that it discloses no reasonable grounds for bringing the claim against the defendant and amounts to an abuse of the process of the court.

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[3] See also ***Air France v Saks*** (supra)

RESPONDENTS'/ CLAIMANTS' SUBMISSIONS

[89] Counsel for the claimant, Miss Williams, began her submissions by outlining the law as regards striking out and summary judgment. With respect to the former, she directed the court's attention to rule 26.3 of the **CPR** and in respect of the latter to rules 15.2 and 15.5. Reference was also made to ***Stewart and others v Samuels*** (unreported), Supreme Court, Jamaica, SCCA No.02 of 2005, judgment delivered 18 November 2005, ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** [2013] JMCA Civ 37, ***ED & F Man Liquid Products Limited v Patel and another*** [2003] EWCA Civ 472, ***Swain v Hillman and another*** [2001] 1 All ER 91 and ***Allan Lyle v Vernon Lyle*** (unreported), Supreme Court, Jamaica, Claim No 2004 HCV 02246, judgment delivered 10 May 2005.

[90] Counsel then addressed the applicability of the **Convention** and stated that it is the claimants' position that the **Convention** is inapplicable because the events in question, being the false imprisonment and the purchase of additional airfare and penalty charge took place outside of its scope. This is so because the events took place after the claimants were removed from the airline and carriage was terminated.

[91] Miss Williams submitted that the considerations of the court in determining the applicability of the **Convention** were set out in ***Acevedo-Reinoso v. Iberia Líneas Aéreas De España S.A***. 449 F.3d 7, 12 (1st Cir. 2006) as:

(a) The passenger's activity at the time of injury

(b) His or her whereabouts when injured

(c) The extent to which the carrier was exercising control

[92] She stated that these considerations assist the court in determining the threshold test of whether the actions alleged occurred on board the aircraft or while embarking or disembarking.

[93] Miss Williams pointed out that in ***Christine K. Schroeder, v. Lufthansa German Airlines, et al.***, the US Court of appeal in applying the considerations detailed in the ***Acevedo*** case found that:

> *"Looking at the total circumstances surrounding Schroeder's detainment and search, with particular emphasis on location, activity, and control, leads us to the conclusion that any injury Schroeder suffered due to the action of the RCMP was not sustained in the course of embarking or disembarking from the airplane. First, we note that the RCMP conducted their detention and search of Schroeder in the terminal building, away from the airplane. Additionally, the RCMP carried out these actions in an area that was neither owned nor leased by Lufthansa."*

[94] It was submitted that all three requirements as listed in ***Allan Lyle v Vernon Lyle*** (supra) above have not been satisfied in the instant case. The facts that are before the court are disputed and the claimants do have a reasonable prospect of successfully disputing them.

[95] Counsel further submitted that the application for summary judgment should be denied as this is not an appropriate case for such a remedy to be granted.

[96] She argued that there are disputes of fact and law relating to whether the "injury" or incident occurred on board the aircraft and whether the **Convention** is applicable to the circumstances of this case.

[97] Counsel stated that the interpretation of the provisions in the General Conditions of Carriage is also a matter that ought to be dealt with by the trial judge.

[98] She submitted that the **Convention** does not apply to the matters in dispute. This is because the acts complained of as giving rise to the claim occurred after the claimants were removed from the aircraft and/or after the aircraft had left.

[99] She further submitted that this determination is a mixed question of law and fact. She stated that the parties are not agreed on the circumstances that led to the claimants being removed from the plane and detained for the period complained

of. Miss Williams contended that in the circumstances it would not be appropriate to order summary judgment against the claimants.

[100] In concluding, Miss Williams submitted that the claimants have a prospect of successfully prosecuting the claim insofar as time and place of the activity alleged to have caused the injury in question is a question of fact and the claimants maintain that the allegations do not bring the claim under the **Convention**.

[101] She submitted therefore that based on all the foregoing, the court ought to dismiss the defendant's application.

DISCUSSION

Application to strike out the Claim

[102] Rule 26.3(1)(c) of the **CPR** states:

> *"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim."*

[103] The applicant has argued that there are no reasonable grounds for bringing the claim as provisions of the **Convention** are applicable to this case.

[104] The provisions of paragraph 3.4 (2) of **Civil Procedure**, 2012, Volume 1 (the White Book) are similar to rule 26.3 (1)(c) of the **CPR.** The explanatory notes in the White Book states that striking out may be appropriate where the "…particulars of claim disclose no reasonable grounds for bringing the claim: those claims which set out no facts indicating what the claim is about; those claims which are incoherent and make no sense; and those claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant…". They include particulars of claim *"which raise an unwinnable case*

where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides…".

[105] A claim or defence may also be struck out as not being a valid claim or defence as a matter of law. Where the claim is in area of developing jurisprudence, striking out may not be appropriate as in such areas, decisions as to novel points of law should be based on actual findings of fact. It is also inappropriate to strike out a statement of case if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence. The learned editors also state that "an application to strike out should not be granted unless the court is certain that the claim is bound to fail…".

[106] This principle was accepted by McDonald-Bishop J in ***Dotting v Clifford & The Spanish Town Funeral Home Ltd***, (unreported) Supreme Court, Jamaica, Claim No. 2006HCV0338, judgment delivered 19 March 2007. The learned Judge stated as follows:

> *"In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based (**Three Rivers District Council v Bank of England (No. 3)** [2003] 2 A.C., 1)**.** It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain, among other things, whether the claimant's pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the facts pleaded are capable of satisfying the requirements of the tort alleged. **The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be essentially, the same as that in granting summary judgment, that is: the claim against***

the defendant is one that is not fit for trial at all?"[4]

[My emphasis]

The applicability of the Montreal Convention

[107] The applicant/defendant has asserted that the claim is governed by the provisions of the **Convention** as the claimants were in international carriage when the incident occurred. The respondents'/claimants' position that the **Convention** is not applicable because the events in question, being the false imprisonment and the purchase of additional air fare and penalty charge, are all events that took place after the claimants had disembarked the aircraft. That is, when carriage was terminated.[5] In the circumstances, it was argued that they fall outside of the scope of the **Convention** and as such are to be considered according to domestic law.

[108] The defendant however contends that the circumstances are such that the **Convention** is applicable and its applicability precludes the claimants' claim. Consequently, the claim should be struck out or, in the alternative, summary judgment granted in its favour.

[109] The Convention for the Unification of Certain Rules for International Carriage by Air (the **Warsaw Convention**) was modernised, consolidated and replaced by the **Montreal Convention.**[6] For the most part, their provisions are materially the same. Jamaica[7] and the United States of America[8] are both signatories to the **Convention** which was also incorporated into law in both territories.

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[4] Page 4, paragraph 10
[5] See paragraphs 5 and 11 of the affidavit of Tawana Bennett filed on March 14, 2019
[6] Article 55 – Relationship with other Warsaw Convention Instruments
[7] July 7, 2009 and incorporated into law on September 5, 2009
[8] September 5, 2003 and incorporated into law on November 4, 2003

[110] Articles 1 and 2 of the **Convention** state:

> *"1. **This Convention applies to all international carriage of persons**, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.*
>
> *2. For the purposes of this Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two States Parties, or within the territory of a single Party if there is an agreed stopping place within the territory of another State, even if that State is not a State party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention."*
>
> [My emphasis]

[111] The framework for the **Convention** was outlined in the **Encyclopaedia of Forms and Precedents**.[9] It states as follows:

> *"Carriage to which the Conventions apply*
>
> *The Montreal Convention, and every version of the Warsaw Convention, apply to all international carriage of persons, baggage, or cargo performed by aircraft for reward, as well as gratuitous carriage performed by an air transportation undertaking.*
>
> *To determine if carriage is international, it is necessary to look at the contract of carriage made by the parties to determine the places of departure, destination, and intermediary agreed stopping places before identifying whether they are located in the same state parties to the Convention or different state parties. A state party (referred to*

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[9] Encyclopaedia of Forms and Precedents/CARRIERS vol 6(1)B/(B) Commentary/(2) CARRIAGE BY AIR/B:FRAMEWORK OF THE MONTREAL CONVENTION 1999 AND THE WARSAW CONVENTION SYSTEM/40 Carriage to which the Conventions apply.

in instruments of the Warsaw Convention system as a high contracting party) is a state which has ratified the Convention.

International carriage exists wherever the place of departure and the place of destination are situated within the territories of two different states parties to the same Convention, whether or not there is a break in the carriage or transhipment. *It also exists where the carriage begins and ends within the territory of a single state party if there is an agreed stopping place in the territory of another state, regardless of whether that state is a state party. It follows that one-way carriage between a state party and another state which is not a state party is not international carriage for the purposes of any of the conventions in spite of the fact that it is clearly international in nature. Likewise, where carriage is between two points within the territory of a single state party without an agreed stopping place in another state, it will not be international carriage and none of the conventions will apply. Additionally, where the carriage is between two states, where one is a state party to one convention only (eg the Montreal Convention 1999) and the other is a state party to a different convention only (eg the Warsaw Convention as amended by the Hague Protocol), it will not be international carriage for the purpose of either Convention.*

The places of departure and destination are the first and last points specified in the agreement for carriage between the parties, regardless of whether the agreement is performed and/or fully performed. *For example, in the case of an agreement for carriage from London to New York returning to London at a later date, London is the point of both departure and ultimate destination and New York is the agreed stopping place, regardless of the length of the stopover in New York. New York is not the point of destination because it is not the last point of carriage named in the agreement for carriage.*

The existence of an agreed stopping place will be relevant only where the places of departure and destination specified in the agreement are located in the territory of a single state party. When identifying the existence of agreed stopping places generally, it is not relevant to consider the purpose of the aircrafts descent to land and the rights of the passenger to break his journey at the place of landing, provided that the stopover has been agreed in the contract.

> *In practice, therefore, an agreed stopping place can range from a place where a passenger leaves the aircraft (for example, to take a holiday or to attend to business) to a place included in the carrier's timetable as a refuelling stop with the passenger having no right to leave the aircraft."*
>
> [My emphasis]

[112] As can be seen, from Articles 1 and 2, the **Convention** itself outlines the scope of its application. Therefore, when faced with an argument that the **Convention** does not apply, the first issue for the court's determination is whether the claim arose in the context of international carriage.

[113] The determination of this question depends on the circumstances of each case. In ***Phillips v Air New Zealand*** [2002] 1 All ER (Comm) 801 the claimant was planning to travel by air from Fiji to the United Kingdom. She was unfit to carry heavy baggage and arrangements were made with the defendant for her to be provided with assistance. Whilst being transported in a wheelchair to the departure gate upstairs on a moving escalator, the chair fell back and she sustained an injury. She issued proceedings in March 2000 against the airline for damages arising out of the accident.

[114] The proceedings were commenced on March 16, 2000, just within the three-year limitation period under the Limitation Act 1981 but after the expiry of the two-year period under the **Warsaw Convention** (as set out in Sch 1 to the Carriage by Air Act 1961). Section 5(1) of the 1961 Act provided that no action against a carrier's servant or agent arising out of damage to which the Convention related could be brought more than two years 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. Article 29 of the Convention provided that the right to damages was extinguished if a claim was not brought within two years from the date the aircraft arrived or should have arrived at its destination. The airline contended that the claimant's action was time-barred under the Convention.

[115] In determining the question whether the **Warsaw Convention**[10] applied, Morison J said:

> *"[13] By s 1 of the 1961 Act the convention applies 'in relation to any carriage by air to which the Convention applies'. International carriage is defined to mean any carriage in which the place of departure and the place of destination are, by reason of the agreement between the parties, within the territories of two high contracting parties. Fiji and the United Kingdom are two such parties. The contract of carriage is contained in or evidenced by the ticket which incorporates the carrier's conditions of carriage. Those conditions incorporate the provisions of the convention.*
>
> *[14]* ***The Warsaw Convention applies so soon (sic) as the passenger has presented a valid ticket for travel and the ticket has been accepted and a boarding pass issued. In other words, the carriage begins when the passenger has successfully completed the check-in procedure.*** *That is the beginning of the contract of carriage. In my view the question as to when the carriage begins is different from the question as to when art 17 comes into effect."*
>
> [My emphasis]

[116] In **Shawcross and Beaumont: Air Law**[11] the following appears:

> *"United States case law: when does Tseng apply?*
>
> *The US Courts continue to explore the precise scope of the Tseng ruling.* ***Before the exclusivity of the Convention can apply, the facts must be such that the claim arises in the context of international carriage. Unless the plaintiff is actually engaged in the process of international carriage there is no basis for applying the Convention****. So a Californian court held that actions*

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[10] As successor to the Warsaw Convention, the Montreal Convention, retains the same basic structure and many of its key provisions

[11] Shawcross & Beaumont: Air Law/Division VII Carriage by Air/Chapter 30 The Convention Cause of Action/B Exclusivity of the Convention/Exclusivity across international carriage/3United States case law: when does Tseng apply?

brought by passengers who had never checked in or received boarding passes were not pre-empted by the Convention. Conversely, in Selke v Germanwings GmbH, two of the cases arising out of the crash of Germanwings Flight 9525 on 24 March 2015, the actions were pre-empted. The deceased passengers purchased from United Airline a round trip from Washington Dulles Airport to various destinations in Europe on several air carriers. State law negligence was alleged in that the crash was caused by the failure of the defendants, namely, Germanwings, Eurowings, Lufthansa and United, to require two crew members present in the cockpit at all times.

In a number of cases, Tseng has been distinguished on the ground that the passenger, having disembarked, was no longer engaged in international carriage*. A decision to this effect in Donkor v British Airways Corpn, where the claim arose out of the passenger's detention by immigration authorities while awaiting a connecting flight, was followed in a later case where the passenger's delayed baggage contained firearms, a fact he claimed to have declared at the departure airport; the carrier's agent at destination denied that the carrier knew of their presence, and the passenger was arrested and sentenced to imprisonment under Greek law. The action was allowed to proceed as the passenger had completed disembarkation and returned later to the airport to collect baggage. But in another case involving a return to the airport in search of lost baggage, the Court of Appeals for the District of Columbia Circuit held the action was pre-empted by the Convention. The court offered as illustration of facts which would escape the Tseng ruling that of a passenger being hit by a baseball bat wielded by an agent of the carrier and a slanderous statement in a heated dispute over lost luggage. Yet a result similar to that in Donkor was reached on facts remarkably similar to those in El Al Israel Airlines v Tseng in a Florida case, Zuliana de Aviacion v Herrera. Similarly, claims based on events occurring inside an airport terminal during a two-hour layover at an intermediate stop have been held not to be pre-empted by the Convention. In Acevedo-Reinoso v Iberia Lineas Aereas de Espana SA which concerned failure to tell a passenger that he needed a visa and the resulting detention and ill-treatment of the passenger on his arrival in Spain, the court emphasised that in El Al Israel Airlines v Tseng the parties had agreed that the incident happened in the*

course of embarkation: the District Court should have considered whether the events alleged in Acevedo-Reinoso occurred within the period identified in art 17, and if not the tort action under State law would not be pre-empted by the Convention. However, the location of the incident is not always easily determined: in Singh v North American Airline the substance of the plaintiffs' claim was that the carrier's agents had moved luggage labels bearing their names to cases containing drugs being smuggled by those agents: on arrival the plaintiffs were arrested and the husband spent nine months in custody; the court held that as the mislabelling had occurred as part of the embarkation process, the Convention applied and was the exclusive remedy. Another view is obviously tenable.

In Bridgeman v United Continental Holdings the US Court of Appeals for the Fifth Circuit had to deal with a situation where an item in a passenger's checked baggage (a sex toy) had been removed and was found attached to its outside as it passed around a luggage carousel. The Court held that claims for emotional distress, invasion of privacy and negligence were not pre-empted by the Convention as the connection between the alleged misconduct and the operations of disembarking were tenuous at best and were wholly unconnected to the physical act of exiting the aircraft. There was no `tight tie' between the alleged incident and the act of disembarking the aircraft. In McCubbins v United Airlines, a US District Court held that a state claim for the negligent failure of a carrier to warn a passenger that his passport was due to expire within six months from the date of his flight to Panama was not pre-empted by the Convention. The carrier argued that this was essentially a claim for delay with art 29 pre-empting it. Following extensive discussion of Bridgeman, the Court disagreed holding that the grievances of the claimant were not occasioned by any delay as he was duly carried to Panama, where he was detained and flown back to the US the next morning. The cause of his grievances was the failure of the carrier's agents to notice that his passport was due to expire within six months and as such fell outside the scope of the Convention.

The courts are not unanimous in cases where the facts do not involve personal injury. In O'Callaghan v ARM Corpn, the plaintiffs claimed that they had purchased tickets in reliance on the representation that the carrier gave passengers more leg-room than other airlines, a

> *representation said to be untrue. It was held that this claim was not pre-empted by the Warsaw Convention. This was not followed in Knowlton v American Airlines Inc where the issue also concerned an allegedly false representation, this time one stating that free breakfasts were provided. One US District Court has held that claims by persons other than passengers are outside the scope of the Convention, so that a claim for loss of consortium is not pre-empted; but this was expressly not followed in a later District Court case. It has been held that an action for loss of consortium is cognisable under the Montreal Convention itself. It is clear that fatal accident and wrongful death claims are pre-empted. Similarly claims for punitive or non-compensatory loss which might otherwise succeed in US state or federal courts are pre-empted by the Conventions which do not permit their recovery. The relevant Convention will pre-empt claims for delay, but not claims based on total non-performance of the contract of carriage."*
>
> [My emphasis]

[117] In ***Gontcharov v Canjet*** (supra) the **Warsaw Convention** was held to be applicable in circumstances similar to those in the case at bar. In that case, the claimant whilst on board the defendant aircraft complained to the flight attendants that he was cold. He requested a blanket or that the heat be turned up. He was informed that it would cost ten dollars ($10) and that he was a "high maintenance" passenger. On arrival in Toronto at 12:45 a.m. he was escorted off the aircraft by two police officers and required to stand aside while the other passengers disembarked. He was detained until 4:00 a.m. when he was released with an apology. The court stated that the **Warsaw Convention** applied to all international carriage of persons between contracting states and that Canada was a signatory. Its jurisdiction was also based on the country of origin and destination.

[118] In ***Acevedo-Reinoso v. Iberia Líneas Aéreas De España S.A***., 449 F.3d 7, on which the claimants relied, the claimant who was a Cuban citizen and a legal resident of the United States travelled to Spain. At the time of the action, he resided in Puerto Rico. The travel agency who was responsible for his booking had

informed him that he did not need a visa and only needed only to show his Cuban passport and United States resident alien card upon entry to Spain.

[119] When he and his partner, Maria Pacheco-Gonzalez, a United States citizen, arrived the plaintiff showed his Cuban passport and the Spanish government ordered his immediate detention. Acevedo-Reinoso was questioned, strip searched and detained with other alleged illegal immigrants in a closed room in the airport. The following day he was released and allowed to board a flight to Puerto Rico. He and his partner filed a suit in negligence against the airline. The District Court dismissed the action for failure to state a claim under the **Warsaw Convention.** The appeal was allowed on the basis that the District Court had not determined whether the incident occurred during the process of embarking or disembarking before granting the airline's motion to dismiss the claim.

[120] In arriving at its decision the court stated:

> *"The Convention, as amended by the Montreal Agreement, governs the liability of international air carriers for "passenger injuries occurring on board the aircraft or in the course of any of the operations of embarking or disembarking… **The Convention is pre-emptive: a carrier is not subject to liability under local law for passenger injuries "covered by" the Convention, that is, "all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking…** The corollary is also true:*
>
> > *the Convention's pre-emptive effect on local law extends no further than the Convention's own substantive scope. A carrier, therefore, is indisputably subject to liability under local law for injuries arising outside of that scope: e.g., for passenger injuries occurring before any of the operations of embarking or disembarking."*
>
> *"Treaty interpretation," we have noted, "is a purely legal exercise."… Therefore, the question [of] whether a passenger's injury was sustained "on board the aircraft or in the course of any of the operations of embarking or disembarking," Convention art. 17, "is a*

question of law to be decided by the court" based on the facts of each case,…Since "[t]he terms 'embarking' and 'disembarking' are not specifically defined in the Convention,"… and absent some direction from the Supreme Court, which has not yet had occasion to define them, we have found "(1) the passenger's activity at the time of injury, (2) his or her whereabouts when injured, and (3) the extent to which the carrier was exercising control . . . highly relevant in determining the applicability of [the Convention]."

If the Convention applies (and local law is thereby pre-empted), the next question is whether the carrier is liable under the Convention. This inquiry involves a determination of whether there was an "accident," i.e., "an unexpected or unusual event or happening that is external to the passenger,"…; whether the passenger suffered a compensable injury, i.e., "death, physical injury, or physical manifestation of injury," …and whether the accident was a proximate cause of the passenger's injury…"

[121] The court then went on to say:

"Acevedo-Reinoso's claim falls short because he does not allege any physical injury or an "accident." Acevedo-Reinoso, on the other hand, argues that the court erroneously assumed the Convention's applicability without resolving the threshold issue of whether his injuries were "sustained ... on board the aircraft or in the course of any of the operations of embarking or disembarking." Convention art. 17. According to Acevedo-Reinoso, the Convention does not apply and his Puerto Rico tort claim is therefore not pre-empted because he was not embarking or disembarking when he sustained his injuries. Rather, Acevedo-Reinoso argues, his injuries were sustained "in Spain in a detention jail and [in] . . . being deported back to Puerto Rico in front of all the members of the Association."…

We agree with Acevedo-Reinoso that the district court erroneously conflated the applicability of the Convention with liability under the Convention. The Convention's applicability rests on a determination of whether the passenger's injury occurred "on board the aircraft or in the course of any of the operations of embarking or disembarking." *Convention art. 17. If the Convention applies in a particular case, it is preemptive, and the*

> *trier of fact must then determine whether the carrier is liable under the Convention."*

[My emphasis]

[122] In this matter, travel was between the United States and Jamaica who, as stated previously, have both ratified the **Convention**. The incident began whilst the claimants were on board and allegedly continued after they were removed from the aircraft. The **Convention** itself indicates when it applies. That is a separate issue from that of liability[12]. The claimants maintain that the **Convention** is inapplicable because the penalties were applied after the claimants had disembarked from the aircraft and were therefore not in international carriage.

[123] The situation in ***Gontcharov v Canjet*** (supra) was described as a "chain of causation". In those circumstances, based on the pleadings, the claimants were in international carriage and therefore subject to the **Convention**. Liability for any personal injury is however subject to whether they satisfy the test in Article 17.

The scope of the Convention

[124] Article 29 of the **Convention** which is similar to article 24 of the **Warsaw Convention** has been described as an "exclusivity provision"[13] It states that any action for damages whether brought under the **Convention** or in contract or tort must be brought subject to the conditions and limits of liability set out in the **Convention.** It reads as follows:

> *"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in 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*

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[12] See ***Phillips v Air New Zealand*** (supra) at paragraph [14]
[13] See ***Stott v Thomas Cook Tour Operators Limited*** (supra) at paragraph 28

action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."

[125] The effect of this exclusivity provision was considered in ***Sidhu v British Airways plc*** (supra), ***Stott v Thomas Cook Tour Operators Limited*** [2014] UKSC 15, ***El Al Israel Airlines Ltd v Tsui Yuan Tseng*** (supra), ***Vincent Lee Ferguson v Air Jamaica*** (supra) and ***Janet Morgan v Air Jamaica Limited*** (supra).

[126] In ***El Al Israel Airlines Ltd v Tsui Yuan Tseng*** (supra) Ginsburg J who delivered the opinion of the court stated:

"Tseng alleges psychic or psychosomatic injuries, but no "bodily injury," as that term is used in the Convention. Her case presents a question of the Convention's exclusivity: When the Convention allows no recovery for the episode-in-suit, does it correspondingly preclude the passenger from maintaining an action for damages under another source of law, in this case, New York tort law?

The exclusivity question before us has been settled prospectively in a Warsaw Convention protocol (Montreal Protocol No. 4) recently ratified by the Senate. In accord with the protocol, Tseng concedes, a passenger whose injury is not compensable under the Convention (because it entails no "bodily injury" or was not the result of an "accident") will have no recourse to an alternate remedy. We conclude that the protocol, to which the United States has now subscribed, clarifies, but does not change, the Convention's exclusivity domain. ***We therefore hold that recovery for a personal injury suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking," Art. 17, 49 Stat. 3018, if not allowed under the Convention, is not available at all…***

Recourse to local law, we are persuaded, would undermine the uniform regulation of international air carrier liability that the Warsaw

Convention was designed to foster".[14]

[My emphasis]

[127] The learned judge also conducted an extensive analysis of the history and terms of the Convention. She continued:

> *"Our inquiry begins with the text of Article 24, which prescribes the exclusivity of the Convention's provisions for air carrier liability. "[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Saks, 470 U. S., at 399. "Because a treaty ratified by the United States is not only the law of this land, see U. S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux preparatoires) and the postratification understanding of the contracting parties." Zicherman, 516 U. S., at 226. Article 24 provides that "cases covered by article 17"—or in the governing French text, "les cas pre´vus a` l'article 17" 11—may "only be brought subject to the conditions and limits set out in th[e] [C]onvention." 49 Stat. 3020. That prescription is not a model of the clear drafter's art. We recognize that the words lend themselves to divergent interpretation….*[15]
>
> *A*
>
> ***The cardinal purpose of the Warsaw Convention, we have observed, is to "achiev[e] uniformity of rules governing claims arising from international air transportation."*** *Floyd, 499 U. S., at 552; see Zicherman, 516 U. S., at 230. The Convention signatories, in the treaty's preamble, specifically "recognized the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier." 49 Stat. 3014. To provide the desired uniformity, Chapter III of the Convention sets out an array of liability rules which, the treaty declares, "apply to all international transportation of persons, baggage, or goods performed by aircraft." Ibid. In that Chapter, the*

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[14] Pages 160-161
[15] Pages 167-168

Convention describes and defines the three areas of air carrier liability (personal injuries in Article 17, baggage or goods loss, destruction, or damage in Article 18, and damage occasioned by delay in Article 19), the conditions exempting air carriers from liability (Article 20), the monetary limits of liability (Article 22), and the circumstances in which air carriers may not limit liability (Articles 23 and 25). See supra, at 162–163, and n. 7. ***Given the Convention's comprehensive scheme of liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations.***

The Court of Appeals looked to our precedent for guidance on this point, but it misperceived our meaning. It misread our decision in Zicherman to say that the Warsaw Convention expresses no compelling interest in uniformity that would warrant preempting an otherwise applicable body of law, here New York tort law. See 122 F. 3d, at 107; supra, at 166. Zicherman acknowledges that the Convention centrally endeavors "to foster uniformity in the law of international air travel." 516 U. S., at 230. It further recognizes that the Convention addresses the question whether there is airline liability vel non. See id., at 231. The Zicherman case itself involved auxiliary issues: who may seek recovery in lieu of passengers, and for what harms they may be compensated. See id., at 221, 227. Looking to the Convention's text, negotiating and drafting history, contracting states' postratification understanding of the Convention, and scholarly commentary, the Court in Zicherman determined that Warsaw drafters intended to resolve whether there is liability, but to leave to domestic law (the local law identified by the forum under its choice-of-law rules or approaches) determination of the compensatory damages available to the suitor. See id., at 231.

A complementary purpose of the Convention is to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability. Before the Warsaw accord, injured passengers could file suits for damages, subject only to the limitations of the forum's laws, including the forum's choice-of-law regime. This exposure inhibited the growth of the then-fledgling international airline industry. See

Floyd, 499 U. S., at 546; Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 499–500 (1967). Many international air carriers at that time endeavored to require passengers, as a condition of air travel, to relieve or reduce the carrier's liability in case of injury. See Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw, Minutes 47 (R. Horner & D. Legrez transls. 1975) (hereinafter Minutes). The Convention drafters designed Articles 17, 22, and 24 of the Convention as a compromise between the interests of air carriers and their customers worldwide. In Article 17 of the Convention, carriers are denied the contractual prerogative to exclude or limit their liability for personal injury. In Articles 22 and 24, passengers are limited in the amount of damages they may recover, and are restricted in the claims they may pursue by the conditions and limits set out in the Convention.

Construing the Convention, as did the Court of Appeals, to allow passengers to pursue claims under local law when the Convention does not permit recovery could produce several anomalies. Carriers might be exposed to unlimited liability under diverse legal regimes, but would be prevented, under the treaty, from contracting out of such liability. Passengers injured physically in an emergency landing might be subject to the liability caps of the Convention, while those merely traumatized in the same mishap would be free to sue outside of the Convention for potentially unlimited damages. The Court of Appeals' construction of the Convention would encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty. *See Potter v. Delta Air Lines, Inc., 98 F. 3d 881, 886 (CA5 1996). Such a reading would scarcely advance the predictability that adherence to the treaty has achieved worldwide.*

The Second Circuit feared that if Article 17 were read to exclude relief outside the Convention for Tseng, then a passenger injured by a malfunctioning escalator in the airline's terminal would have no recourse against the airline, even if the airline recklessly disregarded its duty to keep the escalator in proper repair. See 122 F. 3d, at 107. As the United States pointed out in its amicus curiae submission,

however, the Convention addresses and concerns, only and exclusively, the airline's liability for passenger injuries occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." …[16]

B

The drafting history of Article 17 is consistent with our understanding of the preemptive effect of the Convention. The preliminary draft of the Convention submitted to the conference at Warsaw made air carriers liable "in the case of death, wounding, or any other bodily injury suffered by a traveler." Minutes 264; see Saks, 470 U. S., at 401. In the later draft that prescribed what is now Article 17, airline liability was narrowed to encompass only bodily injury caused by an "accident." See Minutes 205. It is improbable that, at the same time the drafters narrowed the conditions of air carrier liability in Article 17, they intended, in Article 24, to permit passengers to skirt those conditions by pursuing claims under local law….[17]

C

Montreal Protocol No. 4, ratified by the Senate on September 28, 1998, amends Article 24 to read, in relevant part: "In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention…" Both parties agree that, under the amended Article 24, the Convention's preemptive effect is clear: ***The treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty****".*[18]

[My emphasis]

[128] In ***Sidhu and Others v British Airways plc; Abnett (known as Sykes) v British Airways plc*** (supra), the claim was for damages for psychological injury arising

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[16] Pages 169-172
[17] Pages 172-173
[18] Pages 174-175

out of an attack by Iraqi forces at the Kuwait airport, the House of Lords held that where no remedy was provided by the **Warsaw Convention**, none was available under domestic law. Lord Hope of Craighead who delivered the judgment of the court stated:

> *"The idea that an action for damages may be brought by a passenger against the carrier outside the convention in the cases covered by art 17, which is the issue in the present case, seems to be entirely contrary to the system which these two articles were designed to create.*
>
> ***The reference in the opening words of art 24(2) to 'the cases covered by Article 17' does, of course, invite the question whether art 17 was intended to cover only those cases for which the carrier is liable in damages under that article****. The answer to that question may indeed be said to lie at the heart of this case. In my opinion, the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the article. In its context, the purpose seems to me to be to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air.*
>
> ***The phrase 'the cases covered by Article 17' extends therefore to all claims made by the passenger against the carrier arising out of international carriage by air, other than claims for damage to his registered baggage which must be dealt with under art 18 and claims for delay which must be dealt with under art 19****. The words 'however founded' which appear in art 24(1), and are applied to passenger's claims by art 24(2), support this approach. The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the convention are to apply.* ***To permit exceptions, whereby a passenger could sue outwith the convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the convention did not create any liability on the part of the carrier. Thus, the purpose is to ensure***

> ***that, in all questions relating to the carrier's liability, it is the provisions of the convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the convention."***[19]
>
> [My emphasis]

[129] The facts as outlined in the judgment are as follows:

> *"The pursuer and the plaintiffs were all fare-paying passengers on the same flight, BA 149, which left London Heathrow for Kuala Lumpur at about 6.15 pm on 1 August 1990. The flight was scheduled to travel to Kuala Lumpur by way of Kuwait and Madras. It was due to arrive at Kuwait in the early hours of the following day, 2 August 1990. According to the pursuer's pleadings in the Scottish action, relations between Iraq and Kuwait had been deteriorating for some days prior to the departure of the flight from Heathrow. She avers that the respondent knew or ought to have known that the passengers would be at severe risk if the aircraft were to land in Kuwait after hostilities had been commenced against Kuwait by Iraq. The same point is made by the plaintiffs in their particulars of claim, where they refer to the respondent's negligence in landing their aeroplane in Kuwait when they knew or ought to have known of the hostile situation between Iraq and Kuwait and the possibility that war might break out and Kuwait be invaded by Iraq. In the event, the invasion of Kuwait by Iraq began at about 11:15 pm on 1 August 1990. About four hours later, at about 3 am on 2 August 1990, the respondent's aircraft landed at Kuwait airport for refuelling.* ***The passengers disembarked into the transit lounge at the airport terminal. While they were in the terminal the airport was attacked by Iraqi aircraft and taken over by Iraqi soldiers. The***

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[19] Pages 206 j-207e

airport was closed, and the passengers and crew of flight BA 149 were detained by the Iraqis and later removed to Baghdad.

The pursuer avers that she was detained by Iraqi forces for a period of about a month. She claims to have suffered psychological injury due to the stress resulting from her captivity and the pain of separation from her family*. She also claims that she was off work on a number of occasions as a result of the psychological consequences. She claims damages of £100,000 on the ground that the respondent was in breach of an implied condition of her contract with it that it would take reasonable care for the safety of its passengers, in respect that it allowed its aircraft to land at Kuwait when it knew or ought to have known that the passengers were exposed to risk due to the invasion. Her alternative claim for damages caused by delay under art 19 of the Convention was, as I have said, held by Lord Marnoch to be irrelevant and no further issue arises on that point. She made no claim against the respondent under art 17 of the Convention.*

The plaintiffs state that they were detained by the Iraqi forces until about 21 August 1990. In their particulars of injuries they allege that they suffered physical and psychological injuries. These included mental injury comprising stress and anxiety and possible permanent psychological damage as a result, and bodily injury comprising loss of weight, eczema and excessive menstrual bleeding. They also claim for loss of baggage amounting to £2,562·93 as special damages.

Their action has been based entirely on negligence at common law. The negligence relied on in their particulars falls under three heads: landing its aircraft in Kuwait when the respondent knew or ought to have known of the hostile situation between Kuwait and Iraq and the possibility that war might break out and Kuwait be invaded; flying its aircraft into a war zone or war situation; and failing to divert its aircraft to a safer airport for refuelling when it knew or ought to have known that Kuwait airport was at risk of being attacked or invaded. They make no claim against the respondent under art 17 of the Convention."

[My emphasis]

[130] The court looked at the provisions of the **Warsaw Convention**. It said, at page 156:

> *"The headnote to the English text in Pt I of Sch 1 describes the Convention as being 'for the Unification of Certain Rules relating to International Carriage by Air'. There then follow five chapters, headed respectively: Ch I, 'Scope—Definitions'; Ch II, 'Documents of Carriage'; Ch III, 'Liability of the Carrier'; Ch IV, 'Provisions Relating to Combined Carriage'; and Ch V, 'General and Final Provisions'.*
>
> *In Ch I, art 1(1) is in these terms:*
>
> > *'This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.'*
>
> *Article 1(2) of this chapter contains a definition of the expression 'international carriage' which need not be quoted, as it is common ground that the present case is concerned with international carriage by air because the place of departure and the place of destination were both situated within the territories of High Contracting Parties.*
>
> [My emphasis]

[131] In ***Gontcharov v Canjet and Imperial Group International Inc*** (supra) J. Wilson J stated:

> *"[59] I conclude that the plaintiff cannot succeed under the Convention for the damages he claims for psychological harm and mental distress based upon Article 29 of the Convention and the case-law interpreting the Convention.*
>
> *[60] The pleadings in this case include a claim for aggravated and punitive damages. Article 29 makes it clear that these are not recoverable if a claim is made under the Convention, or in contract or tort…*
>
> *[61] As Dovell J. noted in Walton, supra, at para. 32, the wording of Article 29 is "clear and obvious… Any claim for damages of a passenger of an international flight against a carrier, contracting*

> *carrier or employee of either carrier can only be brought within the ambit of the Montreal Convention of 1999."*

[132] ***Stott v Thomas Cook Tour Operators Ltd (Secretary of State for Transport intervening)*** [2014] UKSC 15[20] is also relevant in respect of this issue. In ***Stott*** the claimant who was paralysed from the shoulders down and a permanent wheelchair user booked return flights to Greece with the defendant for himself and his wife. He arranged to be seated next to his wife on both flights and was repeatedly assured that that would happen. On the return flight, at check-in and at the departure gate, the claimant and his wife were informed that it was not possible for them to be seated together. Whilst entering the aircraft, the claimant's wheelchair was overturned and he fell to the cabin floor. He was extremely embarrassed, humiliated and angry. It was asserted that during the flight, the cabin crew made no attempt to ease the claimant's difficulties and made no requests of the other passengers to enable the claimant and his wife to sit together. He brought a claim under Regulation 9a of the United Kingdom Disability Regulations for injury to his feelings. Although the recorder found that there was a breach of those regulations he declined to make an award of damages on the basis that the **Convention** was applicable.

[133] The appeal was dismissed by the Supreme Court. Lord Toulson who delivered the judgment of the court said:

> *"34. In Sidhu the House of Lords considered the question whether a passenger who sustained damage in the course of international carriage by air due to the fault of the carrier, but had no claim against the carrier under article 17 of the Warsaw Convention, was left without a remedy. It concluded that this was so. Lord Hope gave the only speech. He analysed the history, structure and text of the Convention, and he reviewed the domestic and international case law. He explained that the Convention was a package. It gave to*

[20] See paragraphs 36 to 40 of the judgment

passengers significant rights, easily enforceable, but it imposed limitations. He held that the whole purpose of article 17, read in its context, was to prescribe the circumstances – that is to say, 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, even in cases for which the Convention did not create any liability on the part of the carrier.

35. This interpretation has been accepted and applied in many other jurisdictions….

41. In King v American Airlines Inc 284 F 3d 352 (2002) the Court of Appeals for the Second Circuit considered the question whether discrimination claims could properly be regarded as generically outside the Convention's substantive scope, so that a claim for compensation under local law would not be affected by the Convention…

42. The argument advanced unsuccessfully by the plaintiffs was that discrimination claims fell outside the scope of the Convention because of their qualitative nature. ***Sotomayor CJ (now Justice Sotomayor of the US Supreme Court), delivering the opinion of the court, emphasised that the preemptive scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on when and where the salient event took place:***

> *"Article 17 directs us to consider when and where an event takes place in evaluating whether a claim for an injury to a passenger is preempted. Expanding upon the hypothetical posed by the Tseng Court, a passenger injured on an escalator at the entrance to the airport terminal would fall outside the scope of the Convention, while a passenger who suffers identical injuries on an escalator while embarking or disembarking a plane would be subject to the Convention's limitations. Tseng, 525 US at 171. It is evident that these injuries are not qualitatively different simply because they have been suffered while embarking an aircraft, and yet article*

> *17 plainly distinguishes between these two situations.' [Original emphasis] … The aim of the Warsaw Convention is to provide a single rule of carrier liability for all injuries suffered in the course of the international carriage of passengers and baggage. As Tseng makes clear, the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered. See Tseng, 525 US at 171 (rejecting a construction of the Convention that would look to the type of harm suffered, because it would 'encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty'); Cruz v Am Airlines, 338 US App DC 246, 193 F3d 526, 531 (DC Cir 1999) (determining that fraud claim was preempted by Article 18, because the events that gave rise to the action were 'so closely related to the loss of [plaintiffs'] luggage . . . as to be, in a sense, indistinguishable from it')."…*

59. To summarise, this case is not about the interpretation or application of a European regulation, and it does not in truth involve a question of European law, notwithstanding that the Montreal Convention has effect through the Montreal Regulation. ***The question at issue is whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention, and that depends entirely on the proper interpretation of the scope of that convention****. The governing principles are those of the Vienna Convention on the Law of Treaties…*

60. ***The temporal question can be answered by reference to the facts pleaded and found. The claim was for damages for the humiliation and distress which Mr Stott suffered in the course of embarkation and flight, as pleaded in his particulars of claim and set out in paras 6-8 of the recorder's judgment. The particulars of injury to Mr Stott's feelings and the particulars of aggravated damages related exclusively to events on the aircraft****. In the course of argument it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. If so, it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention, but that was not the claim advanced. Mr Stott's*

> *subjection to humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention. It is no answer to the application of the Convention that the operative causes began prior to embarkation. To hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention. Many if not most accidents or mishaps on an aircraft are capable of being traced back to earlier operative causes and it would distort the broad purpose of the Convention explained by Lord Hope in Sidhu's case to hold that it does not apply to an accident or occurrence in the course of international carriage by air if its cause can be traced back to an antecedent fault.*
>
> *61 Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is No for the reasons given by Circuit Judge Sotomayor in King v American Airlines**. I agree with her analysis that what matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation**. The answer to that general question also covers the more specific question."*

[My emphasis]

[134] The UK Supreme Court found that the Convention was applicable to the claim even though it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. The court spoke about the substantive and/or temporal scope of the Convention and, in arriving at its decision, it examined the pleadings and observed that "*The particulars of injury to Mr Stott's feelings and the particulars of aggravated damages related exclusively to events on the aircraft*." The court emphasised that what matters is the time and place of the accident or mishap.

[135] Article 17 which deals with liability for personal injury sets out the conditions in which such actions may be brought states:

> *"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****. "*

[My emphasis]

[136] The issue of whether or not the carrier is liable to the claimant is to be resolved by an examination of the facts in the case in order to determine whether they fall within articles 17of the **Convention**. Damages however are not at large, as Article 21 of the **Convention**, states:

> *1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.*
>
> *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.*

[137] It is to be noted that, Article 20 of the **Convention** provides for the full or partial exoneration of carriers from liability where it is proved that the damage suffered was either caused or contributed to by the negligence of the passenger. It states as follows:

> *"If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from*

> *its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21."*

A. *Accident*

[138] The issue of whether an event may be classified as an accident within the context of the **Convention** cannot be described as being clear cut**.** The leading case in respect of this issue is ***Air France v Saks***. In that case, the claimant became permanently deaf in one ear as a result of pressurisation changes while the aircraft descended to land. There was no malfunction of the pressure system and the airline argued that the normal operation of the system could not qualify as an Article 17 accident. The court held that under the Convention an accident must be defined in relation to the cause of the injury rather than the occurrence of the injury alone. O'Connor J who delivered the judgment of the court stated:

> *"… the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury. In light of the many senses in which the word "accident" can be used, this distinction is significant. As Lord Lindley observed in 1903:*
>
> > *"The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word `'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate*

between them." Fenton v. J. Thorley & Co., 1903. A. C. 443, 453.

In Article 17, the drafters of the Warsaw Convention apparently did make an attempt to discriminate between "the cause and the effect"; they specified that air carriers would [470 U.S. 392, 399] be liable if an accident caused the passenger's injury. The text of the Convention thus implies that, however we define "accident," it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone. American jurisprudence has long recognized this distinction between an accident that is the cause of an injury and an injury that is itself an accident. See ***Landress v. Phoenix Mutual Life Ins. Co****., 291 U.S. 491 (1934).*

While the text of the Convention gives these two clues to the meaning of "accident," it does not define the term. Nor is the context in which the term is used illuminating. See Note, Warsaw Convention - Air Carrier Liability for Passenger Injuries Sustained Within a Terminal, 45 Ford. L. Rev. 369, 388 (1976) ("The language of Article 17 is stark and undefined"). To determine the meaning of the term "accident" in Article 17 we must consider its French legal meaning. See ***Reed v. Wiser****, 555 F.2d 1079 (CA2), cert. denied, 434 U.S. 922 (1977);* ***Block v. Compagnie Nationale Air France****, 386 F.2d 323 (CA5 1967), cert. denied, 392 U.S. 905 (1968). This is true not because "we are forever chained to French law" by the Convention, see* ***Rosman v. Trans World Airlines, Inc****., 34 N. Y. 2d 385, 394, 314 N. E. 2d 848, 853 (1974), but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. Reed, supra, at 1090;* ***Day v. Trans World Airlines, Inc.****, 528 F.2d 31 (CA2 1975), cert. denied, 429 U.S. 890 (1976). We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-500 (1967).*

A survey of French cases and dictionaries indicates that the French legal meaning of the term "accident" differs little from the meaning of the term in Great Britain, Germany, or the United States. Thus, while the word "accident" is often [470 U.S. 392, 400] used to refer to the event of a person's injury, it is also sometimes used to describe a

> *cause of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event. See 1 Grand Larousse de La Langue Francaise 29 (1971) (defining "accident" as "Evenement fortuit et facheux, causant des dommages corporels ou materiels"); **Air France v. Hadda**d, Judgment of June 19, 1979, Cour d'appel de Paris, Premiere Chambre Civile, 1979 Revue Francaise de Droit Aerien 327, 328, appeal rejected, Judgment of February 16, 1982, Cour de Cassation, 1982 Bull. Civ. I 63. This parallels British and American jurisprudence. See **Fenton v. J. Thorley & Co**., supra; **Landress v. Phoenix Mutual Life Ins. Co.**, supra; **Koehring Co. v. American Automobile Ins. Co.**, 353 F.2d 993 (CA7 1965). The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event."*[21]

[139] In ***Wipranik v Air Canada*** Case No. CV06-3763 AHM, May 15, 2007 the plaintiff sued the airline for a burn injury sustained during a flight from Toronto, Canada to Tel Aviv. The defendant applied for summary judgment on the basis that the injury was not caused by an "accident". The court in its consideration of that issue adopted the definition in ***Saks*** and refused the application. In its conclusion, the court stated:

> *"Under Saks, Plaintiff must show that her injury was caused by (1) an external event; (2) that was unusual or unexpected; and (3) took place during the operation of the aircraft. There is no dispute that plaintiff was injured during the operation of the aircraft (that is, during flight). The slide of the tea off of the tray table and its fall onto Plaintiff's lap were events "external" to Plaintiff. Moreover, those events were unusual and unexpected. Although it may be common for an airline seat to shake when its occupant moves around, it is not common for beverages placed on the tray table behind that seat to be so jolted by the movement that they fall onto another passenger. It is the failure of the tray table to hold beverages securely despite passenger movement in the seat in front that is unexpected."*

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[21] Pages 398-400

[140] Whether the removal of the claimants from the aircraft can be classified as an accident is subject to interpretation and need not be decided at this stage. I only wish to add that the Contract of Carriage states that a passenger may be removed from the aircraft if, in the opinion of the crew that passenger's conduct may endanger the aircraft, other passengers and/or the crew. It states:

> ***"12.1*** *If you conduct yourself aboard the aircraft so as to endanger the aircraft or any person or property on board, or obstruct the crew in the performance of their duties, or fail to comply with any instructions of the crew, or behave in a manner to which other passengers may reasonably object, we may take such measures as we deem necessary to prevent continuation of such conduct, including restraining you or removing you from the aircraft.*

[141] If the claimants intend to argue that they ought to be awarded damages for their humiliation and embarrassment they will have to convince a tribunal that their removal from the aircraft constituted an accident and that it caused bodily injury

B. *Did the injury occur on board or during embarkation or disembarkation?*

[142] It is common ground that the incident began whilst the claimants were on board. The applicant has argued that the **Convention** is applicable as it is a series of events that have given rise to the claim. The respondents have sought to oust the applicability of the **Convention** on the basis that the alleged false imprisonment, breach of contract and monetary damage occurred after disembarkation. That was also the argument advanced by the plaintiff in ***Gontcharov v Canjet and Imperial Group International Inc*** (supra). In that case, the court found that the pleadings confirmed that the initial injury was sustained during the flight and continued when he was arrested and later detained by the police.

[143] In ***Sidhu and Others v British Airways plc; Abnett (known as Sykes) v British Airways plc*** (supra), the court approached the matter from the perspective of a chain of events. This is evident from the following statement of Lord Hope of Craighead:

> *"The issue between the parties is confined to a single but important point which depends for its answer on the interpretation of the Convention. Much of the background is common ground. As both cases are being dealt with on a preliminary issue of law, the facts have not been investigated. The respondent made it clear that it was not to be taken as admitting that all the allegations which have been made against it are true. But it was content that the issue of law should be dealt with on the pursuer's pleadings in the Scottish action and on the particulars of claim in the English action.* ***For their part, the pursuer and the plaintiffs accept that their claims against the respondent arise out of international carriage by air. Their apprehension by the Iraqis took place in the terminal at Kuwait, but they accept that they were still in the course of international carriage by air at that point because they were still in transit to their ultimate destination in Malaysia. The breaches of duty which they allege all relate to decisions taken while the aircraft was in the air between London and Kuwait.*** *It is, however, also common ground between the parties that neither the pursuer nor the plaintiffs have a claim against the respondent under art 17 of the Convention."*[22]

[My emphasis]

[144] The claimants have sought to rely on ***Schroder v Lufthansa German Airlines*** 875 F. 2d 613 (1989) and ***Acevedo-Reinoso v Iberia Lineas Aéreas De Españia S.A.*** 449 F. 3d 7 (1st Cir.) (Puerto Rico) (2006) as authorities which support its position that the alleged injury occurred after disembarkation and as such was not subject to the **Convention**. With respect, I do not agree.

[145] In ***Acevedo-Reinoso v. Iberia Líneas Aéreas De España S.A*** (supra), it was stated as follows:

> *"'Treaty interpretation,' we have noted, 'is a purely legal exercise.'* ***McCarthy****, 56 F.3d at 317 (interpreting meaning of "embarking" and "disembarking" *12 under Convention). Therefore, the question [of]*

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[22] Pages 158-159

> *whether a passenger's injury was sustained "on board the aircraft or in the course of any of the operations of embarking or disembarking," Convention art. 17, "is a question of law to be decided by the court" based on the facts of each case,* ***Marotte v. American Airlines, Inc****., 296 F.3d 1255, 1259 (11th Cir. 2002). See also* ***Schmidkunz v. Scandinavian Airlines Sys.****, 628 F.2d 1205, 1207 (9th Cir. 1980) (same). Since "[t]he terms 'embarking' and 'disembarking' are not specifically defined in the Convention,"* ***Marotte****, 296 F.3d at 1259, and absent some direction from the Supreme Court, which has not yet had occasion to define them, we have found "(1) the passenger's activity at the time of injury, (2) his or her whereabouts when injured, and (3) the extent to which the carrier was exercising control . . . highly relevant in determining the applicability of [the Convention]."* ***McCarthy****, 56 F.3d at 317".*

[146] The approach adopted in ***Gontcharov v Canjet and Imperial Group International Inc*** (supra) and ***Sidhu and Others v British Airways plc; Abnett (known as Sykes) v British Airways plc*** (supra) was also used in ***Schroder v Lufthansa German Airlines*** (supra). In that case, the Royal Canadian Mounted Police's search of the plaintiff was conducted in the terminal building away from the airplane while questioning her about a bomb threat. The court also found as follows:

> *"Looking at the total circumstances surrounding Schroeder's detainment and *618 search, with particular emphasis on location, activity, and control, leads us to the conclusion that any injury Schroeder suffered due to the action of the RCMP was not sustained in the course of embarking or disembarking from the airplane. First, we note that the RCMP conducted their detention and search of Schroeder in the terminal building, away from the airplane. Additionally, the RCMP carried out these actions in an area that was neither owned nor leased by Lufthansa. Second, the RCMP was questioning Schroeder about a bomb threat. This activity is not even remotely related to a passenger's embarking or disembarking from an airplane. Finally, we note that Lufthansa had no control whatsoever over Schroeder or the RCMP while the RCMP detained and searched her. Although Schroeder's first amended complaint alleges that the RCMP officials were acting as agents for Lufthansa,*

> *see Plaintiff's First Amended Complaint, Rec. 63, ¶ 43 (Count I), she has failed to present any facts to support this bare allegation. 618*
>
> > *'Moreover, it is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties." Maugnie, 549 F.2d at 1258. Our interpretation of article 17 is fully consistent with the legislative history of the Warsaw Convention. The delegates of the Warsaw Convention expressly 4 Schroeder v. Lufthansa German Airlines 875 F.2d 613 (7th Cir. 1989) rejected a proposal which would have made an airline liable for all injuries a passenger sustained from the time he first entered the airport of departure until the moment he left the airport of arrival. See id. at 1260; Martinez Hernandez, 545 F.2d at 283; Day, 528 F.2d at 35. Instead, the delegates opted for the more restrictive language contained in article 17. Thus, the contracting parties to the Warsaw Convention never intended for an airline to be liable for every injury sustained by a passenger before the passenger reached his destination, and we will not impose such liability. Therefore, because any injury Schroeder allegedly suffered due to her detainment and search by the RCMP was not sustained on the plane or in the course of embarking or disembarking, Lufthansa cannot be held liable for those injuries under article 17 of the Warsaw Convention'."*[23]

[147] The issue of whether an accident occurred during the process of embarkation or disembarkation has been the subject of much litigation, albeit not in this jurisdiction. An examination of those cases makes it abundantly clear that its resolution is dependent on the circumstances of each case. Factors such as the area in which the accident occurred as well as the activity in which the passenger was engaged are clearly relevant. So too is the degree of control that the airline had over the passenger [24].

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[23] Page 618
[24] See ***Acevedo-Reinoso v. Iberia Líneas Aéreas De España S.A*** (supra)

[148] In this matter the issue of whether the passengers had disembarked is the focus. That issue in my view is far more easily resolved than that of embarkation which may involve many processes. In the case at bar, the initial injury was allegedly sustained when the claimants were asked to disembark. It therefore began on board. It continued during their detention and culminated in their having to pay a penalty and the cost of changing their tickets. These acts in my opinion cannot be viewed in isolation. They are a part of one continuous incident. The payments that the claimants were required to make in order to secure their departure cannot be divorced from the initial request to disembark the aircraft.

[149] In the circumstances, I am of the view that the alleged injury suffered by the claimants was part of “a chain of causation” that occurred on board the aircraft.

C. *Death or bodily injury*

[150] In the instant case the claimants have claimed aggravated damages for the humiliation, distress and embarrassment they allegedly suffered as a result of the incident. No physical injury has been asserted.

[151] In ***El Al Israel Airlines Ltd v Tsui Yuan Tseng*** 525 U.S. 155 (1999) which was referred to in the extract from **Shawcross and Beaumont: Air Law,** referred to at paragraph [116] of this judgment, the issue of whether a claim for psychic or psychosomatic injury could be sustained under the **Warsaw Convention** was addressed by the United States Court of Appeals for the Second Circuit. In that case, the plaintiff was subjected to an intrusive security search at John F Kennedy International Airport in New York before she boarded a flight to Tel Aviv. She sued the airline under New York tort law for damages for psychosomatic injury as well as assault and false imprisonment. The appellant argued that her claim, in respect of the treatment which she suffered *before embarkation*, was not within the ambit of the Convention in the absence of some physical injury. The Court of Appeals held that the article 17 did not permit recovery solely for psychic or psychosomatic injury. It was also held that the **Warsaw Convention** precluded a passenger from

maintaining an action for damages for personal injury under local law where the claim does not satisfy the conditions for liability under the Convention.

[152] In ***Sidhu and Others v British Airways plc; Abnett (known as Sykes) v British Airways plc*** [1997] 1 All ER 193, the incident occurred after the passengers had disembarked but it was common ground that they were in international carriage. However, no claim could be sustained under article 17 of the **Convention** as the injury complained of was psychological injury arising out of an attack by Iraqi forces at the Kuwait airport and not *"bodily injury"***.**

[153] In ***Eastern Airlines v Floyd*** 499 U.S. 530 (1991) a claim for damages for mental distress arising out of the failure of the aircraft's engines during flight failed. The court concluded that:

> *"…an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury".*[25]

[154] Similarly, in ***Gontcharov v Canjet and Imperial Group International Inc*** (supra), where the claimant who was arrested and detained filed a claim for general, punitive and aggravated damages for pain and suffering, mental distress and false imprisonment, the court concluded that such damages were not recoverable in light of article 29. J. Wilson, J stated:

> *[62] Further, quite apart from Article 29, the Canadian and international case-law interpreting the intended scope of the Convention is clear that damages for psychological harm, without accompanying bodily injury, are not recoverable under the Convention.*
>
> *[63] The House of Lords in Sidhu v. British Airways Plc; Abnett v. British Airways Plc [1997] 1 All E.R. 193 at 201, 207 [Sidhu], makes*

[25] Page 554.

> *it clear that damages for psychological injury cannot be maintained under section 17 of the Convention.*
>
> *[64] The Supreme Court of the United States in Tseng, adopted the approach in Sidhu and confirmed that the plaintiff, Tseng, who alleged psychic and psychosomatic injuries, but no "bodily injury" as that term is used in the Convention had no remedy available under the Convention or the common law. At page 162, the Court reaffirmed its decision in Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991) to the effect that "mental or psychic injuries unaccompanied by physical injuries are not compensable under Article 17 of the Convention."*
>
> *[65] Canadian decisions have consistently followed the approach in Sidhu, supra and Tseng, supra confirming that psychological harm, unless it is connected with bodily injury is not recoverable under the Convention. See Plourde v. Service aérien FBO inc. (Skyservice) 2007 QCCA 739, at paras. 52-54; Walton v. Mytravel Canada Holdings Inc. 2006 SKQB 231, at para. 43; Chau v. Delta Airlines (2003) CanLII 41999."*

[155] Based on the above cases, it is clear that the claimants who have not alleged that they were physically injured in any way cannot recover damages under the **Convention** for humiliation or embarrassment even if due to an "accident". They are also expressly barred from obtaining exemplary or aggravated damages in any claim failing within its ambit. The wording of article 29 is pellucid:

> *"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in 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."*

The Claims for Breach of Contract and False Imprisonment

[156] The claimants have also alleged that the respondent breached its contract with them and they have also stated that they were falsely imprisoned. Those claims in my view arose out of the removal of the claimants from the aircraft. The subsequent charges that were levied have been listed as particulars of the breach. I do not agree that this designation is proper. The claimant in the words of Lord Toulson in ***Stott v Thomas Cook Tour Operators Limited*** (supra) has employed *"deft pleading"* by couching the particulars of breach of contract in the way that they have been presented. Those particulars with the exception of items (a) and (b) appear to sound in damages.

[157] In ***Rogers v Continental Airlines*** Civil Action No. 10-3064 (KSH), United States District Court, D. New Jersey, Decided Sep 21, 2011, the claim by a passenger who had been removed from a flight for damages for emotional distress and breach of contract was impugned on the basis that it ought to have been made pursuant to the **Convention**. Summary judgment was granted against her as the injury complained of was not bodily injury and the breach of contract arose from the events leading up to and surrounding her removal from the aircraft. (See also ***Paradis v Ghana Airways Ltd.*** 348 F. Supp. 2d 106 (2004).

Resolution

[158] The framework of the **Convention** is a broad applicability provision[26] and then it seeks to limit the liability of the carrier (the rationale is aptly discussed in the dicta of Ginsburg J, Lord Hope and Lord Toulson set out above at paragraphs [127], [128] and [133]).

[159] The ***Stott*** (supra) case made it quite clear that the **Convention** is intended to deal comprehensively with the carrier's liability for *whatever may physically happen to*

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[26] Article 1 of the Convention

passengers between embarkation and disembarkation and in the ***Tseng*** (supra) case, Ginsburg J (as she then was) agreed that "the Convention addresses and concerns, only and exclusively, the airline's liability for passenger injuries occurring 'on board the aircraft or in the course of any of the operations of embark.'." As such, it was held that the **Convention's** pre-emptive effect on local law extends no further than the **Convention's** own substantive scope. Therefore it was undisputable that a carrier is subject to liability under local law for passenger injuries arising outside that scope, for example injuries occurring before "any of the operations of embarking or disembarking."[27] It bears repeating that this claim relates to an occurrence which began on board the aircraft.

[160] I am however mindful that an application to strike out should not be granted unless the court is certain that the claim is bound to fail[28]. I am also mindful of the principle that it is not appropriate to strike out a claim in an area of developing jurisprudence.[29] I am not of the view that this case concerns a novel point of law.

[161] All of the cases concerned with the issue of whether or not a claim falls within the **Convention** have been decided on their facts. There is therefore, no one size that fits all. The detention cases are ***Sidhu*** (supra) and ***Acevedo-Reinoso*** (supra). In both cases there were no incidents on board the aircraft which were precursors to the claimants' detention.

[162] In ***Sidhu*** (supra), however, the court noted that the breaches of duty which the claimants alleged all related to decisions taken while the aircraft was in the air between London and Kuwait. In ***Acevedo-Reinoso*** (supra), problems arose after the claimants' arrival in Spain when a Spanish immigration official requested passports from all passengers.

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[27] Page 172
[28] ***Hughes v Colin Richards & Co.*** [2004] EWCA Civ 266
[29] See paragraph [121] of this judgment

[163] The facts of this case are therefore distinguishable from the facts in those two cases. The alleged false imprisonment and breach of contract had their genesis in an incident which occurred while the claimants were on-board the aircraft.

[164] However, I am not of the view that the claim is bound to fail. Therefore, I am not minded to strike out the claim.

Summary Judgment

[165] Part 15.2 of the **CPR** outlines the circumstances in which the court may grant an order for summary judgment. The rule states:

> *"Grounds for summary judgment*
>
> *15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue."*

[166] This rule allows the court to actively manage cases by disposing of issues that have no real prospect of success. Where such an application is made, if the respondent shows that its claim or defence has some prospect of success the matter ought properly to proceed to trial.

[167] This rule was recently considered by the Privy Council in ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** [2018] UKPC 12. Lord Briggs who delivered the decision of the Board in his discussion of the law in this area said:

> *"16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a*

proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.

17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.

18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms:

"The court may give summary judgment on the claim or on a particular issue if it considers that-

> *(a)The clamant has no real prospect of succeeding on the claim or the issues; or*
>
> *(b)The defendant has no real prospect of successfully defending the claim or the issues."*

19. That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

"(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies

> *....*
>
> *(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."*
>
> *Para.8.9A further provides:*
>
> *"The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.*
>
> *20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: see para 61 of the judgment of the Court of Appeal in this case…"*

[168] The test which is to be applied in order to determine whether there is a real prospect of success was examined in ***Swain v Hillman*** [2001] 1 All ER 91. In this case Lord Wolf MR said:

> *"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*[30]

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[30]Page 92

[169] The meaning of the term "real prospect of success" was considered in ***International Finance Corporation v Utexafrica Sprl*** [2001] All ER (D) 101 (May) which dealt with the setting aside of a default judgment. In that case, the Court stated that in order to satisfy the test, a case should be more than merely arguable. A party is not however, required to convince the Court that its case must succeed.

[170] In ***Gordon Stewart, Andrew Reid and Bay Roc Limited v. Merrick (Herman) Samuels*** (supra), where Harrison J.A. stated as follows:

> *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of each party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect" and not a 'fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning."* [31]

[171] The burden of proof rests on the applicant. In ***ED & F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472, Potter LJ in his examination of the difference between application for summary judgment (rule 24.2) and one to set aside a judgment (rule 13.3 (1)) said:

> *"9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside."*

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[31] Page 6

[172] Where credible evidence has been adduced in support of the application, the respondent in order to rebut that assertion, has the evidential burden of proving that it has a real prospect of success. The court must however be careful in its consideration of the evidence so as not to embark upon a mini trial. Where facts are in dispute, it is the trial Judge who is tasked with their resolution. In ***Royal Brompton Hospital National Health Service Trust v Hammond and others*** [2001] EWCA Civ 550 Aldous LJ said that *"… summary disposal, it does not contemplate a preliminary trial adopting the standard of proof applicable to a trial"*. [32]

[173] In this matter, the only facts in dispute are those concerned with the circumstances in which the claimants were removed from the aircraft. Was the action justified or not? For the purposes of this application no finding is necessary in relation to that issue. The question under consideration is whether the claim as it now stands has a realistic prospect of success having been filed without reference to the **Convention**.

[174] I am inclined to take a similar view to the court in ***Rogers v Continental Airlines*** (set out at paragraph [157] of this judgment). The claim which arose out of international carriage ought to have been made pursuant to the **Convention**, which cannot be circumvented by "deft drafting". There is merit in Miss Montague's submission that the claim falls within the ambit of article 17, and that the conditions for imposing liability on the defendant have not been satisfied. As mentioned previously, the very injury being complained of is not bodily injury and the alleged breaches in my view, clearly flowed from the events occurring on board the aircraft surrounding the claimants' removal.

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[32] Paragraph 23

[175] In the circumstances, I am not convinced that the claim has a real prospect of success.

CONCLUSION

[176] At this stage I cannot conclude that the claimants' claim is bound to fail and will therefore refuse the application to strike out the claim. I do however find that the threshold for summary judgment has been met, that is the claimants have no real prospect of succeeding on the claim. Accordingly, it is ordered as follows:

(i) Application to strike out the claim is refused.

(ii) Summary judgment is granted in favour of the applicant.

(iii) Costs of this application and costs thrown away to the applicant to be agreed or taxed.

(iv) Leave to appeal granted to the claimants in respect of the order for summary judgment.

(v) Leave to appeal granted to the defendant in respect of the refusal of the application to strike out the claim.

(vi) Applicant's Attorneys-at-law to prepare, file and serve this order.