IN THE HIGH COURT QUEEN'S BENCH DIVISION Claim No. [2021] EWHC 2955 (QB)

QB-2019-002198

MASTER MCCLOUD

BETWEEN

Mr BERNARD SILVERMAN

Claimant

And

RYANAIR DAC

Defendant

Counsel for the Claimant Mr Max Archer instructed by Irwin Mitchell Solicitors.

Counsel for the Defendant Mr Christopher Loxton instructed by Kennedys Solicitors.

Keywords: Aircraft - Aviation law – choice of law – law of forum – Rome I – Rome II – Montreal Convention – Warsaw Convention – Irish Law – English Law – quantum – contract – personal injury – lex fori

Domestic authorities cited by parties or referred to in judgment:

Preston v Hunting Air Transport [1956] 1 QB 454

The Tatry [1994] ECRI 543

RSC Plc v Digital FZE (Cyprus) Ltd [2005] EWHC 1408

Deep Vein Thrombosis v Air Travel Group Litigation [2006] 1 AC 495 (HL)

Iranian Offshore Engineering and Construction Co v Dean [2018] EWHC 2759 (Comm.)

Suppipaj & Ors v Narondej and Ors [2020] EWHC 3191 (Comm.)

International authorities cited by the parties or referred to in judgment:

Zicherman v Korean Air Lines Co 516 US 217 (1996)

El Al Israel Airlines Ltd v Tsui Yuan Tseng 525 U.S. 155 (1999)

Grueff v Virgin Australian Airlines Pty Ltd [2021] FCA 501

Authorities referred to in judgment but not before the court (referred to in other authorities/sources cited):

Surprenant v Air Canada [1973] CA 107 (Quebec CA)

Bochory v Pan American World Airways Inc (1961) 24 ILR 630
Parkes Shire Council v South West Helicopters Pty Ltd [2019] HCA 14

Air France v Saks 470 US 392 (1985)

Other material cited:

The Convention for the Unification of Certain Rules for International Carriage by Air ("The Montreal Convention")

Rome I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I))

Rome II (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II))
Dicey, Morris and Collins on the Conflict of Laws

Shawcross and Beaumont: Air law

Thomas Kadner Graziano *(2016) THE LAW APPLICABLE TO TORT CLAIMS BROUGHT BY SECONDARY VICTIMS THE FLORIN LAZAR V. ALLIANZ SPA AND GERMANWINGS CASES*" Yearbook of Private International Law XVII.

Accessible language summary (not part of judgment)

This summary has a Flesch score of above 50 and was written to ensure accessibility of the judgment to readers with average reading ability.

The claimant was injured whilst going down stairs at an airport terminal in England. The airline was Ryanair. The terms and conditions of the ticket which allowed the Claimant to fly said that Irish Law governed the agreement and how to interpret it unless the Montreal Convention provided otherwise. The Claimant said that Irish Law applies to the contract under the Terms and Conditions. The Defendant said that the contract paragraph did not

apply to the claim and that English Law had to apply. The Court held that Irish Law applies to the remedies under the contract.

JUDGMENT (*CORRECTED* and re-issued 11/11/21 for typographical and citation slips)

1. This is a trial which arises from personal injury sustained by the claimant whilst whilst descending a set of stairs from the terminal on the way to the aircraft operated by the Defendant[1].

2. This trial relates to the narrow but somewhat difficult question of whether the applicable law is that of the Republic of Ireland or that of England. The question was simply framed by my order of 7 January 2021 thus "whether the law of Ireland or the Law of England and Wales shall apply to the claim".

3. The point is one of significance to aviation law practitioners because it is a determination as to whether an airline can disapply its own choice of law clauses and also it is a decision which relates to how the Montreal Convention ('the Convention' – strictly 'The Convention for the Unification of Certain Rules for International Carriage by Air') interacts with the choice of law rules of the Forum. It is common ground that the Convention applies.

4. In this instance the Claimant's journey was between East Midlands Airport in England and the Berlin Schönefeld Airport, in Germany. The Claimant alleges he suffered bodily whilst leaving the terminal on his way to the aircraft, in course of embarkation. The English courts have jurisdiction but this case concerns applicable law.

5. The Claimant's case is that the law of the Republic of Ireland applies, due to the provisions of the Defendant's Terms and Conditions containing a choice of law clause, whereas the Defendants argue that, contrary to what is said in their own Terms and Conditions, the law of England applies ie the law of the Forum, insofar as the Convention does not indicate jurisdiction, and that that conclusion includes in particular the question of what damages are recoverable (what Scalia J in a decision referred to later refers to as legally cognizable damages). It is contended that the law of Ireland would differ materially in respect of quantum. It is not contended that it makes any difference to liability. Under Art 33 of the Convention the Claimant had a choice of a range of fora in which to issue his claim, and he could for example have issued if he wished in Ireland, but he issued in England, understandably given that he lives here.

6. The Convention makes no express provision as to quantum in respect of choice of law, and the Claimant says the Convention operates simply as a 'pass-through' to the Forum's own choice of law rules, and there you select the applicable law (and hence that the contractual choice of law provisions of the Rome I Regulation would apply in this forum, and the applicable law would be that of the Republic, per the contract).

[1] The claim is defended on familiar terms for aircraft claims namely that it is said that the injuries were not (for the purposes of the Montreal Convention) sustained whilst embarking or disembarking the aircraft and that they were not sustained as the result of an 'accident'. However those are not the issues for me today

7. By contrast the Defendants say the Convention mandates that the law of the Forum itself governs quantum, and hence that English law applies irrespective of the provisions in the Terms and Conditions applicable to this flight, and hence that its own choice of law clause is of no effect. If that is not correct and the question of choice of law falls to be considered then they say that Rome II – choice of law for non-contractual obligations - governs the proper law and not Rome I – choice of law for contractual obligations.

The Claimant's argument (and references to relevant terms and Articles)

8. The relevant Terms of the Contract by which Mr Silverman flew are the general terms and conditions of carriage for Ryanair. Clause 2.2 says that if any provision of the terms is invalid under applicable law the remaining terms remain valid. The Clause in issue here is 2.4: Governing Law:

   "*Except as otherwise provided by the Convention or applicable law, your contract of carriage with us, these Terms and Conditions of Carriage and our Regulations shall be governed by and interpreted in accordance with the laws of Ireland and any dispute arising out of or in connection with this contract shall be subject to the jurisdiction of the Irish Courts.*"

   The clause governs "any" dispute arising out of the contract. It was common ground that the jurisdiction clause element was invalid because the Montreal Convention has the effect of overriding that provision and contains a self-contained jurisdiction regime.

9. Notwithstanding the above the Claimant's position was that clause 2.2 meant that the invalidity of the jurisdiction clause did not affect the interpretative element insofar as it did not relate to matters where the Convention provides otherwise. Liability for Damage therefore was governed on the Claimant's case by the Convention (as in fact is also expressly mentioned in the contract elsewhere, where the Convention is incorporated albeit that that adds nothing legally) but the approach to quantum should, says the Claimant, be governed by the choice of law clause (ie Art. 2.4).

10. Art. 2.4 of the contract, as far as the Defendant was concerned, has a different effect. It does not specify that Irish law applies to the interpretation of the Convention or the assessment of damages under the Convention, but only to the contract and to the Defendants' regulations, and there was no need to consider the choice of law clause, therefore, on the question of the approach to assessment of quantum. The result was that under the Convention the Lex Fori applies, that is to say the law of England where this case is brought.

11. The Claimant accepted that Art. 2.4 of the contract does not say expressly that Irish Law applies to quantum or to the interpretation of the Convention, but the Convention makes no arrangements for assessment of damages or choice of law for that, which gives rise to an obvious answer on the issue as to how to approach the applicable law, which is to apply the contractual choice of law clause, with the effect that Irish Law applies to assessment of quantum.

The Montreal Convention 1999 provisions of relevance

12. It was not in dispute that one must interpret the Convention in accordance with principles of Comity between nations. Choice of law as to how to approach that is therefore important given that there are many signatories to the Convention and many different local law approaches to calculation of quantum. The predecessor to the Convention was the Warsaw Convention and no points were taken arguing that it was impermissible to consider decisions of courts in respect of that earlier and similar Convention or that there was any fundamental difference between the two as regards the matters in issue here.

13. The Convention was brought into force in the UK by way of the Carriage by Air Acts Order 2002 and it also has the force of law, and as we have seen is incorporated into the terms of carriage in this case. The Convention applies to all international carriage (including for reward) of persons by air transport undertakings such as Ryan Air. Art. 1(2) of the Convention provides that:

"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 transhipment, are situated either within the territories of two States Parties […]"

The Claimant said that this 'anchors' the liability to the contract provisions and indeed the emphasis on contract provisions was also present in the necessity for certain documents in Art 3, again implying it was said contractual emphasis by the Convention (and not for example that contracts had no role to play or that the approach was to treat loss as tortious) *(*Art 3 states: *"In respect of carriage of passengers, an individual or collective document of carriage shall be delivered…")*

14. Art. 17 of the Convention governs liability: the carrier is liable for damage sustained in case of death or bodily injury of a passenger on condition only that the injury took place during the course onboard the aircraft or in the course of any of the operations of embarking or disembarking. There are limits on quantum by way of strict liability in Art. 21, and above the limit the liability for further damage can be excluded to a certain extent if another person/party's negligence is the cause of the loss.

Art. 27 provides freedom to contract: the parties can set conditions which do not conflict with the Convention. It was argued this again emphasises the contractual basis.

Art. 29 mandates that any action which comes within the scope of the Convention can only be brought within the Convention which is a comprehensive code from embarkation or disembarkation. ("*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*").

Art. 33 provides the regime – overriding local law – as to where a claim may be brought, and also states that questions of procedure shall be governed by the law of the court seized of the case.

15. The Claimant, given the above, put forward the following propositions. The Convention is a complete code for governing liability and it provides for matters of procedure to be governed by the law of the forum, but provides nothing about how

to approach assessment of quantum. Liability is for 'damage' which is not defined, and the parties are permitted to enter into contractual provisions as long as they do not conflict with the Convention.

16. The Claimant noted that there are 137 different contracting parties each of which could have very different approaches to how to assess quantum. The Convention does not refer to the applicable law applying to liability, it is silent on applicable law in all respects, albeit it contains a complete liability code of its own that must be interpreted and applied uniformly. Given that the Convention allows parties to contract for matters which do not conflict with the Convention, the logical result therefore would be that the contractual choice of law provisions as to quantum should apply (and 'Rome I' contains a straightforward set of provisions which apply to choice of law in contracts of carriage, permitting choice of law clauses, incorporated into UK law).

17. There appears to be no binding English authority dealing with the issues here. There were two international authorities cited by the Claimant, from the US Supreme Court which contained judgments by Justices Scalia and Bader Ginsberg. Given that the matters under consideration here (and there) relate to an international Convention it is of course acceptable to cite persuasive authority from other jurisdictions where on point.

18. In *Zicherman* It was held in a judgment by Justice Scalia that (headnote under A):

"*Article 17 permits compensation only for legally cognizable harm, but leaves the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.*"

And more specifically under II on page 227 in his own words:

"… the questions of who may recover, and what compensatory damages they may receive, were regarded [by the framers of the Warsaw Convention] were regarded as intertwined; and that both were unresolved by the Convention and left to "private international law" – ie to the area of jurisprudence we call "conflict of laws" dealing with the application of varying domestic laws to disputes that have an interstate or international component…

The postratification conduct of the contracting parties [to the Convention] displays the same understanding that the damages recovered … are to be determined by domestic law….

Having concluded that compensable harm is to be determined by domestic law, the next question to which we would logically turn is that of which sovereign's domestic law. … Choice of law is, of course, determined by the forum jurisdiction. …

… Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention."

19. The Claimant argued that this in effect is dispositive. The most natural reading of the Warsaw Convention (Art. 17) and by analogy the Montreal Convention's equivalent provision here was that in action under that Article the law of the Convention did not affect the substantive questions of who may sue and what may be compensated for, rather those questions were to be answered by reference to the domestic law

selected by the courts of the contracting states, and that per Scalia J was a matter of private international law unresolved by the Convention.

20. In *Zicherman* there was no issue as to which country's law applied. But (also per Scalia J) that would have been logically the next question. That is an issue in the case here and not in *Zicherman*. The Convention was held to contain no provision superseding the normal Federal disposition in the USA and absent such provision Art 17 provided no more than a 'pass-through' as Scalia J described it. Being on all fours with the facts here albeit under the previous Convention in similar wording, it was said that the case was effectively dispositive and in any event highly persuasive of the correct approach to be taken by me, such that I should treat the Montreal Convention as providing a pass-through to the law of this forum, and then proceed to apply the law as to choice of law which applies here (leading, on C's case, to a conclusion that Rome I applies and hence that the applicable law is Irish Law pursuant to the choice of law contract clause).

21. In the *El Al Israel* case p120-123 Scalia J's dicta in *Zicherman* were expressly approved by Bader Ginsberg J. to the effect that the Convention left the decision of determination of the compensatory damages to domestic law: per Bader Ginsberg J at 170:

    "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."*

22. I was also taken to *Grueff*, where passengers on an Australian flight were served perfume to drink in place of water. In that rather recent case it was held that any damages would be decided under the forum's choice of law rules (para. 72) and the effect here therefore would it was said be that the agreed choice of law would apply. *Grueff* was a Montreal Convention case. Referring to Gordon J in *Parkes Shire Council* (a Warsaw Convention case), it was said in *Grueff* at para. 78-81 that the reasoning as to 'pass-through' to domestic law held in *Zicherman*, affirmed in *El Al Israel*, had to be afforded weight in view of the emphasis on striving for uniformity of interpretation of international treaties.

23. It was said therefore by the Claimant that *Zicherman* has thus been applied both in the US at the highest level and in Australia, and, moreover, recently. *Grueff* was a case under the Montreal Convention such that it can be said that at least in the view of the Australian court the fact that there was a new but similar convention made no difference to correctness of the approach taken in *Zicherman*.

24. If one accepts that the forum's choice of law rules apply then the Claimant's argument was that it should follow, under Rome I, that the contractual agreement governed choice of law. The reference to *Shawcross* took the defendant no further (see below for that point under Defendant's argument), and the decision from the 1960s in *Preston* did not assist them: there was no discussion there as to choice of law. The court decided it under English law but it did not follow that that amounted to saying that the choice of law was necessarily that of the forum, rather the matter of choice of law was not in play in *Preston*.

25. The net effect, it was said, of the Defendant's argument was that if they succeeded the mere silence of the Convention on this issue would effectively override Rome I and Rome II, and would also be contrary to the view espoused in *Zicherman* whereby the Convention in effect simply 'passed through' issues of quantum to the domestic rules.

26. It could not be the case that silence in the convention could override Rome I and II. By analogy, I was taken to authorities on the Brussels Convention and it was said that where a Convention contained special rules of jurisdiction, the Brussels Convention was excluded only where it conflicted with the other international convention. Thus in *The Tatry*, the issue was interaction between the Arrest Convention and the Brussels Convention. It was held (pp 520-521) that the Brussels Regime was only excluded to the extent to which it conflicted with the Arrest Convention on a particular matter. Silence, therefore, in the Montreal Convention could not sensibly be treated as overriding Rome I or II being the forum's choice of law rules.

Rome I or Rome II?: Claimant's position

27. Self-evidently, it was said, the Convention spoke in contractual terms. In Rome I itself there were express provisions (such as recitals 11 and 13) relating to contracts and more specifically art Art. 5 of Rome I which provides a whole article on contracts of carriage of persons whereby (per para. 2 thereof) the parties can choose the law applicable to a contract for the carriage of passengers as long as it falls within one of the heads set out there. It could not sensibly be said that Rome II should be applicable where in Rome I there was an express 'carve out' for contracts for carriage. The parties had the freedom under Rome I to contractually choose the applicable law, and that was to apply here given that the Convention, silent as it is on cognisable damages, merely acted as a 'pass-through', per Scalia J.

Defendant's argument

28. The Defendant made it clear that the issue was indeed whether Irish law or English law applies, but it was not simply a matter of whether the English Court could decide issues of quantum. The preliminary issue was determined to be, in this case, whether the law of Ireland or that of England applies, and was not solely expressed as to issues of quantum.

29. As a preliminary observation it was noted that the situation was unusual in that the accident happened in England, the loss was sustained in England and yet the passenger was seeking to apply Irish law. By Art. 2.4 of the terms and conditions the key expression was 'except as otherwise provided by' the Convention. Either the Convention specifies the applicable law or the applicable law is determined by the choice of law rules of the forum, and in that event it was said Rome II applied – or in the alternative that if Rome I applied then it did not apply in the manner suggested by the Claimant.

30. Another important issue was the interpretation of the contract clause. It provided that the contract of carriage and terms and conditions were to be interpreted in accordance with the laws of Ireland but it did not specify that the Convention itself should be interpreted in accordance with the laws of that State. The court in this case would therefore have to engage for example with issues such as the meaning, in the

Convention, of words such as 'accident' or 'bodily injury' for which there was relevant authority and which were in issue in the Claim. It would be the law of the forum, said the Defendant, for the purpose of interpreting those expressions. What clause 2.4 was designed to do on the Defendant's case was to ensure that if the Convention applied, or some other applicable law applied then Irish law does not apply to the dispute. Hence if one was for example bringing a claim for dissatisfaction in the absence of international carriage, Irish law would apply. It was not in any event an exclusive jurisdiction clause and if there were to be a more appropriate applicable law then that law should be applied and it was suggested that such would be the law of England. Otherwise in this contract every time a claim was brought under the Convention, expert evidence would be required as to Irish law.

31. The first submission by the Defendant therefore was that when one looks at the Convention the answer was that the law of this forum was to apply, not least in relation to the meaning of 'accident' under the Convention.

32. The starting point was the practitioner's text *Shawcross*. In relation to damage, *Shawcross* by way of a reference in a footnote confirmed that it was for the lex fori to determine the meaning of 'damage' for the purposes of the Warsaw Convention Art. 19 (citing *Surprenant* (Quebec CA) and *Bochory* (NY Sup. Ct.)) and mentioning *Preston*, supra. There was no suggestion that the approach would be different under the Montreal Convention Art. 17. *Shawcross* for example was referred to in the *Deep Vein Thrombosis* case, by the House of Lords and should it was said be seen as persuasive. Likewise it was referred to in *Grueff* at para. 46 and referred to as the leading text.

33. In relation to *Preston*, two infants lost their mother in an air accident. Applying Art 17 of the Warsaw Convention the court implicitly assessed what damages were to be paid, by applying English law (there was no dispute as to the applicable law or as to choice of law clauses) and hence it was an example, albeit not deciding the point, of the law of the forum applying as to the assessment of damages.

34. I was taken to some examples of places in the Montreal Convention where the law of the forum was said to apply for various purposes. For example Art. 22(6) where it was said that Art. 21 and Art. 22 did not prevent the court in accordance with its own law from awarding costs and other expenses (but then added what I described as a form of international procedural law whereby a carrier could protect itself in costs and interests if it had made an offer, analogous as I suggested to Part 36 of the CPR).

35. Article 35(2) on limitation of actions – in laying down a limitation period of 2 years - stated that the method of calculating the limitation period was nonetheless to be determined by the law of the court seized of the case. It was suggested by counsel for the Defendant as illustrative of his point, that this for example would override the provisions of the contract at clause 2.4 which was expressly subject to the Convention, so that the choice of Ireland in the contract would be ousted in favour of the law of the court seized of the case. This case is not a limitation case but it was confirmed to me when I asked that counsel on both sides knew of no cases where the question as to the applicable law on limitation had actually arisen where there was a choice of law clause, so that the argument that Art 35. would oust that provision has not been tested. Most cases I was told are heard in the County Court and hence it is

relatively rare for issues under the Convention to come before the Senior Court for trial as it does, now, before me.

36. Article 49 provides that "*any clause … and all special arrangements …. by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void."* The Defendant's case was that this was intended to prevent what Art. 2.4 of the contract does. The Convention provided options for the passenger to have quite extensive choice of where and how to bring a claim and no doubt most would choose where they were resident. To then discover one had (per contract Art. 2.4) that one was forced to apply the law of a foreign jurisdiction (Ireland) was surely, it was said, something the framers of the Convention would have intended to avoid, including by way of Art. 49.

37. *Zicherman* and the other overseas cases were not binding on me but should it was accepted by treated as highly persuasive. It was accepted that *Zicherman* did hold that the questions of what type of damage was recoverable, and its quantum, was a matter for the choice of law provisions of the forum. But nonetheless *Zicherman* and *El Al Israel* were not to be treated as conclusive on the 'pass-through' point as to applicable law, even if it persuasive. It was accepted to that extent those authorities were against the Defendant's position.

Rome I or Rome II?: Defendant's position

38. If the Defendant was wrong and the choice of law clause applied and not the Lex Fori, the applicable law was Rome II and not Rome I.

39. On the applicability of Rome II, the liability of the carrier was not contingent on there being a contract of carriage. Consideration was not required under Art. 1 of the Montreal Convention. There were, it was accepted, things said in the Convention about contracts of carriage because often there were contracts. It was only necessary that carriage was for reward or gratuitous carriage by an air transport undertaking.

40. Article 2 of Rome II provided that 'damage' covered consequences of torts or delict, and other matters listed there, and applied also to non-contractual obligations that were likely to arise. Art. 4(1) was relied on especially:
"… the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

(But note that per Art. 4(3) where from all the circumstances it is clear that the tort is manifestly more closely connected with a country other than that indicated above, the law of that other country would apply and a 'manifestly closer connection *"might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question")*

41. I was taken to *Dicey* at 35-021. Article 4 of Rome II as discussed there clearly related to the type of consequence here, an injury arising from a harmful event.

42. The rider to the cap on compensation at Art. 21(2) of the Convention (the provision whereby the carrier can exclude some damages if the negligence of a third party is

shown or that it was not due to its own negligence) were also said to be considerations of a type relevant to Rome II. Rome II moreover provides at Art. 14 that the parties could agree to submit to the law of their choice by way of an agreement entered into *after* the event in question or where the parties were performing commercial activity by way of a freely negotiated agreement before the event. Those provisions clearly did not allow the choice of Irish law here. Hence by Art.4(1) of Rome II the applicable law should be the law of this forum.

43. If in the alternative Rome I applies the Defendant's position was that by Rome I the effect was that the law of England should apply by reason of Art. 5(2) of Rome I where the passenger had habitual residence in England (but note that the list of options open to the contract parties, among them is also the law of the residence of the carrier or its place of administration, which I take to be Ireland).

44. The Defendant re-iterated that contract Article 2.4 did not state that the law of Ireland applied to the interpretation of the Convention but only to the terms and conditions. Accordingly where as here the term 'accident' was in issue as well as quantum, one should look at relevant case law under the Convention. I was taken to the *Deep Vein Thrombosis* case at 15, where *Air France v Saks* was referred to and an accident was referred to as 'an unexpected or unusual event or happening that is external to the passenger'. That definition was pleaded in the Defence here to the effect that in this case no 'accident' took place. It was said to be unclear at present what the Claimant's approach to 'accident' as a term was: was it accepted that the definition of 'accident' should be determined by the case law under the Convention or was it said that Art. 2.4 of the contract required the term 'accident' in the Convention to be interpreted under Irish law despite the contract only referring to the construction of the contract and not to the application of the Convention.

45. By way of reply Counsel for the Claimant did not dispute that *Shawcross* is a respected practitioner text: it was simply that the passage relied on did not mean more than it said namely that the law of the forum applied and hence the law of the forum as to choice of law. As to the issue raised over 'accident' and also a similar issue as to the Convention definition of 'bodily injury' those were (as I had observed during the defendant's submissions might be the case) triggers for liability and fell within Convention law and were different matters from the law relating to the computation of quantum. In *Zicherman* it was clear also that such matters were for the Convention but the question of damage was for the lex fori and its choice-of-law rules.

46. Article 49 of the Convention was of no help to the Defendant – it was a provision to deal with contacts which sought to contract out of the Convention. That was not saying on plain reading that the parties are not free to choose the proper law consistent with the Convention provisions.

Decision

47. The issue for me for trial is whether English or Irish Law applies to this claim. The Defendant is correct in its assertion that the question is framed broadly and not, for example, so as to be limited just to the question whether determination of quantum is subject to Irish Law.

48. The relevant contract clause is 2.4, which I have quoted above and in my judgment it, and the saving provision of clause 2.2, also referred to above clearly have the effect that in the event that any part of the contract conflicts with the Convention, the remainder is not rendered invalid.

49. Clause 2.4 states: *Except as otherwise provided by the Convention or applicable law, your contract of carriage with us, these Terms and Conditions of Carriage and our Regulations shall be governed by and interpreted in accordance with the laws of Ireland and any dispute arising out of or in connection with this contract shall be subject to the jurisdiction of the Irish Courts.*

50. Clause 2.4 is, as the Defendant says, silent as to law applicable to interpretation of the Convention expressly, in that it speaks only about the contract and disputes arising out of or in connection with it but, as already noted, this is a dispute arising under or in connection with the Contract, and furthermore the Convention not only as a matter of law applies to the contract but is applied by its terms expressly. I am of the view that clause 2.4 thus purports to apply Irish law, by implication, to the interpretation of the Convention itself given that the dispute as to the meaning of the Convention terms 'accident' and 'bodily injury' are disputes 'in connection with' the contract.

Recoverable damages and Scalia J's 'Pass-through' to the lex fori's choice-of-law rules

51. This being a claim relating to international convention, it is appropriate to consider international decisions in the interests of comity in the application of the Convention (or its similar predecessor the Warsaw Convention which does not differ relevantly to this case).

52. In my judgment the US decision of Scalia J in *Zicherman*, followed in *El Al Israel* by Bader Ginsburg J (and applied in Australia in *Grueff* and *Parks Shire*) is of the highest authority short of a Supreme Court domestic decision. I use the term 'authority' in the sense that it is very persuasive, rather than in a strict sense binding on me: I would be entitled to depart from it if so persuaded. The statement by Bader Ginsburg J in *El Al Israel* as to the effect of *Zicherman* is succinct and I respectfully adopt it: *"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."*

53. I do not find the Defendant's argument based on *Shawcross* persuasive in relation to issues of what damages are recoverable ('cognizable' per Scalia J): I do not read the analysis there as contradicting the position in *Zicherman* in terms of the 'pass-through' to the choice-of-law arrangements of the forum when it comes to the determination of what compensatory damages are recoverable. In my judgment the lex fori's choice-of-law rules apply to such matters here.

Applicable law to matters of interpretation of the Convention

54. The above deals with applicable law as regards quantum and with notions of what types of damage are legally cognizable, subject to the arguments presented as to 'Rome I versus Rome II'. When we come to issues relating to the ingredients of liability, such as 'accident' and 'bodily injury', which are Convention terms as well as

contractual ones, the Convention does not provide a 'pass through' in the sense used by Scalia J: rather it legislates expressly but is silent on whether a contractual choice-of-law arrangement could operate validly if it purported to select an applicable law for the interpretation of the Convention itself other than the law of the forum, as I have decided is the implication of clause 2.4.

55. The drafters of the Convention did not provide *expressly* for which law should apply to the interpretation of the Convention. In reaching a view on this issue therefore I have in mind the guidance in the *Deep Vein Thrombosis* cases at 11 and 12 that the language of the Convention must be the starting point, and in particular the 'natural meaning' given a purposive interpretation.

56. In my judgment the evident purpose of the Convention relevant here was to ensure that issues of liability, and limits thereon were governed by the Convention and could not be reduced or extinguished contractually. To enable parties to choose a foreign law for the interpretation of the Convention which would have that effect would in large measure provide an avenue or loophole capable of defeating the Convention by escaping the circumscribed forum provisions in Art. 33.

57. In my judgment Articles 25, 26 and Art 49 taken together are indicative of the intention consistent with the above:

> "Article 25. Stipulation on limits
>
> A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.
>
> Article 26. Invalidity of contractual provisions
>
> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void ...
>
> Article 49. Mandatory application
>
> Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void."

58. Considering the above provisions (a) it is evidently open to a carrier to agree to higher limits on liability or to no limits (so a departure from the limits is permissible to that extent), (b) it is not permissible to seek to escape liability contractually or to fix a *lower* limit and (c) contractual provisions to the effect in (b) would be void.

59. The intention therefore appears to be to prevent, inter alia, parties contracting in such a way that the Convention could be required to be interpreted (applying domestic rules as to interpretation under a sovereign local law) so as to defeat liability or to reduce the limit on liability. The effect in my judgment effect is the

unremarkable one that the law of the forum as to interpretation of the Convention should apply. Applying the lex fori in that context is consistent with *Shawcross*, and the cases cited there namely *Surprenant* (Quebec CA) and *Bochory* (NY Sup. Ct).

60. What that means in practice is spelled out in the House of Lords Decision in the *Deep Vein Thombosis* cases which bind me: per Lord Scott of Foscote at 11 with my emphasis:

    "*the language of the Convention should not be interpreted by reference to domestic law principles or domestic rules of interpretation* … assistance can and should be sought from relevant decisions of the courts of other Convention countries, but the weight to be given to them will depend upon the standing of the court concerned and the quality of the analysis ..."

61. The upshot is that insofar as I need to spell it out, the expressions 'accident' and 'bodily injury' which are Convention terms forming triggers for liability, must be interpreted in accordance with Convention law as understood by this court, ie the lex fori in that rather special international sense. The fact that the Convention is incorporated contractually makes no difference, and in my judgment the choice of law clause 2.4, insofar as it purports – by implication - to permit an effective choice of law provision for matters of Convention interpretation contradicts the Convention if purposively interpreted, and hence is ineffective insofar as it would impinge on the ingredients of liability.

Rome I or Rome II?

62. The issue whether Rome I or Rome II applies is, given the above, therefore relevant only to aspects of the claim which are 'passed through' (per Scalia J) to the domestic jurisdiction. Rome I and Rome II amount to the domestic choice-of-law arrangements in this forum.

63. In my judgment nothing in the Convention requires carriage by air to be pursuant to a contract: the Convention naturally deals with contracts of carriage and the requirements as to documentation in some detail but it nonetheless contains nothing which makes it a condition of liability that there be a contract of carriage. The preamble to the Convention indicates that the intention is to provide equitable compensation based on the principle of restitution and that is – at the very least – consistent with the Convention not anticipating that liability will hinge on issues of breach of contract. Rather the Convention in my judgment implements its own system of law applicable whether or not there is a contract of carriage. The very fact that it encompasses gratuitous carriage, and does not qualify that with a requirement that there be a contract, is consistent with that view.

64. All cases turn on their own facts, to a greater or lesser degree, and in this case the Claim and Particulars are clear: they plead a claim for damages for breach of the Convention, they do not plead a claim in the law of contract. It is true that they refer to the choice-of-law clause in clause 2.4, to found the argument as to applicable law, but the claim as a whole is clearly not put as a claim for breach of contract but rather as a Convention claim to which it is said that, by reason of clause 2.4, the law of Ireland applies. I do not rule out the possibility that a claim could be pleaded in

contract relying on the incorporation of the Convention as a species of contractual indemnity but this claim is not put on that footing.

65. This being a claim made under the Convention, as such in my judgment it falls within the provisions of Art 4(1) of Rome II namely that it is a claim in respect of a non contractual obligation, and it arises out of a tort or delict, in the form of causing injury to the claimant through negligence. The Convention applies strict liability and it is informative that recital 11 of Rome II states:

"(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability."

As to the principles regarding applicable law recitals 17 and 18 state:

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

(18) The general rule in this Regulation should be the lex loci damni *provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country."*

The above is formally implemented by Art. 4. Article 4(1) sets out the basic principle:

"… the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur"

And the 'escape clause' mentioned in recital 18 is at Art. 4(3) with my emphasis:

"3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. ***A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."***

66. In my judgment the fact that the Convention speaks in terms of documentation and contractual arrangements, does not mean that a claim under the Convention is thereby a contract claim, rather the Convention puts in place arrangements which cover contractual matters as well as strict liability for injury, a classically tortious concept. Likewise the fact that Rome I includes provision relating to claims in contract arising from contracts of carriage does not logically have the effect that a claim under the Convention, framed non-contractually, must invariably be treated as if it is a contract claim.

67. The correct analysis in my judgment is this: this claim under the strict liability provisions in the Convention relating to bodily injury arising from an accident is most appropriately seen as falling within Rome II in terms of the applicable law relating to forum, and to choice-of-law to which I shall turn in a moment.

68. This approach finds acceptance in academic literature. See for example the paper by Prof. Thomas Kadner Graziano, "*THE LAW APPLICABLE TO TORT CLAIMS BROUGHT BY SECONDARY VICTIMS THE FLORIN LAZAR V. ALLIANZ SPA AND GERMANWINGS CASES*" (2016) Yearbook of Private International Law XVII, which treats claims by primary and indeed secondary victims of air accidents as being matters governed by Rome II Art 4(1) in terms of choice of law and discusses displacement of Art 4(1) in such cases where there is a choice of law clause in a (Rome I) contract of carriage.

69. The analysis there accords with my own view in this judgment which is that the relationship between the Convention on the one hand, and Rome I and Rome II on the other, is that the Convention governs liability, and Rome II governs forum and choice of law where the Convention does not stipulate applicable law. However the 'escape clause' of Art. 4 (3) of Rome II can have the effect that where a contract of carriage is entered into (itself of course governed by Rome I), entered into prior to the tort or delict in question, the existence of a choice-of-law provision in that contract can be a basis for saying that the choice of law provision in the contract displaces the presumption under Rome I Art 4(1) as to applicable law. Quoting the above paper at 485 with my own emphasis:

> *" The primary victims [in the Germanwings air disaster of 2015] were in a contractual relationship with the airline.* ***Given that the tort that deprived the passengers of their lives was closely connected with the contract of carriage, the law of the place of the accident would thus be displaced by the law governing this contract (accessory connecting mechanism or*** rattachement accessoire***). Thus, the question becomes "which law governs the contract between the primary victim and the airline?"***
>
> *The airline and the passenger formed a contract of carriage. In the Member States of the EU, the law applicable to this contract would be determined by the Rome I Regulation."*

70. Prior to locating the above paper I had reached effectively the same conclusion, and before circulating this judgment in draft I invited any observations from the parties as to the academic analysis given in the paper. I am grateful to counsel on both sides for their supplemental written submissions on the analysis in that paper. The claimant's

submissions essentially agreed with the analysis in the *Graziano* paper, subject to some qualifications. The Defendants' argument stressed the relatively unique analysis there (there appear to be few academic papers on this subject) and I shall quote the main points directly from the submission by Mr Loxton:

"It appears that Mr Graziano makes three relevant assertions in his article[2], namely:

(1) For claims pursued in EU Member States[3] to which the Montreal Convention applies, Rome II will apply, specifically article 4 (and its three sub-sections).

(2) However, for such claims, if there is a contract of carriage between the airline and the passenger then the provisions of article 4(3) of Rome II means the law governing the contract will apply (what he terms as the '*accessory connecting mechanism or rattachement accessoire*').

(3) The law applicable to '*pure contract of carriage*' cases is governed by article 5(2) of Rome I Regulation.

It should be noted that for none of the above propositions does Mr Graziano provide case or academic authority.

[…]

Secondly, the Defendant agrees with the first proposition that in a conflict of laws analysis for Montreal Convention cases brought in the EU or UK, the starting point is article 4 of Rome II (as set out at paragraph 35 onwards of the Skeleton Argument).

The Defendant strongly disagrees with the second proposition. […] it is noteworthy that neither of the two phrases '*accessory connecting mechanism'* or *'rattachement accessoire*' appear in ***Dicey, Morris & Collins on the Conflict of Laws***[4] (or indeed any other commentary on Westlaw or LexisNexis, save for another article from Mr Graziano dating back to 2005)."

71. The submission then goes on to make the point that even if the *Graziano* analysis is apt, it does not necessarily follow that the choice of law clause must apply, because (quoting *Dicey* Volume 2, Chapter 35, para.35-032.) under Art 4(3) of Rome II, '[T]*he requirement that the tort be manifestly more closely connected with the law of another*

[2] At pp.485-486.
[3] The same holds true for the UK post-Brexit as Rome I and Rome II have been retained in UK law.
[4] 15th Ed., 2018, Sweet & Maxwell.

country (which must be "clear from the circumstances of the case") emphasises that the court must be satisfied that the threshold of closer connection has been clearly demonstrated. ... The court must have regard to "all of the circumstances of the case"'

72. I remind myself that Art 4(3) singles out in particular that a 'manifestly closer connection' may be based in particular 'on a pre-existing relationship between the parties, such as a contract'.

73. In this instance we have a choice-of-law clause in the contract of carriage and the airline is clearly connected with the jurisdiction in question (Ireland) rather than a jurisdiction unsuitable and unconnected with the case. The question whether in any case Art. 4(3)'s 'escape clause' applies is a case-by-case one based on the issue of 'manifest connection', but in this instance the existence of such a choice-of-law clause fixing a choice of law which is connected with the airline's own place of domicile coupled with the very fact of the clear and unambiguous contractual choice of Irish Law, in my judgment satisfies Art. 4(3) and has the effect that for issues of cognisable damage and quantum, the law of this forum relating to choice-of-law clauses operates to hold that Irish law applies.

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MASTER VICTORIA MCCLOUD, sitting as trial Judge

Handed down 10/12/2021