THE HIGH COURT

[2021]IEHC 298

[RECORD NO: 2018 8309 P]

BETWEEN

HELEN FORDE

PLAINTIFF

AND

EMIRATES

DEFENDANT

EX-TEMPORAE RULING of Mr. Justice Mark Heslin delivered on the 22nd day of April, 2021

1. At the outset I want to thank both counsel and their instructing solicitors for the assistance which they have provided to the court. I was furnished and was grateful to receive in advance and took the opportunity to read very carefully a book of pleadings as well as two sets of detailed written legal submissions and a book of relevant authorities. Counsel supplemented their written submissions today with oral submissions made with great clarity and skill and they have been of enormous assistance to the court, and I have considered these very carefully in the context of the ruling I now give.

2. In the present case, the defendant issued a motion on the 10th February 2020 seeking either of two alternative reliefs, that is a trial of a preliminary issue or a modular trial, and I will refer in due course to the specific wording in the motion. The motion was initially returnable for the 9th March of 2020 but, no doubt due in large measure to the Covid-19 pandemic, it came before the court for hearing today. I have very carefully considered the contents of affidavits sworn by Mr. Gerard Carroll solicitor on the 10th February and on the 7th May 2020, on behalf of the defendant, who is the applicant, in today's motion and the contents of the affidavit sworn by Mr. Ian Murphy, solicitor for the plaintiff, on 10th March 2020 in circumstances where the plaintiff/respondent opposes entirely the reliefs sought.

3. The underlying proceedings were issued by way of a personal injuries summons which is dated the 20th September 2018, in which the plaintiff, who is a retired air hostess and who is currently 77 years of age, made a claim against Emirates Airlines in respect of injuries, loss and damage which she alleges arose in circumstances where she was fare-paying passenger on an Emirates flight on or about the 25 February 2017. The Indorsement of Claim to the Personal Injuries Summons makes *inter alia* the following pleas in relation to what is alleged to have occurred. At para. 3 of the Indorsement of Claim it is stated inter alia that:-

> *"she was caused to suffer personal injury, loss and damage when she was caused to suffer and sustain a trip and fall due to the presence of a set of wired head/ear phones in the aisle of the aircraft."*

Later, under the heading of "Particulars of Personal Injury Occasioned by the Wrong of the Defendant" the following is stated:-

"The plaintiff's leg became entangled in the wire of the head-/ear phones and she tripped and fell hitting her head/face on an armrest and landing heavily on the cabin floor on her right hand side".

4. In a Notice for Particulars which is dated the 7th November 2018, the plaintiff was called upon to provide full and detailed particulars of the provenance of the earphones and particulars as to whether or not the earphones were loose or plugged into an earphone jack at the time. The following replies to particulars were given by the plaintiff on the 12th December 2018, these appear at para. 2, (i) and (ii) of the replies, and there it is said at (i):-

"The plaintiff does not know where the earphones originated from. The plaintiff was only aware that the earphones were left in her path upon exiting the plane".

At (ii) it is stated: -

"The plaintiff states that the earphones were plugged into an earphone jack at the time on the aisle seat, however she cannot be sure about this".

5. In circumstances where the claim relates to injuries allegedly sustained in the course of a flight operated by the defendant from Dublin to Dubai, what is known as the "Warsaw" and subsequently and currently the "Montreal Convention" of 1999, as given effect to by the Air Navigation and Transport (International Conventions) Act 1936 – 2004, is of particular relevance. The Montreal Convention provides, in the manner I will discuss, what appears to be an exclusive system of remedies for passengers bringing claims against carriers in respect of international flights. This has been made clear including in particular in the 24 March 2011 High Court decision by Hedigan J. in *McAuley v. Aer Lingus & Ors*. [2011] IEHC 89, a case referred to at para. 6 of Mr. Carroll's first affidavit. At para. 27 of p. 396, the following is stated: -

"The Irish Courts have followed the Sidhu decision in finding that the Convention contains an exclusive and exhaustive code governing actions against carriers arising out of international carriage. In Smyth and Company Limited v Aer Turas Teoranta (Unreported, Supreme Court, 3 February, 1997) Blaney J held at 28: -

'"There is one further matter to which I should refer. Mr. Deeney said he was relying on a claim in negligence outside the Warsaw Convention. The respondent did not contest his right to make such a claim and therefore it did not become an issue in the appeal. It would appear, however, that where a claim is in respect of international carriage by air, a party with such a claim may be confined to such remedy as is given by the Convention. This would appear to be what was decided by the House of Lords in two cases reported in the London Times on the 13th December 1996, Sidhu and Others v. British Airways Plc 1997 AC 430 and Abnett (known as Sykes) v. British Airways Plc. The Court decided that Article 17 of the Warsaw Convention provided that the only remedy open to a passenger claiming to have suffered personal injuries

arising from an international flight was under the Convention and that the Convention contained an exclusive and exhaustive code governing such actions and excluded actions brought under common law'".

6. It is also appropriate and useful to quote from the headnote in McAuley, 3 IR 383, which states as follows: -

"Held by the High Court (Hedigan J.) in striking out the plaintiff's claim: -

(1) That the Montreal Convention contained an exclusive and exhaustive governing actions against carriers arising out of international air carriage and as Article 17.1 of the Convention provided that the liability of an air carrier was limited to cases of death and bodily injury, it was clear that the plaintiff could not succeed in a case for defamation, Sidhu v. British Airways and Smyth and Company Limited v Aer Turas Teoranta followed".

7. In light of what this Court has held in *McAuley*, I am satisfied that for the purposes of this application the Montreal Convention provides a standalone self-contained and exclusive remedy for passengers making civil claims arising from international air carriage. It is also appropriate to say that it is a Convention which has plainly been adopted in many jurisdictions and unsurprisingly therefore cases to which this Court's attention has been directed, being cases which have considered the provisions of the Convention, including the *Barclay* decision to which I will refer presently, stress the importance of common construction of the Convention provisions in all the jurisdictions in which it has been adopted.

8. The Montreal Convention and the legislation which incorporates it in to Irish law are specifically pleaded at para. 5 of the Indorsement of Claim in the Personal Injury Summons, in which pleas are also made of "negligence" and "nuisance", these being of course common law principles. The Personal Injuries Summons also pleads *inter alia* a "breach of duty", including "breach of statutory" duty. It is clear however that the incident in question occurred on an aeroplane involved in an international flight and I have already made comments in respect of the Convention in that regard. To make that observation, i.e. that the accident occurred on an aeroplane is to state a fact and also to highlight that this is not a typical personal injuries claim against, for example, an Irish defendant where in such a claim there is no dispute as to the entitlement to sue relying on common law principles including negligence and, indeed, relying on duties under Irish statute law.

9. This Court cannot ignore the significance of the Convention and Article 17 of the Convention in particular. The Defence delivered by Emirates on the 13th January 2020 admits the identity of the parties, and that the defendant was a carrier and that the plaintiff was a "passenger" under the Montreal Convention. The plaintiff is put on full proof of the circumstances alleged to have resulted in her sustaining personal injuries and it is specifically denied that the circumstances pleaded constitute an "accident" within the meaning of Article 17 of the Montreal Convention. It is also pleaded in the Defence that the plaintiff's claim is exclusively governed by the Montreal Convention as given effect to

by Part 2 of the 2004 Air Navigation and Transport (International Conventions) Act, and it is pleaded that the plaintiff's claim for negligence, nuisance, breach of duty, breach of statutory duty and other common law claims are otiose and misconceived. Liability under the Convention is denied and, among other pleas, the Defence places the plaintiff on full proof of all personal injuries claimed and places her on full proof of all special damages.

10. Article 17 of the Convention, a copy of which has been opened to the court today states the following in relation to and under the heading of "Death and injury of passengers – damage to baggage": -

> *"1. 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".*

11. As one can see, Article 7.1 makes reference to "the accident" and counsel for the applicant Mr. Buckley, has helpfully directed the court to a number of cases where the concept of "accident" was examined. These include a 1985 decision by the United States Supreme Court in the case of *Air France v. Sachs*, where that court stated that an accident arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. Mr. Buckley has also drawn the court's attention to a 2008 decision in *Barclay v. British Airways plc.* [2008] EWCA Civ. 1419, in which the first instance court and, on appeal, the Court of Appeal held that there had been no unexpected or unusual event and therefore no accident within the meaning of the relevant article in the Convention. In that case, the claimant slipped on a strip of plastic embedded in the aircraft floor on the way into her seat. The court found that rather than an "accident" this was a "mere fall". In the applicant's written submissions, reference is also made to *Chaudhry v. British Airways plc.* [1997] EWCA Civ. 1413 where Leggett L.J. in the Court of Appeal followed the decision in *Sachs*, holding that accident is not to be construed as including any injuries caused by the passenger's particular personal or peculiar reaction to the normal operation of the aircraft, notwithstanding that a fall and injury in that case was sustained by the claimant, who it appears, suffered from left side paralysis. The applicant's submissions also drew the court's attention to the decision in *Rafailov v. El Al Israel,* 15 March 2008, where despite the plaintiff slipping on an empty plastic bag beneath a nearby seat and sustaining injury in a fall, the court did not consider this to be an "accident" within the meaning of the Montreal Convention, stating that: *"after four hours in flight, it would seem customary to encounter a certain amount of refuse on an aeroplane floor including blanket bags discarded by passengers who had removed the bag's content in order to use the blanket."* The court in *Rafailov* found that the event was neither unexpected nor an unusual event external to the passenger and similar approaches appear to have been taken in other cases including *Craig v. Air France*, a 1994 United States decision where the claimant failed in her claim. In that case, despite slipping and falling on shoes belonging to another passenger on the floor between two seats of the relevant aircraft, this was not considered to be an accident under the Convention. Similarly, *Vanderwall v. United Airlines* (80 F. Supp. 3d 1324), was a case

which involved a translucent plastic on the floor, but even though there were disputes as to fact in that case, the court decided the case on a limited and undisputed fact, namely the presence of plastic on the floor and it held that the relevant incident did not constitute an "accident".

12. I also note the contents of an extract in the book of authorities from the text in respect of "Principles of Liability in Passenger Cases" which refers among other things to the decisions in *Chaudhry, Sachs* and in *Barclay* and copies of the judgments in *Barclay, Craig* and *Vanderwall* as well as the other authorities which appear helpfully in a book provided to me and which I had the opportunity to read in advance as well as noting what was opened to the court today.

13. Now, in saying the above, I am not for a moment purporting to make any finding as to whether what the plaintiff has pleaded does or does not come within the concept of an accident as contemplated by the Montreal Convention. It is however very clear that such an issue arises in the present case, and in my view it can fairly be said to be a discreet issue. In other words, depending on how that issue is resolved, there are likely to be significant consequences. It is in this context that the applicant moves today's motion which seeks one of two alternative reliefs which are urged on the court, and as to those, para. 1 seeks an order pursuant to O. 25, r. 1 and/or O. 34, r 2 RSC setting down for trial as a preliminary issue of law the following: -

    i. Whether the alleged acts described in the personal injuries summons, namely a trip and fall due to the presence of a set of wired head/ear phones in the aisle of the aircraft constitute an accident within the meaning of Article 17 of the Montreal Convention as incorporated into Irish law by the relevant Act of 2004;

    In the alternative, the defendant as applicant in the motion seeks an order pursuant to O. 36, r. 9 (1) RSC setting down for modular trial the following mixed question of fact and law, that is:-

    i. The factual circumstances of the plaintiff's alleged trip and fall in or about 25th February 2017 on board Flight EK 164;

    ii. Whether the said factual circumstances as may be found constitute an accident within the meaning of Article 17 of the Montreal Convention as incorporated by the 2004 Act.

14. In the context of today's ruling, I very carefully noted and have taken full account of all submissions made by the plaintiff/respondent including detailed written submissions and among these is a reference from Shawcross and Beaumont on Air Law, Issue 171, June 2020 at p. 685, in which the authors note that authorities in England and in the United States required some event which happened independently of anything done or omitted by the passenger in order for an accident to be established within the meaning of the Convention. The authors set out this analysis in the context of discussing the *Barclay* decision, and the authors go on to observe that:-

"to hold otherwise would mean that any slip or fall resulting merely from contact with an inert piece of equipment installed and operating as intended would constitute an accident, and the Court of Appeal considered that such a result would offend against the balance struck by the Conventions."

15. The plaintiff's written submissions underline and emphasise the words **"**installed and operating as intended**"**. That does not of course mean that a fall as a result of contact with material which is *not* "installed" will necessarily constitute an accident for the purposes of Article 17, nor, as I want to emphasise once more, is today's application a determination of any such issue. It is however perfectly clear that such an issue does arise in the present case. That view is fortified indeed by the various authorities which the plaintiff/respondent has referred to in written submissions, including the 2009 Australian case of *Airlink PTY v. Patterson*, a New South Wales Court of Appeal decision [2009] NSWCA 251, in which an airline was held liable where a disembarking passenger was injured when a step moved beneath him. Reference is also made in the plaintiff's written submissions to incidents deemed to constitute accidents within the meaning of Article 17 (1) as found in *Wassmann v. CIS Mexicana de Aviacion SA*, a 1998 decision where a passenger was injured by a hypodermic needle protruding from fabric in the seat in front of him, and in the case of *Sharma v. Virgin Atlantic Airways*, a case concerning a fall in an aircraft lavatory caused by slippery material on the floor, thought to be soap.

16. In my view, the range of cases drawn to this Court's attention by both parties and the various decisions as to what is or is not an accident within the meaning of Article 17 (1) of the Convention, coupled with the Supreme Court's observations in *Smyth* and this Court's decision in *McAuley*, make it perfectly clear that there is a discreet issue in this case, the determination of which is fundamentally important to the claim which the plaintiff brings. There is no doubt and no dispute between the parties as to the power of this Court under the Superior Courts Rules to direct, in an appropriate case, the trial of a preliminary issue or, where appropriate, to order a modular trial. Among other things, I have taken very full account of what is said by both sides in relation to a range of issues canvassed, including what is said in relation to the anticipated duration of a full trial, were that to proceed as a unitary hearing and I note the defendant's estimate is of four days whereas the plaintiff's estimate is two to three. It is not in dispute however that the claim made is a significant one and a substantial one. The plaintiff pleads among other things that the incident has had a profound effect on her confidence and on her physical capacity in and around caring for herself and it is also pleaded that, as a consequence of the incident, the plaintiff has had to move into long-term residential care in a nursing home. It is also pleaded that the plaintiff will require ongoing long-term care and is unlikely ever to regain her independence. As per Replies to Particulars delivered on the 12th December 2018, special damages in respect of nursing home fees of €53,046.65 for the year 2018 and €20,478.62 for 2017 are sought. General damages are also sought and, given the claim that it was the incident which was in effect life changing for the plaintiff, and given that further special damages in respect of nursing home costs for 2019, 2020 and 2021 may well be sought, as well as the fact that it is pleaded that the plaintiff continues to suffer

adverse sequelae, this is a claim which is clearly of some complexity and a substantial claim with expert evidence likely to be required including by a number of witnesses.

17. Taking just one issue, it seems to me likely that there would be several witnesses in respect of the plaintiff's alleged injuries and treatment. I say this in circumstances where in addition to referring to treatment by paramedics at the scene and reference being made to treating doctors bringing bleeding under control, the personal injuries summons refers to treatment of the plaintiff by her general practitioner and to long-term care which is being provided to her. Furthermore, and apart from those providing nursing home care and her GP, the plaintiff's Replies to Particulars also refer to the plaintiff having being reviewed by a Mr. Conor Hurson of St. Vincent's Private Hospital in the context of obtaining a medical report. Reference is also made in the December 2018 Particulars to the plaintiff having sustained a pre-accident injury to three vertebrae in her mid-back five years prior to the index incident, as a result of a fall at her home, with reference also being made to a post-incident injury to the plaintiff's left leg and coccyx due to a fall on or about the 7th January 2018 as a result of which the plaintiff was brought to Blackrock Clinic for treatment. In addition to the foregoing, which of course relates to the plaintiff's witnesses, medical experts will no doubt be called to give evidence on behalf of the defendant. Given the nature of the pleaded claim, the entirety of the witness evidence on this issue alone could take some considerable portion of an overall trial.

18. In an uncontroverted averment made at para. 5 of Mr. Carroll's 7th May 2020 affidavit, he states that it may be necessary to hear evidence from orthopaedic surgeons owing to the presence of prior back conditions, geriatricians and very potentially other disciplines, depending on how the claim progresses and he also refers to separate expert witnesses being required to assess the plaintiff's cost of care claim. In contrast, whether the incident constitutes an "accident" for the purposes of the Convention is a discreet issue, but one of obvious significance given the pleaded claim.

19. Among the submissions made orally today with skill by Mr. Fitzgerald is the submission that the plaintiff's claim is brought in light of the Montreal Convention applying and on the basis that it does apply but also the submission is made that the claims by the plaintiff in negligence and nuisance etc., are as Mr. Fitzgerald put it, "alive and well". He cited para. 50 and 51 of the Supreme Court's decision in *Smyth*. He submitted that what Hedigan J. did in *McAuley* was to refer only to para. 50 of Blaney J.'s decision in *Smyth* and he laid emphasis on the fact that the High Court did not refer to para. 51 from *Smyth.* The gravamen of his submission was to say that the plaintiff's claim in the alternative, based on common law principles, remains alive and he took issue also with the phrase in the defendant's submissions that it is "reasonably settled" that the Montreal Convention represents an exclusive and exhaustive liability code. This application however proceeds in circumstances where both the plaintiff and the defendant have engaged on the basis that the Convention applies and, as to the submission that it is open to the plaintiff to make alternative claims derived from common law principles including negligence and nuisance as well as breach of duty, I take the view that this Court simply cannot ignore the existence of a decision given in 2011 by this Court to the effect that the Convention

contains what is an exclusive and exhaustive code governing actions against carriers arising from international air carriage.

20. At para. 28 of Hedigan J.'s decision in *McAuley*, having referred to the Supreme Court's decision in *Smyth*, he went on to refer, *inter alia*, to a Circuit Court decision by Her Honour Judge Linnane in *Nolan v. Aer Lingus* on 9 November 2009, in which a plaintiff's claim was struck out on the basis that there was no common law remedy outside of the Convention and I observe at this juncture I am not aware of any appeal, much less a successful appeal against that decision. Reference was also made by Hedigan J. in *McAuley* to extracts which had been cited from "Dicey & Morris on "Conflict of Laws" wherein it was pointed out that the purpose of an international convention is to harmonise the laws of all contracting states on the particular topic dealt with by the convention and it is not in dispute that the Convention has been given force of law by the relevant Act of 2004 in this jurisdiction. Most especially, Hedigan J. states at that juncture that: - *"On the basis of these authorities, it is quite clear that the plaintiff cannot succeed in relation to his claim that he was defamed whilst disembarking the aircraft*". Earlier in this ruling, I quoted the heading to the Irish Reports decision, which set out what was held. Based on the state of the law as opened to the court, I cannot for the purposes of this application take the view that Hedigan J. was wrong. I cannot, contrary to the High Court's decision in *McAuley*, and against the backdrop of the Supreme Court's statements in *Smyth*, adopt the position that the Convention as given force of law in Ireland by s. 4 (1) of the relevant Act of 2004 does not contain an exclusive and exhaustive code governing actions such as the present one. Comments made *obiter* in *Smyth* undoubtedly comprise what is the *ratio* of the decision in *McAuley,* and I regard myself as obliged to have regard to that.

21. Among his submissions, Mr. Fitzgerald took issue with the use of the term "detritus", and I will presently refer to the response by Mr. Buckley in that regard, detritus being a phrase which appeared in certain cases as analysed in the submissions. Mr. Fitzgerald also submits that there is no agreed statement of facts as between the parties. He takes issue with the averment that it should be eminently possible for the parties to agree a set of assumed facts. At this juncture, I think it is appropriate to point to the case *Elliot v. ACC Bank plc & Anor* [2020] IECA 278, which was opened to the court and in which the Court of Appeal did not criticise the High Court's entitlement to set down a preliminary issue, even though in that case the High Court also permitted the defendant to give evidence should they wish, the issue in that case being the statute of limitations. Even more appropriate, however, is to point out that the defendant/applicant has made very clear that it is willing to accept entirely all the facts pleaded in respect of the incident and is prepared to do so for the purposes of the hearing of a preliminary matter. On behalf of the plaintiff, Mr. Fitzgerald also takes issue with several of the contents of the affidavit sworn on behalf of the defendant insofar as the defendant asserts that the relief sought is appropriate. Mr. Fitzgerald opened the *Vanderwall* case, submitting that the question of whether the incident constitutes an accident cannot be decided today and he used the decision in *Vanderwall* to illustrate the type of factual evidence which, he submits, would be necessary before a court could decide if the incident was an "accident" pursuant to the Convention. He also submitted that a lot of other facts and a lot of other evidence would

be needed and submitted that in other jurisdictions these facts can come before courts by way of, for example, depositions or filings which, he submits, do not feature in this jurisdiction. The court as I say, and as I have emphasised, is making no determination today as to whether the incident constituted an accident within the meaning of the Convention.

22. Mr. Fitzgerald also made submissions to the effect that the facts in other decisions should be distinguished, and should be distinguished from the facts arising in the present case. In particular, he submitted that "trash", to use the American term, on the floor causing a fall is not comparable to the facts in the plaintiff's case where the plaintiff, it is pleaded, tripped and fell due to the presence of earphones. I have very carefully considered all Mr. Fitzgerald's submissions which concluded with a submission, in short, that the defendant had failed entirely in their proofs and that no relief should be granted, Mr. Fitzgerald also submitting to the court that there was no saving of time or cost identified or indeed possible.

23. In response, Mr. Buckley pointed out that it is not canvassed in the plaintiff's written submissions that the Convention is not the exclusive remedy in cases such as this, but he submits that it is settled law that the Convention provides this and, for the purposes of dealing with this application, that is a submission I am bound to accept for the reasons given. He also stressed that the defendant is prepared to accept the facts and all the facts pleaded and indeed all the facts averred to, insofar as the incident is concerned, for the purposes of the reliefs sought. As to "detritus", Mr. Buckley made clear that it is not claimed that the earphones are said by the defendant to be detritus. In other cases, various items including things described as detritus were found on the floor but the question, as Mr. Buckley rightly says, revolves around whether the presence of headphones in the context of the pleaded claim amounts to an accident within the meaning of the Convention and, among his submissions, were that it is Mr. Murphy's affidavit which expands the list of witnesses said to be necessary. The thrust of the submissions by Mr. Buckley being very clearly that there was a discreet issue capable of determination and, for the reasons advanced, either of the reliefs were canvassed with an acknowledgment that the court may find one or other more appropriate. In his submissions Mr. Buckley made clear his view that very little of the plaintiff's arguments were directed to the defendant's proposition that a modular trial was appropriate. He also took issue with the suggestion that time had been lost; plainly some time has been lost due no doubt to the impact of Covid-19 restrictions, but his submission was very much to the effect that no time would be lost as a result of a modular trial being directed or, for that matter, a preliminary issue being set down for hearing.

24. As to the relevant test with regard to the setting down of a preliminary issue, this was set out by McKechnie J. in *Campion v. South Tipperary County Council* [2015] 1 IR 716, and before turning to look at that test, let me emphasise that I am very much aware that the default position for this Court is that a unitary hearing should take place and would normally take place. I have approached today's application from the perspective that the court leans against directing either a trial of a preliminary issue or a modular trial. There

is no dispute however, between the parties as to the correctness of this Court taking the approach which was outlined by McKechnie J. in *Campion*, and doing so in my view produces the following result.

25. Firstly, I am satisfied that there does not exist a dispute as to the material facts asserted by the relevant party in circumstances where the defendant has made clear that for the purposes of the application it is prepared to accept the fact as pleaded, both in the plenary summons and in the reply to particulars and indeed indicated a preparedness to accept the facts as averred to in the plaintiff's solicitor's affidavit in response to the motion. I do have to say that whether there are other facts which have not yet emerged from evidence and which may or may not be in dispute but which may be relevant to a determination of the issue as to whether the incident constituted an accident is a separate issue to which I shall return presently.

26. Secondly, I am satisfied that there is a question of law which is discreet which can be distilled from the factual matrix as presented. I would add however that whether the facts distilled are entirely sufficient, as matters stand, to enable the issue of law to be determined is a separate issue which gives rise to certain concerns and for that reason I will refer to it again shortly.

27. Thirdly, I am satisfied that a saving of time and of cost will arise and this is averred to by Mr. Carroll who also avers at para. 13 of his 7th February 2020 affidavit that *"if for some reason the facts are not agreed, I believe the necessary facts as to whether the circumstances constituted the accident could be easily and discreetly determined in well under half a day."*

28. Fourthly, it is beyond doubt in my view that the determination of the issue has the potential to impact greatly on the entire case.

29. Fifthly, I also take the view that the determination of this key issue would benefit the action in an overall sense.

30. Sixthly, as to whether it is convenient for the court to make such an order, noting that the concept of convenience involves a consideration of all aspects and noting of course and most especially that an appropriate and vital consideration for the court is the interests of justice, I do have certain concerns, and I feel that given those concerns, it is appropriate to err on the side of caution, and to explain what I mean, even though the defendant is willing to accept the facts as pleaded and indeed as averred in relation to the incident for the purposes of the determination of a preliminary issue, Mr. Murphy makes averments on behalf of the plaintiff to the effect that a more detailed factual matrix would need to be before the court than is pleaded in the Personal Injuries Summons and Replies to Particulars in order for the court to make a determination as to whether the incident constituted an accident within the meaning of Article 17 of the Montreal Convention. I am not in a position to decide fairly, I believe, whether that averment is or is not true, but as I say, I think it is appropriate for this Court to err on the side of caution, in the manner explained in this ruling.

31. The possibility that the court might have concerns as to the sufficiency of evidence of fact in order to determine the issue as a preliminary one is very clear from the contents both of Mr. Carroll's affidavits and the defendant's submissions and was reflected, of course, in the fact that the defendant, as applicant, sought the alternative relief at para. 2 of the motion. Guided by the crucial consideration of ensuring the overall justice of the case, I have come to the view that, although there were numerous factors very much in favour of the trial of a preliminary issue, this Court should direct a modular trial, in the terms set out at para. 2 of the motion. This is a relief which the plaintiff/respondent also opposed, but in my view, it is relief which without doubt should be granted.

32. In coming to this decision I have taken full account of all submissions made with such skill on behalf of the plaintiff, both oral and indeed the written submissions as well as all averments made by Mr. Murphy. I cannot, however, agree with the assertion made to the effect that a modular trial does not offer the prospect of any savings in time or cost, nor do I accept the assertion that a modular trial of the type sought is likely to increase the costs and duration of the trial due to what is described in para. 14 of Mr. Murphy's affidavit as the potential for duplication in evidence. Neither the evidence of those who treated the plaintiff in the immediate aftermath of the incident, nor her GP's evidence is required to determine if the incident was an "accident" within the meaning of Article 17.1, nor is any evidence necessary from the consultant, Mr. Hurson, who examined the plaintiff in St. Vincent's. Similarly, no evidence is required from anyone currently providing care to the plaintiff at Our Lady's Manor Nursing Home in order to determine the mixed question of fact and law referred to at para. 2 of the motion. Equally, evidence regarding her falls both pre and post-incident, would not appear to be necessary in that regard, nor would it seem necessary for the court to hear from such medical or other experts as the defendant might call in order to deal with issues such as the nature of the plaintiff's injuries and the consequences for her or touching on quantum, in particular what Mr. Carroll refers to as the cost of care claim in para. 5 of his 7th May 2020 affidavit and what is undoubtedly a substantial special damages claim. None of this evidence is likely to be repeated and my view that it is appropriate to direct a modular trial as per para. 2 of the applicant's motion is also guided very much by the principles referred to by Clarke J. (as he then was) in *Cork Plastics Manufacturing v. Ineos Compounds (UK) Ltd*., a 2008 High Court decision at 93. I am satisfied that it is without doubt both just and convenient to make this order, in particular I am satisfied that doing so reflects both the interests of justice and the most effective use of court time with a real prospect of saving both costs and time.

33. On the evidence before this Court, there are very distinct issues as to liability, as opposed to quantum. Claims for Personal Injuries are common but this is not a common or typical claim in respect of personal injuries. Whether or not there was an "accident" within the meaning of a convention which constitutes the exclusive system or remedies for passengers bringing claims against international air carriers according to what was held in *McAuley*, is a fundamentally different issue to what injuries were suffered or what effect they have on a plaintiff or the question of quantum. I am satisfied there is no question of any third party being involved in some aspect only of the present claim in circumstances

where a modular trial is directed. It is not a case where a range of approaches to the calculation of potential damages depends upon the basis upon which liability may be established. There is no question of the modular trial being ordered having the knock on effect of creating an unnecessary hearing, for example as to quantum or any other issue. I am also very satisfied that there are unlikely to be significant, if any ,overlaps in the evidence of relevant witnesses when one looks at the different modules in all scenarios. Taking all issues into account including the principles outlined by Charleton J. in *McCann v. Desmond* [2010] 4 IR 544, a modular trial is in my view undoubtedly appropriate. The issues to be tried by way of a preliminary module are readily capable of determination in isolation from other issues such as, most obviously, the nature of the injuries and the effect on the plaintiff and issues touching on quantum. A clear saving in terms of time and costs arises in this context, and in the context of the need to administer justice in the entire circumstances of the case. No prejudice to any party is likely to arise and I take the view that a modular approach is likely to be of genuine assistance to the proceedings and to both parties in the proceedings. By ordering the modular trial, this will, I am satisfied, meet the interests of justice and, in my view, any concerns raised on behalf of the plaintiff/respondent. Doing so will ensure that oral testimony as to all facts said to be relevant to the question can be given to the court determining the issue, being an issue so plainly of relevance to the underlying claim and being a distinct and discreet one. A modular approach is in my view in ease of both sides, not least because if the plaintiff establishes an "accident" within the meaning of the Convention a strict liability regime would appear to arise, rendering it unnecessary to call, for example, an expert on negligence such as referred to by Mr. Murphy in his affidavit. In my view the contents of the pleadings and the nature of the case undoubtedly justified the bringing of the application today which very appropriately included the alternative relief at para. 2. Erring on the side of caution, I have decided for the reasons given that the more appropriate relief is that sought at para. 2.

34. I have to say that had, for example, the Personal Injuries Summons or the Replies to Particulars contained a very full and detailed and exhaustive account of all factual circumstances said to relate to the plaintiff's alleged trip and fall, it would have been appropriate in my view to grant the relief at para. 1 of the motion. Because the details as to fact furnished by the plaintiff to date may not be sufficient to enable a court to determine the preliminary issue, I have decided to grant the relief at para. 2 rather than at para. 1.

35. It is also fair, I think, to observe that in para. 7 of his affidavit, Mr. Murphy provides additional detail which is not found in the Personal Injuries Summons or in the Replies to Particulars in relation to what is said to be certain facts concerning the incident. These include that the plaintiff requested assistance due to her age and that she was assisted by cabin crew in attempting to disembark, and that she waited until all other passengers had disembarked prior to herself attempting to do so. That is not for a moment to make any criticism whatsoever of the pleadings to date, or of the affidavits which were undoubtedly helpful in determining the matter today, but it is to say that if an exhaustive factual account of the incident had been given, the relief at para. 1 would in my view have been

appropriate. As things stand, the ascertaining at a modular trial of fuller facts and the full facts of the incident seem to be to be eminently possible and doing so in respect of a trial in a modular manner seems to me to be likely to result in savings.

36. While making no direction of course, it is appropriate to say that if there is any difficulty with the plaintiff travelling to court to give evidence, the question of the appropriateness of giving evidence remotely is an obvious one which could be explored. In short, the reality is that despite the great skill with which the application was opposed, the facts which emerged from an analysis of the pleaded case mean that given its particular nature, and the clear issue arising in respect of the Convention, an issue which certainly does not arise in a common or routine personal injuries claim resulting from a fall, a modular trial is undoubtedly needed in the interests of justice and in ease of both sides. I also want to say that even if this Court were entirely wrong to follow the *ratio* of *McAuley*, whether or not the incident constitutes an accident under the Convention is still a very significant issue in the case and justifies a modular approach in respect of that issue.

37. I should also say that, even though a significant portion of the affidavits and submissions concerned the reliefs sought at para. 1 of the motion, all material before the court was undoubtedly in my view relevant and helpful to the court in relation to the relief now granted at para. 2 of the motion. In truth, the application as made, and as it ran today, was one in which alternative relief was at all material times sought and, in reality, a similar basis was advanced in relation to both alternative reliefs. The issue in reality was a single one, namely whether the incident constitutes an "accident" and the approach which this Court is satisfied should be taken in respect of what is a successful motion constitutes the difference; namely whether to direct a preliminary trial of a purely legal issue or to direct a modular trial so that evidence as to fact could be given in the context of the same issue being determined. For the reasons given in this ruling I am satisfied that the relief at para. 2 should be granted. I am also satisfied that there has been no waste of time in relation to the application brought by the defendant/applicant. This was not a situation for example where, in the discovery context, two distinct and different categories of documents are sought, one of which should never have been sought. On the contrary, the application was an appropriate one. The plaintiff/respondent it has to be said, resisted both reliefs which were sought in the alternative. Only one relief was ever going to be granted and could ever be granted if the motion was successful. Again, wholly unlike a discovery application where an applicant who seeks two categories hopes and expects to receive an order in respect of both categories, there was never any question of this Court being able to grant both orders and this is of course a position all parties have been aware of at all material times. Therefore, the defendant has been successful in its application which the plaintiff/respondent resisted unsuccessfully and, for the reasons given in this ruling I am granting relief in terms of para. 2 of the motion.

38. I thought it was appropriate given the skill with which the submissions had been made written and orally and given the issues in dispute to give a very detailed ruling in respect of the court's decision and as I say, I will now invite the parties to address any other issue which arises.