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The Montreal Convention 1999 and the Decisions of the ECJ in the Cases of *IATA* and *Sturgeon* – in Harmony or Discord?

Robert Lawson & Tim Marland*

This article considers Regulation (EC) No. 261/2004 in so far as it deals with delay in the carriage by air of passengers, as interpreted by the European Court of Justice in the cases of R. (on the application of International Air Transport Association and European Low Fares Airline Association) v. Department of Transport *and* Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France SA. *It considers whether these two cases are consistent with each other and with the Montreal Convention (in respect of carriage to which the Convention and Regulation 261 both apply). It concludes that they are irreconcilable with each other and that if the* IATA *case is consistent with the Montreal Convention, as it purports to be, then* Sturgeon *is not.*

1. Introduction

Regulation (EC) No. 261/2004[1] (hereinafter 'Regulation 261') applies to: passengers departing from an airport located in the territory of a Member State to which the Treaty establishing the European Community applies; and to passengers departing from an airport located in a third country to an airport situated in the territory of an EC Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.[2]

Article 5 of Regulation 261 imposes liability upon carriers '[i]n the case of cancellation of a flight'. This includes 'the right to compensation by the operating carrier in accordance with Article 7' unless certain requirements are met.[3]

Article 7 in turn states that:

> 1. Where reference is made to this Article, passengers shall receive compensation amounting to:
> (a) EUR 250 for all flights of 1500 kilometres or less;

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[1] Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91 (OJ 2004 L 46, 1).

[2] Article 3(1). However, re Gibraltar, see Art. 1(2)–(3). For the definition of 'Community carrier', see Art. 2(c).

[3] See Art. 5(1)(c).

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(b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 kilometres and 3500 kilometres;
(c) EUR 600 for all flights not falling under (a) or (b).

It further provides for a reduction in compensation by 50% in certain prescribed circumstances.[4]

Article 6 of Regulation 261 deals with delay. It provides that:

1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:
   (a) for two hours or more in the case of flights of 1500 kilometres or less; or
   (b) for three hours or more in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 kilometres and 3500 kilometres; or
   (c) for four hours or more in the case of all flights not falling under (a) or (b), passengers shall be offered by the operating air carrier:
      (i) the assistance specified in Article 9(1)(a) and 9(2); and
      (ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and
      (iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).
2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.

In *Sturgeon v. Condor Flugdienst GmbH and Böck v. Air France SA*[5] (hereinafter '*Sturgeon*'), the Fourth Chamber of the European Court of Justice (ECJ) held, in effect, that the right to compensation contained in Article 7 of Regulation 261 is to be read into Article 6, so as to be recoverable against a carrier in respect of delay, notwithstanding that this is clearly contrary to what Regulation 261 actually says. At paragraph 69 of its judgment, the Court concluded that:

> Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

On any reasoned analysis, in so doing, the Fourth Chamber indulged in an act of judicial legislation.[6] Much has been written in criticism of this decision, especially by reference to principles of European law. Our purpose is to consider whether the decision in *Sturgeon* is compatible with the Montreal Convention 1999[7] and with the decision of the Grand

[4] See Art. 7(2).
[5] Joined Cases C-402/07 and C-432/07, judgment 19 Nov. 2009.
[6] Indeed, in para. 69 of the *Sturgeon* judgment, the Fourth Chamber even added a concept of delay in arrival at destination even though this is not addressed by Art. 6 (which concerns only delay to the scheduled time of departure).
[7] The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999.

Chamber of the ECJ in *R. (on the application of International Air Transport Association and European Low Fares Airline Association) v. Department of Transport*[8] (hereinafter the *IATA* case). Our conclusion is that it is not.

2. The Montreal Convention

The Montreal Convention applies to 'all international carriage of persons . . . performed by aircraft for reward' as defined therein.[9] It is part of European law: the European Community signed this treaty in its own right, as did all of its Member States in their own right; it was approved by the EC Council,[10] and Regulation (EC) No. 2027/97 as amended by Regulation (EC) No. 889/2002[11] (hereinafter 'Regulation 2027 as amended') has prescribed that the liability of Community carriers in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability (whether that carriage is 'international' as defined in the Convention or otherwise).[12] Moreover, the ECJ has held that:

> 35. Article 300(7) EC provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation (Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, paragraph 52, and Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33).
> 36. The Montreal Convention, signed by the Community on 9 December 1999 on the basis of Article 300(2) EC, was approved by Council decision of 5 April 2001 and entered into force, so far as concerns the Community, on 28 June 2004. Therefore from that last date the provisions of that Convention have, in accordance with settled case-law, been an integral part of the Community legal order (Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).[13]

The Montreal Convention will, accordingly, prevail over the provisions of Regulation 261 should the two conflict.

As its preamble makes clear, the Montreal Convention is the successor to the Warsaw Convention of 1929[14] and related instruments. It was intended to 'modernize and consolidate' the same,[15] the parties being 'CONVINCED that collective State action for

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[8] Case C-344/04, judgment 10 Jan. 2006.

[9] See its Art. 1, which defines 'international carriage' as '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 State Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party'. Art. 1 also provides that the Convention 'applies equally to gratuitous carriage by aircraft performed by an air transport undertaking'.

[10] Council Decision (EC) 2001/539 (OJ 2001 L 194, 38).

[11] Regulation (EC) No. 889/2002 of the European Parliament and Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents (OJ 2002, L 140, 2).

[12] See its Arts 1 and 3.

[13] The IATA case, paras 35–36. See also *Emirates Airlines – Direktion für Deutschland v. Schenkel*, Case C-173/07, judgment 10 Jul. 2008, para. 43 – a decision of the Fourth Chamber.

[14] The Convention for the Unification of Certain Rules relating to International Carriage by Air, signed in Warsaw on 12 Oct. 1929.

[15] See the first and second recitals of its preamble.

further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests'.[16] To this end, it uses the same structure as the Warsaw Convention (albeit also taking in subsequent related instruments), and many of its articles are worded with no material difference.

The title to the Montreal Convention asserts that it unifies certain rules for international carriage by air. Those unified rules include, by its Chapter III, 'Liability of the Carrier and extent of Compensation for Damage'. In short, this chapter provides a comprehensive liability code, namely (among other things), causes of action,[17] potential defences for the carrier,[18] a maximum limit of liability,[19] a prohibition on contracting upon terms more favourable to the carrier,[20] a jurisdiction provision,[21] and a prescription period within which any action must be brought.[22] By its Article 29, it makes this code exclusive in operation.[23] Article 29 provides that:

> In the carriage of passengers, baggage and cargo, *any action for damages, however founded,* whether under this Convention or in contract or in tort or otherwise, *can only be brought subject to the conditions and such limits of liability as are set out in this Convention* without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. *In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable* (emphasis added).

Pertinently, one of the causes of action provided by the Montreal Convention is for delay. Its Article 19 states:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

However, its Article 22(1) limits that liability of the carrier for each passenger to a maximum sum of 4,150 Special Drawing Rights.[24]

The Montreal Convention therefore provides a right to compensatory damages for 'damage occasioned by delay' in the international carriage by air of passengers.

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[16] See the fifth recital of its preamble.

[17] See its Arts 17–19, of which its Art. 19 relates to delay (and is quoted below).

[18] Re delay, see the second sentence of its Art. 19 (quoted below). See also generally its Art. 20 and its Art. 21, noting that although the latter provides a defence in certain circumstances, it does not do so in respect of delay.

[19] See its Arts 22–24.

[20] See its Art. 26.

[21] See its Art. 33.

[22] See its Art. 35.

[23] The effect of this article in making the liability code exclusive in combination with the structure of the convention is well established in respect of the corresponding article and structure of the Warsaw Convention. See, e.g., *Sidhu v. British Airways Plc* [1997] AC 430; *El Al Israel Airlines Ltd v. Tseng* 525 US 155 [1999]; *Seagate Technology International v. Changi International Airport Services Ptd Ltd* [1997] 3 SLR 1.

[24] This is the amount set by the Convention as signed. As a result of a review undertaken by ICAO pursuant to Art. 24 of the Convention, the sum has increased to 4,694 Special Drawing Rights with effect from 30 Dec. 2009.

3. Overlap between the Montreal Convention and Article 6

It can thus be seen that the Montreal Convention[25] and Regulation 261 both purport to provide a remedy to passengers in respect of delay in carriage by air to which they apply. Moreover, they are worded such that they will often apply to the same carriage.[26] This gives rise to an issue of whether and/or to what extent they are compatible.

In considering this question, it is apt to recall the obligation to construe the Montreal Convention in good faith:

(1) As the ECJ acknowledged in *Walz v. Clickair SA*: '. . . Article 31 of the Convention on the Law of Treaties, signed in Vienna on 23 May 1969, which codifies rules of general international law, states that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose . . . '[27]

(2) As Advocate General Mazák stated in *Bogiatzi v. Deutscher Luftpool Luxair SA*: '. . . the Community endeavours, in general, to exercise its powers in conformity with international law and, more specifically, as is required under the principle of co-operation in good faith enshrined in Article 10 EC, with due regard to the international obligations binding on its Member States'.[28]

4. Reconciling the Montreal Convention and Article 6

As already noted, Article 6 of Regulation 261 gives a passenger rights in respect of delay. There is nothing in the regulation which suggests that this includes a right to compensation as contained in its Article 7. In contrast, this right is provided for expressly in respect of denied boarding[29] and cancellation[30] – events that fall outside carriage by air and thus are not governed by the Montreal Convention.

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[25] Both in its own right and also as applied to Community carriers by Regulation 2027 as amended.

[26] For example, they will both apply (1) to any carriage by any carrier which, according to the agreement between the parties, is for a one-way trip between EC Member States; (2) to any departure from an airport located within an EC Member State which, according to the agreement between the parties, is part of a round trip to a place outside the EC beginning and ending in an EC Member State – including carriage on non-EC carriers such as American Airlines, Aeroflot, Emirates, Qantas, Egyptair, or Air China; and (3) to any departure from an airport located within the territory of a State party to the Montreal Convention that is not part of the EC (e.g., the USA, China, Barbados, South Africa, Morocco, Turkey, Brazil, or Australia) if the operating carrier is a Community carrier (e.g., British Airways, Air France, Lufthansa, or easyJet Airline Company Ltd) and the carriage is, according to the agreement between the parties, either part of a round trip beginning and ending in an EC Member State or a one-way trip to a Member State – unless the passengers concerned receive benefits or compensation and are given assistance in that third country.

[27] Case C-63/09, judgment 6 May 2010, para. 23, which continues (see, to that effect, in particular, Opinion 1/91 [1991] ECR I-6079, para. 14; Case C-312/91 *Metalsa* [1993] ECR I-3751, para. 12; Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, para. 47; and Case C-268/99 *Jany and Others* [2001] ECR I-8615, para. 35).

[28] Opinion of Advocate General Mazák in Case C-301/08 delivered on 25 Jun. 2009, at para. 48. The footnote to that paragraph states 'See, to that effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10, and *Intertanko and Others* [[2008] ECR I-4057], paragraph 52'.

[29] See its Arts 4(1) and (3).

[30] See its Arts 5(1)(c) and (3).

In light of the fact that the Montreal Convention is an integral part of the European legal order and, all things being equal, it can be assumed that Regulation 261 (as secondary Community legislation) is intended to be consistent with it,[31] an obvious reason why Regulation 261 does not purport to provide compensation for delay is because Article 19 of the Montreal Convention provides a right to damages for delay in carriage by air. That is to say, so that Regulation 261 does not trespass upon the province of the Montreal Convention (or indeed Regulation 2027 as amended).

It is consistent with this that the preamble to Regulation 261 refers to compensation when dealing with denied boarding and cancellation but does not do so when dealing with delay[32] and that the drafters of Regulation 261 clearly had the Montreal Convention in mind because they refer to it expressly in the preamble.[33]

5. The *IATA* Case

In the *IATA* case, the claimants challenged the validity of Articles 5, 6, and 7 of Regulation 261 on the grounds including, as the first question referred, that Article 6 was inconsistent with the Montreal Convention and, in particular, with its Articles 19, 22, and 29 (as quoted from above).[34]

In considering this issue, the Advocate General, LA Geelhoed, observed that the carrier has certain obligations under Regulation 261 in relation to denied boarding, cancellation, and delay:

> In the case of denied boarding: *compensation (Art. 7)*, rerouting/reimbursement (Art. 8), and care (Art. 9).
>
> In case of cancellation of a flight: assistance in the form of rerouting or reimbursement (Art. 8), and care, in the form of meals, etc. (Art. 9), *but no compensation (Art. 7)*, provided the passengers were informed in good time or if the carrier can prove that cancellation is caused by extraordinary circumstances.
>
> In the case of delay: *only care under Art.9*, except for delays of five hours or more. In that situation a passenger is also entitled to reimbursement in accordance with Art. 8[35] (emphasis added).

And further that 'it is clear that Article 6 of the Regulation does not deal with civil liability or actions for damages'.[36]

The Advocate General therefore clearly proceeded on the basis that the right to compensation contained in Article 7 of Regulation 261 is not relevant in the context of Article 6; that is to say, to what the regulation stipulates in relation to delay.

The Grand Chamber of the ECJ proceeded on the same basis. Indeed, it relied upon it as the central basis for its decision on the first question referred. It held that 'as regards their

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[31] Which must follow from the obligation of good faith referred to above.
[32] See its Recitals (9), (12), and (17), respectively.
[33] At Recital (14).
[34] See judgment, para. 20.
[35] See opinion, para. 18.
[36] See opinion, para. 46.

content', Articles 19, 22, and 29 of the Montreal Convention are 'unconditional and sufficiently precise',[37] but distinguished their remit by making the distinction at paragraph 43 of the judgment that:

> *Any delay* in the carriage of passengers by air, and in particular a long delay, *may, generally speaking, cause two types of damage*. *First*, excessive delay will cause *damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care* for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. *Second*, passengers are liable to suffer *individual damage, inherent in the reason for travelling*, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be *the subject of compensation* granted subsequently on an individual basis (emphasis added).

Having made this distinction, the Court found Article 6 of Regulation 261 to be consistent with the Montreal Convention because Article 6 deals with the first of these 'two types of damage' whereas the Montreal Convention deals with the second. It held that:

> 44. It is clear from Articles 19, 22 and 29 of the Montreal Convention that they merely govern the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis, that is to say *for compensation*, from the carriers liable *for damage resulting from that delay*.
> 45. It does not follow from these provisions, or from any other provision of the Montreal Convention, that the authors of the Convention intended to shield those carriers from *any other form of intervention*, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.
> 46. The Montreal Convention could not therefore prevent the action taken by the Community legislature to lay down, in exercise of the powers conferred on the Community in the fields of transport and consumer protection, the conditions under which damage linked to the abovementioned inconvenience should be redressed. *Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardised and immediate compensatory measures, they are not among those whose institution is regulated by the Convention*. The system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention.
> 47. *The standardised and immediate assistance and care measures do not themselves prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able to bring in addition actions to redress that damage under the conditions laid down by the Montreal Convention*.
> 48. *Those measures*, which enhance the protection afforded to passengers' interests and improve the conditions under which the principle of restitution is applicable to passengers, *cannot therefore be considered inconsistent with the Montreal Convention* (emphasis added).

The emphasis added shows that it is critical to the distinction made by the Grand Chamber between these 'two types of damages', and thus to its finding of consistency of Article 6 with the Montreal Convention, that Article 6 provides only for care and assistance as per Articles 9 and 8(1)(a) of Regulation 261, that is to say, that it does not give rise to any right to compensation.

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[37] See judgment, para. 39.

6. *Sturgeon*

The questions referred to the ECJ in *Sturgeon* did not ask whether Regulation 261 must be interpreted as meaning that the right to compensation contained in its Article 7 applies to cases of delay, that is to say, to its Article 6. This is a matter the Fourth Chamber chose to consider of its own volition nevertheless.

The conclusion reached by the Fourth Chamber in paragraph 69 of its judgment (as set out above) is based on reasoning that relies only upon considerations internal to Regulation 261 and of European law, namely an assertion of the need for equal treatment of passengers suffering delay with those suffering cancellation (whom by reason of Article 5(1)(c) of Regulation 261 are given the Article 7 right to compensation expressly).[38]

It is telling that a central part of the Court's reasoning on this topic is that '[t]here appears . . . to be no objective ground capable of justifying such a difference in treatment'.[39] This comment is difficult to fathom: there is a very obvious objective ground justifying this difference. It is explained above: the Montreal Convention provides a compensation regime for delay, but does not do so for cancellation; and Regulation 261 does not provide compensation for delay (as part of the relief provided for in its Article 6) in order to avoid it trespassing upon the province of the Montreal Convention. This explanation is, of course, consistent with the reasoning of the Grand Chamber in the *IATA* case, as set out above.

What is particularly difficult to understand is why the Fourth Chamber did not reach this answer to the question that it posed given that it did refer to the *IATA* case and, in particular, to paragraphs 43 and 45 of the judgment in that case.[40] Those paragraphs of the *IATA* judgment are quoted above. They make the distinction between the 'two types of damage' and form part of the reasoning that Article 6 is consistent with the Montreal Convention because it does not provide for the second type of damage, that is to say, for compensation.

The result is that the *IATA* and *Sturgeon* cases are incompatible: in *Sturgeon* the Fourth Chamber adds into Article 6 of Regulation 261 the very thing the absence of which was relied upon by the Grand Chamber in the *IATA* case as the reason that article is consistent with the Montreal Convention – the right to compensation as per Article 7.

It is not possible to sidestep this conclusion in good faith by arguing that Article 7 provides for compensation in a fixed amount and this is accordingly 'standardized' so as to fall within the first type of damage, which the *IATA* case says is outside the scope of the Montreal Convention. There are several reasons for this.

First, the critical distinction made in the *IATA* case between: 'two types of damage' is between damage requiring and redressed by immediate physical assistance and care; and damage that can only be addressed by monetary compensation. Even at this base level,

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[38] See the judgment at paras 40–69.
[39] At para. 59.
[40] See the *Sturgeon* judgment, para. 65.

Article 7 falls into the latter category: it does not provide for immediate physical assistance or care, only for monetary compensation.

Second, Article 19 of the Montreal Convention provides a cause of action for 'damage occasioned by delay'. As the Fourth Chamber recognized in *Sturgeon*, the compensation provided by Article 7 of Regulation 261 is a monetary award for loss of time.[41] If applied to delay, this would mean loss of time by reason of delay. It is therefore monetary compensation for damage 'inherent in the reason for travelling' – to use the phraseology of the Grand Chamber in the *IATA* case when describing the second type of damage – the category falling within the province of the Montreal Convention.[42] They therefore cover the same subject matter. The unreality of suggesting otherwise can be seen by the simple medium of placing side by side Article 19 of the Montreal Convention and paragraph 69 of *Sturgeon*:

Article 19:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Sturgeon:

> [P]assengers whose flights are delayed . . . may thus rely on the right to compensation . . . where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

Third, the concept of 'damage' as used in the Montreal Convention cannot be read down so as to exclude a monetary award for loss of time (such as provided for by Article 7), whether because it is 'standardized' or on any other basis. As the ECJ stated in *Walz v. Clickair SA:*

> 26 . . . Article 22 of the Montreal Convention, which itself forms part of Chapter III and thus the relevant context, limits a carrier's liability in the case of destruction, loss, damage or delay, which implies that the nature of the damage sustained by a passenger is irrelevant in that regard . . .
> 28. . . . there is nothing in the Montreal Convention to indicate that the contracting States intended to attribute a special meaning to the concept of damage, in the context of a harmonised system of liability in private international air law, and to derogate from its ordinary meaning . . .
> 29. It follows that the term 'damage', referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage.
> . . .
> 37. It follows that the various limitations of compensation referred to in Chapter III of the Montreal Convention, including that set in Article 22(2) of that convention, must be applied to the total damage caused, regardless of whether that damage is material or non-material.

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[41] See judgment, paras 52–58 and 69.
[42] See the *IATA* case, para. 43.

Fourth, if the Article 7 right to compensation applies to delay, then the award it makes is covered by the Montreal Convention however it is characterized:

(1) if the fixed compensation provided by Article 7 is intended to be, or count towards, compensation for the loss actually suffered by the passenger as a result of his/her delay it is, or counts towards, the compensatory damages that he/she might be awarded pursuant to the Montreal Convention; conversely
(2) if that fixed compensation is intended to be provided on some other basis it would be 'punitive, exemplary or any other non-compensatory damages', the recovery of which is prohibited by reason of the last sentence of Article 29 of the Montreal Convention.[43]

7. Conclusion

In conclusion, the *IATA* and *Sturgeon* cases are inconsistent because of their different findings in relation to the right to monetary compensation for delay in carriage by air pursuant to Regulation 261. If *Sturgeon* is correct in holding that there is a right to compensation in respect of delay under Article 7 of Regulation 261, then the *IATA* case is wrong because Article 6 deals with both the first and second of the 'two types of damage' and, for this reason, is inconsistent with the Montreal Convention.

There has been a considerable body of criticism of the distinction between the 'two types of damage' made in the *IATA* case, as being false and to the effect that any provision for the first type of damage is as inconsistent with the exclusivity of the Montreal Convention as any provision for the second. There is force in such arguments. However, the *IATA* case is a decision of the Grand Chamber of the ECJ and, for that reason, might be considered more authoritative than the competing decision of the Fourth Chamber. It also has the merit of at least purporting to be consistent with the Montreal Convention. As the Montreal Convention prevails over any provision of Regulation 261 should the two conflict, and the choice is between one interpretation which purports to be consistent with that convention and another which, on any reasoned view, is not, it should follow as a matter of logic that the *IATA* case prevails over *Sturgeon* – the latter is clearly discordant and wrong.

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[43] Of these two possibilities, the former is problematic in so far as it is difficult to see how a fixed standardized sum for delay can be in any way truly 'compensatory' in nature. For example, a catatonic passenger would be oblivious as to whether he/she was experiencing no delay, a three-hour delay, or a three-day delay in carriage by air and would on any view suffer no real loss by reason of any loss of time, no matter what the duration; the position may be similar for a young child. Further, it is not obvious why an individual passenger's loss of time of three hours should result in a monetary award on a *compensatory* basis dependent upon the distance he/she was intending to travel; however, that would be the result on the basis of Art. 7 of Regulation 261 as applied by the *Sturgeon* decision. Indeed, a three-hour loss of time may be felt more keenly by a passenger booked on a flight due to take an hour or less than by a long haul passenger booked on a flight to the Far East who may be anticipating a journey time of some thirteen hours or more in any event; yet, of the two, it would be the latter who received the greater 'compensation' according to *Sturgeon*. This may be considered illogical. It is particularly so when contrasted with the 'assistance and care' provisions incorporated expressly into Art. 6, which proceed on the basis that the longer the intended flight, the longer the anticipated delay needs to be before the carrier's obligations are engaged. It means that according to *Sturgeon*, a long haul passenger is entitled to EUR 600 'compensation' before he/she is entitled to so much as a cup of coffee by way of 'assistance and care', which is perverse.

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