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Travel Law Briefing

Bird strikes and extraordinary circumstances - *Pešková v Travel Service* (C-315/15)

The phenomenon of bird strikes is one that has plagued the airline industry for many years. Indeed, an American study on animal peril from 2011shows that 99,441 collisions between a plane and an animal had been reported since 1990. In 97.4 per cent of the cases it was a collision with a bird. At county court level in England and Wales, the courts have taken a mixed approach to the question whether such events will constitute extraordinary circumstances and thereby relieve a carrier of its obligation to pay compensation under EC Regulation 261/2004.

In **Ash v Thomas Cook** (Manchester CC, 28.4.15), a County Court judge observed that "*Bird strikes happen every day, in fact many times a day, and would hardly be worthy of comment but for the delay which they cause. They do not fall within the same category as a motorway collision between a car and my previous example of a horse, which would be extraordinary for the simple reason that our skies are populated with birds, whereas our roads are not populated with horses.*

By contrast, in an impressive and strongly worded judgment, a deputy district judge in **Rosenblatt v British Airways** (Uxbridge CC 20.4.16) rejected the argument that the frequency of the strikes should be the determinative factor: "*This, with respect, works on the false premise that the greater the statistical presence, then the greater the risk of occurrence: therefore the greater the risk of occurrence, the more ordinary or inherent should that risk be regarded to the activity … This logic has an ostensible attraction but is by no means of reliable universal application. Take for example the everyday feature of cars, cyclists and pedestrians moving in close proximity at rush hour in, say, the West End of London. In this scenario, there are clearly more pedestrians than cars and possibly at least as many cycles. However, the incidence of them colliding is comparatively rare. I do not suggest it is unknown and, without doubt, the consequences can be extremely serious. However, I would struggle to accept that cars striking cycles or pedestrians is 'inherent in the normal exercise of the activity' [i.e. driving]. It is not ordinary: ex hypothesi, it is extraordinary*".

In August 2016 the die appeared to have been cast in favour of the consumer when Advocate General Bot delivered an opinion in the case of **Pešková v Travel Service** (**C-315/15**) in which he concluded that bird strikes should be regarded as an inherent risk of operating an airline, and therefore outside the concept of extraordinary circumstances. Although he also cited the frequency of such events, he explained that it was an illusion to think that the airlines had no control over them either, in the sense of being unable pre-emptively to take steps which

minimise or even prevent them from interfering with the operation of the aircraft. He observed that many airlines used 'chicken cannons', whereby bird carcasses are fired at planes and that as soon as the construction phase begins, the parts that are most sensitive to impact with birds are tested to ensure that an airworthiness certificate is granted.

It therefore came as a considerable surprise to the industry and litigators alike when, on 4th May 2017, the CJEU handed down its judgment in **Pešková** and declined to follow the Advocate General's recommendations, something which ordinarily occurs in at least 70% of cases according to an econometric review carried out in 2016.

In Pešková the CJEU held that a collision between an aircraft and a bird, as well as any damage caused by that collision, are not intrinsically linked to the operating system of the aircraft, with the result that such a collision is not by its nature or origin inherent in the normal exercise of the activity of the air carrier concerned and is outside its actual control. Accordingly, a collision between an aircraft and a bird, it held, is an extraordinary circumstance within the meaning of the regulation irrespective of whether the collision actually caused any damage.

Responding to the points raised by the Advocate General, the Court held that although the air carrier may be required to take certain preventative measures in order to reduce or even prevent the risks of any collisions with birds, it is not responsible for the failure of other entities (such as, *inter alia*, airport managers or the competent air traffic controllers) to fulfil their obligations to take the preventative measures for which they are responsible.
The case represents a rare victory for air carriers in this field of the law and one which is likely to be widely lauded within the industry after a decade or more of judgments which have expanded the scope of the Regulations in favour of the consumer.

The case was not an unqualified success for the Defendant, however. On the facts, following the bird strike it had refused to accept a safety check which had been carried out by an authorised local company and sent its own technician to carry out a second check of the aircraft. The result was a consequential delay to the operation of the aircraft and the Claimant's flight. The court held that in this situation the extraordinary circumstances defence would not be available and it fell to the national court to offset the delay caused by the underlying bird strike against this additional and unjustified delay in deciding whether or not the 3-hour threshold (which triggers the right to compensation under the regulations) had been crossed.

By Jack Harding