



WHAT LIES BENEATH: NEW CASE LAW ON HIDDEN DEFECTS AND DELAY COMPENSATION

The European Court of Justice (CJEU) has ruled that a design fault with a brand new aircraft was an “extraordinary circumstance”, absolving the airline of responsibility to pay compensation for delay under Regulation EC261/2004 when the aircraft was grounded.

The question arose in the case of *Matkustaja A v Finnair Oyj* C-385/23. Judgment was handed down on 13 June 2024. The starting point for cases involving technical defects is the well-known cumulative test laid down by the CJEU in *Wallentin-Herman*, C-549/07: a carrier can only avoid paying compensation if (a) the problem stemmed from events which, by their nature or origin, were not inherent in the normal exercise of the activity of the carrier concerned and (b) those events were beyond its actual control.

In *A v Finnair Oyj (C-832/18)*, the CJEU held that an air carrier cannot rely on “extraordinary circumstances” arising from the failure of an “on condition” part to release itself from the obligation to pay compensation.

The Finnish Supreme Court struggled to apply the Court’s case-law relating to the premature failure of technical parts to a case of a latent defect in design which is revealed for the first time on a new type of aircraft, so they sought guidance from the CJEU.

The flight in question was from Helsinki (Finland) to Bangkok (Thailand). The aircraft (in service for just over five months) suffered a technical failure of the fuel gauge. Finnair saw this as critical to flight safety and cancelled the flight. Using a reserve aircraft, the flight operated the following day and arrived with a delay of around 20 hours. Claims ensued, which Finnair defended on the grounds of “extraordinary circumstances”.

This failure was the first worldwide occurrence for this model of aircraft and, importantly, neither the manufacturer nor the safety authorities had previously been notified of such failures. The failure was later resolved by emptying and re-fuelling the tank, with the aircraft returning to service. It would transpire from further investigations that this was a design fault affecting all aircraft of the same type.

It was eventually resolved definitively by a software update.

The CJEU agreed commented that, as a matter of principle, technical failure or breakdown is not beyond the effective control of the air carrier, since the prevention or repair of such failures and breakdowns is part of the burden on that air carrier to ensure the maintenance and proper functioning of the aircraft which it operates. However, the situation is different for latent design defects. The carrier has no power to identify and remedy a latent defect in design,

so it cannot be considered to exercise control in this scenario.

Crucially, it does not matter that the latent design defect was only linked to the technical failure *after* the cancellation. The fact remains that the carrier never had the power to remedy the defect.

In summary, the defence of “extraordinary circumstances” is available for a delay or cancellation where:

- An aircraft manufacturer confirms that a failure, both unexpected and unprecedented, was caused by a hidden manufacturing or design defect in a new model of aircraft
- The failure affects all aircraft of the same type
- That failure is critical to the safety of the aircraft

This judgment is an interesting development in case law for air carriers. It is the first time that the CJEU has provided a clear definition for a hidden manufacturing defect and when this can be classified as an extraordinary circumstance.

EU261 provides the mechanism for compensating passengers for delays and cancellations. **EU 261** was reborn in the UK as the Air Passenger Rights and Air Travel Organisers’ Licensing (Amendment) (EU Exit) Regulations 2019 (“**UK 261**”) in January 2021 (after the end of the Brexit Transition Period). **UK261** is now Assimilated Law and continues to apply to claims against UK airlines or non-UK airlines departing the UK. The case of *Matkustaja A v Finnair Oyj C-385/23* is therefore not binding on courts in England and Wales or Scotland but it could be cited in a UK case as a “persuasive authority”.

More details can be found in our earlier briefing [Aviation \(Consumers\) \(Amendment\) Regulations 2023 – UK261 goes on to the UK statute book – business as usual?](#)

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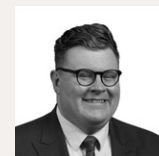


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