

## Case Summary of Supreme Court Decision: BGH judgment X ZR 30/15 of Nov. 21, 2017

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**KEYWORDS:** Flight accident claims, personnel injury, airline liability, extension of strict liability, passenger carriage, boarding airplane, Montreal Convention Art. 17 (1).

### CITATION OF THE CASE:

- **German Supreme Court Judgement**  
BGH X ZR 30/15 of Nov. 21, 2017
- Supreme Court Judgement to be found under the following link:  
<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=80632>
- The full version of the Supreme Court Judgement to be found in these legal journals:  
NJW 2018, 861  
ZIP 2017, 97  
MDR 2017, 13  
MDR 2018, 340  
NZV 2018, 142  
VersR 2018, 939
- **Procedural History**
  - **Regional Court Judgement (Court of First Instance)**  
LG Düsseldorf, 27.06.2014 – 22 O 21/14  
Regional Court decision to be found under the following link:  
<https://www.justiz.nrw/BS/nrwe2/index.php#solrNrwe>
  - **Higher Regional Court Judgement (Court of Appeal)**  
OLG Düsseldorf, 25.02.2015 - 18 U 124/14

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Higher Regional Court decision to be found under the following link:

<https://openjur.de/u/855149.html>

○ **Supreme Court Judgment mentioned in articles**

○ *Reiserecht Prof. Dr. Führich*

<https://reiserechtfuehrich.com/2018/03/23/haftung-des-luftfrachtfuehrers-fuer-personenschaeden-nach-unfaellen-auf-der-fluggastbruecke/>

○ *Anwalt.de*

<https://dejure.org/ext/5360adc49599338f79d884af02bfe43a>

○ *AnwaltOnline*

<https://www.anwaltonline.com/reiserecht/urteile/13818/haftung-des-luftverkehrsunternehmens-fuer-sturz-auf-der-fluggastbruecke>

○ *RRa (Reiserecht Aktuell) 2016, p. 66*

**A) General Remarks:**

Many legal claims concerning flight accidents are mostly related to personnel injuries of air passengers, which they are sustained while they were traveling on an air carrier. Many of these legal issues are related to the boarding and disembarking procedure of the passenger airplane. Injuries of a passenger while boarding, during the flight or in the disembarking process can entitle the affected subject pursuing a legal claim against the carrier. The Montreal Convention which was issued in 1999 settles the claims concerning personnel injury claims of a passenger. This regulation is accepted by most of the countries in the world and establishes a minimum standard of passenger protection and air carrier liabilities.

**B) Legal Issue:**

The legal issue in this particular case is about the **strict liability**<sup>1</sup> of an air carrier under the German BGB and Article 17 para. 1 of the Montreal Convention 1999 (MC99)<sup>2</sup>. Therefore, three main questions are under scrutiny:

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<sup>1</sup> This means that the passenger does not have to prove what the pilot or airline did wrong. It is presumed that aviation accidents are not the passenger's fault. As a result, in case of accidents on international flights, the air carrier is deemed automatically liable.

<sup>2</sup> Convention for the Unification of Certain Rules for International Carriage by Air Montreal, May 28 1999 (ICAO Doc No 4698) by the International Civil Aviation Organization (ICAO) and opened for Signature at Montreal on 28 May 1999 and came into force in Thailand on 2 October 2017.

Full text can be found: <https://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/portrait.pdf>.

1. How to interpret the legal terminus **boarding** into an airplane under the regulations of the Montreal Convention 1999? The embarkment procedure comprises all operations concerning the boarding of an air passenger that consequently states the beginning of air transport. The full process of boarding an aircraft has to be interpreted widely and shall cover all operations of the air passenger's entry into the air carrier.

2. Art. 17 para. 1 Montreal Convention 1999 is intended to **protect an air passenger from specific peril to his life or physical integrity** that are resulting from technical installations and other conditions within an air transport, including the boarding as well as disembarking. There is no need that these risks or hazards are unapparelled or not occur in any other area of life, but only in the course of air transportation. Rather, it is sufficient, if a risk or hazard materializes, which can be derived from the typical nature or condition of an aircraft as well as of any aeronautical equipment applied for the process of the boarding and disembarking (In this case: a passenger boarding bridge).

3. The scope of application under the Art. 1 Montreal Convention 1999 covers only **international carriages**.

### C) Facts:

For 9 February 2013, the claimant booked for himself and his wife a for a flight that was operated by the defendant from Düsseldorf to Hamburg. Following his judicial testimony, he slipped and fell during the boarding process in the passenger boarding bridge due to a damp spot formed by condensation water. As a result of his downfall, the claimant suffered a patella fracture, which is a fracture of the kneecap. Condensation water that was formed by the temperature difference inside and outside the passenger boarding bridge was the cause of this injury. The plaintiff asserted damages for the incurred medical expenses, for his suffered incapacity for work and also from assigned right of its employer on continued remuneration at the altogether amount of € 38.324,22 plus compensation for pain and suffering in the amount of at least € 10.000.

The plaintiff's claim for reimbursement of medical expenses and damages for pain and suffering, among other things, was unsuccessful before the Düsseldorf Regional Court (LG)<sup>3</sup> as well as the judicial appeal to the Higher Regional Court in Düsseldorf (OLG)<sup>4</sup>. The Düsseldorf Regional

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<sup>3</sup> LG (Landesgericht) usually covers legal issues as an instance in a certain legal district of a county of the German state.

In civil law cases, the LG is responsible for cases that involve claims that are over € 5,000 and which are not referred on to an Amtsgericht (district court).

<sup>4</sup> OLG (Oberlandsgericht) is the appellate body (second Instance) in this case the last instance for a regular civil lawsuit. This instance of appeal represents can challenge the decision of a lower (district court) both in legal terms as well as in terms of

Court (LG) dismissed the claim for damages as well as damages for pain and suffering. Only liability under Article 17 para. 1 of the MC99 could be considered. But the requirements of this provision had not been fulfilled. Referring to the judgment, this Article 17 para. 1 MC99 covers simply damage that was caused by **typical risks** of aviation operations. The LG cannot find any typical risk in the materializing of a downfall on the passenger boarding bridge, which would allow to apply the Convention on the actual case. With judgment from 27.06.2014 - 22 O 21/14 the Regional Court (LG) rejected the complaint. The plaintiff then appealed this decision before the OLG Düsseldorf. The appellate body OLG confirmed the decision of the Regional Court with an order dated 25.02.2015 - 18 U 124/14. In the judge's opinion, the obligation of the carrier to pay damages is out of the question from any legal point of view. According to VO (EG) No. 2027/97 as amended by Regulation (EC) No. 889/2002<sup>5</sup>, the liability of the defendant is governed by the regulation under the Montreal Convention 1999<sup>6</sup>. However, the liability of the air carrier grounded on the EU Regulation (EC) No. 889/2002 in connection with the MC99 is excluded. The main argument in the appellate decision was that it must be an event which cause must lie in a typical risk of air transport. According to the court, this was rather an event which occurred **similarly in other areas of life** or **occasionally** of passenger air transportation (boarding process)<sup>7</sup>. The slipping of the passenger during the boarding procedure on the passenger bridge due to floor moisture (condense water) did not give rise to any specific **air traffic hazard**. Slipping on a such a kind of place is possible in all other areas of life and therefore to be constituted only a general life risk. The court stated that, the Art. 17 para. 1 MC99 covers only those damages which are **caused by typical operational risks** in the air traffic and therefore the damages are not encompassed by its protective purpose and the event is entirely unrelated to air transport. The OLG even rejected the plaintiff's reasoning about the omitted assistance of the cabin crew during the boarding operation because there is no causation between the caused injuries and the omitted or neglected measures taken by the carrier's personal<sup>8</sup>. The plaintiff, who had been unsuccessful until then, appealed on question of law before the Federal Supreme Court (BGH)<sup>9</sup> against this.

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fact. In civil law, case parties are only allowed to bring forward new facts or law about the case under very qualified circumstances.

<sup>5</sup> Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents. Go t: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0889&from=EN>

<sup>6</sup> See Art. 1 VO (EG) No. 889/2002 in connection with Art 1 para. 2 MC99.

<sup>7</sup> The OLG cited these judgments: OLG München, TranspR 2013, 126; RRa 2003, 269; KG Berlin, 04.07.2008, 3 U17/07, Rz. 11; OLG Hamm, TranspR 1999, 114

<sup>8</sup> In addition, according to the OLG, the air carrier was also not liable pursuant to § 280 (1) BGB for the breach of its obligations under the air transport contract. You cannot impose any safety obligations in respect of the passenger boarding

**D) Tenor:**

The Federal Supreme Court (BGH) has quashed the appeal decision on the revision of the plaintiff's appeal and referred the case back to the OLG Düsseldorf (Higher Regional Court) for new considerations. The court, by taking into account, the legal opinion of the BGH, has to decide again on the dispute and will have to provide evidence on the exact course of the accident and, if necessary, on circumstances which suggest contributory negligence of the plaintiff.

Key factor: “**Passenger boarding bridge poses a specific risk to held carrier liable**”

Art. 17 para. 1 Montreal Convention 1999: *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.*

**E) Reasoning:**

Passenger boarding bridges are used at most of the airports when passengers boarding a commercial aircraft. These tubular structures are brought up to the aircraft standing in front of the terminal and allow passengers to board and disembark comfortably without having to be exposed to the weather. Thus, this operation procedure occurs generally on airports (thousand times in Germany alone), it was unclear who would have to pay for an accident on such a boarding aid. The Federal Supreme Court (BGH) has now provided some clarity on three legal issues:

1) The BGH held that it was not necessary to decide on whether liability under the Montreal Convention was limited to hazards that are characteristic of air transportation. The fact that passenger bridges, for technical reasons do not have any handrails (usually there is a certain slope) and water condensation is likely to happen because these passenger bridges link different temperatures zones **is sufficient to be qualified as part of a hazard characteristic** for passenger air transportation. In contrast to the OLG, the German Supreme Court considers that the air carrier is liable under Article 17 para. 1 MC99 if the plaintiff's allegations regarding the course of the

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bridge to the airline. Rather, the airport operator is in principle responsible for the obligation to ensure the safety of airport facilities. Airlines regularly do not influence whether the airport as a whole is in a safe condition. They are no obligations for the carrier to hold the position to keep the airport site safe.

<sup>9</sup> The BGH (Bundesgerichtshof) as the instance of revision (Revisionsinstanz) only allows to question about legal terms whether substantive law has been utilized in a correct way, as well as the fundamental process regulations, have been complied.

accident, on which the Court of Appeal has not yet ruled, are correct. The purpose of this specific liability provision in question is to protect the passenger from the specific risks of injury to his body during air carriage. The Supreme court took also the historical interpretation into account and concluded that there is no evidence for a limitation of attribution. According to the content of the minutes of the Montreal Conference it was not presumed that an accident has to be realized by typical aviation hazard<sup>10</sup>. This also includes the processes of boarding and disembarking from the aircraft. In any event, **the boarding procedure includes boarding an aircraft staircase or a passenger boarding bridge**. The passenger boarding bridge carries specific risks, against which the statutory liability in case of danger is intended to protect the passenger. Such specific risks are, for example, the lack of a handrail due to the design, the gradient depending on the height and position of the aircraft door and the danger of condensation due to the connection of areas with different temperatures. If the traveler is harmed because one of these dangers has materialized, the air carrier is reliable, unless this is prevented by contributory negligence on the part of the traveler<sup>11</sup>.

2) The **definition of liability** for an air transporter does not mean that there is no limit at all to the causal attribution of harmful effects. The strict liability under the MC99 is not, necessarily, grounded on a violation of duties of conduct, it serves more the purpose to compensate for the effects of a concrete hazard which is normally permitted. Therefore, it is not a question whether the event of damage was foreseeable based on previous experience<sup>12</sup>, however, it is only a matter of particular impacts of those perils in respect of which air traffic is to be indemnified according to the understanding of the liability provision<sup>13</sup>. For the BGH the purpose of

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<sup>10</sup> The BGH cited these legal sources: Jahnke, RRA 2008, 160; Convention for the Unification of Certain Rules for International Carriage by Air, Montreal 10-28 May 1999, Volume I, Minutes, 110. Recital 7 in the Preamble to Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 makes it clear that this vast interpretation has been imported into EU law under Art.1(4) of this regulation and that its purpose shall be the strengthening the protection of air passengers. This establishes a strict liability or a successful liability and no longer a liability for presumed fault as under Art. 20 Warsaw Agreement BGH 5 December 2006 - X ZR 165/03.

<sup>11</sup> According to Art. 20 MC99, an exemption of the air carrier from liability, in whole or in part, can only be considered if the airline can prove that the injured party caused the damage itself culpably, in whole or in part. Art. 20 MC99: "If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. ....".

<sup>12</sup> The BGH refers to the arguments in Schleicher, R., F., Reymann and Abraham, H-J. (1960). Recht der Luftfahrt II, § 30 LuftVG, Note 8.

<sup>13</sup> The BGH cited the following judgment: BGH, 3. July 1962 - VI ZR 184/61, liability due to the operational risk of a motor vehicle.

this liability provision under Art. 17 para.1 MC99 is the protection of passengers from a particular danger of life or physical integrity that can result from technical installations and other factual circumstances concerning air transport. The court argues that the wording, purpose, and history of the Montreal Conventions do not provide any reason for the assumption that these risks and hazards must be unique and cannot occur in any other area of life, but only in air transport. Rather, it should be sufficient when a risk materializes, from the **typical quality** or the condition of an aircraft as well as from the use of aeronautical boarding or embarking equipment<sup>14</sup>. For sure the Supreme Court intends to strengthen the protection of passengers by establishing a strict liability that does not require liability for presumed fault. The purpose of such strict liability is to compensate for the effects of a concrete danger which is normally permitted. However, it is not a question of whether the determined event of damage was foreseeable based on previous experience. It is only a question of whether this is a specific effect of the dangers concerning which the traffic is to be indemnified following the meaning of this provision. In other words, the consequence of the damage must fall within the scope of the risks for the sake of which the rule of law was adopted.

3) In this judgment the Supreme Court makes it clear that the regulations of the MC99 are also applicable to the domestic carriage and not exclusively to international air operations<sup>15</sup>.

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<sup>14</sup> Supreme Court refers to this judgment: BGH 08.12.2015 - VI ZR 139/15

<sup>15</sup> See Art. 1 VO (EG) No. 889/2002 in connection with Art 1 para. 2 MC99.