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Aviation Law Bulletin

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Australian Appeal Court finds DVT not caused by an 'accident'

The Victorian Court of Appeal has allowed, by a majority verdict, the appeals of British Airways and Qantas against the decision of Bongornio J and found that Povey's alleged DVT was not caused by an "accident" as required by Article 17 of the Warsaw Convention. The Court struck out Povey's claim and ordered him to pay the airlines' costs.

The *Povey* appeal was heard over three days before the Court of Appeal in July 2003 and focused on whether an "accident", for the purposes of Article 17 of the Warsaw Convention, includes omissions as well as positive acts.

In summary, Povey argued that the term "accident" was wide enough to include any kind of unfortunate or undesirable circumstances, whether brought about by an act or omission, and should be construed as capable of covering at least the circumstances embraced by common law negligence actions. Povey argued that the term "accident" should not be given a narrow and technical meaning.

Ormiston and Chernov JJ, who formed the majority view, agreed with the airlines that the conditions of flight and the failure to warn Povey of the risk of DVT did not amount to an "accident" for the purposes of Article 17 of the Warsaw Convention.

The majority were of the opinion that the term "accident" requires proof of a specific incident or occurrence which can

be characterised as fortuitous and the term should be given its natural and ordinary meaning, namely an unexpected or unusual event. The flight conditions and failure to warn as pleaded by Povey described continuing circumstances which were part of the standard operation of the airlines and did not amount to an event or happening. Also, they were not unexpected or unusual. Ormiston J stated:

The allegations in substance do no more than state a failure to do something, and thus can not be characterised as an event or happening.

The majority were further of the view that the definition of “accident” provided in *Air France v Saks* should be accepted and whilst Povey had challenged the applicability of the *Saks* definition, he was unable to point to any decision in any jurisdiction where the *Saks* definition had been disapproved.

“It is hard to see how a failure to warn or advise passengers can ever constitute an accident.”

By contrast, Ashley J, who dissented, was of the opinion that it was arguable that part of the case Povey sought to pursue could constitute an “accident” and should not be struck out. In particular, His Honour considered that the discouragement of Povey from moving around the cabin of the aircraft, encouraging him to remain seated, the offer and supply of alcoholic beverages, tea and coffee during the flights and just possibly impediments to Povey getting out of his seat during the flights, could constitute an accident.

However, His Honour did concede that it was questionable whether Povey could establish that the discouragement against moving around the cabin was causative of him not moving and another question again whether that in turn was a cause of him developing DVT.

As regards the allegation of a failure to warn, His Honour stated:

...a bare failure to warn or advise, unaccompanied by other circumstances, is unequivocally inaction and not “accident – either as an unexpected or unusual event or happening or as an untoward event”.

The case continues

While this was a decisive victory for the airlines, it does not yet mean the end of the Australian DVT litigation. On 20 January 2004, Povey filed an application for

special leave to appeal to the High Court of Australia. It is likely that the special leave application will be heard later in 2004, and should leave be granted, the hearing of the appeal is not likely until the middle of 2005.

Meanwhile, turning to the United Kingdom, we await the House of Lords decision as to whether it will grant the claimants in the DVT and Air Travel Group litigation case permission to appeal.

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The US Supreme Court revisits *Air France v Saks* after 18 years

■ *Olympic Airways v Husain* – 24 February 2004

On 24 February the United States Supreme Court delivered judgment in the case of *Olympic Airways v Husain*. The case arose from the repeated refusal of a cabin attendant during an international flight to move a passenger who was allergic to tobacco smoke.

On one view of it, because of findings made by the lower court which were not in dispute before the Supreme Court, the decision is not controversial. However, there are many who will disagree with this view, particularly concerning an apparent broadening of what will constitute an “accident” as that term is used in Article 17 of the Warsaw Convention.

The facts upon which the case was argued included:

- At the time of the flight smoking was still permitted in the airline’s aircraft.
- Three requests had been made to a flight attendant to move the passenger away from the smoking section during the flight, and each of these requests was refused.
- It was the airline’s policy and an airline industry standard to grant requests to move passengers away from an aircraft smoking section.
- The flight attendant’s refusal was an event which was unexpected or unusual in the circumstances.

“While the decision in *Husain* upholds the *Air France v Saks* interpretation of Article 17, the majority decision has created uncertainty...”

The main point of contention between the parties in the case concerned “which event should be the focus of the ‘accident’ enquiry”. On the one hand the airline argued it was the exposure to cabin smoke which was the relevant event and that this was not unusual or unexpected in the circumstances. This argument was rejected by the Court. The airline also argued that the flight attendant’s refusals to move the passenger were merely instances of inaction, and that Article 17 required a positive action to cause the injury. The Supreme Court also rejected this argument.

In relation to the “injury producing event” issue, the Supreme Court took an expansive view of the events which led to the injury in this case. It found that the exposure to smoke and the flight attendant’s refusal to move the passenger were both “events” and “happenings” that contributed to the passenger’s death. As the flight attendant’s refusal was an unexpected or unusual event, that was sufficient to establish liability under Article 17.

If the Supreme Court had left the matter there, then subsequent controversy may not have arisen. However, the Court proceeded to go beyond the facts of the case to state that “accident” for the purposes of Article 17 could be constituted by inaction.

The minority judges, Scalia and O’Connor JJ – the latter being the author of the Supreme Court’s unanimous decision in *Air France v Saks* in 1985 – were vocal in their dissenting judgment, particularly in relation to the majorities views on the “inaction” issue, and the result that the majority judgment placed the Supreme Court in conflict with judgments of senior appellate courts of fellow Warsaw signatory States.

While the decision in *Husain* upholds the *Air France v Saks* interpretation of Article 17, the majority decision has created uncertainty, particularly in relation to the action/inaction debate. There are many who will no doubt argue that superior courts should strive for certainty and uniformity, particularly where international conventions such as the Warsaw Convention are concerned, and that this decision has not achieved that goal.

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Australian High Court rules on Article 18 of Warsaw Convention

■ *Siemens Ltd v Schenker International (Australia) Pty Ltd*
– High Court of Australia, 9 March 2004

In a judgment handed down on 9 March 2004, the High Court has for the first time considered the amended Warsaw Convention, particularly Articles 18 and 22 concerning the carriage of goods.

Background

Siemens originally claimed damages from Schenker Australia and Schenker Germany (Schenker) in relation to an accident that occurred when goods being transported by Schenker between Melbourne Airport and the Schenker Warehouse outside the airport, fell off the truck and were damaged. Schenker sought to limit its liability by reference to the Warsaw Convention, and in the alternative, by reference to the House Airway Bill.

At first instance, the Judge rejected Schenker’s arguments that the Warsaw Convention and the terms of the House Airway Bill applied, primarily because the damage occurred outside the physical boundaries of the airport. The Trial Judge found Schenker liable and awarded damages of \$1,688,059.50 including interest.

The Court of Appeal agreed that the Warsaw Convention did not apply. However, it held that the terms of the House Airway Bill did apply, including a limitation of liability clause. The Court of Appeal awarded reduced damages to Siemens of US\$74,680 plus interest. Siemens appealed to the High Court of Australia.

The High Court had to decide two issues. First, whether the Warsaw Convention applied and therefore limited the liability of Schenker. Secondly, whether the limitation of liability clause contained in the House Airway Bill applied to limit Schenker’s liability.

The High Court decision

i. Does the Warsaw Convention apply?

The majority judgment found that the Warsaw Convention did not apply in this situation. Consistent with the finding of the Judge at first instance, as approved by the Court of Appeal, the Court held that Article 18 of the

Warsaw Convention did not apply to limit the liability arising out of the damage which occurred outside Melbourne Airport as the Warsaw Convention only applied to damage sustained “during the carriage by air”, and that the period of carriage by air does not extend to carriage outside the physical boundaries of the airport.

ii. Could Schenker rely on the limitation clause in the House Airway Bill?

The Court found that the House Airway Bill applied to the circumstances of this case. Siemens argued that the airway bill only operated in respect of the period of “carriage by air” as specified in the Warsaw Convention. Siemens further argued that as the damage here was sustained outside the boundaries of the airport, this was outside the period of “carriage by air” and therefore the airway bill, and particularly its limitation period, would not operate.

Schenker argued that the airway bill should be read in conjunction with the longstanding commercial agreement between the parties, and that the contract of carriage required delivery beyond Melbourne Airport, and as such the terms of the airway bill continued to operate for the road carriage during which the damage occurred.

The majority of the High Court (Gummow J, Callinan J and Heydon J) accepted Schenker’s argument. McHugh ACJ and Kirby J gave separate dissenting judgments.

Comment

In many ways this case turned on its own facts, in particular, the wording of the airway bill and the longstanding commercial agreement between the parties. As the split in the Court indicates however, the result was far from unanimous.

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DVT decision: stroke not caused by an ‘accident’

■ *Richard Louie v British Airways Limited & ors*

On 17 November 2003, the United States District Court for the District of Alaska published its judgment in a case where a

plaintiff sought damages as a result of a stroke he suffered in London a day after he travelled there from Anchorage, Alaska.

A personal injury suit was filed for the plaintiff Richard Louie against the defendants – British Airways, Alaskan Airlines, the Boeing Company and Dr David Maguire (the plaintiff’s surgeon). Judgment was given concerning two motions brought by British Airways and Alaskan Airlines for Summary Judgment arguing that the plaintiff’s stroke was not caused by an “accident” within the meaning of the Warsaw Convention.

Facts

Prior to leaving Anchorage for London, the plaintiff consulted his physician, Dr David Maguire, regarding whether it was safe to travel in light of his recent knee surgery. Dr Maguire had warned the plaintiff of the risk of blood clots as a complication of surgery but he did not warn the plaintiff of any increase in risk of blood clots associated with international travel. He advised the plaintiff to undertake certain exercises during the flights.

The plaintiff sat in economy class from Anchorage to Vancouver and business class from Vancouver to London. The business class seat was a “cradle seat”, allowing for further reclining than an economy class seat. The plaintiff did not perform any of the exercises suggested by Dr Maguire. The next morning, after arriving in London, the plaintiff was found collapsed on the floor of his hotel room. At hospital he was diagnosed as having suffered a stroke. The cause of the stroke was disputed but the plaintiff asserted he suffered from DVT.

The plaintiff alleged that the design of the leg rest restricted blood flow to his legs and the seat was so comfortable he did not want to get up. He contended that these attributes should be considered an “accident” within the meaning of Article 17 of the Warsaw Convention. Further, the plaintiff alleged that the airlines’ failure to warn of the risk of DVT was a violation of the standard in the industry and should be considered an “accident”.

Decision

The Court found that the stroke was not caused by an “accident” within the meaning of Article 17 of the Warsaw Convention because, first, the alleged event did not occur on the aircraft or in the process of embarking or disembarking, but rather in the hotel room the day after disembarking in London.

Further, the Court found that a comfortable seat in business class with a leg rest is not an unexpected or

unusual event and therefore the seating design could not qualify as an “accident”. In relation to the failure to warn allegation, in the absence of an established industry standard to do so, the Court ruled that such failure cannot constitute an unexpected or unusual event and therefore does not fall within the meaning of “accident”.

Even accepting that a violation of an industry standard could constitute an accident, as was the case in the District Court decision of *Blansett v Continental Airlines* (216 F. Supp. 2d596 (S.D. Tex. 2002)), there was no evidence in this case to show that in the year 2000, when the plaintiff suffered his stroke, warning passengers was the industry standard.

The plaintiff also asserted that Article 25 of the Warsaw Convention provided him with a separate cause of action, because the airlines’ failure to warn constituted wilful misconduct. The Court relied upon the lower Court’s decision in *Cary v United Airlines* (in 77F. Supp. 2d1165. 1174–75), affirmed by the Ninth Circuit, which found that Article 25 only operates to lift the limit on liability and does not act as a separate cause of action, which avoids the requirement in Article 17 that the event constitutes an “accident” as a prerequisite to the imposition of liability on an international carrier.

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Insurance covers the crash, but not the pilot

- *Aspioti v Leigh & Raytheon Aircraft Company*
- *Kortenhurst v Dass & Leigh* [2003] NSWSC 1224
– New South Wales Supreme Court, Hulme J

This joint decision of the New South Wales Supreme Court was handed down on 19 December 2003. The two separate proceedings arose out of a light aircraft crash. The decision deals with issues surrounding insurance cover in respect of the crash.

Background

Both plaintiffs were severely injured when a light aircraft in which they were passengers crashed on 28 May 1996. The pilot, Clifford Collins, was killed in the crash, and Donna Leigh was sued as his personal

representative. Raytheon Aircraft Company was the aircraft’s manufacturer and John Dass was the aircraft’s owner. All three were said to have been negligent.

In the Aspioti proceedings, Leigh cross-claimed against Australian Aviation Underwriting Pool Pty Ltd (AAUP), asserting that the aircraft owner had entered into a contract of insurance with AAUP which indemnified the pilot for liability for causing accidental bodily injury or death. Leigh also cross-claimed against HIH Casualty & General Insurance Limited (in liquidation) (HIH) and Resource Underwriting Pacific Pty Ltd (RUP) under s601AG of the Corporations Law, as the insurers of now deregistered insurance broker Corporate Insurance Management Group Pty Ltd (CIMG) on these grounds:

- the aircraft owner had retained CIMG to effect insurances to indemnify the pilot against all liability and that CIMG owed the pilot a duty to exercise proper skill and care in exercising this retainer; and
- despite putting in place a cover note, CIMG negligently failed to ensure the policy was extended or varied.

This judgment specifically dealt with separate applications by the plaintiffs for leave to join AAUP as a defendant to the proceedings and/or alternatively for a declaration that AAUP must indemnify Leigh and the owner.

Plaintiffs’ argument

In support of their applications, the plaintiffs contended that, at the time of the accident, there existed a contract of insurance issued by AAUP to the owner, John Dass, and that the pilot was an insured, or was otherwise entitled to the benefit of cover under that contract.

Issues for the Court

The fact that on 6 April 1996 AAUP had issued a cover note in respect of the aircraft for the period 12 April to 11 May 1996 was not in dispute. The main issues for the Court were first, whether the cover provided had been extended so as to be current on 28 May 1996 and secondly, whether the insurance granted was such as to provide cover to the pilot Collins.

Decision

His Honour found sufficient evidence to suggest that cover under the insurance policy had been extended up until the date of the air crash. The evidence before him included correspondence between CIMG, AAUP and the owner of the aircraft, which suggested negotiations had been underway to extend the cover for a further month from 11 May 1996. Turning to the question of the terms of the cover, His Honour concluded that cover did not extend to cover the pilot. The quotation and proposal

forms clearly required the applicant to inform AAUP of the names and experience of all pilots who may use the aircraft. Thus the identity or at least the experience of pilots of the aircraft was found to be a material issue in deciding whether insurance cover would be granted. The information provided to AAUP prior to the crash identified only Dass as the aircraft's pilot, and therefore, Collins was not covered by the policy. Accordingly, His Honour refused to join AAUP, or to make the declaration sought.

Side issues

Although this conclusion made it unnecessary for him to do so, His Honour went on to address several other issues raised by the plaintiff:

1. AAUP submitted that, even if insurance cover had extended to indemnify the pilot, such extension conferred no rights on the plaintiff against AAUP, relying on s6 of the *Law Reform (Miscellaneous Provisions) Act 1946*. His Honour applied *Trident General Insurance Co Limited v McNeice Bros Pty Ltd* ((1988) 165 CLR 107) in finding for AAUP on this point. Collins was not someone who had "entered into a contract of insurance" within the meaning of s6, and therefore was not entitled to recover his loss from AAUP.

2. There was also debate as to the effect of s51 of the Insurance Contracts Act, which provides a third party to whom the insured has been found liable in damages with a right to recover those damages from the insurer, notwithstanding that the insured has died or cannot otherwise be found.

His Honour concluded that, in light of the distinction made in s48 between "insured" and a third party entitled to cover under a policy, and against the background of existing legislation in s6 of the Law Reform (Miscellaneous Provisions) Act and similar legislation in the Australian Capital Territory, it is not possible to regard the references to "insured" in s51 as intended to encompass third parties to whom cover is expressed to extend. His Honour noted that this interpretation may cause difficulty for persons in the plaintiff's position to recover against such third party beneficiaries of a policy. Where the third party is not in a position to meet the verdict, such a plaintiff may be obliged to bankrupt the third party's estate and then induce the trustee of that estate to sue the insurer. Despite being a less than ideal result, His Honour thought it was inevitable, without giving s51 an operation which the language does not bear.

3. Another issue was whether CIMG was acting as an agent for AAUP or as a general insurance broker. The

plaintiffs argued that various documents showed a continued course of dealing where CIMG acted as agents for AAUP through the Australian Bonanza Society or the Private Aircraft Owners Group. His Honour rejected this submission on grounds that the documents showed nothing more than that CIMG had some association with these societies or groups and CIMG was probably acting as a general insurance broker.

4. His Honour also rejected a submission that the pilot was entitled to be indemnified by AAUP by reason of the agreement that had been entered into, apparently at the settlement of the proceedings that the owner had brought against AAUP and CIMG.

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Claim allowed to amend after limitation period expires

■ *Camm v Bell Pacific Holdings Pty Ltd* [2004] DC 007
– 4 February 2004

The District Court of Queensland has recently confirmed decisions of the Victorian Court of Appeal in *Agtrack v Hatfield* and the NSW Court of Appeal in *Air Link v Patterson (No 2)* in allowing a plaintiff to amend his Statement of Claim in order to plead a cause of action under the Civil Aviation (Carriers' Liability) legislation after the two year time limit has expired.

The plaintiff hired a piloted helicopter from the defendant to muster cattle and was a passenger in the helicopter when it crashed into a dry creek bed, causing him injuries. The plaintiff's statement of claim was misconceived in that he claimed damages for negligence and breach of contract and failed to make any reference to the *Civil Aviation (Carriers' Liability) Act 1964* (Qld), being the only cause of action available to him.

The Queensland Court rules provide that an amendment may be made outside the limitation period if the Court considers it appropriate and the new cause of action arises out of substantially the same facts. Previous Queensland authority (*Staples v City and Country*

Helicopters Pty Ltd and Cross) was to the effect that once the two year limitation period had passed, the cause of action under the *Civil Aviation (Carriers' Liability) Act 1959* was extinguished completely and the Court had no power under its Rules to revive an extinguished action. However, recent decisions in NSW (*Patterson No 2*) and Victoria (*Agtrack*) had made findings to the contrary.

Brabazon J held that the amendments sought arose out of substantially the same facts, notwithstanding that the facts pleaded would not have sustained a claim under the *Civil Aviation (Carriers' Liability) Act 1964* (the plaintiff had failed to allege that the defendant held a charter licence and that the carriage was in the course of commercial transport – both requirements of the Act). In exercising his discretion in favour of the plaintiff, His Honour also took into account the fact that the defendant had suffered no prejudice and should have known the true position about the law in any event.

The case confirms that the position in Queensland is now clearly aligned with the position in New South Wales and Victoria where plaintiffs have been allowed to amend statements of claim to plead causes of action under the Civil Aviation (Carriers' Liability) Acts, despite being outside the two year time limit. The position may not be settled for long though, as the defendants in *Agtrack* have filed an application for special leave to appeal to the High Court.

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Air rager faces bill for aircraft diversion

In July 2003 an aircraft passenger, who had reportedly had a "bad holiday" in Egypt, caused a Singapore Airlines flight carrying 14 crew and 298 passengers to be diverted to Darwin after he displayed aggressive and drunken behaviour on board. He was subsequently prosecuted in Darwin Magistrates Court.

Michael Donovan pleaded guilty to one count of behaving in an offensive manner, which carries a maximum penalty of A\$1,000. The Commonwealth Director of Public Prosecutions withdrew a second charge of

making threats on board an aircraft, a more serious charge carrying a maximum penalty of a 12-month jail sentence.

On 13 November 2003, the Magistrate convicted and fined Donovan A\$750 and warned he was likely to face a bill for the cost of diverting the aircraft. Media reports have estimated the cost of diverting to Darwin at more than A\$14,600. Donovan is apparently disputing this figure.

The Magistrate also expressed surprise that the more serious charge of making threats on board an aircraft was dropped. He stated that he would have seriously considered jailing Donovan had the charge proceeded. He stated:

I take a very dim view indeed of this conduct... to conduct yourself this way on a passenger aeroplane, 30,000 feet in the air, especially in the environment that unfortunately is in existence in this day and age in respect of such travel, is intolerable. (AAP News Report, 13 November 2003)

As more incidents of so-called "air rage" occur, it is comforting that Courts are prepared to take a serious stand against such conduct. Hopefully this will send a clear message to other potential offenders.

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The 'Gerona' ruling: holiday company liable for psychological injuries

■ *Akehurst & ors v Thomson Holidays Limited and Britannia Airlines Limited* – 25 November 2003

In the Cardiff County Court the Judge found Thomson Holidays liable to pay compensation for psychological injuries suffered by its customers as a result of negligence by one of its suppliers.

More than 70 people have sought compensation from Thomson Holidays for psychological trauma suffered when a Britannia Airways flight crash landed at Gerona Airport in September 1999. The Judge found that Thomson Holidays was liable to compensate customers for psychological injuries because the company had not

clearly stated the limit of its liability for such injuries in its conditions of business and could not merely rely upon the carrier's conditions of liability to limit its own liability without expressly stating its intention to do so. The decision means that travel companies will no longer be able to have the benefit of the Warsaw Convention, which only allows for physical injury claims.

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Montreal Convention 1999

On 5 September 2003, the United States became the 30th State to ratify the Montreal Convention (MC99), which aims to balance the needs of all parties in civil aviation in the compensation of victims of international aircraft accidents.

The existing Warsaw Convention will continue to apply however, for travel between States that have not yet ratified MC99. As such there is bound to be confusion until MC99 is more widely accepted.

The most important features of MC99 include:

- unlimited passenger liability, with strict liability up to SDR100,000 and a defence of no negligence thereafter;
- the baggage liability limit is increased to SDR1,000 per passenger; and
- an unbreakable limit of SDR17 per kilo in respect of cargo claims.

The real life of...

Michelle Dixon
Senior Associate



- Q** Who is the most famous person you have met?
A Gary Kemp from Spandau Ballet (as a new romantic devotee of the early eighties it went close to being the highlight of my decade).
- Q** What is your favourite movie?
A *The Party* with Peter Sellers.
- Q** Who makes you laugh?
A Refer to favourite movie – just thinking about it makes me laugh.
- Q** Who inspires you?
A Anyone who beats the odds.
- Q** If you could live anywhere in the world, where would it be?
A First half of the year in the Maldives and the second half on Sydney Harbour would be perfect!
- Q** What do you do for recreation?
A Apart from chasing my 16 month old daughter up hill and down dale, tennis, theatre and holidays in the sun rate highly.
- Q** Who would you most like to sit next to on an aeroplane?
A Andre Agassi or Steffi Graf – either would be great!

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