



August 2003

Bulletin

Aviation Law

APPEAL DECISION AWAITED ON AUSTRALIAN DVT CLAIMS

The decision late last year in *Van Luin* in the NSW District Court dismissed an airline passenger's claim for DVT on the basis that no reasonable cause of action was disclosed. The Court relied heavily on the United States Supreme Court decision of *Air France v Saks* (one of the leading cases on Article 17 of the Warsaw Convention) in dismissing the claim. There have been a number of interesting developments in the DVT saga, both in Australia and elsewhere, since the *Van Luin* decision. Here is a brief overview of those developments.

On 20 December 2002 a litigious coincidence occurred. On that date, the Supreme Court of Victoria in the case of *Povey v Civil Aviation Safety Authority and Others*, rejected the application by two airlines for summary judgment. The airlines had argued that the claim as pleaded and particularised did not disclose a cause of action (as the alleged DVT was incapable of having been caused by an "accident" for the purposes of Article 17).

In summary, the claimant argued that his DVT was caused by certain aircraft cabin conditions combined with the offering of certain beverages during flights, and

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Aviation Law

a failure by the airlines to warn about DVT. The Court agreed with the airlines that the case as pleaded and particularised could not succeed. However, the Court permitted the claimant to reparticularise the claim to focus on the failure to warn allegation. In the Court's opinion, it was arguable that a failure to warn in the circumstances alleged could constitute an "accident" under Article 17.

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Later the very same day, Nelson J of the English High Court delivered judgment in the DVT and Air Travel Group Litigation case in London. In a considered judgment he found that the claimants' alleged DVTs were not the result of an "accident" as required by Article 17. Nelson J did have the benefit at the last minute of reading the decision in *Povey*, however, it did not cause him to change his opinion.

We return back to Australia and the "Sunshine State" of Queensland where, on 7 February 2003 in the case of *Rynne*, Boulton DCJ of the Queensland District Court agreed to an airline's application to strike out a claimant's DVT claim on the basis that it had no real chance of success. The claimant had alleged a number of matters principally concerning failures to warn about the risks of DVT, as well as certain flight conditions and procedures. The Court cited with approval *Air France v Saks*, the *Van Luin* decision, and the judgment of Nelson J in the UK DVT case. In respect of the latter, the Court said:

"...I find the analysis of Nelson J to be absolutely compelling".

The Court also looked closely at the decision of *Povey*, particularly that aspect of the decision where the Victorian Court had applied "modern risk allocation theory" in reaching its decision

regarding the failure to warn aspects of the claim. In the UK DVT case, Nelson J had specifically rejected such notions as being inappropriate when interpreting Article 17 of the Warsaw Convention. Similarly, Boulton DCJ rejected this approach.

It is then necessary to look north to Canada and the Province of Ontario where, on 18 February 2003, the Court of Appeal for Ontario dismissed the claimant's appeal in *McDonald v Korean Air*. The Court of Appeal cited with approval *Saks*, *Rynne*, as well as Nelson J's decision in the UK DVT case. In a laconic, handwritten judgment of admirable brevity, the Court stated:

"...these pleadings disclose no reasonable cause of action, given the language of Article 17... and the leading jurisprudence decided under it such as Saks, Rynne and Nelson J's judgment".

(This must have been a pleasing endorsement for the Queensland District Court.)

Returning across the Atlantic to England once again, the claimants (or rather a reduced number of claimants who were able to obtain litigation expense funding), appealed Nelson J's decision. The appeal became one focusing on the question whether an omission could constitute an "accident" for the purposes of Article 17. The airlines in *Povey* in the Victorian Supreme Court also appealed the Court's refusal to grant summary judgment.

The race was on to see which jurisdiction would decide the DVT issue at appellate level (no disrespect intended to the Court of Appeal of Ontario). Those of a sporting mind (and perhaps those with a recollection of the outcome of recent cricket matches) might speculate that an air of competitiveness arose between the two jurisdictions. Expedition was granted by the Victorian Court of Appeal. Hearing dates were discussed on both sides of the Equator. However, the English appeal was heard on 1–2 July this year, and remarkably, judgment was given the very next day.

In a well-reasoned decision, the Court of Appeal presided over by the Master of the Rolls, Lord Phillips of Worth Matravers, dismissed the claimants' appeal. The Court held that an

omission of the type relied on by the claimants could not constitute an “event or happening” and therefore did not constitute an “accident” under Article 17. Likewise the Court said a failure to warn of the risks of DVT did not qualify as an “accident”. Importantly, the Court disagreed with the first instance decision in *Povey*.

Some of the English claimants have now petitioned the House of Lords as a result of their unsuccessful appeal.

The focus now returns to Victoria, where, in the middle of a cold and wet winter, the Victorian Court of Appeal heard the appeal by the airlines in *Povey* on 28 July. *Povey*’s case is being treated by claimants as a type of “test” case with approximately 500 other cases waiting in the legal departure lounge.

The *Povey* appeal was heard for three days and focused on whether an “accident” for the purposes of Article 17 included omissions as well as positive acts. Judgment has been reserved by the Court.

The focus once again shifts to the English House of Lords, as it now decides whether to grant the claimants permission to appeal. Later this year the United States Supreme Court will hear an appeal in the case of *Husain v Olympic Airways*, which also involves Article 17. One hopes that the uniformity so cherished by the designers of the Warsaw Convention regime prevails after these superior courts have examined Article 17 and DVT.

Simon Liddy

CARRIERS COVERED AGAINST RISKS OF WAR AND TERRORISM

In our last Aviation Bulletin (November 2002), Ian Awford discussed the Insurance and Aviation Liability Legislation Amendment Bill 2002. Daniel Natale now reports on recent developments.

On 10 November 2002 sections of the *Insurance and Aviation Liability Legislation Amendment Act 2002* (Cth) (the Act) amending the *Insurance*



“Many Australian aviation firms were left without cover.”

Contracts Act 1984 (Cth), commenced. The amendments have radically altered the operation and availability of terrorism and act of war insurance contracts for Australian insureds. Previously, insureds were prevented by sections 53 and 63 of the *Insurance Contracts Act* from entering into insurance contracts that allowed for the cancellation or variation of contracts.

As most standard international contracts covering terrorism or acts of war allowed the insurance company to cancel policies following a major incident, many Australian aviation firms were left without cover.

As a result, the government, realising that Australian firms needed proper access to terrorism and war cover, enacted the Act. The Act amends section 9 of the *Insurance Contracts Act 1984* (Cth) to state that sections 53 and 63 of that Act do not apply to policies covering “risks related to war” and “risks related to terrorism”. This effectively means that, since November 2002, firms have been able to enter into insurance contracts covering acts of war and terrorism.

IMPLICATIONS

The amendments should mean that firms are able to access both international and national insurance cover for risks related to both war and terrorism and should provide welcome relief in what are still difficult times.

Daniel Natale

STEPPING UP SECURITY: AVIATION TRANSPORT SECURITY BILL 2003

The Aviation Transport Security Bill 2003 (the Bill) was introduced into the House of Representatives on 27 March 2003 and has been sent to the Senate and subsequently to the Rural and Regional Affairs and Transport Legislation Committee for comment, which was due to report by 16 May 2003.

The Bill provides a framework for the implementation, regulation and enforcement of new security measures which will affect "aviation industry participants".

"Aviation industry participants" are defined in the Bill to include:

- airport operators;
- aircraft operators;
- regulated air cargo agents;
- persons who occupy an area of an airport under a lease, sub-lease or other arrangement;
- a person performing security functions; and
- contractors providing services to the persons or organisations mentioned above.

The Bill requires all aviation industry participants to develop and comply with a Transport Security Program. If an aviation industry participant operates without a "program" it is a strict liability offence with the penalty being a maximum of \$22,000 for an aircraft operator or airport operator or \$11,000 for other aviation industry participants.

Special airport areas and zones are also established by the Bill. This will enable different security measures to be applied to different parts within the airport boundaries. The regulations attached to the Bill will stipulate the security requirements for each particular zone and the



consequences for contravening those requirements.

Further security measures are established which require that passengers and other persons obtain a security clearance each time they enter certain areas and/or board an aircraft.

The Bill also establishes different classes of persons who may exercise official powers. These include aviation security inspectors, law enforcement officers, airport security guards and screening officers.

All aviation industry participants, on becoming aware of an aviation security incident, must report the incident as soon as possible. It is a strict liability offence not to report such an incident to a particular person, however, a defence exists if the aviation industry participant believes on reasonable grounds that the person is already aware of the incident or another reasonable excuse exists. However, a defendant does bear the evidential burden of proof in relation to this defence.

“The Bill provides a framework for the implementation, regulation and enforcement of new security measures which will affect ‘aviation industry participants’,”

The Bill provides a wide range of enforcement options including infringement notices, enforcement orders, injunctions and a demerit points system. An enforcement order will prohibit or restrict certain activities or alternatively, require certain activities to be undertaken. If the person named in the enforcement order fails to abide by the order, an application may be made to the Federal Court for an injunction.

If an aviation industry participant is convicted or found guilty of an offence against the Act, a prescribed number of demerit points may be allocated. If the demerit points reach a certain level within a certain period, approval under the program may be cancelled. Appeal mechanisms are, however, available to the Administrative Appeals Tribunal.

If you would like to discuss any aspect of the Bill or its progress through Parliament, please contact a member of our Aviation team.

Tony Greenwood



The federal Parliament has amended the Civil Aviation Regulations 1998 in the Civil Aviation Amendment Regulations (No. 2) 2003. The main impact of the amendments is upon aerodromes and aviation-related services in the following fields:

- aviation safety services;

- aerodrome operators; and
- air traffic controller operators.

>> AVIATION SAFETY SERVICES

Pursuant to the Civil Aviation Safety Regulations (as amended by the Civil Aviation Safety Regulations Amendment (No. 1) 2003), the Manuals of Standards (MOSs) that are published by CASA are to be incorporated by reference into the regulations.

The MOSs establish various procedures relating to aviation safety services. Prior to the issue of these amendments, the MOSs were not subject to parliamentary scrutiny or to a wide public consultation and notification process.

Owing to an industry backlash against CASA's lack of public consultation, the regulations have been altered so that CASA is subject to formal rules of notification and consultation with the public when issuing, or the industry will be able to have greater input as to the nature and extent of future standards regarding aviation safety. The industry will also have increased forewarning of the issue or amendment of MOSs and Parliament now has the right to disallow MOSs directly, which further increases scrutiny of their content.

Pursuant to the Civil Aviation Safety Regulations (as amended by the Civil Aviation Regulations Amendment (No. 1) 2003), CASA was entitled to grant approvals for any person to provide safety services including such services as:

- Aerodrome Rescue and Fire-Fighting Services (ARFFS);
- Air Traffic Services (ATS),
- Air Traffic Service Training; and
- Aeronautical/Telecommunication Navigation Services.

Previously, these services were predominantly provided by Airservices Australia. It was seen that by permitting CASA to grant approvals for any persons to provide aviation safety services, the government was engaging in a "back door" attempt to privatise the industry.

The amended regulations have changed this state of affairs so that CASA can only grant approvals to those persons specifically nominated in the

regulations. Such persons include the Commonwealth (and certain authorities of the Commonwealth's territories), Airservices Australia and contractors and agents of Airservices Australia that are approved by CASA. The regulations further provide that CASA may impose conditions on contracts between Airservices Australia and agents or contractors. Accordingly, the Aviation Safety Services Industry remains under strict regulatory control.

>> AERODROME OPERATORS

The major change affecting aerodrome operators is the fact that they are no longer obliged to provide ARFFS. The Civil Aviation Safety Regulations (as amended by the Civil Aviation Safety Regulations Amendment (No.1) 2003) required ARFFS to be provided at those aerodromes:

- a. from or to which an international passenger air service operates; or
- b. any other aerodrome through which more than 350,000 passengers passed on air transport flights during the previous financial year.

Many effected owners of aerodromes complained about the requirement to provide ARFFS, stating that it was an unjustifiable hardship for them to bear. In response, the regulations have been amended to drop this requirement. Those aerodrome operators that still provide ARFFS, however, must do so according to Annex 14 to the Chicago Convention.

It is possible, though untested, that aerodromes will still be civilly liable for failing to provide ARFFS should an accident occur within the airport. Accordingly, it is advisable that aerodrome

operators continue to provide such services pursuant to the requirements of the Chicago Convention.

>> AIR TRAFFIC CONTROLLER OPERATIONS

The regulations have further altered the requirements for an individual to be licensed as an air traffic controller. Previously, a person was excluded from holding a licence if he or she had certain psychological attributes or personality characteristics. References to such requirements have been removed from the regulations as the government felt that they were draconian. Now CASA must apply existing medical standards to the air traffic controller to determine eligibility for a licence.

Daniel Natale

PERSONAL INJURY REFORM IN QLD

The *Civil Liability Act 2003 (Qld)* (CLA) was assented to by the Queensland Parliament on 9 April, effecting substantial changes in relation to personal injuries claims in response to the escalating cost of insurance.

The CLA contains a series of reforms limiting damages and the circumstances in which they are recoverable in personal injuries actions. The new provisions dealing with damages can be summarised as follows:

- General damages will be capped at \$250,000 based on an injury scale of 0–100. An injury scale is yet to be made available and is likely to be prescribed under a Regulation.

“Before the enactment of the CLA, there were issues as to whether PIPA applied to Convention claims brought under the State and Commonwealth Civil Aviation Acts. Insofar as concerns the limitation of damages, the uncertainty has now been removed..”

- There will be no interest awarded on general damages.
- In calculating economic loss where the Court cannot make precise calculations, the Court *must* have regard to the injured person's age, work history, actual loss of earnings and other relevant matters. The Court must state both the assumptions used by it and the methodology used to calculate the award of damages.
- Superannuation is calculated at the minimum percentage required by law.
- Damages for loss of earnings will be capped at three times the average weekly wage.
- A threshold requirement will be applied to damages for gratuitous care, being a minimum of six hours per week for six months;
- Loss of consortium and loss of services claims will not be recoverable unless general damages are greater than \$30,000 or the person died as a result of the injury.
- A discount rate of 5% will be applied when calculating future loss and gratuitous services.
- Damages will be reduced by at least 25% for contributory negligence where the person was intoxicated when injured. There is a threshold issue as to whether this will apply to the Civil Aviation (Carriers' Liability) Act (both 1959 (Cth) and 1964 (Qld)). It appears likely that this section will not operate in respect of such claims.
- A court cannot make an award for exemplary, punitive or aggravated damages in relation to a claim for personal injury damages unless the act that caused the personal injury was unlawful and done with the intent to cause personal injury or an unlawful sexual assault or sexual misconduct.

Some of these provisions were previously found in the *Personal Injuries Proceedings Act 2002* (Qld) (PIPA). Before the enactment of the CLA, there were issues as to whether PIPA applied to Convention claims brought under the State and Commonwealth Civil Aviation Acts. Insofar as concerns the limitation of damages, the uncertainty has now been removed, in that aviation claims will now be subject to the

limitation of damages provisions in the CLA. The only issue remaining is whether the pre-trial procedural provisions of PIPA now apply to aviation claims. The issue is complex and unresolved. The most that can be said at this stage is that:

- PIPA *will not* apply to claims relating to intra-state flights within Queensland.
- PIPA *arguably will not* apply to claims under the Commonwealth Act.
- PIPA *arguably will* apply to claims under the Convention in respect of international flights.

Megan Caffery

NEWS IN BRIEF

MONTREAL CONVENTION

On 31 July 2003, the US Senate, with two-thirds of the Senators present and voting having voted in the affirmative, agreed to the resolutions of ratification of MC99 and HP55. The Senate has thereby given its Advice and Consent to ratification of MC99 and HP55 separately. The instruments of ratification will now be transmitted to ICAO and the depository for HP55.

If this happens in the next 30 to 60 days, we understand MC99 will be in force before the end of the year.

OUR INSURANCE LAWYERS NAMED AT TOP OF PROFESSION

Australian Legal Business has identified six Ebsworth & Ebsworth lawyers as the very best legal practitioners in Australia. The *Legal Who's Who Australia 2003* lists Ebsworth & Ebsworth's transport group partner **Simon Liddy** as a leading practitioner in the transport area.

The other outstanding professionals in their areas of practice who made the final cut are Senior Partner **Tony Scotford** (insurance and reinsurance; litigation and alternative dispute resolution), **Robert Johnston** (insurance and reinsurance), **Patrick Monahan** (insurance and reinsurance), **Philip Rowell** (insurance and reinsurance), and **Robert Tuck** (insurance and

reinsurance; transport). Around 3180 clients, legal professionals and in-house counsels were surveyed to produce the definitive list of the country's top legal practitioners across 20 practice areas.

These latest accolades follow on from Ebsworth & Ebsworth's recognition as **Insurance Law Firm of the Year** at the 2003 Australian Law Firm of the Year Awards earlier this year.

The REAL LIFE of... Simon Liddy

Q Who is the most famous person you have met?

A I don't think I have met anyone really famous, except for Mickey and Minnie Mouse at Disneyland earlier this year. Do they qualify as "persons"?

Q What are your favourite movies?

A Endless Summer; any Elvis movie; Westerns; James Bond (Sean Connery version, of course).

Q What do you do for recreation?

A Mainly surfing at my local beach – occasionally golf; anything outdoors.

Q If you could live anywhere in the world where would it be?

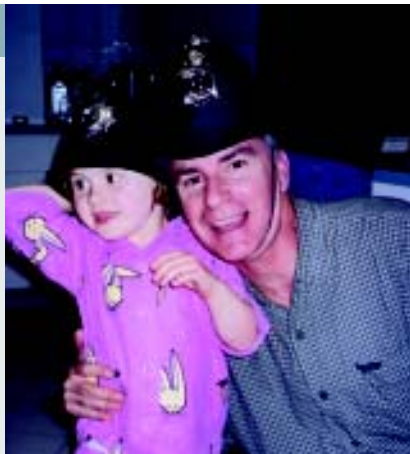
A The north coast of NSW, otherwise Sydney's northern beaches where I live now.

Q What is your favourite food?

A A tough one to answer... I like Thai, Greek, Indian, Chinese, Italian, French... I can't single out one above the rest. Oh, and home cooking, of course!

Q Who makes you laugh?

A Just about any decent comedian (I have many favourites) and my kids.



Q Who inspires you?

A Old surfers – still keen to catch that one last wave despite creaky bones.

Q Who would you most like to sit next to on an aeroplane?

A Probably my children – they really know how to get the most out of the inflight entertainment system, and they never get bored. To them, flying is one big adventure!

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