Povey v. Qantas Airways Limited (2005)

Under these circumstances, the Saint-Nazaire commercial court, upheld by the court of appeal, declined jurisdiction to hear the claims for compensation. According to the lower court, the place where the arrest was made was not sufficient grounds for determining the jurisdiction of the court of the place where the arrest was made, unless there was a specific rule that justified such jurisdiction. Moreover, consignee was aware of the jurisdiction clause – which was standard practice in this type of relationship and was clearly marked on the bill of lading – and such clause could therefore be enforced against the insurer subrogated to consignee's rights.

The *Cour de cassation* dismissed this reasoning on two grounds. First of all, the court of appeal had infringed Article 7(1)(c) of the Convention, according to which the courts of the State in which the vessel was arrested had jurisdiction to determine the merits of the case, when the maritime claim arose during the voyage in the course of which the arrest was made. This applied in the instant case, to the claim made by the insurer subrogated to consignee's rights, and confirmed the jurisdiction of the commercial court of Saint-Nazaire. Second, although consignee may have been aware of the jurisdiction clause, it had not expressly agreed to it and therefore could not be enforced against insurer subrogated to consignee's rights.

<*www.legifrance.gouv.fr*>; *Le droit maritime français*, 2005, 133; *Bulletin des transports et de la logistique* 2005, 11.

Summary kindly supplied (in French) by Ms Anne-Isabelle Anfray.

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR (Warsaw, 1929)

WARSAW CONV. 1929 – AUSTRALIA

Article 17 of the Convention as amended by the 1955 Hague Protocol and by Montreal Protocol No 4, 1975.

HIGH COURT OF AUSTRALIA – 23.VI.2005 – Povey v. Qantas Airways Limited [2005] HCA 33.

"ACCIDENT" – Deep vein thrombosis – Passengers not advised of risk or told what precautions to take by airline – Whether "accident" under Convention (no).

This is an appeal from the Supreme Court of Victoria – Court of Appeal [1] which was allowed to test whether the appellant's claim revealed an arguable cause of action. In essence, the question was whether there could be an "accident" pursuant to Article 17 if a passenger suffered deep vein thrombosis (DVT) by reason of the following: flight conditions, failure of the air carrier to warn passengers of the risk, failure to advise passenger of precautions, the discouraging of the passenger from moving about the aircraft, the encouraging of the passenger to remain in his seat or the supply of alcohol and caffeine beverages during the flight.

Neither party argued that the decisions handed down [2] in *Air France v. Saks,*[3] *El Al Israel Airlines Ltd v. Tsui Yuan Tseng* [4] *or Olympic Airways v. Husain* [5] *or Sidhu v. British Airways Plc* [6] were wrong. The appellant simply contended that a wider meaning should be given to

Article 17 and specifically to the term "accident". The argument was that it should extend beyond acts occurring on board an aircraft and should embrace at least some kind of omissions.[7]

The appeal was dismissed. However, the significance of this decision is that it gives finality to the interpretation of Article 17 in general and DVT cases in particular. The full Bench of the High Court was united in their view that Australia cannot take an insular approach to the construction of Article 17 and must be guided by international jurisprudence.

Kirby J most succinctly expressed the views of the majority of the High Court. He noted that the start of the analysis must be the definitions reached in *Saks*. It was accepted that the appellant did not know about the risk of DVT or the protective measures that ought to have been taken. To that extent, the conditions of DVT may have been unexpected or unusual. However, the important point was that these events were "essentially passive" and could not be turned into an "event or happening" in order to fall under the definition of accident as stipulated in *Saks*.[8]

It is interesting to note that the decision was not unanimous in all its parts. McHugh J. found (espousing a minority view) that two particulars of the statement of claim by Mr Povey were accidents pursuant to Article 17 of the Warsaw Convention, namely the offer and supply of alcoholic beverages, tea and coffee to the appellant and discouraging him from moving around the aircraft and encouraging him to remain seated during the flight. In his opinion, there could be an "accident for the purpose of Article 17 when the employee of an air carrier engages in conduct that causes an injury that is not intended or reasonably foreseeable." [9]

McHugh J discussed the definition of accident which has also been applied in domestic law. He noted that in *Fenton v. Thorley & Co Ltd* [10] an accident was defined as meaning "any unintended und unexpected occurrence which produces hurt or loss." In Article 17, on the other hand, "accident" did not refer to "the hurt or loss suffered. It refers to the *cause* of the hurt or loss." [11] He clearly stated - and so did the other judges - that Article 17 operates by "reference to the act or event that causes the harm – and not the harm itself ..." [12] Simply put, accident within the Warsaw Convention refers to something which takes place on board of an aircraft, which may include the actions of the flight attendants, as seen in *Olympic Airways*.

Interestingly, McHugh specifically suggested that the United States Supreme Court in *Saks* did not exhaustively define the scope of "accident." He concluded that there was a wider view which permitted the interpretation that *Saks* also decided that "it is the cause not the injury that is the accident. ... [but the alleged accident] is the result of the normal operation of the aircraft" [13] However, McHugh did suggest – and in this he rallied to the majority - that the bare omission - that is, an absence of action in itself - cannot fit under the definition of accident. There has to be a causal connection between the two as seen in *Olympic Airways*.

1 Supreme Court of Victoria – Court of Appeal, 23.XII.2003 – *Qantas Ltd & British Airways PLC v. Povey* [2003] VSCA 227; see summary of this decision in *Unif. L. Rev.* / *Rev. dr. unif.* 2004, 660.

2 *Povey v. Qantas Airways Limited & Anor*, [2005] HCA 33 (23 June), 26.

3 Supreme Court of the United States, 4.III.1985, *Air France v. Saks*, 470 US 392 (1984); see summary of this decision in *Rev. dr. unif.* / *Unif. L. Rev.* 1986-II, 542.

4 Supreme Court of the United States, 12.I.1999 – *El Al Israel Airlines v. Tseng*, 525 US 155 (1999); see summary of this decision in *Unif. L. Rev.* / *Rev. dr. unif.* 1999, 195.

5 Supreme Court of the United States, 24.II.2004 – *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004); see summary of this decision in *Unif. L. Rev.* / *Rev. dr. unif.* 2004, 204.

6 Court of Appeal (Civil Division), 27.I.1995 – *Sidhu v. British Airways PLC*. [1977] AC 430; see summary of this decision in *Unif. L. Rev.* / *Rev. dr. unif.* 1996, 782.

7 Povey, *supra* note 2, at 11.

8 Povey, *supra* note 2, at 167.

9 Povey, *supra* note 2, at 48.

10 (1903) AC 443, at 453 *per* Lord Lindley.

11 Povey, *supra* note 2, at 63.

12 *Ibid.*

13 *Ibid,* at 75.

<http://www.lexisnexis.com.au/aus/services/high_court/200504275.pdf>.

Summary kindly supplied (in English) by Dr Bruno Zeller.

WARSAW CONV. 1929 – FRANCE

Articles 19 and 20 of the Convention.

COUR DE CASSATION (Ch. civ. 1) – 22.VI.2004 – Appeal No.: 01-00444.

DELAY – Passenger transport – Flight postponed 24 hours – Application of the no-guarantee clause in respect of the timetable (no) – Proof that carrier took all necessary measures to avoid the damage (no).

Following engine failure in one of its aircraft, an airline company decided to postpone departure of a flight from Saint-Denis de la Réunion to Paris (France). Because of business commitments requiring that he leave that day, one passenger refused to wait until next day and had to purchase another ticket from a competing carrier. He brought an action for damages against the first airline. The lower courts accepted his claim.

On appeal, carrier argued that the appeal court should not have declined to apply the no-guaranteed timetable clause stipulated in the contract, since the flight had not been cancelled but merely postponed, as contemplated in the clause at issue. Moreover, by requiring carrier to prove that it had been unable to repatriate all the passengers, the appeal court had placed upon it an obligation to achieve a result, *i.e.* to transport passengers at a specified time, whereas an air carrier in principle only has a duty of best efforts. In doing so, the court was in breach of Article 19 of the Convention.

The *Cour de cassation* dismissed both defences. To begin with, a 24-hour postponement could not be qualified as a simple delay; on the contrary, it was an excessive delay with respect to which the carrier could not limit its liability in advance, which would undermine the very essence of the air passenger transport contract. Application of the no-guarantee clause should, therefore, be ruled out in the instant case.* Second, carrier had not adduced evidence, in accordance with Article 20 of the Convention, that it had taken all necessary measures to avoid the damage, and in particular, that it was unable to repatriate the passengers on the same day, using other airlines' aircraft. Carrier was, therefore, fully liable.