Damages assessments for indigenous persons' services

Emily Kepa, for and on behalf of the estate and dependants of Frank Billy, deceased & Ors v Lessbrook Pty Ltd (In Liq) [2012] QSC 311

By Patrick Nunan

On 7 May 2005, a Fairchild Metroliner passenger aircraft VH-TFU operated by Transair crashed near Lockhart River in Far North Queensland. All 13 passengers and 2 crew members died in the crash. Among the lives lost in the tragedy were five indigenous persons from the communities of Injinoo and Bamaga, near the western tip of Cape York Peninsula.

They were:

- Frank Billy, the de facto husband of Emily Kepa;
- Fred Bowie, the de facto husband of Florence Kepa;
- Mardie Bowie, the wife of Francis Bowie;
- Helena Woosup, the de facto wife of Mimia Whap; and
- Gordon Kris, the de facto husband of Elizabeth Stephen.

Each of the spouses of the deceased commenced proceedings in the Supreme Court of Queensland at Cairns (the Cairns proceedings) claiming damages for dependency for and on behalf of the estate and dependants of each of the deceased persons. The dependants of 14 passengers and crew also commenced proceedings in the US (the US proceedings). The US proceedings are still to be finalised.[1]

THE LEGISLATION

The Cairns proceedings were commenced under the *Civil Aviation (Carrier's Liability) Act* 1964 (Qld) (the State Act). The State Act provides the statutory basis for the compensation to persons (and their dependants) injured or killed in an aircraft being operated by the holder of an airline licence or charter licence in the course of commercial transport operations. By s5 of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) (the Commonwealth Act), in particular the provisions of Part 4 and 4A, the provisions of the Commonwealth Act are incorporated into the operation of the Queensland legislation. Damages under both the Commonwealth and Queensland Acts are capped at $500,000.

It is important to realise that the Commonwealth Act was passed into law in 1929 when Australia became a signatory to the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (the Warsaw Convention). The Warsaw Convention was added to by the Hague Protocol in 1955. The Commonwealth Act created a statutory cause of action. In *Povey v Qantas Airways Limited*,[2] McHugh J[3] observed that one of the objects of Article 17 of the Warsaw Convention is to provide compensation for injured passengers without the need to prove fault on the part of the air carrier. The price that is paid for this benefit is a limitation on the amount of compensation payable and the imposition of a condition that the injury or death occurred by accident. The statutory cause of action was created in substitution for any rights of a claimant or for any civil liability of the carrier under any other law in respect of injury. The Commonwealth and State Acts create a 'stand-alone' cause of action.

In *Kepa*, Henry J found that s35(2) of the Commonwealth Act excluded the modern form of a *Lord Campbell's Act* action[4] contained in Part 4 of the *Supreme Court Act* 1995 (Qld).[5] However, he found that s35(2) of the Commonwealth Act did not exclude Chapter 3 of the *Civil Liability Act* 2003 (Qld) (CLA).[6]

Another difficulty and challenge to His Honour in preparing his judgment related to whether the definition of 'family members', referred to in s35(3) of the Commonwealth Act and defined in s35(5), extended to 'traditionally

adopted'[7] family members. Traditional adoption is widely practised in the Torres Strait islands and northern Cape York communities.[8] An indigenous mother may have her own biological children as well as a traditionally adopted child or children, usually adopted from a close family relative. This subject alone is worthy of a separate thesis. His Honour found that 'Section 35(5) does not include relationships by way of traditional adoption.'[9]

THE ASSESSMENT OF SERVICES

Henry J accepted the submissions of the plaintiffs' counsel, Mr Gerry Mullins (Mr Mullins), and assessed the loss of 'usual' domestic services according to the comments made by Deane J in *Nguyen v Nguyen*.[10] Henry J valued such services at $20 per hour.[11]

Mr Mullins also submitted that the 'services' lost to the family members included the services provided by the deceased for the provision of food by way of traditional hunting and fishing. In his written submissions to Henry J, Mr Mullins submitted:

> 'The fishing and hunting carried out by the members of this community has a strong connection to its tradition and culture. In past generations, the majority of food that was provided for the family was obtained by hunting and fishing. Although, to some extent, the generation of income has been replaced by modern forms of labour, the provision of food by way of fishing and hunting is still a fundamental component of the lifestyle and diet of people in the Injinoo and Bamaga communities.'

The defendant's counsel submitted that there was really no loss of food from fishing in any event because the local community members would share their catch so that the families of the deceased would not miss out.

> His Honour said at paragraph 41:
> 'The loss is not the loss of food on the table *per se*. It is the loss of food on the table provided by the services of the deceased as part of a way of life; that is, it is the loss of a service. It is likely that service was in any event the only realistic option in that remote location by which such food could be readily procured and provided. However, the service was carried out in accordance with long standing custom, albeit with modern adjustments, such as outboard motors. Hunting and providing like this was a way of life. It bears no comparison to the occasional fishing trip to which some urban dwellers recreationally aspire. To value the provision of this service by reference to the purchase price of fresh seafood from a hypothetical (non-existent) local fishmonger is to value it only by reference to the urban way of life. It is in effect to say the only compensable method of provision of seafood in any way of life is the use of money to buy seafood.'

His Honour accepted the evidence of the plaintiffs' witness, Robert Bagie – who had been employed by the Northern Peninsular Area Regional Council (NPARC) as the Community Development Employment Program (CDEP) manager – to the effect that the hunting and fishing activities 'require(d) special skill'. Evidence had been given by an employee of the NPARC that the hourly rate for a qualified carpenter employed by the NPARC was around $23.10 to $24.10 per hour. His Honour felt that an hourly rate of $25 per hour was appropriate to reflect the 'special skill'. Henry J allowed between 3.75 hours per week[12] and 7.2 hours per week for hunting and fishing.[13]

CONCLUSION

It is believed that Henry J's decision to extend the type of lost services by a deceased to his or her family to include hunting and fishing was the first instance of such an award in common law countries. Having said that, Henry J no doubt gained particular assistance from the comments made by Applegarth J in *Schimke v Clements & Suncor Metway Insurance Limited*, a judgment which placed a value on the services (labour) of a farmer's wife in the operation of a family-owned farm in the Lockyer district of Queensland.[14] The extension of Applegarth J's findings in *Schimke* to those of Henry J in *Kepa* are logical and consistent. ■

Notes: **1** There are US proceedings underway against the aircraft component manufacturers and the company that produced the approach map for the Lockhart airfield. **2** [2005] HCA 33. **3** Dissenting at [69]. **4** In 1846, following the advent of the railways in the UK and the increase in fatal accidents involving trains, the English parliament passed a *Fatal Accident Act* (now known as a 'Lord Campbell's Act action') that gave limited protection to the dependants of those who died in rail accidents. **5** At [10] of the judgment. **6** At [11] of the judgment. **7** See Nicholson CJ in *Lara v Marley* [2003] FamCA 1393. **8** See paper by Deanne Drummond, 'Incorporating Traditional Adoption Practices into Australia's Family Law System', 17 March 2013 http://www.lawrights.asn.au/papers/Incorporating%20Traditional%20Adoption%20Practices%20into%20Australia_s%20Family%20Law%20System%20-%20Deanne%20Drummond.doc. **9** At [20] of the judgment. **10** (1989) 169 CLR 245 at 255. **11** At [36] of the judgment. **12** Mardie Bowie, at[284] of the judgment. **13** Fred Bowie, at [211] of the judgment. **14** [2011] QSC 182.

Patrick Nunan *is a solicitor with Shine Lawyers in Toowoomba, QLD. He was the solicitor for the plaintiffs in the matter of Kepa, one of the cases arising out of the Lockhart River air crash in 2005. The case advanced understanding on damages assessments for indigenous persons' services (for example, hunting and gathering).*

PHONE *(07) 4698 9400*

EMAIL *pnunan@shine.com.au.*