Aviation Law Association of Australia and New Zealand
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Opening Address

9.00am Monday 13 October 2003

Chief Justice Paul de Jersey AC*

Introduction

On 17 December 1903, the Wright brothers undertook their first, celebrated flight at Kitty Hawk, North Carolina. Since then, over the course of the intervening century, aviation has progressed at a remarkable rate; we now travel to Europe in a matter of hours by aeroplane, rather than in a matter of months by boat. Jonathon Swift, though not a contemporary of the Wright brothers, once remarked contemptuously that "the bulk of mankind is as well equipped for flying as thinking." "Which," as Will Durant points out, "is now a more hopeful statement than Swift intended it to be."

The study of the law relating to aviation has necessarily followed a similarly ascendant path. A mere century ago, aviation law scarcely existed as a discrete field of legal scholarship. Today, it has a firm and unchallenged place within the international system. That veritable bible of aviation law, *Shawcross and Beaumont: Air Law*, summarises it this way: "no other system of law has been so

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* I am indebted to my Associate, Mr Chris Peters, for his substantial assistance in the preparation of this address.

rapidly developed by sovereign states collaborating for national and international objects."[1]

If proof of such development is necessary, what better evidence is there than this 22nd annual conference of the Aviation Law Association of Australia and New Zealand? The conference is attended by approximately 100 delegates from around the world, and is organised by an association whose active contribution and commitment to the understanding of aviation law in this part of the world has been unrivalled since its inception in 1980. At this juncture, the tireless work of the conference organisers should, of course, be immediately acknowledged.

A four day program lies before you, covering topics as diverse as access to and pricing of airports, the regulation of airlines, and even a session rather poetically entitled "Queensland – Aviation is Great in the Sunshine State." It goes without saying that I lend my full endorsement to that sentiment. There is one session to which I am particularly drawn by virtue of my office; to be held tomorrow morning, it is entitled "Liability issues – the new frontiers." I will make some brief comments on such issues, in the hope that you consider a judicial perspective en-lightening, rather than lighthearted or lightweight.

DVT – the basic legal framework

In recent years, one of the most contentious issues in aviation law has been the capacity of passengers to sue carriers in relation to deep vein thrombosis (DVT) allegedly suffered as a consequence of air travel. The courts in several jurisdictions, including Queensland, have pronounced judgment on that question,

[1] J McClean (ed), *Shawcross and Beaumont: Air Law*, 4th ed, Butterworths, London, 2003 at I[14].

and while carrier liability has consistently been rejected, a recent Victorian Supreme Court decision seems to imply at least some hope for plaintiff passengers.

Claims in respect of DVT are founded in the *Warsaw Convention*[2], which governs claims by passengers against carriers. (The Convention forms part of Australian domestic law by virtue of s 11 *Civil Aviation (Carriers' Liability) Act* 1959 (Cth), which implements the treaty.) Article 17 of the Convention provides that:

> "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

A passenger's ability to recover against a carrier often turns on whether the event said to have caused the loss or damage was an "accident" within the meaning of article 17. That is certainly true of DVT-related claims, where the central issue is whether DVT is the consequence of an "accident", or a mere "occurrence" for which the carrier cannot be held responsible.

Definition of "accident" within the *Warsaw Convention*

While the term "accident" has no precise legal meaning under the Convention, several courts have provided guidance as to its proper interpretation. The leading

[2] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw, 12 October 1929.

authority in this area is the United States Supreme Court's decision in *Air France v Saks*[3].

Ms Saks had flown from Paris to Los Angeles on an Air France flight. As the aircraft descended to Los Angeles, she developed pressure and pain in her left ear. After five days, she was diagnosed as having permanent deafness in that ear. Saks sued Air France, claiming that her deafness was caused by an "accident" taking place on board the Air France flight.

Air France applied for summary judgment on the basis that Saks' injury could not be classified as having been caused by an "accident". The carrier's position was that the aircraft's operation, including its pressurisation systems, was entirely normal, and that any injury was merely an ordinary consequence of air travel rather than an "accident".

The Supreme Court granted summary judgment in favour of Air France. According to the Court:

> "… liability under Article 17 of the *Warsaw Convention* arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger … when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the *Warsaw Convention* cannot apply."[4]

[3] 470 US 392 (1984).
[4] *Air France v Saks*, note 3 at 405-406.

While the Court also indicated that any such definition of the term "accident" should be "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries,"[5] the distinction between injuries caused by external and internal factors has remained pre-eminent in international law. The Supreme Court's formulation has been explicitly endorsed in the United Kingdom by the Court of Appeal in *Chaudhari v British Airways plc*,[6] where Leggatt LJ held that: "In principle, "accident" is not to be construed as including any injuries caused by the passenger's particular, personal or peculiar reaction to the normal operation of the aircraft." The *Saks* approach has also been approved in Canada.[7]

Is DVT an "accident" within article 17?

The more specific question, then, is how the definition of "accident" should apply to claims relating to DVT. Internationally, there is considerable judicial support for the conclusion that the contraction of DVT on an aircraft cannot be characterised as being caused by an "accident". Proponents of that outcome argue that the development of DVT during flight can only be the consequence of a particular passenger's internal reaction to the normal operation of the aircraft, rather than any "unexpected or unusual" external event required by *Saks*. That position has essentially prevailed since 1976, when the United States case *Scherer v Pan American World Airways Inc*[8] was determined.

[5] *Air France v Saks*, note 3 at 405.
[6] [1997] EWCA Civ 1413 (16 April 1997).
[7] See *Quinn v Canadian Airlines International Ltd* (1994) 18 OR (3d) 326.
[8] 387 NYS 2d 580 (1976).

A more sophisticated version of the argument is that even if DVT developed during air travel is not directly caused by an aircraft's operation, a carrier's failure to take steps to limit the risk of development of DVT may constitute an "accident", on the basis that that failure is external to the passenger.

This argument has also been given short shrift internationally. It was rejected most prominently in the decision of the United Kingdom Court of Appeal in *The Deep Vein Thrombosis and Air Travel Group Litigation*[9]. There, the Court was presented with the argument that the 15 defendant carriers knew that long-haul air travel exposed passengers to an elevated risk of contraction of DVT, and failed to mitigate or avoid those risks; accordingly, it was contended that subjecting passengers to those risks meant that the contraction of DVT was an unexpected event and not merely the result of a passenger's internal reaction.[10]

The Court, however, found that neither the provision of cramped seating itself, nor the failure to warn of the risk of DVT or to advise on precautions, constituted an event capable of amounting to an "accident". That decision now constitutes persuasive authority around the world, particularly in other Commonwealth jurisdictions.

Indeed, judicial determinations elsewhere have been largely consistent with the United Kingdom position. In Canada, a similar conclusion was recently reached by the Ontario Superior Court of Justice. That court dismissed a DVT claim in *McDonald v Korean Air*[11], and Hermiston J held that:

[9] [2003] EWCA Civ 1005 (3 July 2002).
[10] See [10]-[14].
[11] (2002) 116 ACWS (3d) 795 (Ont).

> "I find that in not advising passengers of the risk they assume, an airline may be negligent, but this negligence is not in itself an accident within the meaning of Article 17 in the sense that the DVT sustained by the plaintiff is not linked to an unusual and unexpected event external to him as a passenger."[12]

In Australia, two recent District Court cases in different states have also yielded similar outcomes. The first was *van Luin v KLM*[13], a decision of Judge Knight of the New South Wales District Court. That case arose from air travel undertaken by an Australian, Ms van Luin, on KLM aircraft to and from Amsterdam. The passenger contracted DVT as a result, she claimed, of the carrier's failure to properly advise her of the risks associated with air travel.

However, Judge Knight struck out the pleadings, on the basis that they disclosed no reasonable cause of action. His Honour said:

> "… it seems to me, applying *Air France v Saks*, that the failure of the crews of the relevant aircraft to advise the plaintiff of the need to regularly move around the cabin and the failure of such crews to advise the plaintiff to drink extra fluid do not constitute either individually or collectively an unexpected or unusual event or happening external to the plaintiff and that therefore such failures either individually or collectively do not constitute an accident within the meaning of Article 17 of the [*Warsaw*] *Convention*."[14]

[12] *McDonald v Korean Air*, note 11 at [17].
[13] Unreported, New South Wales District Court, Judge Knight (18 October 2002).
[14] *Van Luin v KLM*, note 13 at [50].

The second case was *Rynne v Lauda-Air Luftfahrt Aktiengesellschaft*[15], a decision of Judge Boulton in the Queensland District Court. That involved a Lauda Air flight undertaken by Ms Rynne from Sydney to Vienna. As in *van Luin*, the plaintiff alleged that the carrier had not acted to advise passengers adequately of the risks associated with air travel.

Unlike Judge Knight in *van Luin*, Judge Boulton had the benefit of having considered the decision of Nelson J in the High Court proceedings in *The Deep Vein Thrombosis and Air Travel Group Litigation*[16] (the first instance decision subsequently upheld by the Court of Appeal). Judge Boulton held that: "I find the decision of Nelson J is absolutely compelling … In its present form the action has no real chance of success and should be struck out."[17]

His Honour also considered whether, although the pleadings were not presently adequate, an opportunity to amend them might enliven the action. Significantly, however, Judge Boulton concluded that: "This is not a case where the factual matrix discloses matters which might be pleaded differently in order to amend the pleadings successfully. There is no real as opposed to a fanciful prospect of this action succeeding."[18]

The significance of Judge Boulton's refusal to allow amendment of the pleadings lies in its contradiction of the Victorian Supreme Court's position in *Povey v Civil Aviation Safety Authority*[19]. That decision, of Bongiorno J, is the only recent

[15] [2003] QDC 4. Unreported, Queensland District Court, Judge Boulton (7 February 2003).
[16] [2003] 1 All ER 935.
[17] *Rynne v Lauda-Air Luftfahrt Aktiengesellschaft*, note 15 at [30].
[18] *Rynne v Lauda-Air Luftfahrt Aktiengesellschaft*, note 15 at [34].
[19] [2002] VSC 580; No 7223 of 2001, 20 December 2002 (Bongiorno J).

authority to which a plaintiff can point in support of his/her case, even though the assistance it renders is arguably limited.

Mr Povey had been a passenger on a flight from Sydney to London, and contracted DVT leading to a pulmonary embolism, a stroke and other consequent medical difficulties. Like Judge Knight and Judge Boulton, Bongiorno J found that "on the plaintiff's case as currently particularised he cannot succeed as a matter of law in establishing that his DVT was caused by an accident."[20] However, Bongiorno J continued: "… the matter does not rest there … the plaintiff's statement of claim pleads a viable cause of action under the Convention. The question is whether there is any reasonable possibility of the plaintiff being able to particularise his allegation of an accident in such a way as to raise a triable issue as to whether his DVT was caused by an event falling within the appropriate legal definition of an accident."[21]

Unlike Judge Knight and Judge Boulton, Bongiorno J concluded that with proper particularisation, an arguable case could arise. According to His Honour, the pleadings were deficient in failing specifically to plead knowledge by the carrier of the risks associated with DVT, and in failing to plead specifically the usual and commonplace nature of warnings and advice to passengers.[22] His Honour concluded that were such matters pleaded, an arguable case might arise.[23]

The decision in *Povey* is the first in this country to suggest that the contraction of DVT on an aircraft may give rise to a claim for damages under article 17. The

[20] *Povey v Civil Aviation Safety Authority*, note 19 at [35].
[21] *Povey v Civil Aviation Safety Authority*, note 19 at [36].
[22] *Povey v Civil Aviation Safety Authority*, note 19 at [37].
[23] *Povey v Civil Aviation Safety Authority*, note 19 at [43].

decision is presently the subject of an appeal to the Victorian Court of Appeal, with judgment reserved. Even if the Court of Appeal confirms Bongiorno J's first instance decision, and the matter proceeds to trial on the basis of amended pleadings, it is far from certain that the plaintiff will succeed. Nonetheless, given consistently contrary decisions in the United States, the United Kingdom, Canada and elsewhere, the intermediate outcome in *Povey* has at least provided some hope for potential DVT plaintiffs.

Conclusion

That is a very brief appraisal of the law as it stands; no doubt subsequent speakers will provide additional insight and analysis. However, even such a brief consideration reveals that notwithstanding the relatively clear United Kingdom position espoused in *The Deep Vein Thrombosis and Air Travel Group Litigation*, the application of article 17 to DVT in Australia remains somewhat controversial. The position adopted in *Povey* is arguably meritorious, and some commentators have expressed support for such views. Lawrence Goldhirsch argues that:

> "… suppose, as the passenger alleges, that the airlines have known about this problem for years, and that numerous passengers have suffered from injuries due to DVT, one even dying. Would courts be more inclined to find such occurrences are an "accident" in the same way as they ruled hijackings to be "accidents" because they became more frequent? The answer is probably "yes" and the

> reason for this is frequency … the fact that something occurs more often puts it in a category of a risk inherent in air travel."[24]

Goldhirsch points out that if DVT is indeed a common affliction among air travellers, then it becomes less capable of being attributed to specific passengers' internal reactions, and more capable of being considered a concern related to air travel. A failure by carriers to warn adequately of the risk of its contraction might then reasonably give rise to liability.

The Victorian Court of Appeal decision in *Povey* will go some way towards resolving the issue in Australia. Should the Court find in favour of the carrier, the issue will be all but concluded, although of course a High Court appeal is possible. On the other hand, if the Court confirms that the plaintiff has at least an arguable case, the subsequent trial will undoubtedly attract considerable attention.

May I say more generally, that it is a universal concern that airlines survive the problems of the moment, of the era: DVT, SARS, terrorism, world war. The internet apart, air traffic guarantees the so-called global village, so potentially productive of the understandings which not only unravel, but preferably forestall conflict. There is abiding interest in the health of global aviation. So far as your present initiative supports it, I enthusiastically applaud what you are doing.

These are exciting and fast-moving times in aviation law. In 1908, Wilbur Wright said, in a speech to the Aero Club of France: "I confess that in 1901, I said to my

[24] L Goldhirsch, "Definition of 'Accident': Revisiting *Air France v Saks*" (2001) 26(2) *Air and Space Law* 86 at 89.

brother Orville that man would not fly for fifty years … ever since, I have distrusted myself and avoided making predictions." Just as advances in air travel itself have surpassed all expectations, the irrepressible development of aviation law has been equally unpredictable. Your attendance at and contribution to this gathering perpetuates that development. Beyond the narrow range of topics I've canvassed this morning, there are many areas worthy of your detailed consideration over the coming days. I encourage your involvement and commend you on your worthy attention to this important legal field.