THE CIVIL AVIATION (CARRIERS' LIABILITY) ACT AND SERVITIUM

The Civil Aviation (Carriers' Liability) Act 1959-1970 (Commonwealth) seeks to substitute a statutory liability for any civil liability in respect of death or injury, or damage to baggage. The Carriage by Air Act 1935, which this legislation replaced, had adopted the international rules governing liability which had been prepared at a Convention in Warsaw in 1929. Then in 1955 a conference at the Hague agreed on amendments to the Warsaw Convention which took the form of a Protocol to the Warsaw Convention. The Commonwealth Government was a party to this Protocol and the Convention as amended by the Protocol was given legislative effect in the Civil Aviation (Carriers' Liability) Act 1959. Since the convention and Protocol related only to international carriage, Part IV of the Act extended the same principles to other carriage by air in Australia.[1]

In 1962 the Civil Aviation (Carriers' Liability) Act 1959 was amended to give effect to the Guadalajara Convention, a supplement to the Warsaw Convention. This Convention sought to cover the situation where the actual carrier was not the person with whom the passenger had contracted for carriage. This supplementary convention was made necessary by the activities of tour operators who contracted to carry passengers and then arranged with a scheduled airline or charter airline for the actual carriage of those passengers. It was designed to give the passenger the option of a direct remedy against the actual carrier for the part of the journey for which he was responsible. In 1966 the Act was amended to provide for the alteration of the amounts of limitation to decimal currency.

The limit of compensation for death or personal injury originally provided by the Warsaw Convention was 125,000 gold francs (approximately £3,700). This was doubled under the Hague Protocol to 250,000 gold francs. The Convention and the Protocol both provided that the sums mentioned in gold francs might be converted into round figures in national currency and the 1959 Act adopted the figure of £7,500. In 1970 this figure was amended by doubling it to $30,000.

1 The limits on the application of Part IV are given in section 27. However, these limits are matched by complementary state legislation. This matter is dealt with below.

The legislation provides not only for compensation for death or personal injury but also for damage to or loss of baggage, both registered and unregistered. The 1959 Act was reviewed in *Some Aspects of the Liabilitities of Airline Operators in Australia* by L. R. Edwards[2] and practitioners interested in wider aspects of the operation of the Act are referred to that article.

The Commonwealth Act can only have constitutional validity, speaking generally, where it is applying an international convention (external affairs power) or where the flights are interstate (trade and commerce power) or intra-territory (territories power) or in Queensland and Tasmania (referred power). Accordingly, it could not apply to flights within Western Australia without the benefit of supporting State legislation. The supporting legislation is the Civil Aviation (Carriers' Liability) Act 1961-70 (W.A.).

The scheme of the Act, speaking generally, has been to provide a uniform statutory liability in replacement of all civil liability. Then, recognising that carriers will seek to contract out of any liability or to impose a limit of liability less than the specified limits. There is no impediment, however, to contracting for unlimited liability or for a limit of liability higher than the specified limits.

The Civil Aviation (Carriers' Liability) Act 1959-1970 seeks to exclude liability, except that under the Act, by the following sections:

(a) for liability for death in the case of flights covered by the Warsaw Convention:

12. (1) The provisions of this section apply in relation to liability imposed by the Convention on a carrier in respect of the death of a passenger (including the injury that resulted in the death).

(2) Subject to section 14 of this Act, the liability under the Convention is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.

(b) for liability for injury in the case of flights covered by the Warsaw Convention:

13. Subject to the next succeeding section, the liability of a carrier under the Convention in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger, is in substitution for any civil

2 (1960) 34 A.L.J. 142 at 146.

liability of the carrier under any other law in respect of the injury.

14. Nothing in the Convention or in this Part shall be deemed to exclude any liability of a carrier:
    (a) to indemnify an employer of a passenger or any other person in respect of any liability of, or payments made by, that employer or other person under a law of the Commonwealth or of a State or Territory of the Commonwealth providing for compensation, however described, in the nature of workers' compensation, or,
    (b) . . . .

    but this section does not operate so as to increase the limit of liability of a carrier in respect of a passenger beyond the amount fixed by or in accordance with the Convention.

(c) for liability for death or injury in the case of flights not covered by the Convention:

28. Subject to this Part, where this part applies to the carriage of a passenger, the carrier is liable for damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

35. (2) Subject to section 37 of this Act, the liability under this part is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury of that has resulted in the death of the passenger.

36. Subject to the next succeeding section, the liability of a carrier under this Part in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger is in substitution for any civil liability of the carrier under any other law in respect of the injury.

37. This section provides the same liability as section 14 (supra).

SERVITIUM

The action of *per quod servitium amisit* and to a lesser extent, that of *per quod consortium amisit,* have had a revival in recent times. The former cause has principally been adopted by employers seeking to pass on the cost of maintaining an injured employee.[3] The causes of

[3] See 32 A.L.J. 131, note. The military forces, for whom the remedy is unavailable, have adopted a device to effect recovery in the name of the employee: Blundell v. Musgrave (1956) 96 C.L.R. 73.

action are admittedly anachronistic[4] but I am not as critical as Dixon C.J. apparently was when he spoke of *servitium* in the context of "the resources of the law for superseding or avoiding the obsolescent".[5]

I am concerned only with *servitium* in this note, but the principles are also applicable in cases of *consortium.* While there are a number of cases reported on the topic, it is sufficient to refer to *Commissioner for Railways (N.S.W.) v. Scott*[6] to outline the elements of the tort:

1. there must be a relationship of master and servant;[7]
2. there must be a tortious act by the wrongdoer against the servant;
3. a loss of services of the servant must result from the tortious act; and
4. the master or employer must have actually suffered loss through the loss of services.[8]

In the Civil Aviation (Carriers' Liability) Act, the words used are "liability in respect of the death of a passenger", "liability in respect of the injury that has results in the death of the passenger" and "in respect of personal injury suffered by a passenger". Is liability to an employer for *servitium* such a liability?

In *State Government Insurance Office (Queensland) v. Crittenden*[9] the question arose as to whether a policy isued in conformity with section 3 (1) of the Motor Vehicles Insurance Acts 1963-1961 (Qld.) covered the insured's liability for loss of *consortium* or loss of *servitium.* The section requires an owner to indemnify against "all sums for which he or his estate shall become legally liable by way of damages in respect of such motor vehicle for accidental bodily injury (fatal or non fatal) to any person . . . where such injury is caused by, through, or in connection with such motor vehicle". It was held that the Act, which governed the interpretation of the policy, did

4 See Brett, *Consortium and Servitium—History and some Proposals* 29 A.L.J. 321, 389, 428.

5 Commissioner for Railways (NSW) v. Scott 33 A.L.J.R. 126 per Dixon C.J., dissenting, at p. 127.

6 33 A.L.J.R. 126.

7 Commissioner for Railways (NSW) v. Scott was concerned with the question whether the category of servants was restricted to menial servants. By a four to three majority (Kitto, Taylor, Menzies and Windeyer JJ., Dixon C.J., McTiernan and Fullagar JJ. dissenting), the High Court decided that the restriction did not apply and in doing so, diverged from the English authorities.

8 The question of the measure of damages is in itself somewhat vexed, but is not within the scope of this note. See Mercantile Mutual Insurance Co. Ltd. v. Argent Pty. Ltd. (1972) 46 A.L.J.R. 408 and Luntz, *The Measure of Damages for Loss of Services* (1970) 2 Australian Current Law Review 35.

9 (1967) 40 A.L.J.R. 260.

extend to *consortium* and *servitium*. The High Court accepted that "for accidental bodily injury" and "in respect of accidental bodily injury"[10] as broadly equivalent, and gave the words a wide enough ambit to include persons other than persons actually injured.
provides:

In *Ure v. Humes Ltd.*[11] an employee had commenced an action against the defendants for negligence. The employer sought to be joined as a plaintiff to recover damages for *servitium*. The defendant pleaded that the employer was out of time, and relied on section 5 of the Law Reform (Limitation of Actions) Act 1956 (Qld.) which

> Notwithstanding anything contained in any other Act or law or rule of law to the contrary, actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any contract or any such provision) where damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injury to any person shall be commenced within three years after the cause of such actions arose, but not after.

Hart J. of the Queensland Supreme Court held that the reasoning in *S.G.I.O. (Queensland) v. Crittenden*[12] applied and that the action was one "in respect of personal injury". His Honour also held that it was an action for "breach of duty" and accordingly the section limited the employer's right to be joined.

On the particular question whether *servitium* is limited by the Acts I respectfully submit that Hart J. may have oversimplified when he held that the action was one "in respect of" personal injury. He was not bound by the reasoning in *S.G.I.O. (Queensland) v. Crittenden*[12] which turns on the construction of the Motor Vehicles Insurance Acts. The High Court consciously accepted a wide construction of the provisions of that Act. Windeyer J. accepts that the bodily injury is only incidental to the action, and that it is the construction of the particular Act that is crucial when he says:[13]

> On the other hand the damage that is the essence of a cause of action for loss of the consortium of a plaintiff's wife or of the services of his servant is that loss itself. That it may be the result

10 The latter words are taken from section 4 (a) of the Act which deals with the liability of the nominal defendant.
11 [1969] Q.W.N. 57.
12 (1967) 40 A.L.J.R. 260.
13 (1967) 40 A.L.J.R. 260 at 263-4.

> of a bodily injury of the wife or servant is only incidental. It is not the fact of the bodily injury but its consequence that gives rise to the right to damages. I do not overlook the distinction. But saying that does not I think answer the question we have to decide. The words "damages for accidental bodily injury" seem to me, in the context of the Act, apt to cover both kinds of claim . . . The Act is not a model of drafting. But I do not think that its apparent remedial purpose should be defeated by a meticulous construction.

Accordingly, I submit that Hart J. either erroneously considered himself bound to apply *S.G.I.O. (Queensland) v. Crittenden*[14] to the facts in *Ure v. Humes Ltd.*[15] or that His Honour was similarly adopting a wide construction.

Support for the essential distinction between any claim the servant may have, and the employer's claim for *servitium* can be seen by considering an example. If, by the negligence of an air carrier, an aircraft was forced to land in a remote area and a passenger was not able to be rescued for some weeks, the employer of that passenger would have an action for *servitium* for his loss even though the passenger himself suffered no injury. Of course, the employer would have to prove his loss.

I submit that the wide construction given to the Motor Vehicle Insurance Acts in *S.G.I.O. (Queensland) v. Crittenden*[16] should not be given to the Civil Aviation (Carriers' Liability) Acts. Although serving a remedial purpose in preventing carriers from contracting out of any liability, it also serves a restrictive purpose by limiting the quantum available in any particular case.

In *Colombera v. MacRobertson Miller Airlines*[17] Jackson C.J. of the Western Australian Supreme Court had to deal with a case in which the defendant airline had admitted liability to the family of a deceased passenger, but only to the then statutory limit of $15,000. An order was made for the $15,000 to be divided among the deceased's dependants, but order for costs was resisted by the defendant, maintaining that its total liability inclusive of costs cannot exceed $15,000. His Honour found his authority to make an order for costs in the Supreme Court Act and then found that the provisions of the Civil Aviation (Carriers' Liability) Act could be construed to limit liability

14 (1967) 40 A.L.J.R. 260.
15 [1969] Q.W.N. 25.
16 (1967) 40 A.L.J.R. 260.
17 [1972] W.A.R. 68.

for damages only and that no express provision existed which would take away the power of the Supreme Court to award costs.

The conclusion which may be drawn from this case is that the Civil Aviation (Carriers' Liability) Act cannot be construed as a code: it is not conclusive of the liability of air carriers. Even though legislature has neglected to refer to costs, they are still payable. By analogy, the neglect of the legislature to refer to claims by persons other than passengers or their dependants does not exclude those other persons from claiming, and may prevent the limitations in the Act being applied to them.

The Act does provide, in sections 14 and 37, that the liability of the carrier is to include liability to indemnify an employer or other person for workmen's compensation payments—and that this liability may not operate so as to increase the limit of liability. It might be argued that it is the intention of the legislature that no other liability to an employer is to be included, or, if there is any other liability, it is similarly not to operate to increase the limit of liability. I submit that such an argument would not be supported. Clear words will be required to divest the subject of a right of action.[18] It is more likely that the draughtsman has not considered the possibility of a common law action by an employer, and the court will not, I submit, supply his omission.

In summary, the provisions of the Civil Aviation (Carriers' Liability) Acts are not effective to limit an action by an employer in *servitium* arising out of a loss to the employer of the services of a servant in cases where the loss of services did not result from a personal injury, simply because the Acts refer only to death and personal injury.[19] Further, if my submission as to a narrow construction of the Act is accepted by the courts, the provisions are not effective to limit any action by an employer in *servitium*. With the growing use of the action, this may have consequences for insurers of carriers' liability, and for the draughtsmen of exemption clauses, who must seek to apply some limit to claims by an employer, at least where it is a party to the contract of carriage.

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18 See the authorities collected in Craies on Statute Law 6th ed., 1963, p. 118 ff.
19 As in the example given above of the aircraft forced down in a remote area.

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