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BARRISTERS, SOLICITORS

TRANSPORTATION NOTES

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Products Liability Claim Dismissed in Balloon Accident

On August 24, 2007, Stephen Pennock, a hot air balloon pilot, was scheduled to take a number of his customers on a scenic trip over Surrey, British Columbia. At that time, Mr. Pennock had logged over 2,000 hours in a hot air balloon and had never had an accident or incident resulting in injury to any passenger.

The balloon was a Raven 77-A, registered with Transport Canada as C-GRTU. The envelope (i.e. the "balloon" portion of the apparatus) was manufactured by Raven Industries Inc. in 1983. Raven's balloon division was subsequently sold to the defendant, Aerostar International Inc. ("Aerostar"). With the sale, Aerostar assumed all of the responsibilities of the balloon's type certificate holder. The gondola (i.e. the "basket" portion of the apparatus) was manufactured by Aerostar.

In the normal course, while the balloon was aloft, it was powered by one 15 gallon (V15) and three 23 gallon (V23) propane tanks. The tanks were connected to the burners by a hose manufactured by a third party, Parker Hannafin Corporation ("Hannafin"). Aerostar connected the hose fittings to the hose.

On the fateful day, Pennock and his crew began the inflation process by using a fan to blow ambient air into the envelope. Next, an external 10 gallon propane tank was connected to the burner and used for hot inflation, bringing the envelope and the gondola to an upright position.

Pennock then boarded the gondola, followed by his passengers. After boarding, Pennock disconnected the 10 gallon tank and gave it to an employee who removed it from the gondola. He then connected the V15 tank to the burner and continued with the pre-flight inspection. He lit the pilot which resulted in a "good blast of flame", then initiated a full burn, which produced a high flame into the envelope. When Pennock released the trigger mechanism, he sensed a loud sharp release of pressure, and heard an explosion to his right followed by the sound of escaping gas. He then felt vapour around him and smelled propane.

Pennock attempted to turn off the pilot, but did not reach the switch before the fuel ignited around him. He ordered the passengers to evacuate the gondola, reeled back and fell out of it himself, on fire.

He rolled around on the ground, and saw the balloon engulfed in flames. The balloon's tether, which was attached to a truck trailer, broke and the balloon continued to rise. To his horror, Pennock saw his passengers (all of whom had signed releases) jumping from the gondola to the ground. The envelope was ultimately consumed by fire and fell hundreds of feet to the ground into a trailer park.

In all, there were twelve passengers. Many were seriously injured. Two died.

The evidence at trial established that when Penncock activated the valve on the V15 for the full burn, the hose separated from its fitting, causing liquid propane to be sprayed uncontrollably within the gondola, which was ignited by the pilot. There was also evidence that at the critical time the fuel hose was whipping around inside the gondola. It was also noted that propane escaped from the V15 tank fitting where the hose had been attached.

Pennock sued Aerostar as manufacturer of the balloon.

At trial, expert evidence was adduced by Gilles Amirault, a professional engineer with expertise in mechanical engineering and forensic analysis. Mr. Amirault's evidence was that there were numerous ways in which the fuel line could have failed. He provided six possible scenarios — acknowledging that each was "unlikely". Of the six, Amirault identified two as the most likely (though still unlikely), namely:

- The fuel hose was installed improperly onto the fitting, or
- The fuel hose was subjected to excessive stresses while in use by Pennock.

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Mr. Amirault could not identify which of these two causes was the more likely.

The Court carefully examined the role of the V15 fuel hose in the accident. In this regard, the Court noted that the hose in question had been in service for some 3½ years prior to the accident. During that time, in the normal use of the ballon, the plaintiff coiled the V15 fuel hose around the collar of the V15 tank each time he finished using it, also noting that the tank end of the hose remained attached each time as the hose was coiled. Pennock described in his testimony how the hose would be coiled two or three times around the collar of the tank — always following the natural coil of the hose as it came from the factory.

Pennock also testified that the tank had never been knocked over nor had it hit anything while it was in his possession. He testified that the hose had been handled in the same way when used with the 10 gallon tank, but that it was handled by his crew when it was used with that tank.

The trial judge calculated that the hose in question had been coiled and uncoiled four times for each flight — and given the number of flights taken in 2006, the hose would have been coiled and uncoiled 580 times in that year alone.

The trial judge also noted that the V25 hoses were kept inside protective leather covers on the superstructure of the gondola, while the V15 hose was loose and not kept under cover when not in use.

The plaintiff called evidence from Douglas

Products Liability Claim Dismissed *(cont'd)*

Scott, an aircraft maintenance engineer, on the maintenance of the balloon and, in particular, the hoses. Mr. Scott had over 30 years' experience and had worked on at least 30 different types of hot air balloon, including Raven products.

Mr. Scott had performed an annual inspection on the balloon approximately four months earlier. In doing so, he had performed a submersion leak test on the V15 hose, using natural gas with a pressure of 300 psi. The hose passed the test. To Mr. Scott's recollection, it had never failed that test in the past. Mr. Scott described the condition of the balloon as "pristine".

The Court also received evidence from Luis Moreiras, a professional engineer with a degree in mechanical engineering. Mr. Moreiras was employed by Hannafin for over 30 years and became the senior engineer in Hannafin's hose products division before his retirement.

Mr. Moreiras testified that Hannafin manufactured approximately 450,000 fuel lines per year. Over the course of his 30 year career, he only became aware of 100 to 200 instances where hoses separated from their fittings. He also commented that, of these separations, most arose from applications involving the attachment of the hose to the fitting with a crimping device. Only 10 to 30 separations arose from attachments that swivel (as was the case in the fitting used on the balloon).

Mr. Moreiras testified that many of the separations that he had observed were the result of defective manufacture of the fitting, but he also noted that the 25% of the time, the separation arose as a result of misuse of in the field.

In the course of his career, Mr. Moreiras had become aware of four hose failures arising on Aerostar products. In each of those cases, the problem was the result of a service-related issue such as hose abrasion, exceeding minimum bend radius, kinked lines or improper use.

In this particular case, Mr. Moreiras could not arrive at a conclusion respecting the reason for the separation.

Pennock's case was based on four central assertions, namely:

- the V15 fuel line was assembled improperly at the Aerostar factory, most likely the result of the fitting not being inserted to a sufficient depth within the hose, resulting in the fitting slowly migrating out of the hose due to pressure within;
- Secondly, the design of the propane system was faulty because it did not have an emergency shut off to be used in the event of a leak;
- third, even though there is no evidence of defective assembly by Aerostar, same can be inferred because there is no evidence of improper use of the hose by Pennock (a questionable position, given that the plaintiff has the burden of proof); and
- finally, given the foreseeability of a propane fire in the gondola, Aerostar should have installed devices that would reduce the risk of fire.

Accepting that the two most likely causes of the hose failure were either improper assembly or excessive stress during service, and having concluded that the evidence does not exclude excessive stress as a likely cause, the plaintiff has failed to establish on a balance of probabilities that the failure occurred as a result of the improper assembly of the hose by Aerostar.

Aerostar countered by taking the position that there was no basis upon which to find that it had engaged in negligent behavior. It led evidence to the effect that in 30 years it had never experienced a pull-out failure. It argued that, if there was any inference to be drawn, it was that the failure arose from in-service handling problems. It argued that:

- The hose had functioned without problem for nearly four years;
- It was subject to daily and annual inspections;
- It had passed an annual inspection four months earlier when the balloon was declared airworthy;
- Mr. Amirault conceded that explanations exist for the failure that are consistent with no negligence on the part of Aerostar;
- There is no evidence that the hose left the assembly plant in a defective state;
- The plaintiff had used the hose in an unanticipated manner, by connecting the V15 hose to the 10 gallon tank; and
- With respect to the allegation that additional safety features could have been installed, these would have been irrelevant in this accident, given that the fire erupted so quickly after the hose failure.

In coming to his decision in this case. Mr. Justice Bowden relied upon the Nova Scotia Supreme Court (Appeal Division)'s ruling in *Smith v. Inglis* [1978] N.S.J. No. 495, a case in which the court held that:

> The [plaintiff] does … have the burden of establishing on a balance of probability as whole that the [defendant] was the agency responsible for the defect which caused him injury. This he may discharge by showing circumstantially that the defect must have been there when the [product] left the factory. He can in my opinion do this if he can exclude the probability of some other person having created the hazard after the product left the factory.

The trial judge then went on to consider the evidence and the competing theories of liability, placing significant emphasis on the fact that neither Amirault nor Moreira could determine whether the failure was the result of defective manufacturing or improper use in the field.

He also noted, and attached some significance to this, that the hose had been handled by Pennock's employees numerous times. They were responsible for the placement of the hose in the truck and the transportation of the hose from launch site to storage facility. He also noted that, in cross-examination, Pennock admitted that he did not recall any other occasion on which the unattached end of the hose became loose but that it was possible that this had occurred. Also, in cross-examination, the trial judge found it significant that Pennock admitted that he did not how the V15 hose was handled by his employees while he was aloft, nor was there any evidence of how Pennock instructed his employees to handle the hose in his absence.

In the end, Justice Bowden held that he could not exclude the possibility that improper use in the field was the cause of the hose failure — and, as a result, he found that the plaintiff had failed to establish on a balance of probabilities that Aerostar was the negligent party.

As to the allegations that Aerostar should have installed fail-safe mechanisms on the balloon, he accepted Aerostar's submission that such mechanisms could not have prevented the damage in this case, given the suddenness of the explosion. Justice Bowden commented that the fire occurred in a "heartbeat" and that it was "almost instantaneous".

The claim was dismissed with costs.

Pennock v. Aerostar International Inc.
2012 BCSC 1422

Ship Welder Denied Maritime Lien

The plaintiff, Comfact Corporation, provided welding services on a ship under construction. The builder, Davie Yard Inc., sought protection from its creditors under the *Companies Creditors Arrangement Act* (*CCAA*) in the course of building the ship, and the plaintiff was not paid for its welding services. The defendant ship, "Hull 717" was a ship being built in Canada for the benefit of a Norwegian corporation, Cecon Shipping 2A/S. Export Development Canada was the first mortgagee.

The plaintiff filed an action against the ship under s. 139 of the *Marine Liability Act* ("*MLA"*) for what it stated was a maritime lien – if successful, this would place it ahead of Export Development Canada as first mortgagee. Export Development Canada, as a party interested in the ship, opposed Comfact's claim.

Traditionally, a necessaries man only enjoyed a statutory right against the owner and required "some personal behaviour and attitude on the part of the owner" to ground it. This right did not survive a change in ownership. Section 139 of the *MLA*, enacted in 2001, appeared to create a maritime lien, which could exist even without personal liability on the part of the shipowner and would survive a change in ownership.

In order to claim under s. 139 of the *MLA*:

> (i) a claimant must carry on business in Canada,
>
> (ii) the ship in question must be a "foreign vessel", and
>
> (iii) the services provided must be supplied for the operation and maintenance of the ship or for its repair or equipping.

The plaintiff argued that it met the requirements of s. 139, as:

(i) it carried on business in Canada,

(ii) the ship was a foreign vessel, as it was registered in the Canadian Ship Registry as being owned by a Norwegian company, and

(iii) its welding services were supplied for the operation and maintenance of the ship.

Export Development Canada disputed that the ship was a foreign vessel and that the services supplied met the requirements of the section. The *Canada Shipping Act, 2001* defines "foreign vessel" as "not a Canadian vessel or a pleasure craft". However, s. 49 of the *Canada Shipping Act* states that a vessel being built in Canada may be recorded temporarily owned by a foreign national. Export Development Canada argued that the registration in this case was not enough for the court to find that the vessel was a foreign vessel.

Export Development Canada also disputed that the work provided by the plaintiff met the requirements of s. 139. It argued that the plaintiff's services were not for the ship's operation, maintenance, repair or equipping, but were rendered with respect to its construction, and that "shipbuilders and their subcontractors do not benefit from section 139". It contended that shipbuilders were excluded from relying on this section, as they were specifically addressed in section 22(2)(n) of the *Federal Courts Act* with regard to "claims arising out of a contract for the construction of a ship", and that the word "construction" was specifically excluded from section 139 of the *MLA*. Export Development Canada also argued that shipbuilders had possessory liens and other means at their disposal to protect their position, such as the withholding of a construction certificate.

In this case, the court had to determine whether the plaintiff's claim met the requirements of s. 139 and was also asked to decide whether the right under s. 139 amounted to a maritime lien or whether it was a personal action, requiring some personal behaviour on the part of the owner.

The court held that s. 139 of the *MLA* did not apply to the plaintiff. The *Federal Courts Act*, enacted in 1971, confirmed that the High Court had jurisdiction to determine a claim for necessaries supplied to a foreign ship for "construction" of a ship. The court noted that the word "construction" was excluded from s. 139, and thus the plaintiff was not entitled to claim under this section:

> I cannot accept that the failure to mention "building" or "construction" in section 139(2)(b) of the *Marine Liability Act* was a slip. Parliament could not have intended to grant a maritime lien to those engaged in the construction of a ship, such as the plaintiff in this case.

As the plaintiff had not met the requirements of the section, the court declined to decide whether there must be personal liability on the part of the shipowner before the new maritime lien could be created.

The court dismissed the claim and awarded Export Development Canada its costs.

Comfact Corporation v. The Ship Identified as "Hull 717" and Her Owners and all those interested in the Ship Identified as "Hull 717"

End of the Line *(cont'd)*

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in the following priority:

- monies owing to IATA for any costs or expenses of IATA and any other monies owing to IATA by Mexicana under its Counterindemnity Agreement or pursuant to any other IATA financial services. (the Counterindemnity Agreement was signed by Mexicana in favour of IATA as part of its participation in the BSP program. In form it is substantially similar to the Passenger Agency Conference Resolution 850, Attachment "C");
- to the extent that there are any remaining funds available, they are due to ICH members as payment towards the discharge of the Final ICH Balance; and
- finally, all remaining funds are to be paid to Mexicana or its liquidator/ trustee, as the case may be.

All payments received by IATA and ICH members are to be reported to the Mexican court overseeing Mexicana's reorganization — in order to allow the payments to be credited against amounts owed to the applicatble creditors in that proceeding.

To the extent that the ICH Balance is not satisfied in full, Mexicana will continue to owe the deficiency to IATA.

Reinstatement of IATA Services

Mexicana qualifies for reinstatement into the BSP and CASS if, and only if it makes full payment of all amounts owing:

- towards the ICH Final Balance;
- pursuant to its Counterindemnity Agreement with IATA; and
- with respect to any other IATA financial services.

Court approval is to be sought before an distribution of the BSP and CASS funds are to be made.

Compania Mexicana de Aviacion, s.a. de C.V.
2012 QCCS 4434

End of the Line *(Mexicana BSP/ CASS settlement process)*

As many of our readers will know, after 89 years of service, Compania Mexicana de Aviacion ("Mexicana") ceased operations in August 2010 — another legacy airline that fell victim to high labour costs. *The Economist* noted in August 2010 that, at that time, Mexicana's pilots were earning 49% more than pilots working for the mainline US carriers and 185% more than pilots flying for its Mexican LCC competitors. The figures for flight attendants were 32% and 165%, respectively.

In September, IATA made an application to the Quebec Superior Court (Commercial Division) for an order regarding the final settlement of Mexicana's outstanding balance with the IATA clearing house ("ICH") and for the final distribution of the IATA Billing and Settlement Plan (BSP) and IATA Cargo Account Settlement Systems ("CASS").

After considering evidence filed on the application, the Court approved a procedure that we will summarize here. The objective of the process, as stated in the document setting out the approved process, is as follows:

> To create a process whereby Mexicana, as a non-operating, court protected, indirect participant in the ICH, is provided with the technical possibility to enter all of its admissible claims in the records of the ICH, so that IATA can adjust the ICH Balance payable to Mexicana, set it off against the BSP & CASS Proceeds, pay the appropriate costs & debts, and remit any balance remaining to Mexicana (or its estate).

In more detail, the process is as follows:

Reconciliation of ICH Balance

IATA was given two weeks to set up a test environment to act as a "special clearance environment" ("Special Environment"), which would be designed to permit Mexicana to record all of its admissible claims into the ICH system.

Simultaneously, IATA is to copy all of the transactions by and against Mexicana from the live ICH system into the Special Environment. IATA is to advise Mexicana of when that process is complete.

After receiving such notice, Mexicana has four weeks to load its claims into the Special Environment. Mexicana is to advise IATA in writing of the completion of this task.

On receiving this notice, IATA has five weeks to validate the claims posted by Mexicana. IATA is at liberty to consult with other ICH members, as required.

Once the validation process is complete, IATA is to post the balances into its system and determine a Final ICH Balance. Once this amount is determined, no further claim made by Mexicana or other ICH members will be accepted.

Other Modalities

Once the above process is complete, Mexicana may enter data with respect to other modalities via secured web access. In doing so, Mexicana must be in a position to demonstrate that any such invoice relates to a transportation service delivered on or before September 7, 2010 and that the invoice was created and delivered to an ICH member in accordance with the *Revenue Accounting Manual* rules and timelines, and that it also complies with the *ICH Regulations*. Mexicana is to provide IATA a report indicating all invoices entered into the system within two weeks of entry, in order to give IATA to opportunity to validate same.

Also, as part of the process IATA is not permitted to enter any rejections of billings submitted by ICH members for services delivered after September 7, 2010.

In turn, IATA will accept into clearance all claims for services prior to September 7, 2010, provided they are not:

- Contrary to the rules or timelines prescribed by the *Revenue Accounting Manual*; and
- Are not "improper billings" as defined in the *ICH Regulations*.

Once this process is complete any residual disputes between Mexicana and ICH members are to be dealt with bilaterally by those parties.

Final Distribution of BSP/ CASS Proceeds

Once the ICH Balance is determined, the BSP & CASS proceeds are to be distributed

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