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Loss of Enjoyment of Holiday and the *Montreal Convention*

A passenger on an Air Transat flight claimed more than $1.1 million in damages from the carrier after her seat was struck, with force, by a runaway food cart on touchdown in Cancun, Mexico. The British Columbia Supreme Court awarded the plaintiff, Debora Wettlaufer, a fraction of that amount.

Air Transat admitted liability and submitted that the damages recoverable are governed by the *Montreal Convention*. As Justice Funt put it, "Many aspects of the usual law of tort and contract...with respect to personal injury claims are displaced by what is commonly referred to as the *Montreal Convention*." The judge's decision includes a lengthy review of case law governing "bodily injury" under the Convention.

Also of note, Justice Funt included in his award of damages an amount in compensation for the cost of Ms. Wettlaufer's vacation, the basis for which is somewhat unclear.

Before turning to that and to Justice Funt's discussion of the jurisprudence on "bodily injury" and its application to the plaintiff's action, it should be noted that much of the discrepancy between the quantum of damages awarded and that claimed can be attributed to the plaintiff's failure to substantiate her claims of injury. Justice Funt cited case law for the proposition that "no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence" before stating, "I found the plaintiff's testimony to be unreliable in connection with her alleged continuing injuries."

The decision includes several examples of what the trial judge found to be contradictions or omissions or inconsistencies in the plaintiff's evidence. The plaintiff called a vascular surgeon and a psychologist as expert witnesses. Justice Funt gave little weight to the expert opinions provided because they were underpinned by the plaintiff's unreliable description of her symptoms and injuries.

The trial judge did find that the plaintiff suffered whiplash-type injuries, as well as emotional distress, including the fear of flying back to Vancouver and of "being bumped again," as a result of the April 2009 accident. Still, as an indication of his view of the plaintiff's credibility and evidence, when turning to the assessment of damages, Justice Funt stated:

> For the purposes of assessing damages, I will use defendant's counsel's description [of her continuing physical injuries] in order to draw the line, ***even though I may have been more conservative with respect to my findings of ongoing neck and back pain as opposed to tenderness.***
>
> ***[emphasis added]***

While noting that "[m]ost aspects of the meaning of 'bodily injury', as used in the *Montreal Convention*, are settled," Justice Funt nonetheless treated the question of interpreting that phrase in a comprehensive way.

Article 17(1) of the *Montreal Convention* governed on the facts of this case in providing that the carrier is liable in the case of a bodily injury caused by an accident that took place on board the aircraft. The trial judge explained that "bodily injury" has a narrower meaning than "personal injury", which would include mental injury.

Justice Funt reviewed the well-known US Supreme Court decision in *Eastern Airlines Inc. v Floyd*, 499 US 530 (USSC 1991) as well as the House of Lords decisions in *Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd*, [2002] UKHL 7.

In these decisions, the courts interpreted the meaning of "bodily injury" under the *Warsaw Convention*, the predecessor to the *Montreal Convention*. Justice Funt noted that there had been discussion at the conference leading to the *Montreal Convention* of departing from "bodily injury"—and to expanding the ambit of recoverable injury—but that the "narrower concept" was continued.

Justice Funt established that *Floyd*, *Morris* and *King* stand for the proposition that pure mental injury does not constitute "bodily injury" under either the *Warsaw* or the *Montreal Conventions*. In these cases, either no physical, bodily injury was in play or the psychiatric/mental injury at issue did not relate to any bodily injury. In the case before him, where he found that the plaintiff suffered "bodily injury of a whiplash-type nature", Justice Funt moved on to answering "whether or not emotional distress can be claimed as 'damage sustained in case of… bodily injury' as that language is used in Article 17 of the *Montreal Convention*."

For guidance on this question, the judge turned to the Second Circuit, United States Court of Appeals decision in *Ehrlich v American Airlines*, 360 F. 3d 366 (App Ct 2004). While this case was also decided under the *Warsaw Convention*, the court specifically canvassed the *travaux preparatoires* in relation to the *Montreal Convention* in its inquiry into the meaning of "bodily injury."

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Transportation Appeal Tribunal Awards Legal Costs

In June of 2009 the Minister of Transport (the "Minister") issued a Notice of Refusal ("NOR") to Independence Air Ambulance Corporation ("IAAC"), the Applicant, denying IAAC an Air Operator Certificate ("AOC") because of the aviation record of the Applicant and more specifically, the aviation record of Jeffrey Alan McIntosh. The Applicant requested a review of the Minister's decision with the Transportation Appeal Tribunal of Canada (the "Tribunal") and the review hearing was scheduled. About a week before the hearing the Minister requested and was granted an adjournment of the Review Hearing so that the Minister could fulfill his ongoing disclosure obligation.

The Minister used the period of adjournment to prepare an Application to Amend the NOR, which was presented to the Tribunal and included 31 new citations, enforcement actions, and problems in general, which occurred during the existence of Canadian Global Air Ambulance Ltd. ("CGAA"), former employer of Mr. McIntosh. The Minister argued that these events could be attributed to Mr. McIntosh and in doing so, relied on Minister's officials' novel interpretation of "principal" as defined in paragraph 6.71(c) of the *Aeronautics Act* (the "Act") as well as section 103.12 of the *Canadian Aviation Regulations* (the "Regulations"). In its review determination the Tribunal found that the Minister had not proven that the record of CGAA was attributable to Mr. McIntosh and therefore sent the decision to deny the AOC to IAAC back to the Minister for reconsideration. Following the Review Determination, the Applicant requested that an order be made against the Minister for costs, as well as reimbursement of expenses, claiming that the Minister's conduct had been frivolous and vexatious.

In reaching its decision the Tribunal was guided by subsection 19(1) of the *Transportation Appeal Tribunal of Canada Act* (the "Tribunal Act"), which states (among other things) that the Tribunal may award any costs, and may require the reimbursement of any expenses incurred in connection with a hearing, that it considers reasonable if: (a) it is seized of a matter for reasons that are frivolous or vexatious; and (b) a party that is granted an adjournment of the hearing requested the adjournment without adequate notice to the Tribunal. Also relevant to the Tribunal's analysis was section 6.71 of the Act, which states that the Minister may refuse to issue or amend a Canadian aviation document on the grounds that: (c) the Minister is of the opinion that the public interest and, in particular, the aviation record of the applicant or of any principal of the applicant, as defined under paragraph 3(a), warrant the refusal. Finally, paragraph 103.12(a) to (d) of the Regulation defines "principal" for the purposes of paragraph 3(a) of the Act, and it was this provision that the Applicant argued that the Minister attempted manipulate to justify the NOR issued to the Applicant.

In arguing that the Tribunal should award costs against the Minister, the Applicant indicated that there were a number of factors that indicated that the Minister's conduct was considered frivolous and vexatious, including: (1) serious or egregious conduct, even malice on the part of the Minister's officials; (2) the actions of the Minister lacked merit and were intended to embarrass or annoy the Applicant; (3) the Minister's interpretation of "principal" is so unreasonable as to be frivolous or vexatious; (4) the Minister's notice had no legal merit or was instituted for an improper purpose, such as harassment or oppression of the Applicant; and (5) it was obvious that the action of denying the Applicant an AOC could not succeed.

While the Applicant conceded that that there are factors that may overcome a situation that is otherwise considered frivolous or vexatious, including simple errors of judgment, charges dealing with a substantive issue, or if the Minister's interpretation is reasonable from an operation or safety perspective, it argued that none of these were relevant to this case. Furthermore, the Applicant noted that the original NOR provided no grounds for refusal and that the 31 grounds for refusal listed in the amended NOR were not found by the Review Member to be attributable to Mr. McIntosh and in fact, that both the Applicant and Mr. McIntosh had clean records. On this basis the Applicant alleged that the Minister was institutionally blind to the evidence before him and also, biased.

The Applicant pointed to ten separate acts that were said to be frivolous or vexatious, which included: requesting an adjournment a week before the case was to be heard and rather than making additional disclosure, using the time to rewrite the NOR to include 31 new grounds; embellishing evidence; inflammatory comments regarding Mr. McIntosh during the review hearing and written submissions; undertaking a biased risk assessment that was designed to justify an adverse outcome for the Applicant; and approaching the issue with an attitude of malice, spite, harassment and oppression toward Mr. McIntosh. The Applicant suggested that while individually these incidents might not establish malice or spite, when considered together they created a clear pattern of acting without reasonable grounds or legal merit, which rose to the level of harassing and oppressing. The Applicant argued that in light of the foregoing the Minister should be forced to compensate the Applicant for the $108,485.97 that had been spent on legal fees, preparation fees, and travel expenses.

In reply, the Minister argued that CGAA had a long history of contraventions, and that CGAA was a poorly run company, which the Applicant and Mr. McIntosh both admitted. The Minister also submitted that after CGAA went bankrupt in 2008, Mr. McIntosh acted swiftly in attempting to secure a new AOC under a new company name—IAAC– only six months later and that his officials acted prudently in denying the AOC. The Minister also argued that the Applicant misrepresented the Review Member's findings in regard to the 31 grounds contained in the NOR, and that the first 11 grounds were proven, as was the fact that Mr. McIntosh was the Accountable Executive at that time. The only thing that had *not* been proven was Mr. McIntosh's responsibility for the incidents. The Minister also submitted that there were many relevant and substantive questions to be answered, which included the four-corners of the term "principal". Citing the case of *Croll v. Brown*, 2002 BCCA 522, the Minister stated that his actions did not rise to the level of frivolous or vexatious, which the Minister argued requires an egregious abuse of the legal process where the litigant attempts solely to abuse or annoy.

The Tribunal disagreed with the Minister's arguments and in reaching its conclusion reviewed existing cases and noted a reluctance to use section 19(1) of the Tribunal Act, but stated that reluctance notwithstanding, the section should not be treated as ineffectual. In examining the Minister's conduct, as well as the novel interpretation of "principal", the Tribunal concluded that the Minister's actions lacked legal merit, and were not simply an error of judgment. Referencing the Ontario Court of Appeal decision in *Foy v. Foy*, 26 (O.R.) 2d 220, the Tribunal found that a case is frivolous if it has no reasonable chance of succeeding or would lead to no good, and is vexatious if it would bring hardship on the opposite party to defend against. Concluding that the Minister's conduct was objectively unreasonable, and that the Tribunal was seized of this case for reasons that were frivolous and vexatious, it held that an award of costs was appropriate. Following *Drader v. Canada (Minister of Transport)*, 2007 TATCE 7 (Review), the Tribunal stated that section 19(1) contemplates penalization of a party rather than indemnification, and therefore awarded half the Applicant's costs of $54,200.

Independence Air Ambulance Corporation v. Canada (Minister of Transport), 2013 TATCE 35 (Ruling)

Lost of Enjoyment of Holiday *(cont'd)*

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Because the Second Circuit court did not find them to be of any further assistance in that determination, Justice Funt relied on its holding.

In *Ehrlich*, the plaintiffs suffered various bodily injuries, as well as mental ones, like sleep disturbance and fear of flying. The plaintiffs argued that the carrier could be liable so long as the mental injury was accompanied by physical injury, "regardless of whether the two distinct types of injuries shared the causal relationship." The Second Circuit Court of Appeals rejected this argument, holding that the carrier would be liable for mental injuries "only if they are caused by bodily injuries."

Justice Funt gave an example of when the causal link between bodily and mental injury will be clear: "an airline passenger who suffers burns on his or her face as a result of an aircraft will undoubtedly suffer mental anguish. So long as the bodily injury is proven, the mental injury proven to have been caused by it will be compensable."

In the case of Ms. Wettlaufer, the judge accepted that she had suffered whiplash-type injuries and emotional distress. The plaintiff claimed $125,000 in non-pecuniary damages, while the defendant submitted that an award in the range of $40,000 to $60,000 was appropriate compensation. Justice Funt awarded $60,000, noting that damages for emotional distress caused by the bodily injuries, if separated out, would be relatively small and comprise less than $2,000 of the $60,000. He also noted that he was not compensating the plaintiff for a fear of flying "because there is not a sufficient causal link between such a fear and the whiplash-type injury."

While the quantum is small, this is among the first Canadian decisions to award damages for mental injury flowing from bodily injury under the *Montreal* (or *Warsaw*) *Convention*.

In addition to the non-pecuniary damages for her injuries, Justice Funt awarded the plaintiff damages for past wage loss up to the point she returned to her job full-time in October 2009.

He refused to award anything for loss of future earning capacity, which the plaintiff submitted amounted to more than $800,000. The fact that Ms. Wettlaufer worked full-time for two and a half years after her return to her job and the deficiencies and contradictions in her evidence on continuing injuries were fatal to her claim under this head of damage.

Where the plaintiff claimed almost $125,000 in costs for future care and the defendant estimated the cost of a pain program to be $11,000, the court awarded $20,000. She was also awarded special damages for treatment and medication of approximately $8,000.

Justice Funt rejected the plaintiff's claim for non-pecuniary damages for loss of promised enjoyment of holiday—based on the famous Lord Denning decision in *Jarvis v Swan Tours Ltd*, [1972] 2 WCR 954 (Eng CA)—holding that loss of promised enjoyment does not constitute "damage sustained" under Article 17 of the *Montreal Convention*.

However, he found that the recovery of the actual cost of the vacation Ms. Wettlaufer and her husband had begun when the injury occurred does fall within Article 17.

The only case law cited in support of this finding was the 1999 BC Court of Appeal decision in *Hay v Hoffman*, 1999 BCCA 26. In that case, the plaintiff had suffered injuries in motor vehicle accidents and could not undertake a vacation as a result. The appeal court actually overturned the lower court's award of special damages for "lost vacation". In *Hay*, the plaintiff had been offered a complimentary vacation by a tour company after he and his wife had been dissatisfied by a previous vacation. The Court of Appeal determined that because no money had been lost or was required to be expended, an award of special damages was inappropriate. Instead a lower amount under the head of non-pecuniary damages was made.

From this, Justice Funt determined that "it is safe to infer that a lost vacation that has been paid for would be a quantifiable loss that could be compensated for under the head of special damages." (He correctly decided that the pain and suffering the plaintiff experienced during that time was accounted for in the award of non-pecuniary damages.)

But Ms. Wettlaufer and her husband remained in Cancun, as scheduled, for their vacation after the run-in with the food cart. Unlike the Hays, they **did** undertake their vacation. This being the case, it is somewhat difficult to explain the award of $3,144 in special damages for the cost of the holiday.

This amount included the cost of the plaintiff's husband's vacation too. Somewhat reminiscent of, though not as colourful as, Lord Denning's lamentations over absent yodelers and unsatisfactory levels of *Gemutlichkeit* in *Swan Tours*, in support of this holding Justice Funt stated: "When spouses plan a holiday together and one suffers bodily injury and the other does not, the full amount should be viewed as the damage sustained. For what couple, after planning a holiday together, would each not want to experience that holiday together?"

Wettlaufer v. Air Transat AT Inc
2013 BCSC 1245

End of the Line *(cont'd)*

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Not surprisingly, there was no issue with the second branch of the test: namely, that the service need be provided by means of an aircraft.

With regard to the third branch, the Agency noted that "a key component of an air service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or obligation [must] create an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration."

On this point, the Agency noted that, as a prerequisite of providing the service, Angel Flight required passengers to complete:

- a "Patient Information Sheet" containing general information necessary to plan and arrange the requested flight services; as well as
- a "Air Transport Waiver of Liability" form which, in return for being provided with the air transportation services, the applicant agrees to hold Angel Flight and its pilots harmless from liability.

The Agency did not specifically indicate whether the above documents amount to a "contractual arrangement", although such an inference may be made.

Finally, the Agency noted that the service certainly failed on the last branch of the test, given that the service was offered to those in need without charge. Presumably, this means that he "hold harmless clause" in the above-referenced Waiver of Liability does not amount to consideration.

Given the finding on the last branch (and, inferentially on the third branch as well), the Agency concluded that Angel Flight is not an "air service" within the meaning of section 55 of the *Canada Transportation Act* and, as such, a license is not required.

Accordingly, the Agency rescinded the prior order exempting Angel Flight from the requirement to hold a licence, subject to certain conditions.

Determination re: Angel Air
CTA Decision No. 462-A-2013

End of the Line *("Air Service" Redux)*

Section 55(1) of the *Canada Transportation Act*, S.C. 1996, defines the term "air service" as:

> … a service, provided by means of an aircraft, that is publicly available for the transportation of passengers, goods or both.

Any person operating such as service is required to obtain a licence from the Canadian Transportation Agency (the "Agency").

In the October 2013 edition of *Transportation Notes*, we reported on the Agency's *Decision No. 390-A-2013* where the Agency considered the factors that define an "air service".

In that ruling, the Agency identified four criteria the should be considered in order to make the determination. These are whether the "air service" is:

1) offered and made available to the public;

2) provided by means of an aircraft;

3) provided pursuant to a contract or arrangement for the transportation of passengers and goods; and

4) offered for consideration.

Angel Flight of British Columbia Society ("Angel Flight") is a charitable, non-profit organization based in British Columbia that provides air services to persons with cancer or children with certain medical conditions that require care in medical facilities in Victoria and Vancouver.

In essence, Angel Flight uses a network of volunteer pilots, aircraft owners and ground crew support to work with families, medical personnel and social workers in order to arrange benevolent flights for persons in medical need. The service is offered free of charge.

In December 2006 (well before the recent directions provided on how to identify a "publicly available air service") the Agency ordered Angel Flight to cease and desist from providing its services until it obtained a licence from the Agency.

… if a person believes that the criteria set out in [CTA Decision No. 390-A-2013] may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter.

Angel Flight applied for such a licence in January 2007 but, after considering the application, the Agency exempted Angel Flight from the requirement that it hold a licence, "given the unique and particular circumstances of [Angel Flight] and taking into account the nature of the service". It did, however, impose certain conditions on Angel Flight in order to maintain its exemption, mainly relating to:

- ensuring that Angel Flight remained under Canadian ownership and control;
- keeping the Agency apprised of any changes to its operations; and
- ensuring that appropriate insurance arrangements were in place for both the air service as well as its volunteer pilots.

In light of the more recent directions given by the Agency in *Decision No. 390-A-2013*, in October 2013, Angel Flight applied for a determination by the Agency that it is not operating an "air service" — a determination which, if made, would remove it from the Agency's licensing regime altogether.

In considering the application, the Agency looked at the four criteria set out in *Decision No. 390-A-2013*.

On the issue of whether Angel Flight's services were offered to the "public", the Agency noted that:

- the services were promoted through a number of different mediums, including radio advertisements, a website and speeches made by the CEO;
- members of the public can apply for a flight through documents available online via Angel Flight's website; and
- although Angel Flight imposes eligibility criteria on persons applying to use the flight (e.g. must have a particular medical condition, must be treated in Victoria or Vancouver medical facility), the Agency noted that imposing such requirements does not disqualify a service from being "publicly available".

Having considered the above, the Agency concluded that the service was, indeed, available to the public.

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