CASE NOTE: *O'MARA* v *AIR CANADA* 2013 ONSC 2931

Timothy Law

Another case involving the application of the Montreal and Warsaw Conventions was recently decided in the context of a proposed class action against Air Canada. Consistent with both the previous case law from Canada and other countries dealing with these Conventions, the Superior Court of Ontario has again confirmed the existence of the "complete code" that applies to cases that are deemed to fall under the terms of the Conventions.

The case of *O'Mara v Air Canada* was a proposed class action, in which Ms O'Mara claimed damages on behalf of 95 people who were passengers on Air Canada Flight AC878. The claim was made for physical or psychological injury or both, arising from a harrowing experience during a flight from Toronto to Zurich. Along with the claim for compensatory damages, she also claimed aggravated, punitive or exemplary damages.

The case came on for hearing before Justice Perell of the Ontario Superior Court of Justice by way of a motion by Air Canada. Air Canada's motion sought to strike out the claims for punitive, aggravated, and exemplary damages and a declaration that the Montreal Convention and the Warsaw Convention exclude recovery for damages for purely psychological injuries not caused directly by "bodily injury."

For the purposes of Air Canada's motion Justice Perell accepted the facts from the statement of claim. Those facts detailed the departure and flight of AC878, the first officer's misinterpretation of flight data and the resulting requirement that the Captain was forced to execute an emergency manoeuvre which resulted in a terrifying episode which lasted approximately 46 seconds. The episode led to the passengers being violently shaken and thrown and many of them being catapulted into the aircraft's ceiling and interior. Objects in the cabin were also moved throughout the interior of the aircraft and the potential class members suffered serious physical and psychological injuries. Subsequent to the incident there was a cover up by Air Canada as to the actual occurrence of events.

The legal basis for the claims by the putative class was set out in the Statement of Claim, being the contracts of international carriage between each of them and Air Canada and the provisions of the Carriage by Air Act including Articles 17 and 21 of the Montreal Convention and articles 17, 22, and 25 of the Warsaw Convention. The claim went on to allege that the incident constituted an accident within the meaning of Article 17 of the Montreal Convention and Article 17 of the Warsaw Convention, the result of which was that Air Canada was liable to its passengers. Lastly, it alleged that if the bodily injury component of any of the passengers' claims exceeded the $100,000 Special Drawing Rights, the incident was caused by the negligence of Air Canada and its employees including the First Officer and

the Captain, such that Air Canada could not avail itself of any of the limits on liability under Article 21 of the Montreal Convention. That negligence was detailed as "negligently, recklessly and/or improperly failing to advise Class Members of the true cause of the Terrifying Episode".

For its part, Air Canada took the position that Ms O'Mara's claim was pleaded as an "accident", within the meaning of the Warsaw Convention and the Montreal Convention, and it was therefore exclusively and comprehensively governed by the Conventions. Under the Conventions no recovery is permitted for punitive, exemplary or any other non-compensatory damages. On the face of the Statement of Claim Air Canada therefore took the position that it was plain and obvious that there was no reasonable cause of action for punitive, exemplary, or any other non-compensatory damages and that any such claim should be struck from the claim. In addition, Air Canada submitted that even though a claim for aggravated damages is not prohibited by the Conventions, in this case the claim for aggravated damages was in effect a claim for punitive damages and not therefore allowed. Lastly, Air Canada claimed that since it was plain and obvious that the Conventions exclude recovery for damages for any purely psychological injury not caused directly by "bodily injury," Ms O'Hara's claim for purely psychological injury should also be struck.

Ms O'Mara took the position that the claims for aggravated damages were claims for compensatory damages permitted under the Conventions and the common law and these claims should not be struck from the Statement of Claim. Claims for punitive and exemplary damages are not governed by the Conventions because the Conventions apply only to damages sustained by passengers that took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The cover up by Air Canada supports a negligence claim for events subsequent to and long after the events of flight AC 878. Otherwise put, Ms O'Mara claimed that the common law negligence claim with respect to the cover-up was not governed by the Conventions. Lastly, she took the position that the declaratory relief sought by Air Canada was inappropriate because the scope of the motion was limited to the issue of whether the aggravated, punitive and exemplary damages claims disclosed a reasonable cause of action. The declaratory relief was therefore premature according to her because Air Canada had not by the time of its motion filed its Statement of Defence and the common issues had not been defined.

After a review of the test for the existence of a cause of action in the context of a proposed class action (that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim), his Honour proceeded to explain his two stage analysis of the case. In the first he assumed that only the Warsaw or Montreal Convention applied to the claims and concluded, from the case law, "that: (a) there is no claim for pure psychological injuries under the Conventions; (b) a claim for punitive or exemplary damages is not available under the Conventions; but (c) a genuine claim for aggravated damages is available under the Conventions." (para. 27). He then went on to the second stage of his analysis, pursuant to which he reviewed whether the negligence claim, based on the cover-up, was available at common law and outside of the Conventions. In this second stage he concluded that the claim based on the cover-up, "is precluded by the Conventions because this claim is either: (a) a claim already covered by the Convention; or (b) a claim arising out of the international carriage of air for which common law claims are precluded." (para. 28). As a result Ms O'Mara could not rely on a common law claim to advance claims for psychological injuries or for

punitive or exemplary damages.

In the context of his first stage analysis, Perell J. made the following observation with respect to the way in which the provisions of the Conventions have to be interpreted (para 44):

> *"Given that a major purpose of the Conventions was to introduce consistency and uniformity in the international law applicable to air carriage, in interpreting the Conventions, it is important that there be consistency in interpretation from one country to another, and, thus, there must be a very sound reason to depart from the precedents established from around the world:* Connaught Laboratories Ltd. v British Airways *(2002), 61 O.R. (3d) 204 (S.C.J.) at para. 50, aff'd [2005] O.J. No. 3019 (C.A.);* Chau v Delta Airlines Inc. *(2003), 67 O.R. (3d) 108 (S.C.J.) at para. 9;* Ace Aviation Holding Inc. v Holden, *[2008] O.J. No. 3134 (Div. Ct.) at para. 19;* Gontcharov v Canjet, *2012 ONSC 2279 at paras. 18-21;* Plourde v Service Aerien F.B.O. Inc., *2007 QCCA 739 at para. 55, leave to appeal refused [2007] S.C.C.A. No. 400."*

He then went on, with respect to purely psychological injuries under the Conventions, to comment again on the international nature of the case law: (para. 42):

> *"The term bodily injury as used in the Montreal Convention is intended to have the same meaning as in the Warsaw Convention, and the case law from around the world about the Warsaw Convention and about the Montreal Convention holds that compensation for purely psychological injuries that do not manifest physical injury or an injury to the body are not recoverable under the Conventions. See:* Eastern Airlines, Inc. v Floyd, *499 U.S. 530 (1991) (United States);* Sidhu v British Airways, *[1997] 2 Lloyd's Rep 76 (H.L.) (England);* Kotsambasis v Singapore Airlines, *(1997) 42 N.S.W.L.R. 110 (C.A.) (Australia);* Morris v KLM Royal Dutch Airlines, *[2002] A.C. 628 (H.L.) (England);* Chau v Delta Airlines Inc. *(2003), 67 O.R. (3d) 108 (S.C.J.) (Canada);* Walton v MyTravel Canada Holdings Inc., *2006 SKQB 231 (Saskatchewan);* Plourde v Service Aerien F.B.O. Inc., *2007 QCCA 739, leave to appeal refused [2007] S.C.C.A. No. 400 (Quebec);* Simard v Air Canada, *2007 QCCS 4452 (Quebec);* Lukacs v United Airlines Inc., *2009 MBQB 29, affd. 2009 MBCA 111 (Manitoba);* Ehrlich v American Eagle Airlines Inc., *360 F. 3d 366 (2004) (United States);* Lee v American Airlines Inc., *28 Avi 16,552, (ND Tex 2002) affirmed, 29 Avi 18,426 (5th Cir 2004) (United States)* Gontcharov v Canjet, *2012 ONSC 2279 (Canada)."*

In the last part of the first stage of his analysis Perell J. noted the difference between the nature of aggravated damages and punitive damages. Aggravated damages being those awarded not in addition to but rather as part of general damages, taking into account any aggravating features that should increase the award. Punitive or exemplary damages, being awarded to punish the defendant and to make an example of him or her in order to deter others from committing the same tort. Although a claim for aggravated damages is not explicitly prevented under the Conventions, it exists, by its nature as a part of the compensatory general damages claim and therefore cannot stand alone. Relying on this rationale, his

Honour struck the part of the claim including improperly pleading aggravated damages. Punitive or exemplary damages are treated differently under the Conventions. Case law under the Warsaw Convention has interpreted Article 17 to limit recovery to compensable damages only and Article 29 of the Montreal Convention specifically excludes recovery for punitive, exemplary or any other non-compensatory damages for claims that fall within its scope.

Having concluded that "it is plain and obvious that Ms O'Mara's claim under the Conventions for pure psychological injury is legally untenable." (at para. 56), Justice Perell went on, in the second stage of this analysis, to deal with the availability of the common law claim for punitive and exemplary damages and the plaintiff's claim that same were available to her under the shelter of the negligence claim.

Ms O'Mara argued that the negligence claim did not occur on board the aircraft or in the course of embarking or disembarking and was therefore a claim independent of the Conventions. In dismissing this line of argument his Honour noted the following:

> *"The case law from around the world holds that where the liability of an airline for international carriage is in issue, the provisions of the Warsaw Convention are exclusive and they preclude the application of domestic law." (para. 61)*
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> *"Thus, the case law establishes that passengers do not have recourse to domestic law, in advancing a claim for damages arising in connection with international carriage by air." (para. 69)*
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> *"The Conventions were enacted to provide certainty, predictability, uniformity, and consistency about the liability of carriers engaged in the international carriage by air:* Ace Aviation Holding Inc. v Holden*, [2008] O.J. No. 3134 (S.C.J) at para. 19;* El Al Israel Airlines Ltd. v Tseng*, 525 U.S. 155 (1999). Therefore, it follows that courts have given a robust interpretation to the scope of the Conventions and to the meaning of the word "accident", and if the alleged wrongdoing is causally connected with conduct that took place on board the airline, then it is regarded as within the ambit of the Conventions. As noted by the Federal Court of Appeal in* Air Canada v Thibodeau*,* supra*, the Conventions are meant to be a complete code as concerns the air carrier's liability for damages, regardless of the source of this liability." (para. 73)*

Finally, in concluding that the Conventions applied to the case before him, Perell J. noted that: "a cover-up of the cause of the Terrifying Episode is causally connected to the Terrifying Episode and indeed could not have occurred but for the Terrifying Episode. In my opinion, the Conventions apply to this case, and Ms O'Mara's common law negligence claim based on the cover-up is precluded. However, if this conclusion is incorrect and she does not have a claim under the Conventions, then her negligence claim is a common law claim against an airline for damages arising from the international carriage by air, and common law claims are precluded because the Conventions are a complete code of what claims are available in the circumstances of this case." (paras. 81 & 82).

Typical of his reasons for a decision, Justice Perell made reference to and quoted from extensive jurisprudential authority in his reasons. Of interest in this particular decision is the fact that his extensive reference to and review of the case law was to a consistent line of reason-

ing with respect to the all-encompassing nature of the "code" that exists under the Conventions. This then leads to the conclusion that, at least in this one area of travel law, there is an international consistency that litigants can rely on or expect to face in the context personal injury cases against airlines.

Timothy Law is a solicitor with Heifetz, Crozier, Law, Toronto.
He can be contacted at tjlaw@hclaw.com