INSULTED AND IMPRISONED BUT LITTLE JOY FROM MONTREAL

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The international jurisprudence dealing with the Montreal Convention (the 'Convention') was again added to in June 2012 by the Superior Court of Ontario, Canada in the case of *Gontcharov v Canjet* 2012 ONSC 2279. Justice Wilson gave us her thoughts on the 'pre-emptive approach' in interpreting the provisions of the Convention, albeit in the *obiter* portion of her decision, and added her support for a consistent and uniform approach to processing claims involving international travel.

The claims made by the plaintiff in this case were for multiple types of damage, alleged to have occurred on a flight from Puerto Plata, Dominican Republic to Toronto, Canada. The actions of the plaintiff on the return journey led to his detention for more than three hours due to his having been labelled a 'high maintenance passenger' by the on board staff. He was however released with an apology after questioning by the local constabulary.

He was labelled as a 'high maintenance' passenger

The case came before Justice Wilson in the form of an interlocutory motion brought by the defendants to strike out the various claims made by the plaintiff. The plaintiff claimed that the incident in question was not one to which the Convention applied and sought dismissal of the defendants' motion.

Wilson J set out the test applicable to the defendants' motion – that the facts in the pleadings are presumed true and that in order to strike out any portion of same the moving party must demonstrate that it is plain and obvious that that the statement of claim discloses no reasonable cause of action. Her Honour then noted that questions of law that are not fully settled should not be determined in the context of this type of motion. She then set out the facts, as taken from the pleadings.

The plaintiff, a Canadian resident, purchased a return ticket through a tour operator for a vacation in Puerto Plata in the Dominican Republic with the defendant, Canjet, as the air carrier. During the return flight the plaintiff complained that he was cold and asked the flight attendants to either turn up the heat or provide him with a blanket. The attendants initially refused both of these requests and when the plaintiff asked again for a blanket he was told that he would be charged $10 and that he was being considered by the staff as a 'high maintenance passenger'. The aircraft landed in Toronto at 12:45 am and the plaintiff was escorted off the aircraft by two local police officers to where two other officers with submachine guns were located. The plaintiff was then obliged to remain in place while the other passengers disembarked the aircraft. He was detained until 4:00 am when he was released by the officers with an apology. As a result of this treatment the plaintiff claimed that he was unable to sleep for 10 to 12 days, that he came down with severe bronchitis, and that his fear of

police, stemming from his experiences in Russia, was exacerbated.

Justice Wilson first found that because the plaintiff's claim was for wrongful arrest and detention, not delay, that Article 19 of the Convention did not apply to the case. She then went on to adopt the language of her Superior Court colleague, Molloy J, in her judgment in *Connaught Laboratories Ltd v British Airways* (2002) 61 OR (3d) 204 (SC) with respect to the court's obligation to follow case law regarding interpretation of the provisions of the Convention where same have been applied consistently in other jurisdictions. With that perspective in mind Wilson J went on to consider the application of Article 17 to the case before her and issues that had to be addressed by what she identified at the "two lines of authority" that she identified as existing in relation to this article. Rejecting the suggestion that it was a question of applying one or the other line of authority, her Honour explained that both issues had to be addressed. First, she had to decide whether the injury occurred while the passenger was on the aircraft or embarking or disembarking and second, she must determine whether or not the incident was considered an accident.

The plaintiff relied on four cases which allowed claims for wrongful arrest after disembarkation

In this case the plaintiff relied on four United States cases, which allowed claims for wrongful arrest after disembarkation, and he took the position that since the injury began with his wrongful arrest it occurred after the disembarkation and therefore the Convention did not apply. Her Honour distinguished all four of these cases, observing that each was based on allegations against those detaining the passenger for causing the injuries and occurred after disembarkation. In the case before her the injury pleaded was one that began while the plaintiff was on the aircraft, continued during disembarkation and concluded with the detention. Further, unlike the four United States cases, there was no allegation against the police with respect to the detention. As a result, Justice Wilson found that the defendants had met the first part of the test, thereby engaging the Convention. She then went on to consider whether or not the incident was in fact an accident within the meaning of that word in Article 17.

Citing both Canadian and United States case law Wilson J noted that the word 'accident' in Article 17 was considered a term of art to be broadly interpreted and has been interpreted to include the action or omission of a flight attendant. She also noted that the defendants conceded that the part of the plaintiff's claim relating to bronchitis being caused due to the failure to provide a blanket on the part of the carrier, was a claim that could stand pursuant to Article 17 and should not be struck. The main part of the claim was however founded on his wrongful arrest and detention and involved claims for aggravated and punitive damages for mental distress and pain and suffering due to forcible confinement, none of which contained any aspect of bodily harm to the plaintiff. Accepting the defendants submission with respect to these claims her Honour concluded that that there was in fact an 'accident' and therefore moved on to consider whether damages for such claims could be recovered under the Convention in light of Article 29.

Both on a reading of Article 29 and applying the case law interpreting the Convention, Justice Wilson concluded that no claim lies against a carrier for aggravated, punitive or psychological harm or mental distress – without accompanying physical injury. As a result, she ordered the plaintiff's claim for psychological harm, including punitive and exemplary damages, struck but allowed the claim for general damages for the bodily injury of bronchitis to be pursued under the terms of the Convention. Having made these findings Wilson J went on to make an alternate

finding. In the event that her conclusion that Article 17 of the Convention applied to the case was incorrect she found that the claim for punitive and exemplary damages should be struck by application of the restrictions in Article 29. She did so despite the defendants not having made such arguments and her acknowledgement that no appeal court had considered the issue in Canada. She found support for this concept in 'courts worldwide' that have espoused the view of exclusive application of the Convention, known as the 'pre-emptive approach'. To find otherwise, suggested Justice Wilson, "would undermine the principles of consistency and uniformity in processing claims involving international travel."

Wilson J went on to make an alternate finding

Whether one agrees or disagrees with Justice Wilson's 'alternative' interpretation she is to be applauded for her intention to bring consistency to the international body of law regarding the interpretation of the Convention. Such an intention can only assist those of us in the business of advising clients pursuing or defending claims with respect to international travel.

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