



Précis Paper

Psychiatric Injuries and Damages in Aviation Law

A discussion about claims for psychiatric injury and damages in aviation accidents.

Discussion Includes

- The proper construction of Art 17 of the Montreal Convention
- Is PTSD a 'bodily injury'?
- Interpretation of s12 of the Civil Liability Act 2002 (NSW)
- Negligence under the *Civil Aviation (Carriers' Liability) Act*
- Proactive and dynamic inquiries as to evidence

Précis Paper

Pel-Air Aviation Pty Ltd v Casey [2017] NSWCA 32

1. In this edition of BenchTV, Geoffrey Graham (Barrister) and Russell McIlwainesc (SC, Barrister) discuss the NSW Court of Appeal decision in *Pel-Air Aviation Pty Ltd v Casey [2017] NSWCA 32* and the contentious issue of damages for psychiatric injury. Both presenters represented the plaintiffs.

Facts of the Case

2. Ms Karen Casey, a nurse, and Dr David Helm, were employed by CareFlight (NSW). In November 2009, they were dispatched on a Pel-Air ambulance to Samoa to retrieve a seriously ill patient and her husband and transport them to Melbourne. The plane was scheduled to refuel at Norfolk Island however due to extreme weather, the pilot, after four failed attempts to land the plane, ditched the aircraft in the sea during the night.
3. Despite Ms. Casey and Dr. Helm's best attempts to brace themselves, they were both injured in the ensuing crash. The plane proceeded to break apart and sink. Not only were there were no lights, but there was also no deployment of a life raft. Ms. Casey was initially unable to release herself from her seatbelt and was the last passenger to exit the plane. Furthermore only half her life jacket inflated. Ms. Casey and Dr. Helm were able to support the patient and other passengers to stay afloat in the water despite their respective injuries until they were rescued some 90 minutes later.
4. Ms. Casey suffered a range of severe physical and physiological injuries as a result of the traumatic incident. Dr. Helm suffered a significant injury to his back.
5. The physical and psychiatric injuries were not disputed at trial. Pel-Air also accepted that the incident was the cause of these injuries, and that the negligence of the pilot and co-pilot caused the crash.
6. The flight was an international commercial flight. It was thus covered by commonwealth legislation, specifically the *Civil Aviation (Carriers' Liability) Act*. Part 1A of this act enacts into Australian law the 1999 Montreal Convention. Article 17, of the Montreal Convention states "The carrier is liable for damage sustained in the case of death or bodily injury of a passenger... which ... took place on board the aircraft or in the course in any of the operations of embarking or disembarking".

7. The main issue of the case was whether Ms Casey's PTSD was a 'bodily injury'.

Supreme Court of NSW

8. The law relating to the recovery of psychiatric damages is contentious. At the time of the trial, the law stood as articulated by Stein JA in the case of *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110. Stein JA stated that if the psychological injury is proven to be a species of bodily injury' moreover, 'where ...[it] follows and is caused by physical injury, recovery for both injuries is covered...'. This was approved in *American Airlines Inc v Georgeopoulos* [No 2] [1998] NSWCA.
9. Expert evidence highlighted the incomplete and emerging state of knowledge about PTSD as a psychiatric injury. Current research connects PTSD with the malfunctioning of the neurotransmitters in the brain. The Supreme Court found that on the balance of probabilities, the evidence established that Ms. Casey's PTSD was a bodily injury, compensable under the Montreal Convention. Damages were awarded for the physical injuries along with depression, anxiety and the PTSD.
10. The defendant accepted that Ms. Casey's anxiety and depression were consequences of her physical injuries, however they appealed against the finding that Ms. Casey's PTSD was a species of bodily injury.
11. The assessment of damages was in accordance with the *Civil Liability Act 2002 (NSW)*. This is the statutory law of the state where the proceedings were brought as required by s79 and s80 of the Judiciary Act 1903. The trial judge made a provisional finding that if PTSD was excluded on appeal, the award for non-economic loss should be reduced from 80% to 70% and the past and future out of pocket expenses should be adjusted. Due to the severity of the other physical and psychological injuries the other heads of damages should not be adjusted.
12. Ms. Casey cross-appealed the award for fund management. She was awarded \$600 000, however the National Australia Trustee Ltd, who were appointed as manager of the estate would charge \$900 000.

NSW Court of Appeal

13. The Court of Appeal held that the malfunctioning of the brain was not a physical injury of the brain. This is a contentious matter. It was not revisited, as Ms. Casey did not seek special leave to appeal the finding.

14. Ms Casey's cross-appeal was upheld. Provided the appointment of a private trustee could not be said to be unreasonable, the plaintiff is entitled to the costs that the private trustee will charge. The evidence established that the fees of the National Australia Trustee were commercially consistent with the charges of other private trustees. There was no basis for finding the appointment, or charges, of the National Australia Trustee, unreasonable. Although PTSD was excluded, there was ample evidence remaining to support Ms. Casey's need for fund management.
15. The presenters noted the importance of evidence in this case. They advise practitioners to be proactive in their preparation and presentation of evidence in order to establish the reasonableness of the appointment of a particular trustee.
16. In regards to Dr Helm, the court accepted that his back injury would manifest over time and cause difficulties, as he grew older. The issue in the case was how to apply the cap in s12 of the *Civil Liability Act 2002 (NSW)*. The court accepted the plaintiff's submissions that after damages are awarded, the tax should be subtracted before the cap is applied. Without further appeal, this issue was not revisited.
17. Under the *Civil Aviation (Carriers' Liability) Act* liability is strict. There is no need to prove negligence. Furthermore damages are unlimited unless the carrier can prove that it was not negligent. In this case Pel-Air conceded that the pilot and co-pilot were negligent.
18. The presenter's note that practitioners faced with cases about PTSD and where it fits in with the Montreal Convention must pay particular attention to evidence. This requires a dynamic inquiry into the current state of medical knowledge and constant consultation with experts. Trials may take several years and throughout that time the research and knowledge about these issues will constantly change and develop. Particularly as PTSD is a common by-product of aviation accidents, practitioners must stay abreast of the most current findings.

BIOGRAPHY

Geoffrey Graham

Barrister, William Deane Chambers, Sydney

Geoffrey was admitted to the bar in 1982. Geoffrey specialises in Common Law, Probate & Family Provisions, Insurance Law & Workers Compensation.

Russell McIlwainesc SC

Barrister, Sir James Martin Chambers, Sydney

Russell was admitted as a Solicitor in 1972, called to the Bar in 1973 and appointed Senior Counsel in 1997. Russell represents government airlines and passengers in a wide range of aviation related litigation and inquests / inquiries. Russell also represents clients in a range of general litigation at trial and on appeal.

BIBLIOGRAPHY

Focus Case

Pel-Air Aviation Pty Ltd v Casey [2017] NSWCA 32

Benchmark Link

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Judgment Link

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Cases

Kotsambasis v Singapore Airlines Ltd (1997) 42 NSWLR 110

American Airlines Inc v Georgeopoulos [No 2] [1998] NSWCA 273

Legislation

Civil Liability Act 2002 (NSW).

Civil Aviation (Carriers' Liability) Act

Judiciary Act 1903

1999 Montreal Convention