

**THE HIGH COURT****2008 8727 P****BETWEEN****JOHN Mc AULEY****PLAINTIFF****AND****AER LINGUS LIMITED, FRANK FEENEY AND SERENA WYSE****DEFENDANT****JUDGMENT of Mr. Justice Hedigan delivered on the 24<sup>th</sup> day of March, 2011**

**1.** The plaintiff's claim is for damages for slander or in the alternative for negligent mis-statement and/or for injurious falsehood and/or intentional infliction of mental suffering and/or for breach of the plaintiff's constitutional rights. In this Motion, the defendants seek an Order striking out the plaintiff's claim as being bound to fail, disclosing no reasonable cause of action, and/or being frivolous or vexatious.

**2.** The plaintiff is a businessman and resides at Cullion, Dungloe in the County of Donegal. The first named defendant is a limited liability company carrying on the business of an airline and with a registered address at Dublin Airport in the County of Dublin. The second named defendant is an airline pilot employed by the first defendant. The third named defendant is a flight attendant also employed by the first defendant.

**3.** On the 12<sup>th</sup> March, 2008, the plaintiff was travelling with Aer Lingus from Dublin to Vilnius, Lithuania on flight EI 396 which departed Dublin at 15:15 in the afternoon. At the beginning of the flight the plaintiff asked the third named defendant to provide him with four alcoholic drinks to consume during the course of the flight which was three hours fifteen minutes in duration. This request was refused by the third named defendant who informed the plaintiff that only two alcoholic drinks could be provided at any one time. The plaintiff rang the bell on a number of occasions requesting more alcohol and questioning the first named defendant's policy in relation to serving alcoholic drinks. On arriving in Lithuania, the plaintiff, on reaching the door to exit the aircraft was approached by the second and third named defendants who claimed that he had been intoxicated on board the aircraft. The second named defendant contacted the Lithuanian police and two police officers escorted the plaintiff from the aircraft. The Lithuanian police spoke to the plaintiff on the tarmac and then allowed him to leave. The second named defendant wrote a report to the Lithuanian Police as follows:-

"45 mins before landing a pax in 12 D started to interfere with the cabin crew's normal duties. He continually looked for alcohol and confronted Scem S. Wyse for more during the last phase of the flight and the descent. He called cem's continually using the call bell for more alcohol. I asked for Police assistance on arrival and it arrived. On deplaning he was pointed out to police and had a verbal confrontation with me and the Cem's and delayed the normal deplaning for approximately 10 minutes. This passenger had asked on first contact for 4 bottles of wine which was refused by the Scem and gave him 2 instead. I recommend this pax is warned and signs a letter to ensure he does not interfere with the crew on the return leg."

This incident was subsequently reported in the Lithuanian Press.

**4. Plaintiffs Submissions**

**4.1** At all times the plaintiff was sober calm and polite, he did not raise his voice nor did he leave his seat. The plaintiff as per his usual practice at the beginning of a flight asked the attendant to provide him with four miniature bottles of wine. He wished to consume the wine during the course of the flight which was three hours fifteen minutes in duration. His request was refused in an unpleasant manner. During the course of the flight the plaintiff rang the bell on just three occasions to enquire as to the first named defendant's policy in relation to serving alcoholic drinks. The third named defendant refused to engage with him. On reaching the door to exit the aircraft the plaintiff was accused in the presence of other passengers by the second and third named defendants of being intoxicated on board the aircraft. The plaintiff was shocked to be subjected to such accusations in the presence of other passengers some of whom reside in the same region as his family. The plaintiff was humiliated to discover that two Lithuanian Police Officers had been contacted. The Officers quickly established that the plaintiff was not intoxicated and allowed him to leave. The incident was subsequently reported in the Lithuanian Press which caused further distress and embarrassment to the plaintiff whose partner and child, and their family reside in Lithuania.

**4.2** The airline maintains that this action is covered by the Montreal Convention which provides the exclusive cause of action for a passenger who claims for damage sustained in the course of international carriage. Article 17 of the Convention provides that the carrier can only be liable for damage sustained in the case of death or bodily injury of a passenger. The plaintiff argues that this is not an action covered by the Montreal Convention as the defamation by the defendants occurred not only during the carriage of the passenger but also subsequently in Vilnius when the defendants maliciously and wrongfully published a false report to the police which caused the plaintiff to be arrested. In circumstances where the defamation continues after the carriage has taken place it is submitted that the provisions of the Montreal Convention do not apply.

**4.3** It is submitted that if the Court accepts the defendant's argument that the plaintiff's claim discloses no reasonable cause of action, the effect would be that international flights are effectively defamation free zones. If the Montreal Convention was held to apply in this case, a passenger would have no cause of action where defamed by an airline. The defendant has not been able to point to a single Irish Authority for the proposition that the convention excludes this claim. There is no uniform approach amongst the signatory states to the convention which limits liability to accidents and death. The fact that the convention is inapplicable in certain instances does not serve as a bar to other avenues of recovery. This is clear from the U.S. case *Abramson v. Japan Airlines* (1984) 739 F.2d 130, which was decided under the Warsaw Convention which preceded the Montreal Convention. The appellant suffered

from attacks from a hernia. The airline was not informed of his condition. The appellant could alleviate an attack by lying down. During the flight the appellant suffered an attack and he asked a steward for a place he could lie down but was told that there were no empty seats. As a result the plaintiff's condition was aggravated and he required surgery. It transpired upon discovery that there were nine empty seats. The appellant claimed that the negligent conduct of the airline aggravated his hernia. At the District Court it was held that Article 17 of the Warsaw Convention only creates a cause of action for injuries caused by some accident and that because there was no accident the claimant had no case. This decision was overturned on appeal, it was held at paragraph 33 that:-

"In summary, we have concluded that the occurrence that allegedly aggravated the plaintiff's condition was not an "accident" within the terms of Article 17 of the Warsaw Convention and that the claim brought under the Warsaw Convention was properly dismissed. However, the District Court erred in failing to reach the state law claims. When the Warsaw Convention is inapplicable to the claim raised, it does not serve as a bar to alternative theories of recovery."

It is submitted that the fact that the convention is not applicable to the claim raised should not serve as a bar to an action in tort for defamation.

**4.4** The defendant maintains that the carriage was subject to the first named defendant's 'General Conditions of Carriage for Passengers and Baggage.' The plaintiff argues that this action is not an action for damages in relation to the carriage of passengers as at least part of the action is founded on a tort which occurred in Lithuania on the publication of the report to the Lithuanian Police and the publication of defamatory statements and comments to Lithuanian Police and members of the public who were present when the defendant caused the plaintiff to be wrongfully arrested in the airport in Vilnius. The plaintiff submits that the defendants maliciously and wrongfully published a report to the Lithuanian Police which caused the plaintiff to be wrongfully arrested and detained in Lithuania. It is the plaintiff's contention that the report was motivated entirely by malice. The defendant seeks an order to strike out the plaintiff's claim and makes a plea of qualified privilege. This is obviously a matter for evidence which will be required to be adduced at the trial of the within proceedings.

## **5. Defendants Submissions**

**5.1** The defendants submit the carriage of the plaintiff from Dublin to Lithuania constitutes international carriage within the meaning of Article 1 of the Montreal Convention. The Montreal Convention was implemented into Irish Law by the Air Navigation and Transport (International Conventions) Act 2004. Section 4 of the Act states:-

"The applicable provisions of the Carriage by Air Conventions have force of law in the state in relation to any carriage by air to which they apply, irrespective of the nationality of the aircraft performing that carriage."

An action in tort can only be brought in accordance with the convention. See *Smyth and Company Limited v Aer Turas Teoranta* (Unreported, Supreme Court, 3 February, 1997)

**5.2** The defendant argues that the plaintiff's statement of claim discloses no reasonable cause of action as the Convention provides that the carrier is liable for damage sustained in the case of death or bodily injury of a passenger only and the plaintiff makes no such claim. The relevant provisions of the Convention in this regard are Articles 17 and 29.

"Article 17.1 - The carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 29 - In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive exemplary or any other non compensatory damages shall not be recoverable."

The plaintiff's statement of claim clearly discloses no action that is sustainable in law it is frivolous or vexatious or an abuse of process, and should be struck out pursuant to Order 19, Rule 28 of the Rules of the Superior Courts or the inherent jurisdiction of this Honourable Court.

**5.3** In relation to the written report provided to the Lithuanian Police the second named defendant avers at paragraph's 4 and 5 of his affidavit of the 25<sup>th</sup> January, 2011, that:-

"Further, I subsequently completed my written report, of which complaint is made, in the cockpit of the aircraft and handed that report to the police on the ramp at the foot of the steps of the aircraft. In the circumstances, all of the actions complained of in the within proceedings took place either in the actual course of carriage, on the aircraft itself, or during the course of disembarkation, at the foot of the steps of the aircraft."

All of the actions complained of either took place on the aircraft or disembarking the aircraft and are therefore covered by the Convention. The defendants deny that the words were published by them either falsely or maliciously. The defendants deny (as argued by the plaintiff in paragraph 7 of the statement of claim) that the words given their natural and ordinary meaning, meant that the plaintiff was guilty of a criminal offence, had acted immorally and irresponsibly and without regard for the safety of passengers and had abused alcohol. Insofar as it is stated by or on behalf of the defendants that the plaintiff had become aggressive and or a public nuisance on the flight or that that his conduct delayed the disembarkation of other passengers from the aircraft such statements were true in substance and in fact. In the alternative the defendants submit the words complained of were published in the context of a report by the captain of an aircraft to the appropriate civil authorities and as such were published on an occasion of qualified privilege. The first and second named defendants had a duty to make the said report. The defendants submit that they were entitled, in all the circumstances and by reason of Articles 40.3 and/ or 40.6.1.i of the constitution and/or Article 10 of the European Convention on Human Rights to express freely the words complained of. The plaintiff argues that if the Court were to hold that the Montreal Convention does apply in this case, the effect would be that international flights would be defamation free zones. The defendants submit that the Convention prevents a passenger suing an airline for defamation it does not prevent actions between passengers for defamation.

**5.4** The defendants argue that while the jurisdiction to strike out proceedings is exercised sparingly, this is one of those cases where the matters pleaded in the statement of claim clearly do not constitute a cause of action that is known to the law and should therefore be struck out. The plaintiff's action is for slander and libel, malicious and/or negligent misstatement, injurious falsehood, mental suffering and breach of constitutional rights. The acts complained of occurred during the course of international carriage and

are therefore covered by the Montreal Convention which does not allow for damages under these headings therefore the plaintiff's action is bound to fail and should be struck out.

**5.5** While it is claimed by the plaintiff that the publication is ongoing, the defendants submit that defamation is different from other torts such as trespass which can be on going, publication takes place immediately on the slander taking place. In *Gatley on Libel and Slander* (London, 11<sup>th</sup> ed. 2010) it is stated at 165:-

"For limitation purposes it is necessary to know when a tort is committed for the purpose of jurisdiction and applicable law it is necessary to know where it is committed. Publication being the gist of libel and slander actionable per se the cause of action for those torts arises immediately the publication has taken place; but this is not so in the case of other slanders because the cause of action is not complete until special damage has been suffered. Similarly the tort is committed in the place where the publication is received by the hearer, reader or viewer..."

The accusation that the plaintiff was intoxicated took place at the exit door of the aircraft. The defamation is not on going. The publication took place immediately on the alleged slander taking place therefore even if there was slander, which is denied, publication took place on the aircraft therefore the claim that the defamation continued after the carriage because the Lithuanian Police detained the plaintiff on the tarmac is unsustainable.

**5.6** The plaintiff argues that if the Montreal Convention was held to apply in this case the effect would be that there is no cause of action where an airline defames a passenger. The defendants submit that the Convention was not designed to provide remedies against the carrier to enable all losses to be compensated; it was designed instead to define situations in which compensation was to be available in the interests of certainty. The rationale for the Warsaw Convention which is equally applicable to the Montreal Convention was set out in the joined cases of *Sidhu and Others v. British Airways PLC* and *Sykes v. British Airways PLC* [1997] AC 430. It is based on freedom of contract.

The plaintiff cites the case *Abramson v. Japan Airlines* as authority for the proposition that even if the convention does not provide a remedy this does not serve as a bar to other avenues of recovery, such as an action in tort for defamation. The defendants point out that after the decision of the US Supreme Court in *El AL Israel Airlines v. Tsui Yuan Tseng* 525 U.S. 155 (1999) the lower courts no longer found that remedies existed outside the convention. The Supreme Court held at 166:-

"Montreal Protocol No.4, ratified by the Senate on September 28, 1998, amends Article 24 to read, in relevant part: " In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention..." Both parties agree that, under the amended Article 24, the Convention's pre-emptive effect is clear: The treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty."

**5.7** Without prejudice to the foregoing arguments the defendant argues that the carriage was further subject to the defendants General Conditions of Carriage for Passengers and Baggage, the defendants rely on Articles 11 and 15 which state:-

"Article -11.1- If, in our reasonable opinion you conduct yourself aboard the aircraft so as to endanger the aircraft or any person or property on board, or obstruct the crew in the performance of their duties, or fail to comply with any instructions of the crew including but not limited to those with respect to smoking, alcohol or drug consumption, or behave in a manner which causes discomfort, inconvenience, damage or injury to other passengers or the crew, we may take such measures as we deem reasonably necessary to prevent continuation of such conduct, including restraint. You may be disembarked and refused onward carriage at any point, and reported to the relevant authorities with a view to having you prosecuted for any criminal offences committed on board the aircraft."

"Article 15.1.1- Our liability to you will be governed by our conditions of Carriage and the liability of each carrier involved in your journey will be determined by its own Conditions of Carriage."

"Article 15.1.2- Unless otherwise stated in the Conditions, international travel, as defined in the [applicable] Convention, is subject to the liability rules of the Convention."

The defendants argue that no liability arises under the abovementioned conditions.

## **6. Decision of the Court**

**6.1** In this case the defendants are seeking an Order striking out the plaintiff's claim as being bound to fail, disclosing no reasonable cause of action, and/or being frivolous or vexatious. The courts have a power, pursuant to both Order 19, rule 28 of the Rules of the Superior Courts and their inherent jurisdiction to strike out proceedings where they can be shown to be unsustainable, frivolous or vexatious. For the purposes of considering whether to accede to an application based on rule 28 the court must proceed on the basis that the statements of fact contained in the pleadings sought to be struck out are true and can be proved by the party. A statement of claim can be struck out where the matters pleaded do not constitute a cause of action that is known to the law or is likely to be established. If the ingredients of a good cause of action are pleaded, the application pursuant to rule 28 will not succeed. An order to strike out proceedings will only be made in very clear cases where there is no dispute as to the relevant facts. In *Barry v. Buckley* [1981] 3 IR 206 at 208 Costello J. emphasised that the jurisdiction to strike out proceedings is one to be "exercised sparingly and only in clear cases." It is also well established that in so far as there is a conflict of fact, this must be resolved in favour of the party against whom the application to strike out has been brought. This was interpreted by O'Sullivan J. in *O'Keefe v. Kilcullen*, High Court, 24<sup>th</sup> June, 1998, to mean that the court must accept fully all averments and assertions deposed to on the plaintiff's behalf even where these are traversed in opposing pleadings or are contested on affidavit.

It is clear therefore that that the facts as set out by the plaintiff have to be accepted.

**6.2** The test in dealing with a motion to dismiss as frivolous and vexatious was set out in *Farley v. Ireland* Supreme Court 1<sup>st</sup> May, 1997. Barron J stated at 3:-

"If [a plaintiff] has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

In *Lowes v. Ceoilte Teoranta* High Court 13<sup>th</sup> March, 2004, Herbert J expressed the view that Barron J was not confining "frivolous" and "vexatious" to meaning only "proceedings which cannot succeed." In his view it was undesirable to attempt any comprehensive legal definition of those terms instead the court should consider the pleadings in each particular case and determine whether a claim could properly be described as clearly frivolous or vexatious having regard to any relevant previous authorities.

**6.3** There are a number of relevant previous authorities that this Court can have regard to in determining whether it is the case that this claim has no reasonable chance of succeeding. It will first be useful to set out the law which governs the international carriage of passengers which is to be found in the Montreal Convention. The applicable provisions in the present case are Articles 1, 17, and 29.

"Article 1.1- This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

Article 17.1 - The carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 29 - In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive exemplary or any other non compensatory damages shall not be recoverable."

The Montreal Convention has been incorporated into Irish Law by virtue Air Navigation and Transport (International Conventions) Act 2004:-

"Article 4.1 - The applicable provisions of the Carriage by Air Conventions have force of law in the state in relation to any carriage by air to which they apply, irrespective of the nationality of the aircraft performing that carriage."

**6.4** It is clear from the convention that the liability of the carrier is limited to cases of death or bodily injury. The rationale for this limitation is set out by the House of Lords in the joined cases *Sidhu and Others v. British Airways PLC* and *Sykes v. British Airways PLC* [1997]AC 430 Lord Hope held at 453:-

"It is tempting to give way to the argument that where there is a wrong there must be remedy. That is indeed the foundation upon which much of our own common law has been built up...Alongside these principles, however, there lies another great principle, which is freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with another on the basis that his liability in damages excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the Convention must be judged. It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed were to be made. A balance was struck, in the interests of certainty and uniformity."

**6.5** The Irish Courts have followed the *Sidhu* decision in finding that the Convention contains an exclusive and exhaustive code governing actions against carriers arising out of international carriage. In *Smyth and Company Limited v Aer Turas Teoranta* (Unreported, Supreme Court, 3 February, 1997) Blaney J held at 28:-

"There is one further matter to which I should refer. Mr. Deeney said he was relying on a claim in negligence outside the Warsaw Convention. The respondent did not contest his right to make such a claim and therefore it did not become an issue in the appeal. It would appear, however, that where a claim is in respect of international carriage by air, a party with such a claim may be confined to such remedy as is given by the Convention. This would appear to be what was decided by the House of Lords in two cases reported in the London Times on the 13<sup>th</sup> December 1996 *Sidhu and Others v. British Airways Plc* and *Abnett (known as Sykes) v. British Airways Plc*. The Court decided that Article 17 of the Warsaw Convention provided that the only remedy open to a passenger claiming to have suffered personal injuries arising from an international flight was under the Convention and that the Convention contained an exclusive and exhaustive code governing such actions and excluded actions brought under common law. "

**6.6** The limits imposed by the Convention again arose for consideration in the recent Circuit Court case of *Emma Nolan v. Aer Lingus Group PLC* (9<sup>th</sup> November 2009). In that case the plaintiff claimed she suffered psychological injuries and trauma arising out of a flight from Dublin to Paris, Judge Jacqueline Linnane held:-

"The position would appear to be that the Convention excludes recourse to any common law remedy by a passenger who suffered injury or damage to baggage in the course of or arising out of an international flight. In the case of *Sidhu v British Airways PLC* reference is made in the judgment at p. 37 to an extract from Dicey & Morris, *Conflict of Law* 12<sup>th</sup> Ed.

"The purpose of an international convention is to harmonise the laws of all contracting states on the particular topic dealt with by the Convention. It is therefore very important that the interpretation of the Convention should be the same, so far as possible, in all contracting states."

In *Sidhu* it was held that where the convention had not provided a remedy, no remedy was available either under common law or otherwise."

On the basis of these authorities, it is quite clear that the plaintiff cannot succeed in relation to his claim that he was defamed whilst disembarking the aircraft.

**6.7** The plaintiff has however argued that the defamation occurred not only during the carriage but also subsequently when the defendants "maliciously and wrongfully published a false report to the police which caused the plaintiff to be arrested and detained on the tarmac in front of other passengers." It is argued by the plaintiff that because the defamation continues after the carriage has taken place the provisions of the Montreal Convention do not apply. This raises the question as to how far the concept of carriage

goes. Where does it end? In Shawcross and Beaumont *On Air Law* 4<sup>th</sup> ed. 2007 it is stated at paragraph 720 that:-

"The accident which caused the damage must take place on board the aircraft or in the course of any of the operations of embarking and disembarking. The interpretation of this, at first sight unproblematic, provision has given rise to much controversy. In some cases plaintiffs have sought to persuade the courts to give it a broad interpretation so as to extend the scope of liability under the Warsaw system; in others plaintiffs have sought to limit the application of article 17 so that they could rely on other causes of action to which the liability limits of the Warsaw system would not apply. Clearly the phrase 'in the course of any of the operations of embarking or disembarking' includes the time during which the passenger is ascending or descending the steps of the aircraft or using an equivalent device, but the words 'any of the operations' indicate a wider period of potential liability."

In *Galvin v Aer Rianta* [1993] High Court, Barr J. having reviewed the authorities as then examined in this work, considered:

"To make a prima facie case that a particular claim is within article 17 it must be established (1) that the accident to the passenger is related to specific flight, and (2) that it happened while the latter was actually entering or about to enter the aircraft, or (3) if it happened in the terminal building, or otherwise on the airport premises, the location of the accident is a place where the injured party was obliged to be while in the process of embarkation."

I adopt Barr J's reasoning and consider that applied to this case the Convention is not limited, as the plaintiff has sought to argue, to his carriage on the plane or his embarking or disembarking. It extends to anywhere he was required to be for the purpose of disembarking the aircraft. This includes the tarmac around the aircraft's immediate location and would stretch as far as the airport premises itself.

**6.8** In this case the actions complained of occurred on the aircraft, on the steps of the aircraft and on the tarmac immediately adjacent thereto. They are consequently encompassed and governed by Article 17 of The Montreal Convention and cannot therefore give rise to the action pleaded by the plaintiff. For these reasons I am satisfied that the plaintiff has no reasonable chance of succeeding in his claim and I therefore order that his claim be struck out.