

THE HIGH COURT

[2009 NO. 33 CA]

BETWEEN

LIAM HENNESSEY

APPELLANT

v.

AER LINGUS LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 13th day of March 2012.

1. The plaintiff/appellant (the plaintiff) resides at 17 Patrician Villas, Stillorgan, in the County of Dublin. The defendant/respondent (the 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.

2. This case concerns an appeal from a ruling made on the 12th February, 2009 at Dublin Circuit Court. On that date a preliminary hearing was held in relation to the plaintiffs claim for personal injuries and loss under the Air Navigation and Transport Acts incorporating the Warsaw Convention, the Occupiers Liability Act, 1995 and the Equal Status Act, 2000. The preliminary issue before the Court was whether the plaintiff was confined to bringing his claim for personal injuries and loss under the Warsaw Convention exclusively or whether he was entitled to include provisions of Domestic Law in his claim. Judge Linnane determined that the Warsaw Convention provided an exclusive cause of action and the sole remedy for the plaintiff in respect of his claim and precluded any claim based on domestic law. In the within proceedings the plaintiff seeks to appeal against this determination of the preliminary issue.

Background Facts

3. 1 The facts which give rise to the plaintiffs claim are as follows; on the 15th February, 2002 the plaintiff, who is confined to a wheelchair, took a flight with the defendant airline from Dusseldorf to Dublin. The plaintiff's motorised wheelchair was damaged in the cargo hold of the defendant's plane. By letter dated the 2nd September, 2002, the defendant apologised to the plaintiff for the damage to his wheelchair and offered to compensate him for this damage in accordance with the terms of the Warsaw Convention. The plaintiff rejected the defendants offer and initiated proceedings seeking compensation for damage to his wheelchair. The plaintiff also claimed that he suffered personal injury because after the incident he was left without the use of his wheelchair, with the result that his health deteriorated and he become depressed. The plaintiff's claim was brought in contract, negligence and breach of statutory duty pursuant to the Air Navigation and Transport Acts 1936-1998, the Occupiers Liability Act, 1995, and the Equal Status Act, 2000.

3.2 In its defence which was delivered on the 13th July, 2004, the defendant argued that the plaintiff's claim could only be maintained insofar as permitted by the Warsaw Convention. The defendant pleaded that the Warsaw Convention provided the exclusive cause of action which arises in respect of international carriage by air. As the plaintiff failed to serve notice of trial, the defendant brought an application on the 26th February, 2008, to dismiss the proceedings on grounds of delay.

3.3 The County Registrar declined to dismiss the proceedings and instead directed that a preliminary issue be tried which related to the issue of the exclusivity of the Warsaw Convention. In the Circuit Court, Judge Linnane rejected the plaintiff's argument that he was entitled to rely on domestic law. The Court stated at page 3:-

"I do not accept the plaintiff's argument that a collateral contract came into being entitling him to bring claims under the Occupiers Liability Act or The Equal Status Act. These acts were not intended to amend the Warsaw Convention in this jurisdiction. If they had, Ireland would have been in contravention of its international obligations under the Convention. Article 24 clearly precludes a passenger from making concurrent claims under both the Warsaw Convention and domestic law."

The plaintiff now seeks to appeal from this determination.

Plaintiffs Submissions

4.1 The plaintiff seeks to rely on the decision of the European Court of Justice in the Case 22/70 Commission v Council [1971] E.C.R 263 (the AETR case) where the ECJ held at paragraph 22 that:-

"to the extent to which (union) rules are promulgated for the attainment of the objectives of the Treaties, the Member States cannot, outside the framework of the (Union) institutions, assume obligations which might affect those rules or alter their scope."

The plaintiff submits that this judgment read along with the European Community and European Union Legislation with respect to Passengers with Reduced Mobility overrides the Warsaw Convention insofar as it conflicts with the European Union Legislation thus giving passengers with reduced mobility protection against Airlines who breach European Union Laws in this area.

4.2 The plaintiff submits that the defendant has failed in commitments which it entered into in relation to persons with reduced mobility. These commitments are outlined in a letter of the 25th August, 2004 from one Fran Smyth of the Department of Transport to the plaintiff. Mr Smith wrote as follows:-

"I refer to your letter of 3rd August, 2004 to the Department of Transport regarding the legal rights and entitlements of disabled passengers while travelling by air. The regulatory system governing aviation interests stems from the European Union and the majority of Irish Legislation has been drafted to implement European wide legislation in order to enforce it in Ireland.

The Voluntary Passenger Service Commitments are a European initiative aimed at promoting a set of common customer standards among Europe's airports and airlines. The Commitments were adopted during the European Civil Aviation Conference/EU dialogue with the European air transport industry in Lisbon on 10th May, 2001, and came into operation on the 14th February, 2002. Acceptance of the Commitments is voluntary... Aer Lingus is a signatory.

A special protocol entitled 'Meeting the Needs of People with Reduced Mobility' requires signatory airlines and airports to undertake certain commitments in relation to People with Reduced Mobility' ...

Among the commitments to People with Reduced Mobility is the requirement that...

...a signatory airline take all reasonable steps to avoid loss or damage to mobility equipment. If loss or damage does occur, the airline is committed to make appropriate arrangements to meet the individual's immediate mobility needs....

The plaintiff points out that the commitments came into operation the day before his flight with the defendant. The plaintiff submits that due to the negligence of the defendant his motorized wheelchair was damaged with the result that his means of mobility was affected. The plaintiff further submits that the defendant failed to make appropriate arrangements to meet his immediate mobility needs in accordance with its commitments.

4.3 The plaintiff maintains that in order to secure medical treatment which is not available in Ireland he is required to travel abroad and he has no option but to travel by air. The plaintiff argues that his right as a European citizen to free movement within Europe has been interfered with by the defendants as on three occasions when he travelled with the defendant his motorised wheelchair has been damaged. The plaintiff submits that in addition to the defendant negligently damaging his wheelchair the defendant has also infringed his Human Rights by effectively depriving him of the opportunity to travel abroad for treatment. The defendant is acting in breach of *inter alia* Article 2 of the European Convention which protects the right to life and Article 5 of the Convention which protects the right to liberty and security. Finally the plaintiff submits the defendant by its actions has also breached its statutory duties to the plaintiff under the Occupiers liability Act, 1995 and the Equal Status Act, 2000.

Defendants Submissions

5.1 The defendant submits that at the time of the incident giving rise to these proceedings the Warsaw Convention, as amended, had the force of law in the State by virtue of Section 17(1) of the Air Navigation and Transport Act, 1936. The relevant provisions of the convention in this case are articles 17, 18, 22 and 24. Article 17 provides that:-

"The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 18.1 provides that:-

"The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air."

Article 22 contains *prima facie* limits of liability. In so far as damage to checked in baggage such as the plaintiff's wheelchair, is concerned, Article 22.2 limits a carrier's liability to 250 francs per kilogram unless a special declaration of interest was made at the time the baggage was handed over. This equates to approximately US\$20 per kilogram, which formed the basis of the offer made by the defendant.

Article 24 provides that:-

"(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in the present Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right of action and what are their respective rights."

The defendant submits that it is clear that Article 24 precludes a passenger from making concurrent claims under both the Warsaw Convention and domestic law. The defendant further submits that the effect of this provision is that any claim in respect of personal injury allegedly sustained in the course of international carriage by air may only be brought insofar as is permitted by Article 17. Where such a claim does not satisfy the conditions for liability under the Convention the passenger is precluded from maintaining an action for personal injury damages under domestic law. The same situation applies in respect of damage to baggage which is governed by Article 18 alone. In other words, the Warsaw Convention provides the exclusive cause of action and sole remedy against an air carrier for injury, loss or damage sustained in the course of or as a result of international carriage by air and precludes claims based on domestic law.

5.2 The proper approach to the interpretation of the Warsaw Convention was considered by the Supreme Court in *AHP Manufacturing v. DHL Worldwide Network* [2001] 4 IR 531. Fennelly J. stated as follows at 541:-

"Although the Convention enjoys the force of law in the State by virtue of the Air Navigation and Transport Acts, it is an international agreement. As such, it should receive a purposive interpretation."

The rationale for the convention was to bring harmonisation of the applicable laws. Before the convention came into force it was possible for passengers to claim under a variety of national laws and carriers were free to limit their liability to passengers by exception and limitation clauses. With the entry into force of the Convention certainty was brought to the law.

5.3 In *Sidhu and Others v. British Airways PLC* [1997] AC 430, a decision of the House of Lords, passengers on a flight from Kuwait were detained against their will on board an aircraft and subsequently made claims for damages under the common law. The House of Lords held that the passengers had no rights under the common law and the convention was their exclusive remedy. In *El Al Israel Airlines Ltd. v Tsui Yuan Tseng* (1999) 525 US 155, The United States Supreme Court reached the same conclusion in a case where a passenger sought to bring a state-law personal injury claim. The Court observed that to construe the Convention so as to allow passengers to pursue claims under local law when the Convention did not permit recovery could produce several anomalies. The Court noted that such a reading would scarcely advance the predictability that adherence to the Convention has achieved worldwide.

5.4 The issue of the exclusivity of the Warsaw Convention has been considered in a number of Irish Cases. In *Smyth v Aer Turas Teoranta* (Supreme Court, 3 February, 1997) the Supreme Court (per Blayney J) having considered an argument based on negligence in a case of carriage of goods went on to refer (obiter) to *Sidhu* and suggested that the effect of that decision might be that the Convention was an "exclusive and exhaustive code", although the issue was left for another day as it had not been argued. When the Circuit Court was considering the preliminary issue in this case it found that the Warsaw Convention provided an exclusive cause of action and sole remedy for the plaintiff. In so doing the Court relied on the decisions in *AHP Manufacturing, Sidhu and El Al*. The same approach was taken by the Circuit Court in *Nolan v. Aer Lingus Group PLC* (Circuit Court, 9th November, 2009) where Judge Linnane concluded at page 7:-

"The authorities show that in all questions relating to a carrier's liability it is the provisions of the Convention which apply and a passenger does not have access to any other remedies..."

This issue has been recently determined by this Court in *McAuley v. Aer Lingus Ltd.* [2011] IEHC 89. In *McAuley* the plaintiff alleged slander arising from a complaint made by cabin staff to the police. The proceedings were struck out on the grounds that they had no prospect of success because liability for the wrongs alleged was excluded by the Montreal Convention (which contains effectively the same limitations as the Warsaw Convention). In its judgment, the Court set out the relevant provisions of the Montreal Convention and cited the decision in *Sidhu*. The Court then noted that *Sidhu* had been followed in *Smyth* and in *Nolan*. Noting that in *Sidhu* it had been held that where the Convention had not provided a remedy, no remedy was available either at common law or otherwise, the Court concluded (at paragraph 6.6):-

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

Thus the defendant submits that the Irish courts have now expressly approved the approach of the House of Lords in *Sidhu*, i.e. that the Warsaw (or Montreal) Convention's provide the only cause of action.

5.5 The plaintiffs claim is also based on an alleged failure of the defendant to comply with its statutory duties under the Occupiers Liability Act 1995 and the Equal Status Act 2000. As a matter of principle, the defendant submits that, having regard to the decisions referred to above, the same principles apply to a claim based on an alleged breach of statutory duty as apply to a claim based at common law. The desirability of uniformity of rules governing claims arising from international air transportation applies equally to statute based claims as it does to those based on common law principles of liability. In addition, the Oireachtas, in enacting the two statutes, can hardly be taken to have implicitly intended to amend the Air Navigation and Transport Acts, which would have brought the State into contravention of its international law obligations under the Warsaw Convention. Given the absence of clear contrary intention, it is clear that neither statute relied on by the plaintiff can apply to a case governed by the Warsaw Convention.

5.6 The plaintiff has sought to rely on a letter written to him on the 25th August, 2004 by the Department of Transport. The letter refers to Voluntary Passenger Service Commitments and in particular to commitments to People with Reduced Mobility. The Defendant is a signatory to these Commitments. The commitments however are expressly characterised at page one to be "non-legally binding commitments". Thus the defendant submits that they do not provide the plaintiff with any cause of action.

Decision of the Court

6.1 On the 15th February, 2002 the plaintiff, who is confined to a wheelchair, took a flight with the defendant airline from Dusseldorf to Dublin. The plaintiff's motorised wheelchair was damaged in the cargo hold of the defendant's plane. The defendant apologised to the plaintiff for this damage by letter dated the 2nd September, 2002 and offered to compensate the plaintiff for this damage in accordance with the terms of the Warsaw Convention. The plaintiff rejected this offer and initiated proceedings seeking *inter alia* damages for negligence and personal injury. The plaintiff claimed that due to the defendant's negligence his motorized wheelchair was damaged and that as a result of this he suffered personal injury as he was left without his means of mobility, with the result that his health deteriorated and he became depressed. The plaintiff also claimed that the defendant had breached its statutory duties to him under the Occupiers Liability Act, 1995 and the Equal Status Act, 2000. On the 13th July, 2004 the defendant delivered its defence, it pleaded that the plaintiffs claim could only be maintained insofar as permitted by the Warsaw Convention. On the 26th February, 2008, the defendant brought an application to dismiss the proceedings on grounds of delay as the plaintiff had failed to serve notice of trial. The County Registrar declined to dismiss the proceedings and instead directed that a preliminary issue be tried which related to the issue of the exclusivity of the Warsaw Convention. On the 12th February, 2009 Judge Linnane in the Circuit Court found that the Warsaw Convention provided an exclusive cause of action, was the sole remedy for the plaintiff and precluded any claim based on domestic law. In the within proceedings the plaintiff seeks to appeal this decision.

6.2 As provided for under section 38 of the Courts of Justice Act, 1936, this appeal from a decision of the Circuit Court to the High Court has proceeded by way of a full re-hearing of the decision. The decision of the Circuit Court was in relation to the preliminary matter of whether the Warsaw Convention provided an exclusive cause of action for the plaintiff. The Court is confined to considering this narrow issue and may presume for the purposes of this inquiry that the Plaintiff will be able to prove all the factual matters he alleges. The incident complained of in this case occurred on the 15th February, 2002. At that time the Warsaw Convention as amended, had the force of law in Ireland by virtue of Section 17(1) of the Air Navigation and Transport Act, 1936, which provides that:-

"The provisions of the Warsaw Convention as set out in the First Schedule to this Act shall ... have the force of law in [the State] in relation to any carriage by air to which the Warsaw Convention applies, irrespective to the nationality of the aircraft performing the carriage."

Article 1 of the Warsaw Convention provides that it:-

"...applies to all international carriage of persons, baggage or cargo performed by aircraft for reward"

I am satisfied that the Warsaw Convention applied to the carriage of the plaintiff by the defendant in the circumstances pleaded by him..

6.3 The plaintiff complains of damage to his wheelchair and also complains that this resulted in personal injury in that the loss of his mobility led to deterioration in his health. Personal injury and damage to property are covered by Article's 17 and 18 of the Warsaw Convention. Article 17 provides that:-

"The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the

course of any of the operations of embarking or disembarking."

Article 18.1 provides that:-

"The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air."

In so far as damage to checked baggage is concerned, Article 22.2 limits a carrier's liability to 250 francs per kilogram unless a special declaration of interest was made at the time the baggage was handed over. Article 24 provides that:-

"(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in the present Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right of action and what are their respective rights."

Articles 17 and 18 impose a form of strict liability which is to the benefit of passengers however Articles 22 and 24 provides a *quid pro quo* in that passengers are restricted in damages they can receive and the claims which they can bring by the conditions or limits set out in the convention.

6.4 The interpretation to be given to the Warsaw Convention was addressed by the Supreme Court in the case *AHP Manufacturing v. DHL Worldwide Network* [2001]4 IR 531. In that case Fennelly J. held as follows at 541:-

"Although the Convention enjoys the force of law in the State by virtue of the Air Navigation and Transport Acts, it is an international agreement. As such, it should receive a purposive interpretation. On the other hand, it falls to be applied by the courts of each contracting state in accordance with its natural procedural rules and, in particular, the rules of evidence. There is no system or reference of questions of interpretation for rulings to bind the courts of the contracting states as there is under the Treaty of Rome. Hence, it falls to this court to interpret the Convention in accordance with its scheme and objects. It may of course, have regard to notions such as recklessness as they exist in common law, but terms in the Convention should receive, as far as practicable, an autonomous Convention meaning. It is desirable that such an international agreement be interpreted with reasonable consistency in the different contracting states. Inconsistent decisions could lead to forum shopping. Decisions of the courts of other contracting states are useful sources of guidance for that purpose."

The purpose of the Warsaw Convention was to bring order to a fragmented system by a partial harmonisation of the applicable laws. Before it came into operation, passengers were free to claim under a diversity of applicable national laws, while carriers were free to limit their liability to passengers by exception and limitation clauses. The convention involves a form of *quid pro quo*. On the one hand, a form of strict liability is imposed on carriers, who surrender their freedom to limit or exclude liability, while on the other, passengers are restricted in the claims which they can bring in an action for damages by the conditions or limits set out in the convention.

6.5 In *Sidhu and Others v. British Airways PLC* [1997] AC 430, the House of Lords held that the passenger had no rights under the Common law and the Convention was their exclusive remedy. Lord Hope stated as follows:-

"The structure of [Article 23 and 24] seems to me therefore, to be this. On the one hand, the carrier surrenders his freedom to exclude or limit liability. On the other hand, the passenger or other party to the contract is restricted in the claims which he can bring in an action for damages by the conditions and limits set out by the Convention. The idea that an action for damages may be brought by a passenger against the carrier outside the Convention in the cases covered by Article 17, which is the issue in the present case, seems to be entirely contrary to the system which these two articles were designed to create.

The reference in the opening words of Article 24(2) to the 'cases covered by Article 17 does, of course, invite the question whether Article 17 was intended to cover only those cases for which the carrier is liable in damages under that article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion, the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the article. In its context, the purpose seems to me to be to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air".

It is clear that Article 24 precludes a passenger from making concurrent claims under both the Warsaw Convention and Domestic Law, therefore a passenger is not entitled to pursue a claim against an airline for common law negligence or for an alleged breach of statutory duty.

6.6 Notwithstanding that the above finding is dispositive of this case, I feel that it would be appropriate to address a letter produced, for the first time, by the plaintiff at the hearing of this appeal. This letter was sent to the plaintiff on the 25th August, 2004 by the Department of Transport. The letter refers to Voluntary Passenger Service Commitments and there is a section dealing with commitments to People with Reduced Mobility. The Defendant is a signatory to these Commitments. I am satisfied however that the commitments do not give rise to any legally enforceable right on behalf of the plaintiff. The first page of the Commitments expressly states that they are "non-legally binding commitments". Furthermore there is nothing in the document which suggests that it impacts on the exclusivity of the Warsaw Convention, which is the matter at issue in this appeal. Finally, I note that on the 7th February 2012, the date of the hearing in this case, the Court of Appeal of England and Wales affirmed the exclusive nature of the Warsaw and Montreal Conventions: see *Hook v British Airways plc* [2012] EWCA .. The English Court applied the Montreal Convention to exclude a claim for damages for an alleged failure by the airline to make reasonable efforts to meet the disabled plaintiff's seating needs. This claim arose from an alleged breach of the UK implementation of Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons of reduced mobility when travelling by air. That regulation incidentally post-dates the incident which is the subject of these proceedings. At paragraph 28 of its judgment, the Court rejected the submission that claims for damages based on fundamental or constitutional rights are an exception to the exclusivity principle, and concluded (at paragraph 35) that:-

"It is clear from the decisions of the House of Lords in *Sidhu* that there are no exceptions to the exclusivity of the Convention."

Thus it can be seen that The Warsaw Convention provides the one and only way in which a passenger can maintain an action such as

is herein pleaded. Upon this much litigated issue, the Supreme Court of Ireland, the High Court of Ireland, The House of Lords and the Court of Appeal of the United Kingdom and the Supreme Court of The United States are in agreement.

For all the above-mentioned reasons I must dismiss this appeal. The decision of the Circuit Court Judge on the preliminary issue was correct and is affirmed.