IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN: **MORELLE VAUN AGNEW** of 725 Maxville Drive, Hastings, New Zealand, Pensioner:

Plaintiff

A N D: **POLYNESIAN AIRLINES (HOLDINGS) LTD** a duly incorporated company in Western Samoa having its registered office at Apia, Western Samoa, Airline:

Defendant

Counsel: R Drake for plaintiff
K M Sapolu for defendant

Hearing: 16 September 1997

Judgment: 8 December 1997

JUDGMENT OF SAPOLU, CJ

In these proceedings the Court has to deal with two motions. There is the motion by the plaintiff, relying on section 6(7) of the Limitation Act 1975, to extend to 6 years the time for filing her proceedings. The other motion is by the defendant to strike out the plaintiff's statement of claim on the grounds that it discloses no cause of action and that the

proceedings are time-barred. For the purpose of the strike-out motion the Court would have to assume that the facts pleaded in the statement of claim are true.

In the statement of claim, it is alleged that on 7 July 1993 the plaintiff was a passenger on the defendant, Polynesian Airlines, flight 846 which departed from Auckland, New Zealand, for Apia, Samoa, transiting in Tonga en route. The plaintiff was connecting with Polynesian Airlines flight 302 departing from Apia, Samoa, on the same day for Honolulu, Hawaii, United States of America. While the aircraft was positioning for take-off in Tonga for its onward flight to Apia, Samoa, an airline stewardess was checking the overhead baggage compartments. A heavy bag fell out of one of the compartments and struck the plaintiff on the head and shoulders causing her severe injuries for which she is now suing for damages.

On these pleaded facts, counsel for the defendant submitted that the law which is applicable are the provisions of the Warsaw Convention 1929 as amended by the Hague Protocol 1955 which have been given the force of law in Samoa by the Carriage By Air Act 1964. To determine whether this submission for the defendant is correct, I would have to examine the facts as pleaded in the statement of claim in the light of the relevant provisions of the Carriage By Air Act 1964 and the Warsaw Convention as amended by the Hague Protocol 1955 hereinafter referred to as "the Convention".

Section 2 of the Carriage By Air Act 1964 defines the expression "the Convention" to mean :

"the Convention set out in the First Schedule to this Act, being a Convention for the "unification of certain rules relating to international carriage by air opened for "signature in Warsaw on the 12th day of October 1929, as amended by a Protocol "opened for signature at The Hague on the 28th day of September 1955".

It would appear from this definition of the Convention that its purpose is to provide a unified code of rules in relation to international carriage by air. Section 4(1) of the 1964 Act then provides :

"The provisions of the Convention shall, so far as they relate to the rights and "liabilities of carriers, carriers' servants and agents, passengers, consignors, "consignees, and other persons, and subject to the provisions of this Act, have the "force of law in Samoa in relation to any carriage by air to which the Convention "applies, irrespective of the nationality of the aircraft performing that carriage".

It is clear that the effect of section 4(1) of the 1964 Act is to give the provisions of the Convention the force of law in Samoa in relation to any carriage by air to which it applies. More particularly, the 1964 Act applies to Samoa the provisions of the Convention which relate to the rights and liabilities of carriers, carriers servants and agents, and passengers in relation to a carriage by air to which the Convention applies. All of this, of course, is subject to any contrary provision in the Act.

The important question which arises at this stage is *what is carriage by air to which the Convention applies*. The answer to this question is found in Article 1(1) of the Convention which provides :

"This Convention applies to all *international carriage* of persons, baggage or cargo "by aircraft for reward. It applies equally to gratuitous carriage by aircraft "performed by an air transport undertaking". (italics mine)

It is clear from the facts and the submissions of counsel that the carriage in this case was for reward and not gratuitous. So only the first part of Article 1(1) applies to this case. Article 1(1) also makes clear the kinds of carriage by air to which the Convention applies. These are *international carriage* for reward, and gratuitous carriage by an air transport undertaking.

The next important question which arises is what is the meaning of the expression *international carriage*. The answer to that question is found in Article 1(2) which provides :

> "For the purposes of this Convention, the expression *international carriage* means "any carriage in which, according to the agreement between the parties, the place of "departure and the place of destination, whether or not there be a break in the "carriage or transhipment, are situated either within the territories of 2 High "Contracting Parties or within the territory of a single High Contracting Party if "there is an agreed stopping place within the territory of another State, even if that "State is not a High Contracting Party. Carriage between 2 points within the "territory of a single High Contracting Party without an agreed stopping place "within the territory of another State is not international carriage for the purposes of "this Convention".

This definition of what constitutes an *international carriage* obviously covers a variety of situations. However, I am only required to determine whether the facts of this particular case fall with the ambit of the definition. I will therefore refer only to those parts of the definition of *international carriage* which are relevant to the facts of this case.

Leaving aside for the moment the question of what is a High Contracting Party, it is clear that the first important matter to look at is the agreement or contract of carriage by air between the parties. If it appears from the contract of carriage by air that a passenger's

place of departure is within the territory of one High Contracting Party and his place of destination is within the territory of another High Contracting Party, then by definition such a carriage by air would be an *international carriage* to which the Convention applies. It is immaterial whether there is a break in the carriage or transhipment between the place of departure and the place of destination. See the helpful discussion on this point in the judgment by Greene LJ in *Grein v Imperial Airways Ltd [1937] 1 KB 30; [1936] 2 All ER 1258.*

From the facts pleaded in the statement of claim, it is clear that the plaintiff's place of departure was Auckland, New Zealand. It was there that she started her journey when she first boarded Polynesian Airlines flight 846. Her place of destination was Honolulu, Hawaii, United States of America, where she was to travel the same day on Polynesian Airlines flight 302 from Samoa. The clear conclusion to be drawn from the facts is that the agreement or contract of carriage in this case was an *international carriage* to which the Convention applies, that is, provided New Zealand, the place of departure, and the United States of America, the place of destination, are High Contracting Parties, a point I will come to shortly. It is immaterial whether there was a break in the plaintiff's journey because the aircraft stopped in Tonga and Samoa, or whether there was a transhipment in Samoa.

Now Article 40A(1) of the Convention defines the expression *High Contracting Party* by providing :

> "In Article 37, paragraph 2, and Article 40, paragraph 1, the expression *High "Contracting Party* shall mean the State. In all other cases, the expression *High "Contracting Party* shall mean a State whose ratification of or adherence to the

"Convention has become effective and whose denunciation has not become "effective".

The first part of this definition does not apply to the facts of this case. It is only the second part of the definition that applies. It is clear from the second part of this definition that a State which has ratified or adhered to the Convention and has not denounced the Convention would be a High Contracting Party.

Counsel for the defendant produced to the Court a copy of Appendix A of *Shawcross and Beaumont on Air Law*, Issue 59, which lists the Contracting Parties to the Warsaw Convention 1929 and the Hague Protocol 1955. Given the status of *Shawcross and Beaumont* as one of the leading texts in this area of the law, I have no reason to doubt the authenticity of the contents of its Appendix A. Having studied that document, it is clear that New Zealand and the United States of America, as well as Tonga and Samoa, have all ratified or adhered to the Warsaw Convention 1929 and the Hague Protocol 1955 which have also come into force in respect of all those countries. None of these countries has also denounced the Convention or the Hague Protocol. I conclude, therefore, that New Zealand and the United States of America, as well as Tonga and Samoa are all High Contracting parties in terms of Article 40A(1) of the Convention. It follows that the plaintiff's journey with its place of departure in Auckland, New Zealand, which is a High Contracting Party, and its place of destination in Honolulu, Hawaii, United States of America, which is another High Contracting party, was an *international carriage* in terms of Article 1(2) of the Convention and therefore the Convention applies to it.

Counsel for the defendant has, therefore, argued that because the Carriage By Air Act 1964 and the Convention apply to this case, the time limits provided in the Act and the Convention govern the facts of this case. The provisions of the Limitation Act 1975, including section 6(7) thereof which has been raised on behalf of the plaintiff, do not apply. Counsel referred to section 30 of the Limitation Act 1975 which provides :

> "This Act shall not apply to any action or arbitration for which a period of "limitation is prescribed by any other enactment".

Section 8(1) of the Carriage By Air Act 1964 provides that no action against a carrier's servant or agent which arises out of damage to which the Convention relates shall be brought after more than two years. Article 29(1) of the Convention also extinguishes any right to damage if an action is not brought within two years.

The incident to which these proceedings relate occurred on 7 July 1993. The action by the plaintiff was not filed until 19 November 1996 which was about 3 years and 4 months afterwards. This is beyond the time period of two years allowed under the Convention. The plaintiff's action is therefore time-barred.

As to the part of the defendant's motion seeking to strike out the statement of claim as disclosing no cause of action, reliance was placed on two grounds which are inter-related. It was argued for the defendant that in the circumstances of this case, the plaintiff's action is not sustainable at common law. The action should have been founded on the provisions of the Convention which have been given the force of law in Samoa by section 4 of the Carriage By Air Act 1964.

It is clear in my view that the plaintiff's journey from Auckland, New Zealand, to Honolulu, Hawaii, United States of America, with stops in Tonga and Samoa was an international carriage to which the Convention applies. And it was in Tonga while the Polynesian Airlines aircraft on which the plaintiff was travelling and was preparing for take-off for Samoa that the plaintiff sustained injuries.

Now Article 17 of the Convention provides :

> "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 17 clearly applies to the facts of this case and makes a carrier strictly liable for any bodily injury sustained by a passenger from an accident that takes place on board an aircraft.

Article 22(1) then imposes a limitation on the liability of a carrier in the case of a passenger by providing that :

> "In the carriage of persons the liability of the carrier for each passenger is limited "to the sum of 250,000 francs. Where, in accordance with the law of the Court "seised of the case, damages may be award in the form of periodical payments, the "equivalent capital value of the said payments shall not exceed 250,000 francs. "Nevertheless, by special contract, the carrier and the passengers may agree to a "higher limit of liability".

In this case there has been no special contract between the parties to a limit of liability higher than 250,000 francs. So the limit of liability expressly provided in the Convention applies.

It is also clear in my view that the plaintiff should have brought her action under Articles 17 and 22 of the Convention rather than at common law because what is involved in this case is *international carriage* as defined in Article 1(2) of the Convention. The present action which is purported to be founded on common law is therefore not sustainable. Assistance in this regard may be gained from para 1300 of *2 Halsbury's Laws of England* 4th edn which reads :

> "APPLICATION OF COMMON LAW RULES : Almost all carriage by air is "governed either by the international rules contained in the Warsaw Convention, as "amended at the Hague 1955, or by the similar rules which have been applied to "non-international carriage. There are, however, certain specified categories of "carriage, of which the most important is gratuitous carriage not performed by an "air transport undertaking, to which neither set of rules applies. In any such case "the carriage is subject to the ordinary law with regard to carriers, which is dealt "with elsewhere. There is little authority on the application to carriage by air of the "common law rules governing carriage by sea or by land".

As already pointed out, the Carriage By Air Act 1964 and the Convention apply to and govern the facts of this case. The common law, therefore, has no application.

I have also considered whether the plaintiff should be granted leave to amend her statement of claim so that it pleads a cause of action founded on the provisions of the Carriage By Air Act 1964 and the Convention. Given that the action is out of time and time-barred, no useful purpose would be served by granting such leave to amend.

The statement of claim is therefore struck out and dismissed. Counsel to submit memorandum as to costs within seven(7) days.

TFM Saploka

CHIEF JUSTICE