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Airly in Australia: 'refining and enhancing air travel'

For a small but (presumably) well-off number of Australians, air travel between Sydney, Melbourne and Canberra could be about to change.

A start-up company, Airly, is planning a new passenger membership model, and aims to compete, in part, with the major Australian airlines.

Its model is based on a successful one in the US, and while there are differences in the Australian aviation market, could it also be successful here?

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David Hodgkinson and Rebecca Johnston

'More than a seat on a plane'

What are Airly's features and how does it work? Well, it is a self-styled 'unique entry into the world of private aviation, a world that is normally highly exclusive and highly expensive.'

Airly operate Beechcraft King Air 350 aircraft. The aircraft (also, according to Airly publicity, the same aircraft used by the Royal Flying Doctor Service, the Royal Australian Air Force and numerous international operators) has eight leather club seats, each one an aisle *and* a window – 'eliminating the 'armrest war' experienced when flying commercial.' Passengers also travel with 'like-minded individuals including … 'movers and shakers'.'

Passengers will have their 'every need' met – except perhaps lavatory needs; while an Airly aircraft does have a belted lavatory, one's experience, it seems, 'will be far more comfortable if you use the [airport] lounge toilets instead.'

More prosaically, Airly is marketed as saving one to two hours per round trip through an absence of queues, car parks and, well, people. Airly, it's said, provides 'all the benefits of having your own private plane at a fraction of the cost.' In terms of cost, memberships have three tiers – 'starter', 'business' and 'enterprise.' After a $1000 joining fee, each tier respectively costs $2550, $3150 or $3750 per month, together with other opportunities to bring a friend free every month.

Airly will initially fly out of private aviation terminals at Bankstown Airport in Sydney, Melbourne's Essendon Airport and Canberra Airport. Bankstown, further from central Sydney, is less congested than Sydney. Essendon is both less congested than Tullamarine and closer to the city.

'We don't fly passengers, we fly members'

Most significantly, it should be noted that Airly will not itself be an actual carrier. Rather, it acts – or will act – as an agent for its members, and will not be the operator of the relevant scheduled aircraft. Airly states that Civil Aviation Safety Authority (**CASA**) accredited Air Operator Certificate holders

> ***WHICH HAVE REGULAR PUBLIC TRANSPORT (RPT) APPROVALS FLYING ON BEHALF OF AIRLY EXERCISE FULL OPERATIONAL CONTROL OF THE AIRCRAFT. ANY AIRCRAFT OWNED OR LEASED BY AIRLY ARE DRY LEASED TO THE OPERATING AIR CARRIER TO FACILITATE OPERATIONS BY THAT CARRIER.***

A ‘dry lease’ (as opposed to a ‘wet’ one) generally involves only the lease of the physical aircraft ultimately to the operating carrier without crew, maintenance (possibly), or fuel.

Implications – passenger liability and otherwise – for ‘members’

Australian carriers' liability and insurance arrangements are outlined in the *Civil Aviation (Carriers' Liability) Act 1959*. The Act gives the force of law to a number of passenger liability frameworks, including those arising under the various Warsaw liability instruments, and the 1999 Montreal Convention (**MC99**) which is the most passenger-friendly treaty, and provides a separate system of liability for domestic travel.

For Airly’s purposes, ‘members,’ when flying, would be passengers for the purposes of the Australian passenger liability framework for domestic passenger travel created under Part IV of the Act, and is complemented by state government legislation to create a national uniform scheme. Arrangements for compulsory passenger insurance are outlined in Part IVA of the Act.

Will it work?

Airlines go bust fairly regularly. In the US, there have been just under 200 airline bankruptcy filings since 1990 including those of Pan Am, Trans World Airlines and Continental. In Australia, while examples are fewer, Air Australia and Ansett are well known failures.

IATA (the organization of the world’s airlines) projects that, beyond this year, airline profitability will slow due to the cyclical nature of the industry, increasing interest rates and carrier realization of the maximum benefits of cheap jet fuel, according to IATA. Its CEO has said that the industry’s profitability ‘is better described as ‘fragile’ than ‘sustainable.’

Notwithstanding this less than rosy (international) outlook, could this be the right time for the (domestic) Airly? In an average four weeks, 7.6 million Australians do fly on a domestic airline, 4.6 million travel with an international airline and 1.9 million fly domestic business class.

On those figures, absent any other consideration, maybe the times will suit Airly. And given its unique structure and business model, perhaps loss-making factors which apply to other, ‘traditional’ carriers won’t apply so much to it…

Elitism in the skies

The Airly model – or variations of it – has operated in other jurisdictions. In Australia, however, on the scale and in the way Airly proposes, it’s new. It offers yet another ‘class’ of air travel, albeit on fairly straightforward, but sparsely populated and nicely kitted-out, aircraft (again, each seat is both an aisle *and* a window ...).

In passenger terms, air travel has always been stratified (as it were). Airly – and developments like it around the world – is simply another iteration of this stratification. And we suspect Airly probably won't offer carbon offsets to its passengers.

Footnotes can be supplied upon request.

Is flying at a low altitude a breach of a pilot's duty of care?

Cook v Modern Mustering Pty Ltd & Ors and *Savage & Ors v Modern Mustering Pty Ltd & Ors* [2015] NTSC 82

Shannon O'Hara

The Northern Territory Supreme Court recently found in favour of the defendants[1] to a common law claim for damages for catastrophic personal injuries sustained by a passenger during a low altitude aerial mustering accident.

Facts

The accident occurred on 30 September 2008 on Suplejack Station; a large cattle station in the Tanami Desert, Northern Territory owned and operated jointly by a partnership between members of the Cook and Savage families.[2]

The accident helicopter, a Robinson R22 (**helicopter**) belonged to Hayes Holdings (NT) Pty Ltd (**Hayes**) and was being flown pursuant to an AOC[3] held by Modern Mustering Pty Ltd (**MM**), with a contract in place between Suplejack partners and Hayes for the mustering services.[4] The pilot was Mr Zebb Leslie (**Leslie**), an employee of Hayes.

On the morning of the accident, Mr Rob Cook (**Cook**) (the son of the Cook Partners), departed in the helicopter with Leslie in order to locate the tail of the cattle and so Cook could instruct Leslie as to where the cattle were to be mustered.[5]

After locating the tail of the cattle, Cook reportedly asked Leslie to take him back to his gyrocopter so Cook could help Leslie keep the mob walking and then Leslie could get on to mustering the other cattle towards an agreed location at the station (**return flight**).[6]

Leslie allegedly turned the helicopter, gained altitude and increased speed to about 60 to 70 knots to take Cook back to his gyrocopter. The helicopter was reportedly cruising at about 250' above ground level (**AGL**) for between one and two minutes when Cook felt the helicopter lag. In fact, the helicopter had suddenly completely lost power.[7]

Leslie allegedly said words to the effect of *'we're going down*' and attempted an autorotation[8] but as the helicopter came down the tail rotor clipped a tree and broke off. The helicopter landed on the skids without the tail, slid forward for about seven metres, then tipped forward until the rotor hit the ground.[9] It is probable that one of the skids dug into the soft ground or hit a concealed obstacle, causing the helicopter to tip over landing on the passenger side.[10]

Cook sustained multiple catastrophic injuries to his spine, resulting in permanent loss of movement and sensation below the C4 vertebrae, including his left arm and both legs. He retains a limited ability to move his right arm.[11] The pilot was uninjured.[12]

Litigation

Cook commenced proceedings for workers' compensation. This claim was settled for a lump sum payment to Cook of $10.5 million. The workers' compensation insurer in turn commenced proceedings to recover the payments made under that settlement from each of the defendants.[13]

Cook also commenced a common law action against each of the defendants alleging a breach of duty of care owed by Leslie to Cook, with Hayes and MM vicariously liable for Leslie's breach of duty.[14] Each of the defendants admitted the existence of a duty of care on Leslie's part but denied the alleged breach and, in turn, denied any breach of duty caused the injuries suffered by Cook.[15]

In his claim documents, Cook alleged Leslie's duty of care included a duty to not fly the helicopter at a height less than 500' from the ground while carrying a passenger unless taking off or landing, or otherwise forced to, or performing a task in which it was necessary (i.e. a breach of Regulation 157(1)(b) of the *Civil Aviation Regulations*) (**Regulations**).[16]

The court ordered the common law claim and recovery proceeding be heard together with claims for contribution agreed to be postponed until after liability was determined in the principal proceedings.[17]

Did Leslie breach the duty of care owed to Cook?

In order to answer this question, the court considered three issues which we discuss below:

Was Leslie engaged in aerial stock mustering operations at the time of the engine failure?

In his pleadings and at trial, Cook alleged Leslie was not conducting *'aerial mustering operations'* while on the return flight, and was therefore in breach of the Regulations[18] to have been flying below 500' at the time of the accident. In pursuing this allegation, Cook relied on the definition of *'aerial stock mustering'* set out in Civil Aviation Order 29.10 (**Order 29.10**) as *'the use of aircraft to locate, direct and concentrate livestock while the aircraft is flying below 500' AGL and for related training operations'*. Cook claimed that once the decision to commence the return flight had been made, the helicopter was no longer engaged in aerial musting, and was therefore not permitted to fly under 500'.[19]

Cook directed the court to the fact the low flying permit issued to MM only permitted aircraft to fly at a height lower than 500' on condition *'persons other than crew members are not carried'* with the definition of *'crew member'* being *'a person assigned by an Aircraft Operator for duty on an aircraft'*.[20]

Cook alleged there was no evidence capable of supporting the conclusion he was a crew member at the time of the accident because he was in fact an employee of the Cook Partners, and if correct, it would not be permissible for Leslie to fly the helicopter lower than 500' with a spotter on board.[21]

The court did not agree with Cook for two reasons.

Firstly, the court found that while a helicopter is engaged in aerial mustering operations, the person accompanying the pilot as spotter comes within the definition of crew member because the spotter is performing a duty on the aircraft for the purpose of the aerial muster.[22]

Secondly, the court found the pilot is the delegate of the aircraft operator for the purpose of assigning a person for duty on the helicopter and as such, there can be no doubt the pilot would have the right to refuse to carry a person as spotter if the pilot did not believe the person to be suitable.[23]

Was the helicopter engaged in aerial mustering while on the return flight?

As to this issue, the court said Cook's pleadings drew *'a sharp distinction'* between mustering in the strict sense (i.e. specific manoeuvres to move or direct cattle) and spotting, and in turn a further distinction between the activity of spotting and the return flight.[24]

Counsel for Leslie countered Cook's submissions contending the term *'aerial stock mustering operations'* in Order 29.10 (and in turn *'aerial work operations'* in MM's low flying permit) must be construed in the context of the whole of the legislative regime in which they operate, that is by reference to the purpose for which the aircraft is being flown on a particular flight and not restricted to the specific activity of moving cattle with a helicopter. It was asserted this would extend to include all aerial operations related to the function of aerial stock mustering and which occur during the course of a flight for that purpose.[25]

The court agreed, finding a narrow construction of the term *'aerial stock mustering operations'* (which from the regulatory scheme form a sub-set of *'aerial work operations'*) would result in the pilot potentially having to change regulatory requirements mid-flight, a result which would be unworkable and contrary to the court's view of the legislative purpose of the regulatory framework on this issue.[26]

As such, the court concluded the helicopter was engaged in aerial stock mustering operations when the accident occurred, and accordingly, Leslie was not in breach of the Regulations for having flown the helicopter below 500' at the relevant time.[27]

Was Leslie in breach of his duty of care to the Plaintiff in flying below 500' in the circumstances?

The court identified the relevant risk in this matter as 'the risk of injury to Cook, if there was a sudden loss of power or other mechanical failure in the helicopter'.[28]

The court noted the risk of injury should this occur in a *'helicopter flying at any height was obvious'*,[29] but as to the probability of such an occurrence, none of the experts had given evidence addressing this issue and as such, there was an absence of information upon which to form the basis for an assessment of what a reasonable pilot would have done in the circumstances.[30] In addition to the evidentiary limitations canvassed above, the court also found there was little by way of expert evidence addressing the potential costs involved in flying higher during a muster.[31]

Notwithstanding the evidentiary limitations, the court made several findings in regards to these issues:

- ***FIRSTLY, THE EVIDENCE SEEMED TO INDICATE FLYING HIGHER IS GENERALLY CONSIDERED TO BE SAFER IN AN EMERGENCY BECAUSE IT GIVES THE PILOT MORE TIME AND MORE OPTIONS, ALTHOUGH THERE ARE SOME EMERGENCIES IN WHICH FLYING LOWER WOULD BE SAFER;***
- ***SECONDLY, COMMERCIAL HELICOPTER PILOTS ENGAGED IN MUSTERING OPERATIONS GENERALLY FLY BELOW 500' EVEN WHEN NOT ACTIVELY ENGAGED IN MOVING CATTLE;***
- ***THIRDLY, THERE ARE SOUND OPERATIONAL REASONS FOR THIS (REFER TO ITEM TWO ABOVE) IN SOME CIRCUMSTANCES BECAUSE LOW FLYING MINIMISES THE NOISE FOOTPRINT OF THE HELICOPTER AND BAD MANAGEMENT OF NOISE CAN SCARE THE CATTLE OFF IN THE WRONG DIRECTION AND SUBSTANTIALLY INCREASE THE COST OF THE MUSTER;***
- ***FOURTH, THE CRASH HAPPENED ABOUT ONE MILE (TWO MINUTES) FROM THE TAIL OF THE CATTLE BEING MUSTERED, THERE WAS NO EVIDENCE OF HOW LONG IT WOULD HAVE TAKEN THE PILOT TO CLIMB TO 500' AFTER HE COMMENCED THE RETURN FLIGHT;***
- ***FIFTH, THERE WAS NO EVIDENCE OF WHETHER FLYING AT 500' WOULD HAVE BEEN LIKELY TO SCARE THE MOB OFF THE ROUTE THEY WERE ON, OR HOW SOON THE PILOT COULD HAVE STARTED TO CLIMB WITHOUT A REAL RISK OF SCARING THE MOB OFF THAT ROUTE;***
- ***SIXTH, THERE WAS NO EVIDENCE OF HOW LIKELY HELICOPTER ENGINE FAILURE IS TO ENABLE THE COURT TO BALANCE THAT RISK (AND THE POSSIBLE SAFETY MARGIN ACHIEVABLE BY FLYING HIGH) AGAINST THE POSSIBLE COST IN TERMS OF HINDERING THE MUSTER; AND***
- ***FINALLY, NO ONE EXPRESSED THE OPINION THAT IN THE CIRCUMSTANCES DESCRIBED IN THE EVIDENCE OF COOK IT WAS NOT NECESSARY OR DESIRABLE FOR OPERATIONAL REASONS FOR THE HELICOPTER TO BE FLYING AT 250' WHEN THE ENGINE FAILED.[32]***

For the reasons set out above, the court concluded it was 'unable to be satisfied that a reasonable pilot in Leslie's position, would, in the circumstances, have flown the helicopter at 500' or more AGL to guard against the risk of injury to Cook' and for that reason confirmed Cook had not established a breach of Leslie's duty of care in the circumstances.[33]

In concluding its analysis of this issue the court said:

- Leslie was performing a task in respect of which he was authorised to fly below 500'. Cook failed to adduce evidence that Leslie was not performing a task which required flight below 500';[34] and

- Cook's case that Leslie ought to have been flying at 500' AGL was based on the assumption this is what the regulations required. The regulations did not so require this and as such, there would seem to be no reason to choose 500' as the height at which Leslie had a duty to fly, rather than some other height, higher or lower than 500'.[35]

Having found Leslie was not in breach of his duty of care to Cook, the court confirmed it was not necessary to consider the other issues in the case, but for the sake of completeness proceeded to do so nonetheless.[36]

Causation: If Leslie breached the duty of care owed to Cook, did the breach cause Cook's injuries?

Cook's pleadings addressed the cause of his injuries in the following terms:

- If the helicopter had been flying at 500' or higher, Leslie could have selected an alternative landing site devoid of trees and other obstacles; and

- If Leslie had landed at such an alternative landing site, Cook would not have been injured, or not so badly injured.[37]

In response, the defendants' submitted Cook's case was essentially a loss of chance case only. That is, Cook could only demonstrate a bare possibility there may have been a different outcome if the helicopter had flown higher. For example, Leslie *might* have chosen a different landing site and the helicopter might not have caught its skid on a snag and flipped. In any event, the defendants' submitted Cook could not establish either of these two eventualities would probably have occurred.[38] The court agreed with the defendants.[39]

In reaching its conclusion, the court noted the experts agreed that if the helicopter had been flying at 500', the pilot would have had more time to select a landing site and a larger available area of ground from which to choose. However they did not believe flying at a greater height would have made a significant difference in the outcome for three reasons:

- Firstly, the landing site chosen by Leslie appeared to have been large enough and relatively clear of obstructions;

- Secondly, they did not think there was a suitable alternative landing site available nearby; and

- Finally, there were too many other variables (wind speed, direction etc) to enable them to say a greater height would have affected the outcome.[40]

The court found that the case put by Cook involved an *'after the fact'* approach to reasoning which was not sufficient to establish that flying the helicopter at the height it was flown (assuming that was in breach of duty) caused the injuries to Cook.[41] The court also noted Cook had failed to establish that given the opportunity, a reasonably competent pilot would have chosen an alternative site and in that regard, the joint opinion of the experts was contrary to Cook's approach.[42]

Court's conclusion

In summarising its findings the court concluded that: Leslie was engaged in aerial stock mustering operations at the time of the accident; it was not unlawful for Leslie to be flying at less than 500' AGL at the time the helicopter lost power; Cook failed to prove on the balance of probabilities that Leslie was in breach of his duty of care to Cook; and even if Leslie had been in breach of his duty of care in flying under 500', Cook failed to show that doing so was a cause of his injuries.[43]

As a consequence of the court's findings, judgement was entered for all defendants in both proceedings.[44] It is understood that the decision will be appealed.

1 Modern Mustering Pty Ltd (ACN 112 371 543), Hayes Holdings (NT) Pty Ltd (ACN 105 519 695), Zebb Raymond Leslie and Suple Jack Pastoral (NT).
2 *Cook v Modern Mustering Pty Ltd & Ors* and *Savage & Ors v Modern Mustering Pty Ltd & Ors* [2015] NTSC 82 [1].
3 Air Operators Certificate.
4 *Cook v Modern Mustering Pty Ltd & Ors* and *Savage & Ors v Modern Mustering Pty Ltd & Ors* [2015] NTSC 82 [9].
5 Ibid [14].
6 *Cook v Modern Mustering Pty Ltd & Ors* and *Savage & Ors v Modern Mustering Pty Ltd & Ors* [2015] NTSC 82 [16].
7 Ibid [19].
8 Ibid [20].
9 Ibid.
10 Ibid [22].
11 Ibid [23].
12 Ibid.
13 Ibid [24] and [25].
14 Ibid [27].
15 Ibid [28].
16 Ibid [30].
17 Ibid [26].
18 Civil Aviation Regulations, r.157(1)(b).
19 *Cook v Modern Mustering Pty Ltd & Ors* and *Savage & Ors v Modern Mustering Pty Ltd & Ors* [2015] NTSC 82: [40].
20 Ibid [41].
21 Ibid [41].
22 Ibid [42].
23 Ibid [42].
24 Ibid [43].
25 Ibid [51].
26 Ibid [52].
27 Ibid [55].
28 Ibid [60].
29 Ibid.
30 Ibid.
31 Ibid [61].
32 Ibid [69].
33 Ibid [70].
34 Ibid [75].
35 Ibid [76].
36 Ibid [77].
37 Ibid [80].
38 Ibid [85].
39 Ibid [85].
40 Ibid [87].
41 Ibid [102].
42 Ibid [103].
43 Ibid [107].
44 Ibid [108].

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