



TURBULENCE IN INTERNATIONAL AVIATION INJURY COMPENSATION

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DOES STATE CIVIL LIABILITY LEGISLATION APPLY TO THE QUANTIFICATION OF DAMAGES FOR CLAIMS BROUGHT UNDER THE CIVIL AVIATION (CARRIERS' LIABILITY) ACT 1959 (CTH)?

YES

GRUEFF V VIRGIN AUSTRALIA AIRLINES

Griffith J, Federal Court

YES

EVANS V AIR CANADA

Rothman J, Supreme Court
of NSW

NO

BRADSHAW V EMIRATES

Stewart J, Federal Court

GRUEFF V VIRGIN AUSTRALIA [2021] 395 ALR 249; [2021] FCA 249

The applicants were aboard a Virgin Australia flight from Denpasar to Sydney. They were by mistake served a cup of water that contained perfume. The applicants suffered (relatively) minor symptoms which resolved after a few weeks.

EVANS V AIR CANADA [2023] NSWSC 1535

The plaintiffs were on an Air Canada flight to Sydney which encountered turbulence and they alleged they suffered spinal injuries.

BRADSHAW V EMIRATES (2021) 395 ALR 97; [2021] FCA 97

The applicant was on a flight from Dublin to Dubai, connecting to Brisbane on Emirates. He was struck on the head by a suitcase which fell from the overhead baggage compartment during the flight. The applicant claimed damages for headaches and neck pain.



MONTREAL CONVENTION 1999

- Given effect in Australia by the *Civil Aviation (Carriers' Liability) Act 1959 (Cth) (as amended)*
- Article 17.1:
The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only 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 21 deals with compensation with strict liability limits up to a prescribed limit (currently 128,821 SDRs - approx. AU\$265,000).

SECTION 79 OF THE JUDICIARY ACT 1903 (CTH)

79 State or Territory laws to govern where applicable

- (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

SECTION 80 OF THE JUDICIARY ACT 1903 (CTH)

80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, **the common law in Australia as modified** by the Constitution and **by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.** (emphasis added)

GRUEFF

Griffiths J decided that there was no ‘bodily injury’ within the meaning of Article 17.1 of MC99, but then considered whether, Part 2 of the *Civil Liability Act 2002* (NSW) applied if there was a bodily injury.

Applying the analysis of the plurality in *Blunden v Commonwealth* (2003) 218 CLR 330:

1. First must consider s 80 of the *Judiciary Act 1903* (Cth).
2. The phrase ‘laws of the Commonwealth’ refers to statute law.
3. Where the statute law of the Commonwealth is insufficient to carry [itself] into effect, or fails to provide adequate remedies and punishment, the exercise of the necessary federal jurisdiction is, by s 80, directed to be the common law in Australia as modified by the statute law in force in the State or Territory in which the federal jurisdiction is exercised.

(see [63]-[68])

GRUEFF

DOES PART 2 OF THE CL ACT APPLY BY OPERATION OF SECTION 80 OF THE JUDICIARY ACT?

Must consider:

1. whether Article 17.1 of MC99 is 'insufficient'; and
2. Part 2 of the CL Act is 'inconsistent'

Griffiths J decided that (at [69]-[78]):

- Article 17 is insufficient, relying on Gordon J's decision in *Parkes Shire Council v South West Helicopters Pty Ltd* (2019) 266 CLR 212 comparing the regime for damages for death of a passenger with the regime for injury (s 9D c.f. s 9E of the CACL Act); and
- Part 2 of the CL Act was not inconsistent because assessment of damages under Art 17.1 was left to domestic law, and Part 2 of the CL Act only deals with quantification of damages, not liability.

GRUEFF

DOES SECTION 79 OF THE JUDICIARY ACT PICK-UP PART 2 OF THE CL ACT?

Griffiths J (at [82]-[92]):

- referred to *Rizeq v Western Australia* (2017) 262 CLR 1 and *Masson v Parsons* (2019) 266 CLR 554 as to the operation and effect of s 79, reiterating that it fills the gap created by any absence of Commonwealth laws which provide a court with powers necessary for the hearing and determination of a matter and the presence of State laws of this kind which cannot operate of their own force in federal jurisdiction;
- asked whether the CL Act is a State law “directed to” courts which should be “binding” on courts exercising federal jurisdiction in NSW as a gap filling measure, and then whether the Commonwealth statute, namely the CACL Act and Montreal Convention, otherwise provide; and
- decided that Part 2 of the CL Act was picked-up by s 79 of the Judiciary Act using analysis in similar terms to that for s 80.

BRADSHAW

Justice Stewart:

- it is well recognized that a claim under Article 17 is an independent statutory cause of action and is not a claim in either contract or tort.
- general damages for pain and suffering and loss of amenities of life are recoverable under Article 17(1).
- this was an 'accident' and 'bodily injury' was suffered as a consequence.
- but was Bradshaw's claim for non-economic loss subject to section 16 of the CL Act?
- Section 16 prescribes that no damages may be awarded for non-economic loss unless the severity of the loss is at least 15% of a most extreme case, and the maximum amount recoverable is now indexed (and at 1/10/21 was \$693,500).
- uncertainty whether the CL Act applied to no fault liability claims.

BRADSHAW

- Stewart J disagreed with the conclusions reached by Griffiths J in *Grueff*.
- No 'gap' in the Commonwealth regime and the Montreal Convention which required State law to be picked up under the Judiciary Act.
- There was inconsistency between the State and Commonwealth laws.
 - in relation to the issue of fault
 - in relation to application of thresholds
 - in relation to the recoverability of injury for mental injury

"To pluck one component out of one scheme (eg the threshold in s 16(1)) ...and impose it on the other scheme would create such distortion as to be in conflict with that other scheme, namely the Montreal Convention."

Effect would be to extinguish or restrict an entitlement to recover damages.

EVANS

Evans was decided after *Grueff* and *Bradshaw* so Rothman J had the benefit of both judgments.

Rothman J:

- applied the same two-step test for s 80 of the Judiciary Act as in *Grueff*;
- said there was a 'gap' in Article 17.1 applying the reasoning of Scalia J in *Zicherman v Korea Airlines* 516 US 217 (1996) and that MC99 provided nothing more than a pass-through authorising the Court to apply the law that would govern in absence of the Convention (at [99]-[112]);
- determined that Pt 2 of the CL Act was not inconsistent, again applying *Zicherman* (where domestic law defeated a claim that would otherwise be allowed under the Warsaw Convention) and noting that Pt 2 treats all injuries in the same fashion (physical and psychological) (at [113]-[124]); and
- properly construed, s 11A of the CL Act - which says that the part shall apply regardless of whether the claim for damages is brought in tort, contract under statute or otherwise – means that Pt 2 applies to the plaintiff's claim (at [127]-[144]).



OBSERVATIONS

- Bootstraps reasoning in *Grueff* re: whether Pt 2 of the CL Act is consistent with Art 17.1 MC99 (vis s 80 of the Judiciary Act):
[74] ... if the heads of damage available and assessment of damages was intentionally left to the domestic law ... this would suggest that the CL Act cannot be said to be “inconsistent” with the MC99.
- Contrast Pt 2 of the CL Act with other jurisdictions (e.g. *Di Falco v Emirates* (2018) 57 VR 394 vis Part VBA of the *Wrongs Act 1958* (Vic)
- Contrast where cause of action is fault-based with situation where damage caused by the fault of someone.
- Can the decisions be reconciled?