CIV/T/588/95

IN THE HIGH COURT OF LESOTHO

In the matter between

R. Carlos	**First Plaintiff**
Mr. Van Germert	**Second Plaintiff**

and

The Government of the Kingdom of Lesotho	**First Defendant**
The Attorney General	**Second Defendant**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 22nd day of October 1998.

This is an application for absolution from the instance made at the end of the plaintiffs' case. In order to appreciate the issues which arise for determination in this matter it is necessary to refer to the relevant portions of the pleadings as well as to the nature of the evidence which has been led thus far.

Both plaintiffs who are citizens of the Republic of South Africa were at the material time in October 1993 employees of Rodio South Africa (Pty) Limited a company duly incorporated according to the laws of the Republic of South Africa. They were employed as geotechnical engineer site managers

at the Mohale Dam site, Senqu River in the Lesotho Highlands Water Project.

On the 29th October 1993 Rodio entered into an agreement with Lesotho Defence Force in terms of which the latter supplied to the former a helicopter on hire to airlift equipment and supplies at the Mohale Dam site on 2nd November 1993. The Lesotho Defence Force also supplied a pilot one Captain Samuel Makoro for the mission in question.

The plaintiffs have alleged in paragraph 4(e) of their declaration that in the course of the mission on the 2nd November 1993 they were conveyed in the helicopter in order to assist with the airlifting of the equipment and to indicate to the pilot where the equipment and stores had to be delivered. The helicopter itself was equipped with a net for the purpose of containing stores equipment or other goods. It is pertinent to observe that the net was indeed part of the agreement between the parties.

The plaintiffs have alleged further, and this has been repeated in their evidence before me, that in the course of the mission in question the net with its contents was dropped from the helicopter onto a platform, whereafter it rolled off the platform down the mountainside. The pilot then decided to retrieve the net. The plaintiffs allege that they accompanied him at his insistence with a view to assisting him in such retrieval.

In the course of carrying out the retrieval of the net in question the helicopter crashed as a consequence of the roters thereof coming into contact

with the mountain side. This took place at Mohale Dam site in Lesotho.

It is plaintiffs' case that as a consequence of such crash each of them sustained severe bodily injuries which they maintain were caused by the negligence of the pilot who was acting as a servant of the Royal Lesotho Defence Force and of the Government of the Kingdom of Lesotho.

The first plaintiff claims damages totalling M12 161 432.00 for pain and suffering, permanent disability, loss of amenities of life, loss of earnings, past medical expenses, future medical expenses, cost of appliances, modifications to motor vehicles and building operations.

For his part the Second Plaintiff claims damages totalling M249 879.79 for pain and suffering and loss of amenities of life, medical expenses, loss of earnings and future dental expenses.

It is pertinent to bear in mind that the plaintiffs' claims have been brought under the common law. Indeed this is common cause. More about this later.

In their plea the defendants have denied the alleged negligence attributed to the pilot in question. They plead in the alternative that in the event of the Court finding that the pilot was negligent then such negligence did not cause or contribute to the accident.

The defendants have pleaded in the further alternative that in the event of the Court finding that the pilot was negligent and that such negligence caused or contributed to the accident then the first plaintiff was negligent in that he failed to wear a seatbelt specially provided and available in the helicopter and that such negligence contributed to his injuries.

Again the defendants have pleaded in the further alternative that in the event of the Court finding that they are liable to each of the plaintiffs then the liability of the defendants is limited to the sum of M40 000.00 in respect of each plaintiff in terms of Regulation 4 of the Carriage By Air Regulations, 1978, read with Article 22 in Schedule 1 thereof it being alleged that the plaintiffs were conveyed in circumstances governed by the provisions of the said Regulations.

As earlier indicated both plaintiffs gave evidence on their own behalf clearly relying on the common law. They testified that they were not on the helicopter for hire or reward but fortuitously at the request of the pilot. They did not call any witnesses but closed their case.

At the close of plaintiffs' case Adv Penzhorn S.C. for the defendants applied for absolution from the instance mainly on the ground that plaintiffs' claims based purely on common law as they admittedly are, are untenable in the light of the Carriage By Air Regulations 1978 read with the principal Act namely The Carriage By Air Act, 1975.

Now it has long been the law that the test to be applied in determining whether absolution from the instance should be granted at the close of the case for the plaintiff is whether there is evidence upon which a Court, applying its mind reasonably to such evidence might (not should) find for the plaintiff. The leading case in this regard is **Gascoyne v Paul and Hunter 1917 TPD 170 at 173 per De Villiers JP.**

As I see it, it is further instructive to note that "the Courts have frequently emphasised that absolution should not be granted at the end of the plaintiff's evidence except in very clear cases, and that questions of credibility should not normally be investigated until the Court has heard all the evidence which both sides have to offer" **Hoffman & Zeffertt: the South African Law of Evidence: 4th Edition at page 508.** I might add, of course, that each case must depend on its own particular circumstances as for example where the sole point for determination by the Court is the interpretation of a statute the Court might as well resolve the matter at the close of plaintiff's case or even earlier by way of exception rather than engage in a full scale hearing of the evidence for the other side with its attendant consequences such as inconvenience to the innocent party and the Court as well as unnecessary costs occasioned thereby.

It is upon the above mentioned principles that I approach this matter. In doing so I have not lost sight of the submission by Adv Selvan S.C. for the plaintiffs to the effect that where a Court is faced with a difficult point of law as in this case it is better to conclude the case rather than grant absolution

from the instance. I find Counsel's submission very attractive and indeed tempting but the other side of the coin is of course that the Court cannot shirk its responsibility to resolve legal issues no matter how difficult they might be and the sooner it determines the matter the better. Indeed some people might be tempted to ask, by way of a loose example, if a man is legally doomed to hang why prolong his death anyway?

It is no doubt convenient at this stage to examine the relevant portions of the Carriage By Air Act, 1975 and the Carriage By Air Regulations 1978 in so far as they concern this case.

The Carriage By Air Act, 1975

The head note to this Act sets out to "give effect to certain conventions relating to international Carriage by Air, to enable certain of the rules contained in such Conventions to be applied, with adaptions, to other cases of carriage by Air; and for related purposes."

Section 3 (1) of the Act provides that the provisions of the Warsaw Convention, 1929, the Warsaw Convention as amended at the Hague, 1955, and the Guadalajara Convention, 1961, shall have effect and the force of law in Lesotho (irrespective of the nationality of the carrier, the aircraft or the claimant), so far as those provisions relate to the rights and liabilities of carriers, the carrier's servants or agents, passengers, consignors, consignees and other persons, with respect to carriage by air as specified in subsection (2)

which in turn stipulates that the Warsaw Convention, 1929 shall apply to such international carriage by air as is defined in that Convention. It also empowers the Minister, in terms of Section 8 of the Act, to certify which states are parties respectively to the three Conventions referred to above.

Now Section 4 which is on limitation of liability significantly provides that such limitation as is provided in Article 22 in the First Schedule to the Act applies whatever the nature of the proceedings by which liability may be enforced and, in particular -

> "(a) those limitations apply where proceedings are brought by a wrongdoer to obtain a contribution from another wrongdoer, and
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> (b) the limitation for each passenger in paragraph (1) of the said Articles 22 and VI applies to the aggregate liability of the carrier in all proceedings which may be brought against him under the law of Lesotho, together with any proceedings brought against him outside Lesotho."

Then comes the important section namely Section 6 of the Act which provides that with respect to any cases of carriage by air which are not governed by the Conventions referred to above (viz. Section 3 of the Act) the Minister may make regulations applying the rules, with any exceptions or modification specified by him.

In terms of subsection 2 of Section 6 the regulations so made shall include the provisions of Articles 23 and 24 of the Second Schedule and of Sections 4, 5 and 7 of the Act with "any adaptations."

Now in 1978 and pursuant to the powers conferred on him by Section 6 of the Carriage By Air Act, 1975 the Minister made Carriage By Air Regulations 1978 which dealt with local or non-international carriage by air. This, in my view, the Minister was perfectly entitled to do in as much as Section 6 of the principal Act clearly empowered him to make regulations with "any exceptions or modification specified by him." The Act obviously gave him ***carte blanche*** to modify or extend the international carriage by air regulations or rules to local or non-international carriage by air. I proceed then to examine the Regulations in so far as they are relevant to this case.

The Carriage By Air Regulations 1978.

Section 2 of the Carriage By Air Regulations 1978 significantly provides as follows:

"2. (1) These regulations shall apply to the carriage of persons, baggage or cargo by air which -

(a) is not governed by any of the Conventions named in section 3 of the Carriage by Air Act 1975; and

(b) is performed either -

(i) for reward or hire by any person or body or the State; or

(ii) gratuitously by an air transport undertaking.

(2) For the purposes of these regulations, mail and postal packages shall be regarded as cargo."

Consistent with the intention to modify the regulations to apply to both intentional and local or non-international carriage by air the Minister inserted Section 3 of the Carriage By Air Regulations 1978 which reads as follows:-

"3. (1) Schedule 1 (which reproduces the Second Schedule to the Act as excepted and modified for the purpose of these regulations) shall apply to all cases of carriage by air described in regulation 2 except those mentioned in sub-regulation (2).

(2) Schedule II (which reproduces the Third Schedule to the Act as excepted and modified for the purpose of these regulations) shall apply to those cases of carriage by air described in regulation 2 in which the "actual carrier" is not "contracting carrier" as these expressions are defined in Schedule II." (my underlining).

It is important then to examine some of the relevant Articles which were incorporated in Schedule 1. It should be noted that with the exception of Article 1 all the other Articles are indeed identical with those of the

Conventions on international carriage by air.

Article 1 clearly stipulates that this Schedule (i.e. Schedule 1) applies to all Carriage By Air specified in regulation 2.

Article 17 spells out the liability of the carrier in the following terms:-

"Article 17

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 22 (1) sets out the limit for which the carrier is liable in the following words:-

"Article 22

(1) In the carriage of persons, the liability of the carrier for each passenger is limited to the sum of fourty (sic) thousand rand. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed forty thousand rand. Nevertheless, by special contract, the carrier and the

passenger may agree to a higher limit of liability."

Article 23 provides as follows :

"Article 23

(1) Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Schedule shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule."

Article 24 reads as follows :-

"Article 24

(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 this Schedule.

(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 to bring suit and what are their respective rights."

As I have said earlier it is pertinent to bear in mind in determining this

matter that the Carriage By Air Act 1975 as well as the Carriage By Air Regulations 1978 are identical, word for word, with the aforesaid Warsaw Convention as amended at the Hague in 1955.

Now the real and sole question which arises for determination in this matter is whether the Act and the Regulations as they apply to Lesotho provide the exclusive cause of action and sole remedy in respect of claims for loss, injury and damage sustained in the course of, or arising out of, carriage by air. If the answer is in the affirmative then it stands to reason that the plaintiffs' claims which have been brought for damages at common law for personal injury must be dismissed.

As I see it therefore the whole question is one of interpretation of the relevant statutes and the Warsaw Convention as amended at the Hague in 1955. At the outset I should like to say that these statutes and the Convention must be interpreted purposively and meaningfully no matter how difficult the task may be - I confess that this is a very complex issue for which there is no precedent in the country. Accordingly I shall take the liberty to seek guidance from foreign jurisdictions with similar legislation to ours and in doing so it is important to observe that as far as our neighbouring country is concerned namely the Republic of South African, there are no Carriage By Air Regulations in that country. Consequently there are no relevant cases for consideration in that country as far as this case is concerned. Indeed this is one area where Lesotho is undoubtedly one step ahead of the Republic of South Africa.

Nor do I think that this Court can derive any assistance from the United States law in view of the conflicting nature of authorities there on whether the Convention provides an exclusive cause of action for injuries sustained during carriage by air. Indeed the Supreme Court there has twice refrained from addressing the issue.

I have accordingly had to turn to the United Kingdom which fortunately has exactly the same Act and Carriage By Air Regulations as ours. Decisions in that jurisdiction are therefore highly persuasive to this Court. Two of such decisions are in point and they are Sidhu and Others v British Airways 1997 (1) ALL ER 193 and Fellowes (or Herd) and another v Clyde Helicopters Ltd. 1997 (1) ALL ER 775. Both are decisions of the House of Lords.

Sidhu's Case (supra)

This case was based on the Carriage By Air Act 1961 of the United Kingdom which, as I have said above, is exactly identical to ours. The appellants (plaintiffs and the pursuer) were passengers on an international flight operated by the Respondent airline. The airline left London on 1 August 1990 and landed in Kuwait for refuelling on 2 August 1990 after Iraqi forces had begun invading Kuwait during the Gulf War. The airport was attacked by Iraqi forces while the passengers including the appellants were in the airport terminal. They were taken as prisoners and removed to Bagdad. The appellants were released several weeks later and returned to the United Kingdom. On 30th July 1993 the appellants brought an action against British

Airways in the County Court claiming damages for personal injury alleging that the British Airways was negligent in having landed the aircraft in Kuwait after hostilities had started and that consequently they had suffered physical and psychological damage. They also claimed for lost baggage. The trial court dismissed the appellants' claim on the ground that their sole remedy was under the Convention. This decision was upheld by the Court of Appeal hence a further appeal to the House of Lords.

Meanwhile the pursuer brought her action in the Court of Session in Scotland claiming, ***inter alia,*** damages at common law for breach of an implied condition of the contract that British Airways would take reasonable care for her safety. In due course the Lord Ordinary dismissed her action on the ground that the Convention excluded recourse to any common law remedy. Undaunted by this decision the pursuer reclaimed but the Inner House of the Court of Session dismissed her reclaiming motion as a result of which she too appealed to the House of Lords.

The House of Lords dismissed the appeals in question on the ground that the Convention provided the exclusive cause of action and sole remedy for a passenger who claimed for loss, injury and damage sustained in the course of, or arising out of, international carriage by air notwithstanding that that might leave claimants without a remedy adding categorically that where the Convention did not provide a remedy, no remedy was available.

Because of the importance of this decision it is necessary, I think, to

quote the concluding remarks of Lord Hope of Craighead in his speech to the House of Lords. I do so even at the risk of overburdening this judgment. This is what he said at page 212:-

> "I believe that the answer to the question raised in the present case is to be found in the objects and structure of the convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the High Contracting Parties without reference to the rules of their own domestic law. The convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals - and the liability of the carrier is one of them - the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.
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> An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. That indeed is the foundation upon which much of our own common law has been built up. The broad principles which provide the foundation for the law of delict in Scotland and of torts in the English common law have been developed upon these lines. No system of law can attempt to compensate persons for all losses in whatever circumstances. But the assumption is that, where a breach of duty has caused loss, a remedy in damages ought to be available.
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> Alongside these principles, however, there lies another great principle, which is that of 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 is 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.

All the obvious cases in which the carrier ought to accept liability were provided for. But, as one of the French delegates to the Warsaw Convention, Mr. Ripert, observed (minutes, p 73) when the definition of the period of carriage was being discussed, there are an infinite variety of cases not all of which can be put in the same formula. No doubt the domestic courts will try, as carefully as they may, to apply the wording or art 17 to the facts to enable the passenger to obtain a remedy under the convention. But it is conceded in this case that no such remedy is available. The conclusion must be therefore that any remedy is excluded by the convention, as the set of uniform rules does not provide for it. The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the convention. It would lead to the setting alongside the convention of an entirely different set of rules which would distort the operation of the whole scheme.

The convention is, of course, tightly drawn on these matters. This has been done in the interests of the carrier, whose exposure to these liabilities without the freedom to contract out of them was a principal consequence of the system which it laid down. Were remedies outside the convention to become available, it would encourage litigation in other cases to restrict its application still further in the hope of obtaining a better remedy, against which the carrier would have no protection under the contract. I am in no doubt that the convention was designed to eliminate these difficulties. I see no escape from the conclusion that, where the convention has not provided a remedy, no remedy is available."

I respectfully associate myself with these remarks which are indeed apposite to the instant case.

Fellowes or Herd's case (supra)

This case is almost identical to the instant case in all material respects. Like the present case it was based on the Carriage By Air Regulations (referred to as the Order in that part of the world namely the United Kingdom). Significantly those Regulations are identical, word for word, to our Carriage By Air Regulations 1978.

Briefly the facts of that case show that Sgt. Malcolm Herd was killed in a helicopter crash on 24th January, 1990. At the time of his death he was a member of the Police Helicopter Unit of the Strathclyde Police force his duties being to carry out aerial surveillance and detection within Strathclyde. The respondents Clyde Helicopters Ltd. supplied the helicopters used by the Helicopter Unit in terms of a contract. On the fateful day Sgt. Herd and two colleagues were carrying out their duties on board one of the hired helicopters and during the flight they encountered a now storm as a result of which the pilot who was an employee of the respondents became lost, an engine failure occurred and the helicopter crashed against a block of flats in Glasgow resulting in Sgt. Herd sustaining fatal injuries.

The appellants then sued the respondents for reparation in respect of the death of Sgt. Herd basing their claim on allegations on common law negligence on the part of the respondents' part. The first appellant sued in her capacity as Sgt. Herd's widow while the second appellant sued as Sgt. Herd's mother.

The respondents maintained that the claim in respect of common law

negligence is excluded by the aforesaid Carriage by Air Acts (Application of provisions) Order 1967.

The respondents' defence was upheld by the Lord Ordinary (Lord Milligan) and on a reclaiming motion the Second Division of the Court of Session confirmed the judgment of the Lord Ordinary. It was against the latter decision that the appellants then appealed to the House of Lords.

For its part the House of Lords dismissed the appeal on the ground that the limitations of liability set out in articles 17 and 22 applied to the carriage of Sgt. Herd whom they regarded as a passenger. More importantly the House of Lords effectively upheld the respondents defence that the appellants' claim in respect of common law negligence was excluded by the carriage by air regulations.

Emphasising the need for uniformity of interpretation of the convention and the carriage by air regulations Lord Hope of Craighead once more significantly expressed himself in the following words at page 793 of his speech to the House of Lords:-

> "Although this decision may seem harsh in the present case, it should not be forgotten that one of the advantages of excluding the rules of the common law is that the United Kingdom rules are designed to impose liability on the carrier without proof of fault in respect of the death of or injury to passengers and to nullify contractual provisions the effect of which would be to relieve the carrier of liability or to restrict his liability in amount. These are significant advantages, as it may be very difficult to prove where fault lies when an aircraft has been destroyed

> in an air crash and all those who were on board the aircraft have lost their lives, and in view of the opportunities which would otherwise be available to those who provide carriage by air to exclude or restrict their liability. In M'Kay v Scottish Airways Ltd. 1948 SC 254 at 263 the Lord President (Cooper) remarked on the amazing width of the conditions and the effort which had evidently been made to create a leonine bargain under which the passenger took all the risks and the carrier accepted no obligations. In that case a mother's claim for damages for her son's death was held to have been excluded by the conditions printed on the ticket which had been issued to the son as a fare-paying passenger. A bargain of that kind would now be vulnerable to the provisions of the Unfair Contract Terms Act 1977, but the rules in Sch 1 to the 1967 order provide greater certainty so that both parties to the arrangement may now know where they stand and can make their own arrangements with their insurers accordingly."

I find myself in respectful agreement with these remarks and I accordingly hereby respectfully discern the need to adopt them in the instant matter. Indeed as Adv Penzhorn S.C. rightly pointed out one has sympathy with the plaintiffs but regrettably the law is the law. I have accordingly come to the inevitable conclusion that the Carriage By Air Regulations 1978 read with the Carriage By Air Act 1975 as well as the aforesaid carriage by air conventions provid exclusive cause of action and sole remedy in respect of claims for loss, injury and damage sustained in the course of, or arising out of carriage by air.

I consider therefore that by failing to pitch their claim within the ambit of the Regulations and by simply relying on common law negligence the plaintiffs have misconstrued their cause of action and remedy and have missed the boat in the process.

On the question of costs there can be no doubt in my mind that if the defendants had proceeded by way of exception this matter would have been resolved more expeditiously without much inconvenience to the Court. In fairness to Adv Penzhorn S.C., he concedes this point. Accordingly I consider that it would be unfair to saddle the plaintiffs with all the costs of the instant matter.

In all the circumstances of the case therefore the application for absolution from the instance is granted. The plaintiffs shall pay half of defendants' costs.

M.M. Ramodibedi
JUDGE
22nd October 1998

For Plaintiffs : Adv Selvan S.C.
For Defendants : Adv Penzhorn S.C.