Claim No: HQ02X02444, Neutral Citation No: [2003] EWHC 643 (QB)
IN THE HIGH COURT OF JUSTICE
IN THE QUEEN'S BENCH DIVISION

Roya1 Courts of Justice
Strand, London WC2A 2LL

Friday 28th March, 2003

B e f o r e:

HON MR JUSTICE SIMON

– – – – – – –

LEONARD JAMES GLEN & OTHERS

Claimants

– v –

KOREAN AIRLINES COMPANY LIMITED

Defendant

– – – – – – – – –

Mr Philip Shepherd (instructed by Leigh, Day & Co) for the claimants
Mr Charles Pugh and Mr Ben Cooper (instructed by Beaumont & Son) for the defendant

Hearing dates: 17−18 March 2003

J U D G M E N T

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Background

1. In this action the claimants claim damages for personal injury, loss and damage arising out of the crash of the defendant's Boeing 747−2B5F aircraft, registration HL−7451 ("the aircraft") on 22 December 1999.

2. The aircraft had arrived at Stansted Airport at 15.05 from Tashkent. At 18.36 it took off from runway 23/05 bound for Malpensa Airport, Milan, as F1ight KAL 8509. According to the load sheet, the aircraft's weight for take off was 548,352 lbs, which included 68,300 lbs of fuel. After take off the aircraft maintained a track close to the extended runway line before turning left. According to the Stansted Watchman radar it reached a maximum altitude of 2460 ft amsl and a maximum speed calculated as 228 knots. The aircraft then descended, flying low until, at 18.38, it crashed into the Hatfield Forest at a position 1.9 nautical miles from the centre point of the runway on a bearing of 204 degrees ("the crash site").

3. The claimants all lived near the crash site at Great Hallingbury in Hertfordshire. On 21 December 2001 they began the present action. The claimants rely on s 76(2) or the Civil Aviation Act 1982 ("the 1982 Act"). This section provides (in broad summary) that, where an aircraft crashes causing loss or damage to those on the ground, they may recover without the need to prove negligence. It is common ground that s 76(2) creates a statutory tort. However, in §5−6 of its defence, the defendant contends that the right to recover under s 76(2) is limited in two ways. First, claims for psychiatric injury are not recoverable and, secondly, if they are recoverable they are limited to those categories of primary or secondary victims who would be entitled to recover damages in negligence for such injuries.

Preliminary issue

4. On 25 November 2002 Master Whitaker ordered the trial of three preliminary issues in relation to s 76(2) of the 1982 Act. These issues can conveniently be expressed as follows:

> (1) whether "material loss or damage", referred to in s 76(2), is limited to "physical loss or damage";
>
> (2) whether "personal injury", in s 105 of the 1982 Act, includes mental injury where the mental injury is evidence of structural changes to the brain and/or central nervous system;
>
> (3) whether, if damages are otherwise recoverable under s 76(2), such recovery is subject to the common law rules as to categories of people who may recover damages?

5. For the purposes of the preliminary issue it is assumed that the crash occurred, that all the claimants witnessed the crash and the events following the crash either seeing them or hearing them and that, as a result of such experiences the claimants suffered sustained psychiatric injury.

The 1982 Act

6. Section 76 of the 1982 Act is in the following terms:

> (1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order and of any orders under s 62 above have been duly complied with and there has been no breach of s 81 below.
>
> (2) Subject to subsection (3) below, where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the

> loss or damage shall be. recovered without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft.

The terms of s 76(3) are not relevant to the preliminary issue.

7. The general interpretation provisions of the 1982 Act are set out in s 105(1). This provides:

> In this Act, except where the context otherwise requires - "loss or damage" includes, in relation to persons, loss of life and personal injury.

8. The broad intent of s 76 is that (1) provided aircraft comply with certain specified criteria, they will not be susceptible to claims for trespass and nuisance when they over−fly property; and (2) a freestanding right to claim damages arises where loss and damage has been caused to persons or property by the crash of an aircraft or by objects propelled from an aircraft in flight.

The statutory history

9. The words of s 76(1) and (2) of the 1982 Act were originally enacted as s 9 of the Air Navigation Act 1920 ("the 1920 Act"). The 1920 Act was described as

> An Act to enable effect to be given to a Convention for regulating Air Navigation, and to make further provision for the control and regulation of aviation.

As this description suggests, there were two parts to the 1920 Act. Part I created the power to apply the 1919 Paris Convention, which had determined uniform rules with respect to air navigation. Part II (in which s 9 appeared) was intended in the words of the preamble to control and regulate the navigation of aircraft within the jurisdiction.

10. The relevant words in the 1920 Act were "material damage or loss" and there was no definition of the words "damage or loss". A definition of those words was introduced by s 34(3) of the Air Navigation Act 1936. This provided, that the expression "damage or loss" in s 9 of the 1920 Act included "in relation to persons, loss of life and personal injury".

11. The words "damage" and "loss" were transposed to "loss or damage" in the Civil Aviation Act 1949 ("the 1949 Act"), which repealed and replaced the 1920 Act. The words "loss or damage" were defined in s 63(3) of the 1949 Act.

> For the avoidance of it is hereby declared that in this Act the expression "loss or damage" includes in relation to persons, loss of life and personal injury.

12. The 1982 Act, to which I have already referred, was expressed to be "An Act to consolidate certain enactments relating to Civil Aviation".

13. Two points arise from the statutory history. First, since the 1982 Act was a Consolidation Act, on normal principles of statutory construction, the words of the 1982 Act are to be treated as having the same meaning as they had in earlier enactments. Secondly, the words of s 76(2) do not derive from an International Convention. It follows that the court is not searching for "a common construction" or an interpretation that is required to be consistent with the interpretation in the jurisdictions of other countries. The court's task in the present case is in contrast to the task faced by the House of Lords in *Morris v KLM Royal Dutch Airlines* and *King v Bristow Helicopters Ltd* [2002] 2 AC 628 where the House was construing a provision of an International Convention: Art 17 of the Warsaw Convention, incorporated into English law as Schedule 1 to the Carriage by Air Act 1961.

Issue 1. The construction of s 76(2) of the 1982 Act

14. If one is looking at the words "loss or damage" in s 76(2), as interpreted by s 105 of the 1982 Act, it is my view that the words are wide enough to include psychiatric injury. First, psychiatric injury was a recognised form of personal injury in 1982. Secondly, the parties have not been able to find any statutes where "personal injury" is defined as excluding mental impairment. Thirdly, it is difficult to see why Parliament should have intended to exclude psychiatric injury from recoverable loss in a 1982 statute.

15. In *Morris v KLM* (at §17 p 638F−H) Lord Steyn drew a distinction between the restrictive words "bodily injury" and the wider usage "personal injury".

> In this context it is reasonable to expect that if it had been intended to cover mental injury or illness, it would have been provided for expressly. In the absence such an express reference it is reasonable to interpret "bodily injury" and "lésion corporelle" as words of restriction, ie as referring to non−fatal injury which is physical rather than mental: contrast *the wide term* "personal injury" in the Guatemala Protocol which never came into force ... (emphasis added).

The context that Lord Steyn was referring to was, (1) the fact that mental injury was not the subject of compensation in many of the contracting states at the time of the Warsaw Convention, and (2) the large number of circumstances implicit in air travel which might give rise to claims by passengers for mental injury: from in−flight turbulence to delayed gate departure due to mechanical problems with aircraft. So far as the second point is concerned, the circumstances giving rise to a claim under s 76(2) are, fortunately, uncommon. I was told that this is the first case in which it has been necessary to decide the present point.

16. Mr Pugh (counsel for the defendant) submits that the determination of this issue depends on the proper construction of the word: "material". He submits that, in its 1920 context, the word means "physical or bodily" damage or loss to the exclusion of mental or physical damage or loss. He accepts that, looking at the matter in 1982, the word "material" would not be used to mean "physical" damage; but he submits that, once the word acquired that meaning, it was preserved in succeeding statutes, subject to one qualification. The qualification is that, if the 1982 Act and its legislative predecessors were "always speaking" statutes, then the 1982 Act should be construed in the light of contemporary circumstances.

17. Mr Shepherd (counsel for the claimants) relied on another meaning of the word "material", as meaning "legally significant" or "relevant".

18. Looking at the terms of s 76 and s 105 of the 1982 Act as a whole, it is my view that the statutory tort in s 76(2) is drawn in sufficiently wide terms to permit the recovery of psychiatric or mental loss or damage. The word "material" would have been an inapt choice of word to use if the intention had been to limit recovery to physical or bodily loss or damage.

19. The proper interpretation of the 1920 Act is more problematic. There was no definition of "damage or loss" until 1936. "Material" in its context might mean "legally significant" or "relevant"; but, if this were so, it would be necessary to identify the contrast that is being drawn. If no contrast is being drawn then it seems to me that Mr Pugh is correct in his submission that the word "material" would be superfluous. It may be that the draftsman was seeking to exclude disturbance and inconvenience damage from s 76(2). However, if that was the intention then it was clumsily executed since, as Mr Pugh submitted, s 76(l) and (2) of the 1982 Act are dealing with discrete issues. Section 76(1) is dealing with a limitation on a common law right to sue in nuisance and trespass, whereas s 76(2) is dealing with a self−standing statutory tort.

20. Despite this uncertainty, I am prepared to assume for the purposes of the defendant's argument that they are right in their submission that the "material damage or loss" in the 1920 Act meant physical or bodily damage or loss. The issue then is whether that meaning remained fixed in all subsequent enactments so as to provide the key to the proper construction of the 1982 Act.

21. The defendant's submit that, since the statutory words in s 76(2) of the 1982 Act date back in substantially identical form to the 1920 Act, they should be taken to have retained the same meaning as they had in the 1920 Act. In advancing this submission Mr Pugh drew a distinction between statutes whose meaning is

fixed and statutes that are, to use the infelicitous but well−established phrase, "always speaking".

22. It is common ground that it is a principle of statutory construction that the meaning of statutes is not immutable and fixed, and that Acts must be construed in the light of contemporary circumstances, see *Morris v KLM*, Lord Steyn at p.643D. and *Bennion, Statutory Interpretation*, 4th ed. p 762. This principle is subject to an exception where the court concludes that, on proper analysis, the words of the Act were intended to be of unchanging effect.

23. The general principle was described in the speech of Lord Steyn in *R v Ireland* [1988] AC p 147 at 158D.

> Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that "An Act of Parliament should be deemed to be always speaking" *Practical Legislation* (1902), p 83; see also *Cross, Statutory Interpretation*, 3rd ed. (1995), p.51; *Pearce and Geddes, Statutory Interpretation in Australia*, 4th ed. (1996), pp 90−93.

Lord Steyn (with whom the other members of the House of Lords agreed) set out how a court approaches the question as to whether a particular statute is within the general principle or the exception.

> In cases where the problem arises it is a matter of interpretation whether the court must search for the historical or original meaning of the statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted But the drafting technique of Lord Thring and his successors have brought about the situation that statute will generally be found to be of the "always speaking" variety: see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC p 800 for an example of an "always speaking" construction in the House of Lords.

24. In *R v Ireland*, the House of Lords treated the Offences against the Persons Act 1861 as an "always speaking" statute, and held that the words "bodily harm" covered recognised psychiatric injury. As Lord Steyn said (158H−159A):

> The proposition that the Victorian legislator when enacting sections 18, 20 and 47 of the Act of 1861, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsmen is immaterial. The only relevant inquiry is as to the sense of the words in the context in which they are used in the context in which they are used. Moreover the Act of 1861 is a statute" of the "always speaking" type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury.

Developments in scientific understanding are not the only criteria for interpreting "always speaking" statutes. Other changes: in social conditions, technology, medical knowledge and in the meaning of particular words, may all affect the interpretation.

25. Lord Steyn identified statutes dealing with a particular grievance or problem as requiring a fixed or "historical interpretation"; but there are other types of statute that may call for this "historical interpretation": for example, where the statute is in the nature of a contract or implements an international Convention, see *Bennion, Statutory Interpretation* at p 779−780.

26. In the present case, the defendant submits: (l) that the 1982 Act and its predecessors represented "a trade−off between landowners and air carriers", (2) such a trade−off was in the nature of a contract, and (3) the court should adopt an historical interpretation and should not adopt a construction which opens up an entirely new area of liability which cannot have been intended in 1920.

27. In support of the first and second submission, the defendant relied on ministerial speeches reported in Hansard in the debate on the second reading of the bill; and submitted that these speeches were admissible as an aid to construction on the principle established by *Pepper (Inspector of Taxes) v Hart* [1991] 1WLR 483. That case relaxed the rule that excluded reference to parliamentary history as an aid to statutory construction. However, Lord Oliver (at p 620) made clear that the relaxation of the rule was to be confined.

> It is, however, important to stress the limits within which such relaxation is permissible ... It can apply only where the expression of the legislative intention is genuinely ambiguous o; obscure or where a literal or prima facie construction leads to manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matter in issue. Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact, and if the instant case were to be thought to justify the exercise of combing through reports of parliamentary proceedings in the hope of unearthing some perhaps incautious expression of opinion in support of an improbable secondary meaning, the relaxation of the rule might indeed lead to fruitless expense and labour which has been prayed in aid in the past as one of the reasons justifying its maintenance.

On this basis reference to the parliamentary history can only be made where there is genuine ambiguity, obscurity or potential absurdity; but, even in such cases, only if parliamentary proceedings clearly disclose the legislative intention behind the ambiguous or obscure words (see also Lord Browne−Wilkinson at p 634D−E).

28. Mr Pugh recognised that his reason for referring to the parliamentary history was not to resolve ambiguity or obscurity; but rather to demonstrate that the 1920 Act was in the nature of a bargain or contract so that its interpretation was to be treated as fixed as at 1920. I am doubtful whether references to parliamentary proceedings is permissible for this purpose; but, in any event, references to the debates on the 1920 Act do not support his submissions.

29. The Secretary of State for Air (Mr WS Churchill MP) and the Under−Secretary (Lord Londonderry) described the intention of the relevant part of the bill as being the reconciliation of the rights of landowners in the super−incumbent air with the practical necessities of civil aviation. The reconciliation was to be achieved by laying down the principle that no action would lie for aerial trespass or nuisance simply by reason of the aerial flight through the column of air; but that, where damage was done to any persons on the ground, the owner of the offending aircraft would be liable without forcing the injured person to prove negligence.

30. Two points should be noticed. First, a close examination of the ministerial speeches shows that they were not giving particularly close. attention to the language they used; and what they said amounted to little more than a summary of s 9 of the 1920 Act. No ambiguity or obscurity is resolved by reference to these debates. Secondly and importantly, the parliamentary history does not establish a "trade−off" or contract between landowners and air carriers. The ministers told Parliament that the legislative intent was to reconcile potentially conflicting rights. This is a commonplace legislative intent. In the modern world there will frequently be a need to reconcile potentially conflicting interests; but this broad legislative intent cannot bring a statute outside the general category of "always speaking" Acts.

31. Before leaving this point it is necessary to refer to an authority and a text−book which the defendant relies on in support of this part of its argument. In *Steel−Maitland v British Airways Board & ors* (1981) Scots Law Times p 110, the pursuer brought a claim against various air carriers for physical damage allegedly caused to Gogar Castle from over−flying aircraft. The case came before the Lord Ordinary (Lord Jauncey) on an application to dismiss the pursuer's pleas. Those pleas included the plea that, in view of s 40(1) of the 1949 Act (the equivalent of s 76(l) of the 1982 Act), the pursuer could only have a claim under s 40(2) (the equivalent of s 76(2) of the 1982 Act); and that a claim under s 40(2) only applied to single instances of damage and not to cumulative damage. The Lord Ordinary rejected that contention and, in doing so, observed:

> In *McNair's Law of the Air* (4th ed.), p 107, it is stated with reference to the two sub−sections of s 40 that "they represent a compromise or bargain which can be summed up as establishing no

> liability for technical legal injury (if any), but absolute liability for actual material injury". This statement in my view accurately summarises the effect of the two subsections. What the section intended to achieve was the removal of certain activities from the realm of common law nuisance or trespass if they only resulted in disturbance or inconvenience but to afford to an aggrieved person a remedy, at least as effective as his abolished common law remedy in respect of the same activities if they caused material damage to him or his property.

The 4th edition of *McNair's Law of the Air* was not available at the hearing, but the words cited by Lord Jauncey also appear in the 3rd edition (1964), edited by Mr Michael Kerr QC and Mr Anthony Evans (as then they were).

32. It is to be noted that, although reference is made to "a compromise or bargain", the contrast which is drawn is between aerial activities that caused "technical legal injury" or "disturbance and inconvenience" on the one hand, and "actual material injury" on the other. Although these sources support the view that disturbance and inconvenience damages are irrecoverable, they do not directly assist the defendant in its contention that there was a bargain or contract which precluded an award of damages in respect of psychiatric injury. There is also a further and more general point that militates against treating statutes as requiring a fixed or historical interpretation. Although the court may feel confident in construing statutory language according to current meanings of the words used, the search for historical or original meanings may prove more elusive and require rather more than a dictionary based on historical principles.

Conclusion on Issue 1

33. I have therefore concluded that the loss or damage" referred to in s 76(2) of the 1982 Act is not limited to "physical loss or damage" and (subject to my conclusions on Issue 3) includes psychiatric injury.

Issue 2. The meaning of "personal injury" in s 105 of the 1982 Act

34. This matter is largely covered by my conclusions on Issue 1, since I have (implicitly) rejected the defendant's submission that "personal injury" in s 105 of the 1982 Act is to be treated as "bodily injury". But in any event, the defendant very properly accepted that, in the light of the majority opinion in *Morris v KLM*, a person can recover on the basis of a bodily injury if that person can establish that the mental injury is evidence of structural change to the brain or central nervous system.

Issue 3. Whether the loss and damage recoverable under s 76(2) is limited to damages recoverable at common law?

35. The defendant submits (1) that, if personal injury in s 76(2) of the 1982 Act covers psychiatric injury, the words

> *as if* the loss and damage had been caused by the wilful act, neglect, or default of the owner of the aircraft (emphasis added)

limits the categories of people who can recover damages in respect of such injuries; (2) that, if negligence were proved, the law would restrict the ‘categories of persons who can recover damages in respect of psychiatric injury, see for example *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 502E−H, and 504G−505A; (3) on this approach, the claimants can only recover damages for psychiatric injury if they are primary victims or secondary victims with sufficient proximity and ties of love and affection.

36. The claimants submit that (1) this approach places too much emphasis on the word "neglect" and ignores the other words in the phrase, in particular "wilful act"; (2) there is no reason to restrict the right to recover damages for this statutory tort on the basis of rules relating to the recovery of damages for negligence; and (3) by referring to "wilful act" the 1982 Act treats the defendant's act as if it were the deliberate infliction of injury, see *Wilkinson v Downton* [1897] 2 QB 57.

37. I accept the defendant's submissions on this issue. Where there is damage to land and an action for trespass

the claimant would have to show an intentional or wilful act of trespass. Where there is injury to a person, there might be an action in negligence; and the claimant would have to snow carelessness. In my view, the effect of s 76(2) is that the claimant is absolved from having to show either a deliberate act or carelessness. In this context, "wilful act" means a deliberate act and not "intentional wrongdoing". On this basis I can see no reason why the normal rules as to foreseeability and remoteness should not apply.

38. I am reinforced in this conclusion by three further points. First, as the defendant points out, if the claimants' construction were correct, then there would be potentially two different approaches to the recoverability of damages (one arising from a "wilful act", and the other from "neglect or default") without any statutory indication as to which approach applies in any particular case. This is an inherently unlikely legislative intention. Secondly, the conclusion I have reached is more easy to reconcile with the reference to contributory negligence. Thirdly, if claimants can always proceed on the basis that there has been an intentional wrongdoing as if there had been a deliberate assault, then they could recover damages for injury to feelings, see *McGregor on Damages* (16th ed. 1997 §1844). This too seems an inherently unlikely legislative intention.

39. It follows that I find that the answer to Issue 3 is that loss or damage is only recoverable under s 76(2) if such loss or damage would be recoverable at common law.

Conclusion

40. I therefore answer the questions set out in the preliminary issue as follows:

Issue 1: No

Issue 2: Yes

Issue 3: Yes.