**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**

**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

**[2019] SC EDIN 13**

PN75/18

NOTE BY SHERIFF PETER JOHN BRAID

in the cause

CAROLINE DELANEY

Pursuer

against

JET2.COM LIMITED

Defender

**Pursuer: Mackay; Digby Brown Solicitors**
**Defender: Brownlie; Clyde & Co Solicitors**

Edinburgh, 12 February 2019

**NOTE**

**Introduction**

[1] The pursuer's motion, 7/1 of process, for decree in terms of minute of tender and acceptance thereof, expenses, and certification of skilled persons called before me on 4 February 2019. The motion was opposed only in so far as it sought certification for the employment of Dr Martin Livingston, consultant psychiatrist. The defender does not dispute that Dr Livingston has the necessary expertise to merit certification. Rather, the controversy between parties is whether or not it was reasonable for the pursuer's solicitors to instruct him to provide a report at all.

[2] The following background is not contentious. The pursuer's case arose from an accident that occurred on 10 December 2017 at Tenerife South Airport. She had just arrived from Glasgow on one of the defender's flights. En route from the aircraft to the terminal building, the airport transfer bus transporting passengers was involved in a collision with another airside vehicle, a truck carrying concrete pillars. The pursuer admittedly suffered some physical injuries as a result of the collision. She also claimed to have suffered psychiatric injury. The parties agree that the accident fell within the scope of article 17 of the Montreal Convention 1999. The effect of that provision is that the defender is strictly liable to the pursuer in damages for the injuries sustained. Liability to compensate the pursuer for those injuries was admitted, and the action has settled, by virtue of the tender and acceptance already referred to, in the sum of £9,200. However, the difference between the parties arises from their respective approaches to the recoverability of damages for psychiatric injury in cases subject to the Montreal Convention.

**The Montreal Convention 1999**

[3] Article 17.1 of the Montreal Convention states:

> "The carrier is liable for damage sustained in the 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".

**The Warsaw Convention 1929**

[4] It is also relevant to have regard to the precursor of the Montreal Convention, which is the Warsaw Convention 1929. The wording of the corresponding article (also article 17) of the Warsaw Convention is slightly different and is as follows:

> "The carrier is liable for damage sustained in 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".

**Certification of skilled persons**

[5] Before recording parties' submissions, it is pertinent also to note the provision which sets out the test for certification, viz, para 1(2) of schedule 1 of the Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court (1992/1878)). It states:

> "(2) A motion under paragraph 1 [for certification] may be granted only if the sheriff is satisfied that –
> (a) the person was a skilled person and;
> (b) it was reasonable to employ the person".

[6] As I have recorded above there is no dispute that Dr Livingston is a skilled person. As regards the test to be applied in deciding whether or not to grant certification, I was not referred to any authority but the motion before me was argued on the now settled basis that the question of reasonableness must be determined objectively (see *Webster* v *Macleod* 2018 SLT (Sh Ct) 429). As the Sheriff Appeal Court stated in that case, at para. 20:

> "Reasonableness falls to be determined objectively; it falls to be assessed at the time of instruction. That requires consideration of the state of affairs at the point of instruction. Implicit in the concept of reasonableness is proportionality: proportionality between the decision to instruct that skilled person at that particular time and the matters in issue or likely to be in issue."

[7] I acknowledge, therefore, that the sole question I have to decide is whether or not it was reasonable for the pursuer's solicitor to instruct Dr Livingston at the time he was instructed, having regard to the foregoing guidance as to proportionality between the decision to instruct, and the matters likely to be in issue. While that must, of necessity, involve consideration of the law as it was thought to be at that time, my function in this

motion is not to decide which party's interpretation of the Montreal Convention is correct. That will be for another court to decide on another day.

**Pursuer's submissions**

[8] In a very able oral submission (in which he adopted his written submissions) Mr Mackay first referred to the information available to him at the point of instruction. He had the pursuer's GP records, which referred to her having sustained some psychiatric injury and he also had a report from a consultant orthopaedic surgeon, Mr Mark Broadbent, which recommended that a report be undertaken by a psychiatrist (para. 4.11 of 5/1 of process). He stressed that the pursuer had sustained both physical and psychiatric injury. He then referred me to certain authorities. In particular he referred to *King* v *Bristow Helicopters Ltd* 2002 SC (HL) 59 in which the House of Lords held that a claim could not be made under article 17 of the Warsaw Convention where a pursuer had suffered pure psychiatric loss and no physical injury. He submitted that the present case was distinguishable, because the pursuer had sustained both physical injury and psychiatric injury. In *King*, at paras 19-20, Lord Steyn adopted the reasoning of Justice Marshall in the United States Supreme Court case *Eastern Airlines Inc* v *Floyd* (1991) 499 U.S. 530 which also dealt with the recoverability of pure psychiatric injury. In particular, he quoted the following passage at pages 552-553:

> "We conclude that an air carrier cannot be held liable under article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although article 17 renders air carriers liable for 'damage sustained in the event of' ('dommage survenu en cas de') such injuries… we express no view as to whether passengers can recover from mental injuries that are accompanied by physical injuries. That issue is not presented here because respondents do not allege physical injury or physical manifestation of injury."

[9] Finally, Mr Mackay referred to *Ehrlich* v *American Airlines* 360 F.3d 366 (2nd Circuit, 2004), where the second circuit Court of Appeals held that, in cases within the scope of

article 17, psychiatric injury was only recoverable where it was causally linked not to the accident itself but to the physical injury sustained in the accident.

[10] While the pursuer accepted that Warsaw Convention cases were persuasive in the interpretation of Montreal Convention cases and that *Ehrlich* had been followed in some Montreal cases, Mr Mackay submitted that it was no longer universally accepted. In support of that submission, he referred to another recent American decision, *Doe* v *Etihad* 870 F.3d 406 (6th circuit, 2017). In that case, the plaintiff had sustained a needlestick injury on a flight. In holding that she was entitled to recover damages for her mental anguish, the court made reference to the significance of the term "on condition only" which appeared in the Montreal, but not the Warsaw, Convention. Mr Mackay founded upon the following passage pages 9-10:

> "The phrase "upon condition only" is new to the Montreal Convention – it is not found in the Warsaw Convention (either in English or in the official French version) – and it makes clear that the passenger's recovery is conditioned *only* on the occurrence of an accident that causes death or bodily injury either on board the aircraft or during boarding or deplaning. Surely, the drafters of the Montreal Convention could have used a word or phrase with causal meaning instead of "in case of" if they wanted to impose such a causal restriction on the kinds of "damage sustained" that are recoverable when an accident on board an aircraft causes a passenger to incur a bodily injury. Indeed, the drafters *did* impose such a causal requirement in stating that the accident must have "caused" the death or bodily injury. The drafters' use of "caused" to express that an accident must have caused the bodily injury thus provides additional support for our conclusion that the drafters did not, in the very same sentence, use "in case of" *also* to mean "caused by"".

[11] On that state of the authorities, Mr Mackay's argument was, in substance, that there was an arguable case to present to this court that psychiatric injury was recoverable under the Montreal Convention. Since no such case could have been pled, let alone argued, without evidence of psychiatric injury, it was therefore reasonable to instruct a psychiatric

report. Further, at the stage of instruction it was not known whether the injury sustained by the pursuer was as a result of the accident or as a result of the physical injuries.

[12] Mr Mackay presented a further argument based upon the sum tendered, and the pursuer's quantification of other aspects of her claim. He submitted that it was reasonable to infer that some element of the sum tendered included a sum for psychiatric injury.

**Defender's submissions**

[13] In an equally able submission in reply, Mr Brownlie submitted that it was not reasonable for the pursuer's agents to have instructed Dr Livingston when they did. While he accepted that there was an argument that the claim was not excluded by the Montreal Convention, he submitted that it was not an argument which could ever have succeeded in this court. He stressed that *Doe* was not binding, even in America. It was not a United States Supreme Court decision. It was an anomaly which flew in the face of established authority. Rather, he submitted that *King* was binding in this court. He referred in particular to passages of Lord Hope's speech at paragraphs 45 and 83. In the latter paragraph, Lord Hope expressed the view that the term "bodily injury" did not include mental injury. Mr Brownlie was constrained to accept that the facts in *King* were not on all fours with those in the present case, since in *King* there was no physical injury at all. However, he stressed that the definition of bodily injury, which term is used in the Montreal Convention as in the Warsaw one, could not include psychiatric injury.

[14] As far as the breakdown of the tender was concerned, Mr Brownlie submitted that the court should not speculate as to what lay behind the decision to tender the sum offered. There were all sorts of reasons, including commercial expediency, which could lead to a particular sum being tendered. In a slightly contradictory further submission, he then

sought to refer to a letter which accompanied the tender intimated on 4 December 2018, which stated that it was presented purely on the basis of physical injury suffered by the pursuer.

[15] Finally, Mr Brownlie submitted that it would be unreasonable if insurers were to be faced with the plethora of claims for certification of physiatrists, given the present state of the law which, he submitted, favoured the defender. Had the action not settled, he accepted that it would have been open to the defender to have sought a debate in relation to the relevancy of the psychiatric injury claim and, indeed, told me that junior and senior counsel had been lined up to conduct such a debate had it been necessary.

**Discussion**

[16] Dealing with the tender point first, I agree with Mr Brownlie that it is not open to me to speculate what lay behind the defender's decision to tender, or how the sum tendered is to be broken down. I therefore do not proceed on the basis that it must have included an element for psychiatric injury. By the same token, nor can I proceed on the basis that it definitively did not include such an element. If I cannot have regard to the break-down of the sum tendered, and speculate what it does include, then, by definition, I equally cannot have regard to a letter from the defender stating what it does not include. The most that can be said is that the tender was made in the knowledge by the defender that there was at least a risk of the pursuer being found entitled to damages for psychiatric injury and, in tendering, and having their tender accepted, they bought off that risk. I think that is sufficient to deal with the "floodgates" argument. If there is uncertainty in the law (or if the defender's insurers consider that they have been faced with irrelevant claims) it is open to them to seek certainty by taking one or more cases to debate. That said, in accepting the

tender, the pursuer must be taken to have been aware that a higher sum might have been awarded by the court had the pursuer's argument about the recoverability of damages for psychiatric injury been accepted; and by accepting the tender, the pursuer eliminated the risk of having the psychiatric injury point settled against her. By settling the action, therefore, both parties have ensured that the law, for now, must remain uncertain.

[17] The defender, of course, argued that there is no uncertainty in the law and that the claim was doomed from the outset. In making that submission, Mr Brownlie founded upon *King*. While *King* is admittedly binding authority, it is distinguishable. In *King*, the pursuer did not sustain physical injury whereas here the pursuer did. That said, while *King* may not have been conclusive, it would undoubtedly have been the starting point in any debate as to the current state of our law. I also take into account that in *King*, a passage from *Floyd* was quoted with no adverse comment, in which the Supreme Court of the United States expressed no view as to whether a passenger could recover from mental injuries which were accompanied by physical injuries.

[18] Allowing that that was an open question in our law, even under the Warsaw Convention, and having regard to the slightly different wording of the Montreal Convention, it cannot be stated with any certainty that the pursuer had no claim for psychiatric injury. One could reach that conclusion even without having regard to the case of *Doe*. I do not consider that great weight falls to be attached to that case. As Mr Brownlie submitted, it is not binding and it may or may not be followed in this jurisdiction (or in other jurisdictions, including for that matter, the United States). Perhaps the most that can be taken from *Doe* is that there is a colourable argument that the different wording in article 17 of the Montreal Convention, renders that article more amenable to a claim for psychiatric injury than the corresponding wording in the Warsaw Convention.

[19] Having discussed the state of the law, I must now return to the key issue before me: whether instruction of Dr Livingston was reasonable. As explained by the Sheriff Appeal Court in *Webster*, implicit in the concept of reasonableness is proportionality between the decision to instruct and the matters in issue or likely to be in issue. At the point of instruction, the pursuer's solicitor knew that the pursuer appeared to have suffered psychiatric injury. He was, and in any event must be taken to have been, aware that the authorities as to the recoverability of damages for such injury were, in the main, against him; but that there was, as I have put it above, a colourable argument that such damages might be recovered. The claim as pled put psychiatric injury in issue. Irrespective of the view taken of the law, no claim could have been presented without a psychiatric report. In those circumstances, in my view it was proportionate for Dr Livingston to be instructed, notwithstanding the weight of the authorities. The law, after all, must be given the opportunity to develop.

[20] For all of these reasons, I have concluded that it was reasonable for the pursuer's solicitors to instruct Dr Livingston for a psychiatric report and accordingly I will certify him as a skilled person; and also grant the remaining unopposed parts of the motion.

[21] The parties agreed that the expenses of the motion should follow success, and the expenses of today's motion I have also awarded to the pursuer.