HIGH COURT OF AUSTRALIA

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File Number:	S138/2024
File Title:	Evans & Anor v. Air Canada ABN 29094769561
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellants
Date filed:	04 Feb 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN:

RENAE EVANS

First Appellant

STEPHANIE EVANS

Second Appellant

And

AIR CANADA ABN: 29 094 769 561

Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

1. These submissions which are in reply to the Respondent's submissions filed on 21 January 2025 **(RS)** are in a form suitable for publication on the internet.

PART II: REPLY

2. The Appellants accept the starting point of this appeal is that the Appellants' claims are brought pursuant to section 9B of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) (CACL Act).[1]
3. The Appellants agree the dispute on the construction and operation of Rule 105(C)(1)(a) of the Tariff concerns how, if at all, that contractual clause has modified the operation of statutory rights, namely the Montreal Convention.[2]
4. The Appellants agree the Montreal Convention created a two-tier strict liability regime concerning the recovery of compensation for the death or injury of a passenger on an aircraft, with the first tier imposing a limit up to the applicable Special Drawing Rights amount **(SDR)** and an unlimited second tier except where the carrier proves the damage was not due to the carrier's negligence or proves was due to the negligence of a third party.[3]

The Operation of the Montreal Convention

5. At RS [32-34] the Respondent submits the Appellants propositions at AS [33] on the operation of Articles 17, 20, 21 and 25 of the Montreal Convention are inaccurate and do not accord with the preparatory works for the Montreal Convention. In reply the Appellants submit it is not inapposite to describe Article 21(2) as imposing a financial limit in an otherwise unlimited liability scheme, the purpose being to set limits on a carrier's financial liability to passengers. The limitation placed on the amount of damages payable pursuant to Article 21 operates as a limitation on the monetary

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[1] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at [12]. See: AJ [6] CAB 60: RS [11]
[2] RS [12]
[3] Article 21 of the Montreal Convention; PJ [51]; *Bradshaw v Emirates* [2021] FCA 1407 at [116]: AS [33m]: RS [23]

amount payable by a carrier, a financial limit. Article 21(2) allows for a financial limit to be placed on the liability created by Article 17 in the event no fault is proven.

6. At RS [34] reference is made to the academic works and judicial decisions contained in the Dempsey Report[4]. At 283 of the Dempsey Report reference is made to a Canadian decision that is said to refer to Article 21 as imposing a "damages cap".[5] The Appellants submit describing Article 21(2) as imposing a "damages cap" is consistent with the Appellants' proposition that it imposes a financial limit.
7. At RS [35] the Respondent submits that the words "*shall not be liable for damages*" are apt to relieve a carrier of liability rather than to fix a lower limit; this submission could be accepted only if Article 21(2) relieved a carrier of liability altogether, which cannot be the case as the SDR amount specified in Article 21(1) remains payable regardless of whether no fault is proven.
8. In reply to RS [36] the Appellants submit the words in Article 21(2) "*the carrier shall not be liable for damages ....to the extent they exceed*" is a natural way of placing a financial limit on the amount payable – the words "*to the extent they exceed*" can only be construed as imposing a financial limit.
9. In reply to the submissions at RS [37] the Appellants submit that Article 21(2) should not be regarded as merely a defence given that it imposes a financial limit on liability in excess of the applicable SDR amount. A so-called true defence to any claim results in no liability. Article 21(2) does not and probably cannot absolve a carrier from all liability that might be said to be an answer. It therefore can only be regarded as placing a limit on the unlimited financial liability imposed by Article 17(1) considering the use of the words "*…to the extent they exceed…*". As submitted at Appeal Submissions **(AS)** [33m] a true defence under a strict liability regime cannot exist.
10. It must be remembered Article 21(2) appears under the heading "*Compensation in Case of Death or Injury to Passengers*". If the purpose of Article 21(2) were intended to operate as a defence it would have been included as part of Article 20 that is titled "Exoneration" and not included as part of Article 21 that concerns the extent of damages and financial limits. There is a difference between the operation of Articles 20 and 21. Article 20 concerns exoneration whereas Article 21 concerns financial limits. The choice by some diplomats during the preparatory works of the Convention to

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[4] It is noted the Dempsey Report was not considered probative on the Tariff by the primary judge. See: PJ 40 CAB 17 with which the Court of Appeal agreed at AJ 20 CAB 13.
[5] *Somwar v Fly Jamica Airways Ltd* [2019] OJ No 4762; RBFM 283-285.

describe Article 21(2) as a defence is irrelevant. It is for this Court to interpret its operation; the primary judge made similar comments as it concerns the words of academics and politicians in respect to Rule 105(C)(1)(a).[6]

The Construction of the Tariff

11. Contrary to the Respondent's submission at RS [40], the Appellants do not ask the Court to ignore context, indeed, the Appellants invite contextual considerations such as the submissions at AS [33]. The Appellants submit context must be seen from the perspective of both parties. The Respondent focuses on context from the perspective of carriers only.
12. The Respondent does not dispute that the words in Rule 105 (C)(1)(a) are clear and unambiguous, therefore as a starting point the Appellants submit that the reasonable person would understand the words "*there are no financial limits in respect of death or bodily injury*" as meaning there are no limits on compensation. Even if the reasonable person turned to the Montreal Convention and considered Article 21(2) and the ability to prove no fault and limit damages to the applicable SDR amount there is nothing in the Convention or the Tariff that would cause a passenger to recognise or appreciate Article 21(2) has not been displaced by Rule 105(C)(1)(a). The Rule's application is not identified in the Tariff as being limited in any way to alert a passenger to damages possibly being limited nor can it be said that Rule 105(C)(5) that provides for the Convention to prevail in the event of inconsistency with the Tariff would be sufficient to create such knowledge in a reasonable person since Articles 25 and 27 do not identify that Article 21(2) cannot be displaced by contract.
13. The use of clear and unambiguous language in Rule 105(C)(1)(a) satisfies the Respondent's submission made at RS [43]. The Appellants submit the Tariff clearly extinguished a valuable immunity by reason of the use of clear and unambiguous language that consequently expressly precludes the Respondent from now relying on Article 21(2) of the Convention.
14. The submissions made at RS [42/43] equally apply to the Appellants. If Rule 105(C)(1)(a) were not intended to displace the operation of Article 21(2) then the use of such clear language "*there are no financial limits*" is misleading since the carrier

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[6] PJ [56] CAB 17

knew or ought to have known it would cause most passengers to construe the words by applying the plain ordinary natural meaning of such words, and not appreciate the carrier would then rely on Article 21(2).

15. The submissions concerning textual features and comparisons with Rule 105(B) at RS [47] - [49] are arguably irrelevant. Rules 105(B)(1)-(4) concern the Warsaw Convention and appear under the heading "*Laws and Provisions Applicable*" unlike Rule 105C(1)(a) that is contained in a section titled "*Limitations of Liability*".
16. Rules 105(C)(1)(b) and (c) and 105(C)(2)(a) and (b) of the Tariff imposes limits on liability including as it concerns death and bodily injury under the Warsaw Convention. If the operation of Rule 105C(1)(a) were to allow a limitation on liability pursuant to Article 21(2) one would expect this would be identified and expressed clearly in the Tariff as has occurred with Rule 105(C)(1)(b) and (c) and as it concerned the Warsaw convention in Rules 105(B) and105(C) 2(a).
17. As far as damages under the Warsaw Convention are concerned, the Tariff at r105(B)(1)(a) and (b) provides the Respondent shall not invoke the limitation of liability in Article 22(1) being a provision that operates in the same manner as Article 21(2) in the Montreal Convention and also that it would not avail itself of any defence under Article 20(1) thereby enhancing the entitlements of passengers. The stipulation of "*no financial limits*" in r105(C)(1)(a) as it concerned the Montreal Convention was similarly an enhancement of the entitlements of passengers that removed limitations such as the limits imposed by Article 21(2). The Tariff should be read in this way.
18. It would be contextually unlikely if Rule 105(C)(1)(a) were interpreted to restrict the entitlements of passengers whereas Rule 105(B)(1)(a) and (b) were interpreted as enhancements of the entitlements of passengers.
19. In response to the submission at RS [53] the explanation is obvious. The difference between Articles 20 and 21(2) is the conduct of the passenger. If the passenger caused or contributed to the damage then Article 20 allows for exoneration that is achieved by a reduction in the damages payable and possibly a reduction to nil. Article 21(2) does not itself allow for a reduction of damages to nil thereby operating consistently as the Appellants propound a financial limit. Rule 105(C)(1)(a) concerns financial limits of the type stipulated in Article 21 and not exoneration of a financial liability down to nil as authorised by Article 20.
20. Finally, the submissions at RS [54] about an unprecedented result ignores the acceptance of unlimited liability is not inconsistent with the recognition in the Montreal

Convention of "*the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on principles of restitution.*"

Notice of Contention

21. The Appellants repeat the submissions made on the operation of Article 25 in the Montreal Convention at AS [33]. Before the primary judge, the Respondent did not make a submission that the power to stipulate higher limits or no limits at all under Article 25 of the Montreal Convention was confined to financial limits and did not extend to the waiver of a partial defence.[7] The Court of Appeal could not and did not deal with the submission when made on Appeal.[8] However, the Court of Appeal did state even if that were the case Article 27 authorised the waiver of defences.[9]

Dated: 4 February 2025

Bret Walker
(02) 8257 2527
caroline.davoren@stjames.net.au

Michael Tanevski
(02) 8076 6604
mtanevski@sirowendixon.com.au

[7] AJ [88] CAB 92
[8] AJ [89] CAB 92
[9] AJ [90] CAB 93