IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 168 of 2019

BETWEEN : **AMAR PRAKASH** of 6536 Harley Way, Sacramento CA 95828, USA.

PLAINTIFF

A N D : **AIR PACIFIC LIMITED** trading as **FIJI AIRWAYS** and formerly as Air Pacific, a limited liability company having its registered office at Air Pacific Maintenance and Administration Centre, Nasoso Road, Nadi Airport.

DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Ms. Tuitoga for the Plaintiff
Mr. N. Prasad for the Defendant

Date of Ruling: 04 March 2025

RULING

01. The plaintiff, a citizen of United States of America was, on or about 13 July 2016, travelling from Nadi to Los Angeles on board Fiji Airways flight number FJ 810. Whilst the plaintiff was on board another passenger attempted to throw a water bottle into the overhead cabin prior to take off. The water bottle unfortunately hit on the right eye of the plaintiff. Due to the impact, the plaintiff was shocked and hit his knees on the front seat and his elbow against the window. The plaintiff sustained injuries. The plaintiff was provided with cold compression for his eye during the flight-time. Upon landing at Los Angeles Airport, the plaintiff was taken to West LA Medical Centre by an ambulance. He was admitted there for 5 hours. As the result, the plaintiff missed his connecting flight to Sacramento which was initially scheduled. The plaintiff waited several hours to catch the other flight to his destination.

02. The plaintiff commenced the proceedings against the defendant by the writ issued by this court on 02.07.2019. The plaintiff pleaded the special damages incurred to him due to this accident. The plaintiff sought special damages as pleaded, general damages for the personal injuries he sustained due to the incident. The plaintiff also claimed interest

under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act together with the costs on indemnity basis.

03. The defendant acknowledged the writ and filed a summons for striking out. Obviously, plaintiff commenced this action after expiry of two years from the alleged incident. It was suggested that, the ground for striking out was that, the plaintiff action was time-barred due to the limitation period imposed by the statute, namely Civil Aviation (Montreal Convention, 1999) Act 2016. Whilst the defendant's application for striking out was pending, the plaintiff tendered an amended writ and the court allowed it.

04. The plaintiff in his amended statement of claim stated that, he lodged a complaint at the defendant's office after the incident; however, the defendant failed and or refused to act on the complaint; the defendant breached the duty of care owing to him by not acting and or delaying to act on his complaint; and his claim under the Montreal Convention 1999 was statute barred due to this negligence of the defendant to act on his complaint. Briefly, the cause of action, as per the amended statement of claim, is breach of duty of care by failing or refusing to act on the complaint lodged by the plaintiff. The plaintiff claimed damages for this alleged breach of duty of care. In fact, it is the same claim for personal injuries caused by the above mentioned accident that took place on board Fiji Airways flight number FJ 810 under the disguise of new cause of action. The plaintiff tried to found it on the basis that, the defendant breached the duty to care to act on the complaint lodged by him.

05. Despite the amendment of statement of claim, the defendant strenuously pursued the application for striking out. At hearing of the summons, the counsel for the defendant made oral submission and tendered a comprehensive written submission on the law that governs the claim against the air carrier. It was the contention of the counsel for the defendant that, that no cause of action now available for the plaintiff to sue the defendant. The counsel for the plaintiff made oral submission and wished to file the written submission. However, no such submission was filed and the matter was fixed for ruling.

06. The questions to be determined in this matter are firstly, what are the causes of action available for a passenger in an air craft to claim damages, and secondly when they expire? The Civil Aviation (Montreal Convention, 1999) Act 2016 applies to the claim for damages for death, bodily injuries and loss of baggage sustained in the course of, or arising out of, international carriage by air. Admittedly, the plaintiff's claim arises out of international carriage by air and applicable law is the Civil Aviation (Montreal Convention, 1999) Act 2016. This Act gives effect to the Montreal Convention.

07. It has now become important to examine the genesis of the Montreal Convention and the relevant Articles in order to determine the questions in this matter. In order to avoid complex elements of conflicts of law and jurisdiction on the liability of air carriers,

unification of law on a wide international level was warranted. This resulted in adoption of "Convention for the Unification of Certain Rules in Relating to International Carriage by Air" which is commonly known as "Warsaw Convention". The purpose of the treaty was to regulate the conditions of international carriage by air and liability of carriers in a uniform manner. It was the first comprehensive legal framework that governed the aviation at international level. Subsequently number of amending protocols, rules and regulations were added to the convention and all was collectively called as "Warsaw System". Thereafter, the Montreal Convention replaced the Warsaw System. The Montreal Convention (**The Convention**) was signed on 28 May 1999 and came into force on 4 November 2003.

08. The concept of unlimited liability is the major feature of the Convention. It introduced a two-tier system. The first tier includes strict liability up to 100,000 Special Drawing Rights (SDR), irrespective of a carrier's fault. The second tier is based on presumption of fault of a carrier and has no limit of liability. The Convention established a comprehensive and unified framework for the international carriage of passengers, baggage, and cargo by air, balancing the interests of travelers and the shippers of cargo and the aviation industry.

09. The Chapter III of the Convention provides for the liability of the carrier and extent of compensation for damage. This Chapter covers the damages for death and injury of the passengers, damages to cargo and baggage, damages for delay of baggage and cargo. It also covers the limits of liability. The plaintiff's' claim against the defendant in this case is the damages for the injuries he sustained onboard. The Article 17 of the Convention imposes liability on the carrier for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or bodily injury took place on board the aircraft or in the course of any of the operation of embarking or disembarking.

10. Likewise Article 18 provides the liability of the carrier for damage sustained in the event of the destruction, or loss of, or damage to cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air. Similarly, the Article 19 provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo with certain limitation on the liability provided therein. There is limitation on the quantum of damages as provided in the subsequent Article like 21, 22 and other Articles under Chapter II of the Convention.

11. What is most pertinent to this matter is the Articles 29 and 35. The Article 29 of the Convention provides the basis of claims against the air carriers. It reads that:

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort

or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

12. The above Article in its clear terms provides firstly, that, the conditions and limitations that are set out in the Convention will apply to any claim for damages against the air carrier, **whether under the Convention or in contract or in tort or otherwise**. Unlike its predecessor, the Convention specifically mentions in Article 29 the claims under the convention, contract, tort and others. The Convention recognizes that, a passenger could have cause of action to sue an air carrier for damage under the convention or in contract or in tort or otherwise. However, all such actions are subject to the provisions of the Convention, irrespective of where they stem from. Secondly, the damages, which can be recovered in any claim under the Convention, are purely compensatory, and neither punitive, nor exemplary.

13. The Article 35 of the Convention contains an important provision in relation to bringing action against the carrier for damages. It provides for the limitation period for the right to claim damages against the carrier. It reads:

> 1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
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> 2. The method of calculating that period shall be determined by the law of the court seized of the case.

14. The Convention specifically provides that, the time period to exercise the right to claim damages is limited to two years. The right extinguishes if the action is not brought within such two years. The effect of the provisions of both Articles 29 and 35 is that, any claim for damages against the air carrier, whether it is under the Convention or in contract or in tort or otherwise, should be brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The substantive law on limitation is provided by the Convention. Only the procedure – the method of calculating the two year period – is left to the law of the court seized the case.

15. The plaintiff in this case has a cause of action under the Convention to sue the defendant for damages as the Article 17of the Convention imposes liability on the carrier for personal injuries and death. However, the action must be brought within 2 years from the

date of arrival at the destination. The plaintiff, travelled to Loss Angeles on 13 July 2016 and would have reached the destination on the same day due to time difference. The action, under the convention should have been filed on or before 12 July 2018. The action was filed on 02 July 2019. As admitted by the plaintiff, the cause of action under the convention is time barred. The plaintiff has no cause of action under the Convention.

16. In an action for tort, a plaintiff must prove the duty of care, breach (a wrongful act or omission of a defendant), causation and damages. The cause of action for tort therefore arises at the moment the harm or the damage is caused. The action founded on tort as well is subject to the limitation imposed by the Article 35 of the Convention. The harm caused to the plaintiff in this case is the bodily injury caused to him on 13 July 2016. The plaintiff in is original statement of claim alleged it was due to the negligence of the defendant. Since the harm was caused to the plaintiff on 13 July 2016, the cause of action expired on 12 July 2018 pursuant to Article 35 of the Convention. No cause of action is available for the plaintiff in tort too against the defendant.

17. Other than the above causes of action under the convention or in tort, no cause of action is available for the plaintiff to claim damages for the injuries he suffered on board on 13 June 2016. The plaintiff pleaded in his amended statement of claim that, he on or about 13 June 2017 visited the main office of the defendant in Fiji and lodged the complaint; the defendant failed and or refused to act on the complaint lodged by him; therefore the defendant breached the duty of care owed to him; and due to this breach, the plaintiff's action is statute barred.

18. The Convention does not impose any duty of care on the air carrier to respond to any complaint made to it in relation to an injury caused to a passenger in past. Conversely the convention imposes liability on the carrier for damage sustained in case of death or bodily injury of a passenger on the condition mentioned in Article 17 subject to other conditions and limitation under the Convention. In addition, the Convention recognizes other causes of action in contract, in tort or otherwise.

19. Accordingly, a cause of action had already accrued to the plaintiff on the day he sustained injuries on board, i.e. on 13 June 2016. A passenger does not need to write to the air carrier and wait for the response since the cause of action to sue for damages accrues on the day of injury in tort and from the day of arrival to destination under the Convention. For example, a victim of a road traffic accident does not need to write to the driver or owner of the vehicle and wait for their response to sue them for damages, because the cause of action accrues and starts to run the moment the injuries caused. Likewise, a passenger who injured on board of an aircraft does not need to write to the air carrier and wait for response to sue it, because the cause of action accrues as per Article 29 and extinguishes after two years as per Article 35.

20. It is obvious that, the cause of action that accrued under the Convention and in tort had already extinguished by operation of Article 35. The new cause of action pleaded by the plaintiff in his amended statement of claim is plainly unsustainable. Marsack J.A. in his concurring judgment in **Attorney General v Halka** [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

> "Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

21. His Lordship the former Chief Justice A.H.C.T. Gates in **Razak v. Fiji Sugar Corporation Ltd** (supra) held that:

> "The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

22. The plaintiff was alerted of the absence of the cause of action at the inception by the counsel for defendant. However, the defendant amended the cause of action which is not plainly unsustainable. Therefore, I am of the view that, the plaintiff should be ordered to pay costs to the defendant.

23. In result, I make the following orders,

a. The plaintiff's action is struck out as it discloses no cause of action against the defendant, and

b. The plaintiff should pay summarily assessed costs in sum of $ 1000.00 to the defendant within a month from today.

HIGH COURT OF FIJI LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
04.03.2025