The Transportation Lawyer

July 2011 • Volume 13, Number 1

August, 11, 2011
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A Joint Publication of

Transportation
Lawyers Association

and

Canadian
Transport Lawyers'
Association

CTLA Canadian Transport Lawyers Association

Association Canadienne
des Avocats en Transport

A Comprehensive Journal of Developments in Transportation Law

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Article 29 Of The Warsaw Convention Extinguishes A Plaintiff's Claim Commenced Beyond The Two-Year Limitation

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In a recent Rule 20 Motion for Summary Judgment, Societe Air France successfully (and economically) persuaded the (Ontario) Superior Court of Justice to rule that a plaintiffs' action is extinguished where the plaintiffs failed to commence their action within the two-year limitation imposed by Article 29 of the *Warsaw Convention*.

The dismissal of the action was a predictable result: however, Justice Shaughnessy's analysis of the cross-motion brought by Jacques Gauthier, (the plaintiffs' former counsel who had failed to commence the claim within two years after the alleged accident), further clarified the applicability of Article 29 in Canadian jurisprudence since the Court rejected Mr. Gauthier's arguments that French law applied. Mr. Gauthier had unsuccessfully argued that French law could be relied upon to extend the time to commence the action regardless of Article 29 of the *Convention* since the accident took place in the Republic of France. In addition, Justice Shaughnessy rejected the argument that if these claims were prohibited in Canada, they could still be pursued in France. Instead, he ruled that the plaintiffs' claims were extinguished.

At the conclusion of the motion for summary judgment by Societe Air France, and the cross motion brought by Mr. Gauthier for both an extension of time to commence an action, and the survival of the plaintiffs' claims in France, the plaintiffs were left only with claims against their former lawyer.

Therefore, we conclude that (with the exception of one issue, which we consider in our last paragraph), Canadian Counsel can predict that our Courts will extinguish an action commenced beyond the two-year limitation period dictated by Article 29 of the *Convention* to ensure uniform regulation of liability for air carriers for passenger claims.

The Plaintiff's Accident During Disembarkation

The plaintiff, Marwa Saaka, suffers from cerebral palsy and could not walk without assistance. At the time of the accident,[1] she was approximately 26 years old and lived with her parents. Marwa flew from Toronto, Canada to Paris, France on an Air France flight, and alleged that while Air France personnel assisted her from her wheelchair to her seat while in Toronto, she could not obtain assistance to disembark from the aircraft to her wheelchair while in Paris. Despite numerous requests, Air France personnel failed to assist her with disembarkation.

Consequently, her mother, Maram Saaka, carried her daughter while they disembarked. On the way to the wheelchair, with her daughter in her arms, Maram pleaded she tripped at the exit door, and fell onto the bridge platform. Her daughter, Marwa, claimed she injured her knees as a result of the fall.

The Plaintiffs' Action Was Commenced Six Years Post-Accident

The accident allegedly occurred on May 24, 2003, and the action was commenced on May 20, 2009. It is interesting, given the analysis below, that instead of moving to strike the claim without defending, about six weeks later, Societe Air France served and filed a statement of defence. Therein, they pleaded various material facts: that the plaintiffs were passengers on Flight No. 359 between Toronto, Canada and Paris, France; that the plaintiff tripped and fell while disembarking the aircraft, which occurred while the plaintiffs were on an journey of international carriage by air, departing from Canada and returning to Canada, with agreed stopping places in France and Syria.

Societe Air France pleaded that the applicable law governing the rights and obligations of the parties was the *Warsaw Convention* (the "*Convention*") as amended by the Hague Protocol, both of which are international treaties incorporated into the laws of Canada by the *Carriage by Air Act*, as amended, R.S.C. 1985, Chapter C-26.

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Societe Air France also pleaded and relied upon several specific provisions in the *Carriage by Air Act*:

i. Article 17, which provides that the carrier is liable for bodily injury only in the event of an accident on board the aircraft or in the course of embarking or disembarking;
ii. Article 21, which states the carrier may be exonerated in whole or in part if it proves that the damage was caused by or contributed to by the negligence of the injured person; and
iii. Article 29, which provides that the right to damages shall be extinguished if an action is not brought within two years.

Why the *Warsaw Convention* Applied

Since the accident pre-dated the *Montreal Convention* entering into force on November 5, 2003, the *Warsaw Convention* applied. Justice Shaughnessy found that in 1929, the representatives of several nations assembled in Warsaw, Poland and signed a treaty described as the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*. The purpose of the treaty was to regulate in a uniform manner, the conditions of international carriage by air and *inter alia* the liability of the carrier. The *Warsaw Convention* has the force of law in Canada in relation to which the *Convention* applies (*Carriage by Air Act*, supra Schedule I).

Whether The Time Bar Extinguishes a Claim

Air Societe argued the conventional position (conventional in Canada, the U.S. and the U.K.)[2] which is that missing the date to commence a claim is fatal under the *Warsaw Convention*, because the time bar in Article 29 extinguishes the claim. A time bar that extinguishes a claim differs from a time bar that simply bars a remedy while leaving the claim itself in existence. An excellent explanation for the difference is set out by Justice Gulotta in *Kahn v. Trans World Airlines*:

> …[T] general rule in New York for distinguishing between conditions precedent and Statutes of Limitation may be stated as follows: if the statue containing the time limitation *creates* the cause of action, then the limitation will generally be regarded as an ingredient of the cause of action and, thus, a condition precedent to suit. If, on the other hand, the cause of action was cognizable at common law or is made such by virtue of another or different statute, then a validly enacted time limitation will generally be regarded as a mere Statute of Limitations, which, if pleaded, preclude enforcement of the remedy but does not extinguish the right.[3]

In opposition, Mr. Gauthier argued that the two-year limitation was not a condition precedent and that French law tolled the two-year period because the plaintiff Marwa suffered a disability. Further, Mr. Gauthier argued the *lex loci* was Paris, France, and, therefore, the action was governed by the substantive law of France as detailed in the *French Civil Code*.

The Court Rejects Evidence that the French Civil Code Allows Article 29 to be Tolled

Mr. Gauthier's submissions that Article 29 could be tolled was supported by affidavit evidence of Mr. Francois Balsan. Mr. Balson is a lawyer registered with the Bar Council in the Republic of France, and he attested that in France the "law is clear" that Article 29 of the Warsaw Convention is a only a statute of limitations capable of being tolled by the disability of the plaintiff pursuant to the *French Civil Code*.

Mr. Balson referenced the judgments of the Cour de Cassation in *Veuve Kamara v Air France* D.1968 (Cass.l'ere civ. June 24, 1968) as the authority for the limitation period being tolled as well as the decision in *Lorans v Air France* 1977 RFDA 268 (Cass. 14 Jan. 1977). Mr. Balson's evidence was that these cases of the Cour de Cassation held that Article 29 of the *Convention* was a statute of limitations which could be tolled, and was not a condition precedent to suit.[4]

Mr. Balsan's evidence supported the position that Maram Sakka, as litigation guardian of her daughter, could still bring an action under French law. This was Mr. Gauthier's strongest argument and it is the Court's analysis of this position which clarifies the enforceability of Article 29.

It appears, upon review of Justice Shaughnessy's decision, that the weakest arguments advanced by Mr. Gauthier were that there was no evidence that Ontario had jurisdiction in the proceeding on the grounds that there was no evidence of the circumstances under which the air ticket was purchased; the Statement of Claim failed to establish jurisdiction in Ontario, and that Article 28 of the *Convention* failed to establish jurisdiction in Ontario. These arguments were all rejected by the Court.

Uniform Application of Liability Rules Relating to International Carriage by Air

In rejecting Mr. Gauthier's arguments, Justice Shaughnessy commenced his analysis as follows:

> The ordinary meaning of Article 29 of the *Warsaw Convention* supports the conclusion in Canadian and U.S. courts that the two year requirement to bring

> an action is mandatory in all cases regardless of age or disability. This interpretation is consistent with the cardinal purpose of the *Convention*, namely, uniform application of liability rules relating to international carriage by air.[5]

He then concluded that he adopted the precedent of the British Columbia Court of Appeal in *Gal v. Northern Mountain Helicopters Inc.* which, when applied to the interpretation of Article 29, meant that the "two year time frame within which to commence an action is an element of the *Convention* cause of action and is not subject to tolling."[6]

Justice Shaughnessy found that the *Convention* creates the cause of action which cannot be tolled since without the commencement of the action within the two-year time frame, there was no action. Therefore, failure to commence the action within the two-year time frame meant that the plaintiffs' claims were extinguished. Justice Shaughnessy explained that this approach is consistent with the decisions in *Fishman v Elta Airlines Inc supra,.* and *Kahn v. Trans World Airlines Inc., supra.*

However, while Justice Shaughnessy's analysis reaches a similar conclusion, his reasoning to achieve that end differs slightly from the analysis of the U.S. Court in *Kahn v. Trans World Airlines*, *supra*. Whereas Justice Shaughnessy found that the two-year time frame is an element of the *Convention* cause of action, this analysis was specifically rejected in *Kahn*. In fact, in *Kahn*, the U.S. Court rejected two differing analyses: first it rejected an approach which considers whether the *Convention* creates an independent cause of action and, second, it rejected the approach which seeks to distinguish between the two types of limitations.

Instead, Justice Gulotta, writing for the U.S. Court preferred an interpretation of the Convention which focuses on the intent of the draftsman. This latter approach, Justice Gulotta concluded: "conclusively answers the question of the proper construction to be placed upon article 29, and does so *without* delving into the vagaries of attempting to determine whether the Convention itself 'creates' any causes of action."[7]

On this issue, Justice Shaughnessy's decision reflects a similar analysis since he too reviews the Minutes of the Second Conference to resolve ambiguity. He wrote:

> "Article 32 of the Vienna Convention provides that if there is any ambiguity in the ordinary meaning of a treaty provision, it is permissible to review the preparatory work for the treaty as an aid to interpretation. A review of the Minutes of the Second Conference on Private Aeronautical Law indicates that the delegates to the Convention sought to avoid a situation where each signatories domestic law might apply and create uncertainty surrounding the two year limitations period."[8]

In comparison to this brief statement, Justice Gulotta's decision provides more insight into the intent of the delegates where, after reviewing the various amendments to Article 28 (now Article 29) within the context of the explanations of the different delegates regarding the intent of this Article, Justice Gulotta concludes:

> "…it is abundantly clear that the delegates to the Warsaw Convention expressly desired to remove those actions governed by the Convention from the uncertainty which would attach were they subjected to the various tolling provisions of the laws of the member States and that the two-year limitation specified in Article 29 was the intended to be absolute – barring any action which had not been commenced within the two-year period."[9]

Justice Shaughnessy found that the two year time frame within which to commence an action is an element of the Convention cause of action. In contrast, Justice Gulotta found that the only matter to be referred to the forum court by paragraph 2 of the present article 29 was the determination whether the plaintiff had taken the necessary measures within the two-year period to invoke that particular court's jurisdiction over the action. The differences are minor but significant since Justice Gulotta's interpretation resolves all ambiguity, while Justice Shaughnessy's leaves open the consideration for a Court to determine whether it agrees that the two year time frame is an element of the cause of action.

The difference is well illustrated in the following quote of Justice Gulotta:

> "Accordingly, regardless of whether or not the Convention itself "creates" any cause of action, it is readily apparent that the time limitation incorporated in article 29 was intended to be in the nature of a condition precedent to suit, and that it was never intended to be extended or tolled by infancy or other incapacity."

Conclusion (and a Twist)

Justice Shaughnessy found the failure of the plaintiffs to commence the action within two years of the date of arrival at the place of destination (Toronto, and not Syria as Mr. Gauthier had argued) was "dispositive" of the plaintiffs claim against Societe Air France. Within the context of the new Rule 20, there was no genuine issue for trial. In the alternative, he exercised his discretion under Rule 21.01(1)(a) to find that the determination of the limitation period

disposed of the action against Societe Air France.

On a final note, Justice Shaughnessy endorsed the precedent of the British Columbia Court of Appeal in *Gal*, *supra*, and there is one last issue raised in *Gal*, which leaves open yet another attempt by a plaintiff to revive a claim that it has failed to commence within two years, and that is where the evidence reveals "any reliance" by a plaintiff to his or her detriment on the conduct of the defendant.[10] However, this issue is for another plaintiff, another court, and another day.

Endnotes

1. *Balani v. Lufthansa*, 2010 ONSC 3003 at para 11. "Accident" in Article 17 is defined by the US Supreme Court in the case of *Air France v. Saks*, 470 U.S. 392 (1985) to mean "an unexpected or unusual event or happening that is external to the passenger". This definition was adopted in Ontario in *Quinn v. Canadian Airlines* (1994), 18 O.R. (3d) 326 (Gen. Div.) aff'd [1997]O.J. No. 1832, application for leave to appeal dismissed [1997] S.C.C.A. No. 354.
2. *El Al Israel Airlines Ltd. v. Teng*, 119 S. Ct. 662 (USSC) at 671-72; House of Lords in *Sidhu v. British Airways Plc* [1997] 1 All E.R. 193 at p. 212; *Gal v. Northern Helicopters Inc.* (1999), 177 D.L.R. (4th) 249 (BCCA).
3. *Kahn v. Trans World Airlines*, 82 AD 2d 696 NY: Appellate Div., 2nd Dept. 1981 at 699.
4. See *Fishman by Fishman v. Delta Air Lines, Inc.* 132 F. 3d 138 – Court of Appeals 2nd Circuit 1998 at 145, where similar treatises were cited by the plaintiffs (although no copy was furnished to the Court of Appeal) and the Court concluded: "The *Lorans* decision proceeds along lines that are foreign to the principles of treaty construction adopted by our legal system. As we said above, United States courts look to the legislative history of a treaty when the textual language is ambiguous."
5. *Sakka et al. v. Societe Air France et al.* 2011 ONSC 1995 at para 26.
6. *Sakka, supra*, at para 27.
7. See *Kahn, supra*, at 705 [emphasis added].
8. *Sakka, supra*, at para 29.
9. *Kahn, supra*, page 709.
10. *Gal, supra*, para 21.