

2009 CarswellOnt 9412
Ontario Superior Court of Justice

Strugarova v. Air France

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**Mariana Stefanova Strugarova, Miroslav Pavolov Kissiov,
and Stefan Miroslavov Kissiov, Plaintiffs and Air France,
Greater Toronto Airports Authority, Nav Canada, Alain Rosaye,
Frederic Naud, Goodrich Corp. and Airbus S.A.S., Defendants**

L.B. Roberts J.

Heard: October 9-10, 2008

Judgment: February 2, 2009

Docket: 07-CV-336943PD2

Counsel: Timothy Trembley, for Defendants, Air France, Alain Rosaye, Frederic Naud
Ann Christian-Brown, for Plaintiffs

Subject: International; Torts; Civil Practice and Procedure; Contracts

Headnote

Conflict of laws --- Torts — Choice of law — Forum conveniens — General principles

International law --- Miscellaneous

International law --- Application of international law — Miscellaneous

Plaintiff bought ticket in Mauritius for flight on French airline with stopovers in Paris and Toronto — Plaintiff sustained injuries when plane overran runway in Toronto — Plaintiffs brought action for damages against, inter alia, Captain, First Officer, and airline (defendants) — Defendants brought motion to stay or dismiss action for lack of jurisdiction — Plaintiffs alleged that Warsaw Convention on International Carriage by Air, 1929, did not apply to airline's employees pursuant to Article 25A of Convention, as amended by Hague Protocol in 1955 — Motion dismissed on other grounds — Convention applied to all defendants — While provisions of Article 25A of Convention might restrict limits on liability in certain circumstances for employees of international carrier, there was nothing in that Article or other provisions of Convention which excluded application of Convention to employees of international carrier to which Convention otherwise applied, as in present case — To hold otherwise would undermine purpose of Convention, which is to provide for uniformity in law of international travel concerning liability.

International law --- International treaties, conventions, and agreements — Miscellaneous

Plaintiff bought ticket in Mauritius for round-trip flight on French airline departing from Mauritius, with stopovers in Paris and Toronto, and then returning to Mauritius, via Paris, with stopover in Sophia, Bulgaria — Plaintiff sustained injuries when plane overran runway in Toronto — Plaintiffs brought action for damages against, inter alia, Captain, First Officer and airline (defendants) in Ontario — Defendants brought motion to stay or dismiss action for lack of jurisdiction under Warsaw Convention on International Carriage by Air, 1920 — Motion dismissed on other grounds — Under provisions of Convention, only jurisdictions available to plaintiffs were France and Mauritius — Article 28 of Convention states that action for damages must be brought in territory of one of High Contracting Parties, either before Court having jurisdiction where carrier is ordinarily resident, or has his principal place of business, or has establishment by which contract has been made or before Court having jurisdiction at place of destination — Airline was ordinarily resident and had principal place of business in France, and contract of carriage was made through travel agent in Mauritius — Plaintiffs' contention that Ontario had jurisdiction because Toronto was place of destination was not supported by meaning of "destination" set out in relevant case law — Ultimate destination stipulated in contract of carriage constitutes destination for purposes of determining jurisdiction under Article 28 of Convention. Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Lack of jurisdiction

Plaintiff bought ticket in Mauritius for flight on French airline with stopovers in Paris and Toronto — Plaintiff sustained injuries when plane overran runway in Toronto — Airline paid some of plaintiff's medical expenses — Plaintiffs brought action for damages against, inter alia, Captain, First Officer and airline (defendants) in Ontario — Defendants filed statement of defence contesting jurisdiction and defending action on merits — Defendants brought motion to stay or dismiss action for lack of jurisdiction under Warsaw Convention on International Carriage by Air, 1929 — Motion dismissed — Convention applied to plaintiffs' action and to individual defendants, and Ontario had jurisdiction to hear plaintiffs' action — Convention modifies jurisdictional rules of local forum by providing under Article 28(1) for choice of "four fora" depending on circumstances of case without taking away for all purposes jurisdiction of local courts that otherwise have jurisdiction to hear action — Defendants were estopped from objecting to Ontario as proper jurisdiction for hearing of plaintiffs' action by virtue of their conduct on which plaintiffs relied — Airline, through its solicitors and by part payment of plaintiff's medical expenses, acknowledged that plaintiff had suffered personal injuries — Defendants filed statement of defence contesting jurisdiction but also defending action on merits — Ontario Court of Appeal has stated that filing of statement of defence would constitute attornment to jurisdiction where defence was filed.

Estoppel --- Estoppel in pais — Estoppel by conduct — Acquiescence — Miscellaneous cases

Plaintiff bought ticket in Mauritius for flight on French airline with stopovers in Paris and Toronto — Plaintiff sustained injuries when plane overran runway in Toronto — Airline paid some of plaintiff's medical expenses — Class proceeding was certified in Ontario — About 11 weeks before expiry of two-year limitation period for plaintiffs' claim, airline changed its originally stated position that Ontario had jurisdiction — Plaintiff opted out of class proceeding and brought action for damages against, inter alia, Captain, First Officer and airline (defendants) in Ontario — Plaintiff brought action for damages in Ontario — Defendants filed statement of defence contesting jurisdiction and defending action on merits — Defendants brought motion to stay or dismiss action for lack of jurisdiction — Motion dismissed — Defendants were estopped from objecting to Ontario as proper jurisdiction for hearing of plaintiffs' action by virtue of their conduct on which plaintiffs relied — Airline, through its solicitors and by part payment of plaintiff's medical expenses, acknowledged that plaintiff had suffered personal injuries — Instead of bringing motion to dispute jurisdiction, defendants filed statement of defence contesting jurisdiction but also defending action on merits — In binding 2004 case, Ontario Court of Appeal stated that filing of statement of defence would constitute attornment to jurisdiction where defence was filed — If plaintiffs' action were not permitted to proceed in Ontario, plaintiffs would suffer non compensable prejudice as their cause of action would be extinguished by operation of limitation period set out in Convention.

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — General principles

Plaintiff bought ticket in Mauritius for flight on French airline with stopovers in Paris and Toronto — Plaintiff sustained injuries when plane overran runway in Toronto — Airline paid some of plaintiff's medical expenses — Class proceeding was certified in Ontario — About 11 weeks before expiry of two-year limitation period for plaintiffs' claim, airline changed its originally stated position that Ontario had jurisdiction — Plaintiff opted out of class proceeding and brought action for damages against, inter alia, Captain, First Officer and airline (defendants) in Ontario — Plaintiff brought action for damages in Ontario — Defendants filed statement of defence contesting jurisdiction and defending action on merits — Defendants brought motion to stay or dismiss action for lack of jurisdiction — Motion dismissed — Convention applied to plaintiff's action and to individual defendants, and Ontario had jurisdiction to hear plaintiffs' action — By their conduct, defendants were estopped from objecting to Ontario as proper jurisdiction for hearing of plaintiffs' action by virtue of their conduct on which plaintiffs relied — Instead of bringing motion to dispute jurisdiction, defendants filed statement of defence contesting jurisdiction but also defending action on merits — If plaintiff's action were not permitted to proceed in Ontario, plaintiffs would suffer non compensable prejudice as their cause of action would be extinguished by operation of limitation period set out in Convention.

MOTION by defendants to stay or dismiss plaintiffs' action for lack of jurisdiction.

L.B. Roberts J.:

Nature of the Motion

1 The defendants, Air France, Alain Rosaye and Frederic Naud ("the Air France defendants"), bring this motion to stay permanently or, in the alternative, dismiss the plaintiffs' action and all crossclaims against the Air France defendants on the

ground that this Court has no jurisdiction over the plaintiffs' action. The parties have agreed to adjourn the motion of the Air France defendants with respect to the crossclaims to a date to be fixed following the release of these Reasons.

2 The Air France defendants maintain that the plaintiffs' action is governed by the *Warsaw Convention*, an international agreement incorporated into the laws of Canada by the *Carriage By Air Act*, R.S.C. 1985, Ch. C-26¹, and that, in accordance with the *Warsaw Convention's* provisions, in the circumstances of this case, the plaintiffs should have commenced this action in Mauritius or France and not in Ontario.

3 It is the position of the plaintiffs that this action was properly commenced and should be tried in Ontario.

Background Facts

4 In this action, the plaintiff, Mariana Stefanova Strugarova, seeks damages for personal injuries and property damage sustained by her while she was traveling as a passenger on an international Air France flight from Paris to Toronto on August 2, 2005.

5 According to the ticket produced by Ms. Strugarova, the ticket was purchased by her in Mauritius Rupees through a travel agent in Mauritius. Ms. Strugarova's ticket provided for a round trip departing from Mauritius, with stopovers in Paris and Toronto, and then returning to Mauritius, via Paris, with a stopover in Sophia, Bulgaria. Ms. Strugarova's trip was cut short in Toronto because of her injuries.

6 The airplane was operated as Flight 358 by the defendant, Air France. The defendant, Alain Rosaye, was the Captain of Flight 358 and the defendant, Frederic Naud, was the First Officer of Flight 358.

7 On landing, Flight 358 overran the runway at Toronto's Lester B. Pearson International Airport. Ms. Strugarova claims that she suffered serious bodily injuries and property damage as a result of the runway overrun event. In particular, according to the plaintiffs' evidence, Ms. Strugarova sustained a serious knee injury.

8 An action was commenced under the *Class Proceedings Act*, S.O. 1992, c. 6, seeking damages for serious personal injury, property damage and income loss on behalf of the passengers who were traveling in the aircraft at the material time. The statement of claim was issued on August 8, 2005.

9 While Ms. Strugarova was in the hospital following the overrun incident, an insurer for Air France contacted the hospital about paying Ms. Strugarova's hospital bill. Shortly after the accident, Ms. Strugarova was contacted directly by Air France's insurer and received payment for certain medical care and treatment that she had received.

10 From about May 24, 2006 to about May 16, 2007, solicitors for Ms. Strugarova and for the Air France defendants, who are the solicitors for the plaintiffs and the Air France defendants in the present case, entered into discussions and exchanged correspondence concerning the plaintiffs' claim.

11 By letter dated June 29, 2006, the solicitors representing the Air France defendants in the class action, who are the solicitors for the Air France defendants in the present action, advised that the class action had been certified by Mr. Justice Winkler on June 1, 2006. Among others, the letter contained the following statements:

As you know, under the Montreal Convention 1999, made a part of the law of Canada as a schedule to the Carriage by Air Act, your client has the right to recover compensatory damages from Air France for bodily injuries suffered in the incident at Pearson. It follows that regardless of the class proceeding, you and your client can settle your client's claim against Air France directly with us. If we are not able to get the claim resolved prior to the opt-out date specified in the notice, and we assume that will be the case in light of her injuries, it would be preferable for your client to opt-out of the class proceedings in the manner set out in order for us to continue to negotiate directly with you.

12 On September 11, 2006, Ms. Strugarova opted out of the class action proceedings.

13 In their letter dated May 16, 2007, the solicitors for the Air France defendants stated, among other things, that the *Montreal Convention 1999*, which would have provided for Ontario as a possible fifth jurisdiction for the hearing of the plaintiffs' action, did not apply to the present case, that the *Warsaw Convention* applied, and that, as a result, Ontario did not have jurisdiction over plaintiffs' claim.

14 On July 19, 2007, the plaintiffs commenced this action by way of issuance of a statement of claim.

15 By letter dated December 5, 2007, the solicitors for the Air France defendants advised the plaintiffs' solicitors that the Air France defendants and their insurers would not be paying any further expenses incurred by the plaintiffs.

16 The Air France defendants delivered a statement of defence dated June 11, 2008, and amended August 6, 2008.

Analysis

a) Application of the Warsaw Convention

17 There is no question as between the parties to this motion that this is an international contract of carriage. Although the plaintiffs initially contended in their factum that the *Montreal Convention* applies, they conceded through their counsel at the hearing of this motion that the *Warsaw Convention* applies to this contract of carriage.

18 The plaintiffs argue, however, that the *Warsaw Convention* does not apply to Air France's employees, the defendants, Alain Rosaye and Frederic Naud, and that, if the Air France defendants' motion is successful, the plaintiffs are entitled to continue their action against those Air France employees. In support of their position, they rely on Article 25A of the *Warsaw Convention*, as amended by the *Hague Protocol* in 1955.

19 While the provisions of Article 25A may restrict the limits on liability in certain circumstances for employees of an international carrier, there is nothing in that Article, or in the other provisions of the *Warsaw Convention*, which excludes the application of the *Warsaw Convention* to employees of an international carrier to which the *Warsaw Convention* otherwise applies, as in the present case. To hold otherwise would undermine the purpose of the *Warsaw Convention*, which is to provide for uniformity in the law of international travel concerning liability, as the liability limitations of the *Warsaw Convention* could be easily circumvented by the means of an action against a pilot or another employee: *Reed v. Wiser* [555 F.2d 1079 (U.S. 2nd Cir. Ct. App. 1977)], 14 Avi 17,841, at 17,842.

20 I therefore hold that the *Warsaw Convention* applies to all of the Air France defendants.

b) Jurisdiction under the Warsaw Convention

21 The next issue to be determined is whether the plaintiffs are permitted under the *Warsaw Convention* to bring this action before this Court or whether they must commence their action in another jurisdiction.

22 Canada, France and Mauritius, among others, are "High Contracting Parties" under the *Warsaw Convention*. Article 28 of the *Warsaw Convention* sets out four bases for jurisdiction:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

23 There appears to be no issue that the first three bases for jurisdiction set out in Article 28 are not present in this case: Air France is ordinarily resident and has its principal place of business in France; and the contract of carriage was made through a travel agent in Mauritius.

24 The plaintiffs contend that this Court has jurisdiction over their action. They argue that Toronto is the place of destination on the basis that the plaintiff intended to come and stop in Toronto and, because of Ms. Strugarova's injuries, remained in Toronto, not completing her return flight.

25 That contention, however, is not supported by the meaning of "destination" as interpreted by the relevant case law. It is the ultimate destination stipulated in the contract of carriage that constitutes the destination for the purposes of determining jurisdiction under Article 28 of the *Warsaw Convention*. The fact that there may be several stopovers does not alter the fact that the ultimate destination determines jurisdiction (see: *Grein v. Imperial Airways Ltd.* (1936), [1937] 1 K.B. 50 (Eng. C.A.), at pp. 78-9).

26 For those reasons, I agree with the submission of the Air France defendants that, under the provisions of the *Warsaw Convention*, the only jurisdictions available to the plaintiffs are France and Mauritius.

c) Jurisdiction under Private International Law

27 Having determined that the *Warsaw Convention* applies to Ms. Strugarova's contract of carriage and to all of the Air France defendants, and that the only jurisdictions available under the *Warsaw Convention* to the plaintiffs are France and Mauritius, the next issue to be determined is whether the *Warsaw Convention's*, provisions relating to jurisdiction are exclusive or whether, by their actions or agreement, the parties can waive and, in fact, have waived the jurisdiction provided for under the *Warsaw Convention*. In particular, it is necessary to determine, as the plaintiffs contend, whether the Air France defendants can attorn and have in fact attorned to this Court's jurisdiction.

28 The plaintiffs argue that, by their conduct, the Air France defendants have expressly or implicitly attorned to Ontario as the jurisdiction for the hearing of the plaintiffs' action.

29 The Air France defendants concede that, if private international rules governing jurisdiction apply, Ontario is the appropriate and convenient jurisdiction for the hearing of the plaintiffs' action; however, it is the position of the Air France defendants that the *Warsaw Convention* applies exclusively to determine jurisdiction and that private international law and the procedural rules of the *lex fori* determining jurisdiction, like attornment, have no application in the present case.

30 There is a paucity of binding judicial authority on this issue. In Ontario, the only decision relating expressly to this issue is *Maijala v. Pan American World Airways Inc.*, [1992] O.J. No. 4187 (Ont. Gen. Div.). In that decision, Mr. Justice Lane made the brief statement that, "Further where jurisdiction is governed by a Treaty enacted into Canadian law, the principles of attornment which apply under private international law cannot prevail over explicit statute law."

31 It is difficult to discern the basis for Lane, J.'s statement, as there is no further discussion on that issue. Lane, J.'s statement regarding attornment has not been followed or interpreted by other Canadian Courts and does not appear to be the approach taken in other jurisdictions in Canada and elsewhere in the world. In any event, Lane, J. concludes that the action should be stayed permanently on the basis that Ontario was not the convenient forum for the hearing of that action. For those reasons, I distinguish *Maijala v. Pan American World Airways Inc.*, *supra*, from the present case.

32 While not binding on this Court, decisions made in other jurisdictions are relevant and useful to consider. In my consideration of those authorities, I am in agreement with the following approach, that was taken by Madam Justice Molloy in *Connaught Laboratories Ltd. v. British Airways*, 2002 CanLII 4642, (2002), 61 O.R. (3d) 204 (Ont. S.C.J.), at para. 50, and followed by Mr. Justice Nordheimer in *Chau v. Delta Air Lines Inc.* [2003 CarswellOnt 4148 (Ont. S.C.J.)], 2003 CanLII 41999, at para. 9:

It is therefore of fundamental importance that there be consistency in interpreting the provisions of the Convention from one country to another. That is not to say that a judge in Canada is necessarily bound to follow what has been decided in other jurisdictions. However, where a body of case law interpreting a particular provision has been applied consistently in other jurisdictions, it would be a mistake to depart from it without very sound reasons.

33 In their submissions made in the course of their motion and in their subsequent written submissions of October 20, 2008, the Air France defendants contend that where, by statute or otherwise, the court lacks subject matter jurisdiction, the consent, waiver or attornment of the parties cannot confer jurisdiction on the court. (See, for example: *Rothgiesser v. Rothgiesser*, [2000] O.J. No. 33 (Ont. C.A.), at para 33; *Jasen v. Karassik*, [2008] O.J. No. 3031 (Ont. S.C.J.), at paras 29 and 30; *Shaw v. Canada*, [1997] F.C.J. No. 972 (Fed. T.D.), at para. 14; *Canadian National Railway v. Canada Transport Commission* (1987), [1988] 2 F.C. 437 (Fed. T.D.), at para. 31.)

34 The Air France defendants' statement of the maxim that consent cannot confer jurisdiction is correct. As noted by Duff, J. for the majority of the Supreme Court of Canada in *Ottawa & New York Railway v. Cornwall (Township)* (1916), 52 S.C.R. 466 (S.C.C.) (cited by the Court with approval in *Rothgiesser v. Rothgiesser*, *supra*, at para. 36), this, of course, simply begs the question of whether a court has jurisdiction in the first place and whether waiver or attornment is possible:

First, it is said to be a case for the application of the maxim consent cannot give jurisdiction. This, of course, simply begs the question. Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or whether the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative. No consent, for example, could give the Supreme Court of Ontario jurisdiction to hear a petition for determining the right to a seat in Parliament.

35 In my view, the cases relied upon by the Air France defendants can be readily distinguished from the present case in that this Court ordinarily has the requisite subject matter jurisdiction to determine the causes of action pleaded in the plaintiffs' statement of claim, regardless of the appropriate geographical forum for the hearing of the action, as determined in accordance with the provisions of the *Warsaw Convention* or private international law.

36 A distinction must be made between the cases where the legislation in question changes the jurisdictional rules of the local forum and where it completely takes away the jurisdiction of the local court to deal with the subject matter in issue. In my view, while the *Warsaw Convention* modifies the jurisdictional rules of the local forum by providing under Article 28(1) for a choice of *four fora* depending on the circumstances of the case, it does so without taking away for all purposes the jurisdiction of the local courts that otherwise have jurisdiction to hear the action in question.

37 This is the conclusion reached by the Superior Court of Quebec in *Stavropoulos c. Olympic Airways s.a.*, 2006 QCCS 4782 (C.S. Que.), (CanLII). In that case, the defendant airline brought the same motion to dismiss the plaintiffs' action as is before this Court. In support of its decision to reject the defendant airline's argument about the exclusivity of Article 28(1) of the *Warsaw Convention*, the Court referenced, at para. 17 of the decision, a passage from the text, *Contracts of Carriage by Air*, authored by Malcolm Clarke, fellow of St. John's College at Cambridge, England, in which Mr. Clarke cited with approval excerpts from the decision of Mustill, J., of the English Queen's Bench Division in *Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corp.* (1979), [1980] 3 All E.R. 359 (Eng. Q.B.), at p. 365, as follows:

...[It] has been argued successfully in England that, although article 28 takes precedence over the jurisdictional rules of the forum, these have not been ruled out altogether. The contrary argument, that the [Warsaw Convention] was a case in which, except as permitted by article 28, "jurisdiction has been actively withdrawn from the court and conferred on another tribunal", has been rejected. This is because "the argument ignores the distinction between legislation which changes the jurisdictional rules of the *lex fori*, and that which takes away the jurisdiction of the local court altogether". The Warsaw Convention has the first of the effects but not second.

A particular example is that it does not "follow that the court must decline jurisdiction even when the defendant does not object ". The wording of the [Warsaw Convention] is not strong enough to have this effect. Thus "the fact that article 32 specifically invalidates jurisdictional agreements made before the occurrence of damage suggests that the parties to the Convention recognized that a binding agreement on jurisdiction could be made after the event". Moreover, this conclusion is reinforced by the policy underlying article 28 and article 32. This is "to prevent forum shopping by the plaintiff, and at

the same time to prevent the defendant from imposing, through the medium of his standard conditions of carriage, a choice of jurisdiction likely to be favourable to his interests. Neither of these considerations is hostile to a choice of forum, by agreement or acquiescence, made after the damage had occurred, and at a time when the defendant is in a position freely to decide whether or not to submit.

38 As noted by the Court in *Stavropoulos c. Olympic Airways s.a.*, *supra*, at para. 18, the same argument put forward in that case and the present case was considered and rejected for the same reasons by the District Court of New South Wales in *Vertzyas c. Singapore Airlines Ltd.* (2000), 50 NSWLR 1, which applied the rationale cited above from the English Queen's Bench Division in *Rothmans of Pall Mall (Overseas) Ltd. v. Saudi Arabian Airlines Corp.*

39 In my view, *Milor SRL v. British Airways Plc*, [1996] 3 All E.R. 537 (Eng. C.A.), relied upon by the Air France defendants, can be distinguished from the present case in that the English Court of Appeal was considering in that case the applicability of the doctrine of *forum non conveniens* to the jurisdictional provisions of Article 28(1) of the *Warsaw Convention*. In *Milor SRL v. British Airways Plc*, *supra*, the defendants were attempting to change the forum chosen by the plaintiff pursuant to Article 28(1) of the *Warsaw Convention*. Consistent with the concern about forum shopping outlined by the Court in *Rothmans of Pall Mall*, *supra*, the English Court of Appeal held that the defendants could not have recourse to procedural rules to displace the clear right of the plaintiff to choose the forum for the hearing of the action. In the present case, the completely different issue is whether the Air France defendants have attorned to the jurisdiction of this Court through their conduct.

40 The Air France defendants also rely on *Gal v. Northern Mountain Helicopters Inc.* (1999), 177 D.L.R. (4th) 249 (B.C. C.A.) in support of their contention that the *Warsaw Convention* provides an exclusive code with respect to jurisdiction and that recourse to local law is not permitted. In my view, the analysis by the Court in that case can be applied to and is supportive of the plaintiffs' argument that the conduct of the parties to an action brought pursuant to the *Warsaw Convention* can invoke the jurisdiction of the Court.

41 In *Gal v. Northern Mountain Helicopters Inc.*, *supra*, the British Columbia Court of Appeal was considering whether or not the plaintiff's claim was extinguished by operation of the two-year limitation period under Article 29 of the *Warsaw Convention*. In interpreting Article 29(2) of the *Warsaw Convention*, the Court adopted the proposition enunciated by Justice Gulotta on behalf of the Supreme Court of *Kahn v. Trans World Airlines Inc.*, 443 N.Y.S.2d 79 (U.S. N.Y.A.D. 2nd Dept. 1981) that the only matter to be controlled by local rules under that provision was the determination of whether the plaintiff had taken the necessary measures within the two-year period "to invoke that particular court's jurisdiction over the action.". Further, at the conclusion of the decision, in rejecting the estoppel argument advanced by the appellant, the Court stated that it was comforted in reaching that conclusion because the evidence did not reveal any reliance by the appellant to his detriment on any conduct of the respondent.

42 As set out in the case law from Canadian and international courts, the purpose of the *Warsaw Convention* is to provide a complete code with respect to the issue of liability for international contracts of carriage, so that air carriers would not be subjected to the distinct, non uniform liability rules of the individual signatory nations: *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155 (U.S. N.Y. 1999), at pp. 161, 169-170; *Sidhu v. British Airways plc* (1996), [1997] 1 All E.R. 193 (U.K. H.L.), at pp. 205 and 212. As a result, the *Warsaw Convention* constitutes a complete code with respect to the causes of action that may be brought, the situations in which compensation is to be available, and the limits of liability. Domestic courts are not free to provide a remedy according to their own law. (See: *Sidhu v. British Airways plc*, *supra*, at p. 212).

43 While the *Warsaw Convention* may be a complete code with respect to liability and passengers are precluded by the *Warsaw Convention* from having recourse to local laws with respect to the causes of action that may be brought, there is nothing in the *Warsaw Convention* that precludes recourse to local laws for other matters. In fact, the interpretation of the *Warsaw Convention* itself is to be determined in accordance with the *lex fori*: *Bochory v. Pan American World Airways* [[1956] U.S. & Can. Av. R. 209], cited with approval in *George Straith Ltd. v. Air Canada* [1991 CarswellBC 222 (B.C. S.C.)], [1991] CanLII 999.

44 In examining the purpose of the *Warsaw Convention* and its construction, the House of Lords in *Sidhu v. British Airways plc*, *supra*, recognized that, while the *Warsaw Convention* provided an exclusive code with respect to matters that were expressly set out in its provisions, it was clear from the other provisions of the *Warsaw Convention* and their interpretation in the case

law, that matters, like procedural issues, which were not dealt with in the provisions of the *Convention*, were to be left to the local courts:

The convention describes itself as a "Convention for the Unification of Certain Rules relating to International Carriage by Air". The phrase "Unification of Certain Rules" tells us two things. The first, the aim of the convention is to unify the rules to which it applies. If this aim is to be achieved, exception to these rules should not be permitted, except where the convention itself provides for them. Second, the convention is concerned with certain rules only, not with all the rules relating to international carriage by air. It does not purport to provide a code which is comprehensive of all the issues that may arise. It is a partial harmonization, directed to the particular issues with which it deals. (p. 204)

45 In their December 12, 2008 written submissions, the Air France defendants forwarded excerpts from the Minutes of the Second International Conference on Private Aeronautical Law October 4-12, 1929, Warsaw Poland, in support of the proposition that the *Warsaw Convention* provides a complete code dealing with jurisdiction over claims to which the treaty applies, and that waiver, attornment or agreement regarding jurisdiction was never contemplated by the parties that drafted the *Warsaw Convention*.

46 I have read the excerpts provided by the Air France defendants. While the excerpts contain a discussion of the rationale for the text of Articles 28 and 32 of the *Warsaw Convention*, there is no discussion of the effect of waiver or attornment with respect to jurisdiction.

47 The absence of any express reference cannot lead to the conclusion urged by the Air France defendants that the drafters of the *Warsaw Convention* meant to exclude the application of the principles of waiver and attornment with respect to the issue of jurisdiction. Had the drafters of the *Warsaw Convention* or of the *Carriage By Air Act* intended to take away the jurisdiction of the local courts with respect to this aspect of their administration of justice and core jurisdiction, they would and should have expressly provided for it.

48 Accordingly, for the reasons stated above, I hold that the Air France defendants can, by their conduct, be found to have attorned to the jurisdiction of this Court in this action.

d) Waiver or attornment by the Air France defendants and estoppel by conduct

49 The next step is for this Court to determine whether, in fact, the Air France defendants have attorned to or otherwise invoked this Court's jurisdiction. In particular, the plaintiffs contend that the Air France defendants have attorned to this Court's jurisdiction by their communications with the plaintiffs and by filing a statement of defence.

50 With respect to the issue of attornment by the filing of a statement of defence, I am of the view that I am bound by the Ontario Court of Appeal's decision in *M.J. Jones Inc. v. Kingsway General Insurance Co.*, [2004] O.J. No. 3286 (Ont. C.A. [In Chambers]). In that case, the Ontario Court of Appeal was asked to determine whether or not the act of filing a statement of defence would constitute attornment, notwithstanding that the defendant was clearly disputing the forum for the hearing of the action. The Court of Appeal stated that the filing of statement of defence would constitute attornment to the jurisdiction where the defence was filed (see: paras. 19 to 22).

51 The Ontario Court of Appeal's approach is the same as the reasoning and the conclusion by the Court in *Vertzyas v. Singapore Airlines Ltd.*, *supra*. In that case, where the defendant had sought to defend proceedings both on jurisdictional issues and on the merits up to the date of hearing, the Court held that the combination of those acts constituted a submission to jurisdiction whereby the defendant waived its right to object to the jurisdiction of the Court (paras. 107 to 110).

52 In the present case, the evidence filed by the parties establishes that Air France, through its solicitors and by part payment of Ms. Strugarova's medical expenses, acknowledged that Ms. Strugarova had suffered personal injuries, although the extent and quantum of the claim were not admitted. The evidence also demonstrates that Air France initially believed that the plaintiffs' action would be dealt with in Ontario either by settlement or in the context of the class action or another proceeding. It was only

about 11 weeks before the expiry of the two-year limitation period for the plaintiffs' claim that Air France first raised the issue of jurisdiction and thereby changed its originally stated position that Ontario had jurisdiction over the plaintiffs' claim.

53 Instead of bringing a motion to dispute jurisdiction, the Air France defendants filed a statement of defence in which they contested jurisdiction but also defended the action on the merits. There is no evidence that the Air France defendants were compelled to file their statement of defence to avoid being noted in default or could not otherwise have brought a motion to dispute jurisdiction prior to filing their statement of defence. Certainly the Air France defendants were aware of the issue of jurisdiction as early as June 2006 because of the issue having been raised in the class action proceedings, as noted in the certification order of Justice Winkler dated June 1, 2006, which was filed on this motion by the Air France defendants. As a result, the Air France defendants must be taken as having been aware of the consequences of defending the action on its merits. It is my view that, by their conduct, the Air France defendants have attorned to the jurisdiction of this Court.

54 Further, there is nothing in the *Warsaw Convention* which prevents this Court from exercising its inherent and equitable jurisdiction to prevent an injustice. In my view, it would be unfair to the plaintiffs in the circumstances of this case to ignore the Air France defendants' recognition and part payment of the plaintiffs' claim, and failure to raise the issue of jurisdiction until 11 weeks before the expiry of the limitation period under the *Warsaw Convention*. If the plaintiffs' action were not permitted to proceed in Ontario, the plaintiffs would suffer non compensable prejudice as their cause of action would be extinguished by the operation of the two-year limitation period set out in Article 29 of the *Warsaw Convention*. By their conduct, the Air France defendants are estopped from objecting to Ontario as the proper jurisdiction for the hearing of the plaintiffs' action by virtue of their conduct on which the plaintiffs relied. (See: *Gal v. Northern Mountain Helicopters Inc.*, *supra*, at para. 21).

e) Causes of Action covered under the Warsaw Convention

55 The final issue that flows from the Air France defendants' motion for determination by this Court is whether the plaintiffs' action in its entirety should be allowed to go forward or whether some of the causes of action pleaded by the plaintiffs should be permanently stayed by application of the *Warsaw Convention*.

56 Having found and the parties having agreed that the *Warsaw Convention* applies to the plaintiffs' action, the parties also agree and I find that only those causes of action pleaded by the plaintiffs which are covered by the *Warsaw Convention* may go forward as against the Air France defendants. As the *Warsaw Convention* exclusively provides for the sole causes of action and remedies for a passenger who claims against the carrier for loss, injury and damage sustained in the course of or arising out of international carriage by air, the plaintiffs cannot recover for any claims not covered by the *Warsaw Convention* (See: *Sidhu v. British Airways plc*, *supra*, at pp. 204 to 206).

57 In their statement of claim, the plaintiffs plead and rely on the provisions of the *Warsaw Convention* relating to bodily injury and damage to baggage, set out respectively in Articles 17 and 18 of the *Warsaw Convention*. In addition to general and special damages for bodily injury and damage to baggage, the plaintiffs claim aggravated and punitive damages.

58 While counsel for the parties provided brief oral submissions on this issue during the hearing of the Air France defendants' motion, I am concerned that they may not have had the opportunity to respond as fully as they may have wished with respect to all of the causes of action pleaded by the plaintiffs.

59 Accordingly, if the parties cannot otherwise agree on the issue of which, if any, of the plaintiffs' causes of action may not proceed, including any limits on liability, in accordance with the *Warsaw Convention*, they may make further written submissions to me on this issue, or return this issue on motion for an attendance before me or another judge.

Conclusion

60 For the reasons set out above, I have determined that the *Warsaw Convention* applies to the plaintiffs' action and to the individual Air France defendants, and that Ontario has jurisdiction to hear the plaintiffs' action.

Costs

61 With respect to the issue of costs, if the parties to this motion cannot agree on that issue, I invite counsel to make brief written submissions to me as follows: the Air France defendants shall provide their submissions by February 17, 2009 and the plaintiffs shall respond by February 24, 2009. I shall then decide whether any award of costs is appropriate in the circumstances of this case.

62 I thank counsel for their extremely able and helpful submissions.

Motion dismissed.

Footnotes

1 The relevant provisions of the *Warsaw Convention* for this motion are reproduced and attached to these Reasons as Appendix "A".

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