IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/02/2018

7TH NOVEMBER, 2018

1. DR. R. S. D. TEI ..... 1ST PLAINTIFF/APPELLANT/APPELLANT

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2. EVELYN JUMBO ..... 2ND PLAINTIFF/APPELLANT

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VRS

MESSRS CEIBA INTERCONTINENTAL ..... DEFENDANT/RESPONDENT/RESPONDENT

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JUDGMENT

PWAMANG, JSC:-

This is an appeal against the judgment of the Court of Appeal dated 29th June, 2017. The background to the case is as follows; The plaintiff/appellant/appellant, to be

referred to as the appellant, is an international engineering consultant and Executive Chairman of Rockshell International and Delta Group of Companies. On 5th October, 2014 he boarded an aircraft of the defendant/respondent/respondent, to be referred to as respondent, at the Kotoka International Airport, Accra as a fee paying passenger to fly to Malabo in Equatorial Guinea. The trip was to discuss the setting up of electricity generation facilities in Equatorial Guinea with the President of that country and he was in the company of his Executive Secretary and his Lawyer. As he took his seat on the aircraft a co-passenger opened the overhead carry-on baggage compartment and a piece of luggage fell on his left eye and he sustained a cut from which blood flowed. The appellant was given cotton wool and gentian violet by the staff of the respondent with which his Executive Secretary managed the flow of blood. That notwithstanding, they embarked on the flight to Malabo. The injury that the appellant sustained eventually caused him to lose that eye and he is now one-eyed.

He sued in the High Court, Accra for damages and based his claim on the Montreal Convention and the tort of negligence with particulars of damages under various heads namely; Pain and Suffering, Emotional and Psychological trauma, Medical Expenses and Loss of Earnings. From the record it appears that at the time of filing the writ of summons plaintiff had not completely lost the use of the injured eye so he did not claim for permanent disability but at the trial he led evidence to that effect and claimed damages for disfigurement and permanent disability in his written address.

The respondent, though served with the writ of summons, statement of claim and Hearing Notices, did not appear to contest the case. The appellant gave evidence and relied on his witness statement and its attachments in support of his case and as proof of the high damage he suffered both to his person and his business. Though the appellant's evidence stood unchallenged, the trial High Court Judge in her judgment held that since the injury was caused by the act of a co-passenger and not staff of the respondent, the appellant had no cause of action against the respondent. She therefore dismissed the case and the Appellant appealed her decision to the Court of Appeal. In the written submissions of the Appellant in the Court of Appeal he stated that he was entitled to be paid damages to the tune of US$17,000,000.00 excluding

what he claimed as loss of earnings. The Court of Appeal allowed the appeal but held that under the provisions of the Montreal Convention there is a limit to the amount of damages payable by an airline in the event of an accident that occurred on board its aircraft. According to the court, that limit was applicable on the facts of this case so they limited the damages awarded to the appellant to 100,000 Special Drawing Rights (SDRs) as stated in the Convention of 1999. The appellant has appealed against the quantum of damages arguing that the Court of Appeal erred in their interpretation of the relevant provisions of the Montreal Convention so we should reverse their decision and hold that the cap on damages in the Convention is not applicable in this case.

The treaty referred to simply as the Montreal Convention is actually called; **Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28th May, 1999.** It replaced an earlier one of the same title signed on 12th October, 1929 and usually referred to as the Warsaw Convention. There are some of the provisions of the Warsaw Convention that are *in pari materia* with the Montreal Convention so courts' interpretation of such provision are usually cited in the construction of the Montreal Convention which is relatively new. These Conventions were conceived as an international mechanism to protect both airlines and passengers such that a carrier does not out of one incident suffer damages so high as to render it bankrupt and passengers too can get paid reasonable compensation for damage without being required to prove liability against an airline for every incident, which can be a Herculean task in many cases. The Conventions regulate the liability of air carriers and cap the amount of damages payable in the event of liability under certain conditions but from time to time the limit is revised to cater for inflation, the latest review being the one in 2009. These Conventions became part of the domestic laws of a majority of the countries in the world that acceded to them including Ghana and Equatorial Guinea and are subject to interpretation in various courts globally. Because of the international character of the Conventions, every interpretation has to take into account the expectations of the many member parties to the Convention and ensure international continuality of construction of particular provisions having regard to the stated objective of the Conventions which is to achieve unification on the matters covered.

Article 17(1) of the Convention provides as follows;

Article 17 - Death and injury of passengers - damage to baggage

1. The carrier is liable for damage sustained in 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.

Under the above provision there are three elements the presence of which would result in strict liability on the part of the carrier to pay damages for bodily injury or death suffered by a passenger. They are; (i) an accident (ii) bodily injury or death (iii) the first two must have occurred on board the flight or in the course of embarkation or disembarkation. See the case of **Marotte v American Airlines Inc. 296 F. 3rd 1255, 1259 (2002).** The provision places strict liability on the carrier so the trial judge in this case was wrong when she sought to introduce a requirement of wrong doing on the part of the carrier in order to found liability against the respondent. The Court of Appeal were therefore right in reversing the High Court on the issue of liability of the respondent as it is a question of strict liability which in law arises without fault on the part of the party held liable. See also the case of **Saks v Air France 470 US. 392 (1985)**

However, as the Court of Appeal correctly held, there is a limit on the quantum of damages payable under this strict liability but the limit may be exceeded only under certain conditions stated in Article 21 of the Montreal Convention which is as follows;

Article 21 - Compensation in case of death or injury of passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

In the 2009 review of the Convention the cap was raised to 113,100 SDRs.

The Court of Appeal in their judgment took the view that Article 21(2) (a) & (b) above were applicable on the facts of this case since the evidence is that the damage was due to the negligence of a co-passenger, a third party for that matter, and not an agent of the carrier hence their refusal to grant the appellant damages exceeding the Convention limit. However, in his statement of case filed before us the appellant has taken objection to the approach adopted by the Court of Appeal. At pages 6-7 he stated as follows;

"The limitation would only arise when the defendant appeared before the court and raises any of the following grounds under Article 21(2).....But in this case the defendant did not appear before the court to raise those defences and when found probable by the court to limit the award to 100,000 SDRs. The court on its own raised those defences and stood as a judge in its own cause and limited the damages. We submit that is wrong. The defences must be put forward by the defendant personally or by itself and not done by any other party or person on its behalf, more so, the court."

Though the appellant did not refer to any legal authority for the above submission, they appear to be grounded on the rule of pleadings which requires that any point of law which tends to show that a party's claim is not maintainable ought to be pleaded by the party relying on it as his defence. The rule was stated in **Order 19 R 6 of LN**

140A of 1954 and is now provided for in **Order 11 R 8(1) of the High Court (Civil Procedure) Rules, 2004 (C.I.47)**. The general effect of that rule is that where a party has not pleaded such point of law then he cannot raise it to his advantage in the case as that will cause a surprise to the other party. Consequentially, it means that a court of law ought not to *suo moto* rely on such point that has not been pleaded by a party to rule against his opponent. However, our courts have construed that rule as being flexible and have held that a court of law can, on its own motion, raise a point of law that arises on the evidence in a case before it and apply same if even the parties fail to raise it. In **Asaare v Brobbey & Ors [1971] 2 GLR 331, CA** at page 336 Archer JA (as he then was) said as follows;

"Moreover, where all the facts relating to the point are before it, the court will not hesitate to consider it. Thus where a statute makes a particular contract invalid, the judge may refuse to entertain the action even though neither party has raised or wishes to raise the objection. See Royal Exchange Association v. Atk. Sjorforsakrings Vega [1902] 2 K.B. 384, C.A. and also National Omnibus Services Authority v. Owuo, Court of Appeal, 20 August 1969, unreported; digested in (1969) C.C. 158"

The appellant made his claim on the basis of the Montreal Convention and Article 21 of it which the court applied is a point of law arising therefrom since international treaties are usually domesticated by the passage of an Act of Parliament. In those circumstances, no surprise was caused to the appellant and it can even be argued that by him pleading the whole Convention he made that Article part of the case.

Furthermore, what the appellant must note is that the fact that the accident was caused by a third party was not a matter that required proof having regard to his own pleadings. One of the functions of pleadings is to limit the issues and narrow the proofs. If facts alleged in a statement of claim are not denied by the defence or if no defence is filed, they are not in issue, and no evidence need be offered to prove their existence, save the question of damages. See **Order 11 Rule 13 of C.I.47**. See also **Travelers Ins. Co. v. Byers, 123 Cal. App. 473, 482 [11 P.2d 444].** So though Article 21(1) provides that "if the carrier proves", that would be required only in cases

where, having regard to the pleadings, proof is necessary. To construe the provision literally to mean that even in cases where the exonerating grounds in Article 21(2)(a) & (b) are admitted by the passenger the carrier must still appear and prove their existence would result in a legal absurdity and a court of law ought to avoid a construction of a statute or deed in a manner so as to result in an absurdity. In this case the evidence of the party who caused the accident was before the court and it had a duty to consider all the evidence before coming to judgment in the case. See **Abebresseh v Kaah [1976] 2 GLR 46.**We accordingly dismiss this objection of the appellant.

The appellant next argued that even Article 21(2)(a) cannot avail the respondent because, according to him, when he sustained the injury the respondent ought to have made him to disembark at the Kotoka International Airport and offered him immediate medical treatment but it did not. Furthermore, he was not offered adequate first aid during the flight and they failed to get him prompt medical treatment on arrival in Malabo. These, he contends, are omissions on the part of respondent. However, the responsibility of the carrier towards the passenger by the provisions of the Montreal Convention is from embarkation to disembarkation so it is the alleged inadequate first aid during the flight that should concern us in this case. It is common knowledge that airlines are not required to provide medical officers on board flights and the first aid offered to the appellant in this case cannot in all truth be described as negligent or a wrongful act or an omission on the part of the respondent as provided in Article 21(2)(a). As for the decision to disembark from the aircraft at Kotoka International Airport, that was for the appellant to take since the staff of the respondent were not qualified medical officers to take such a decision.

Besides, the appellant in his statement claim, or even in his evidence at the High Court, did not allege that the first aid in the form of the gentian violet he was given on the flight caused worsening of the injury from the falling luggage. In fact, from his evidence, when he arrived in Malabo the bleeding stopped the following day and on the third day he proceeded to a town called Bata and attended a meeting with the President of Equatorial Guinea and it was after that meeting that he got to see a doctor

on the fourth day of the accident. We have read the report of the ophthalmologist from Malabo, who was not called to testify anyway, and no where is it suggested that the eye got infected due to the first aid that was administered. The later medical report by Dr Stephen K. Akafo of Barnor Hospital, Accra did not help matters by way of the cause of the eye losing sight apart from the injury caused by the falling luggage. If it had been pleaded that the first aid exacerbated the injury or such evidence had been adduced, it would probably have been possible to argue that the damage to the extent of total blindness in the eye was not "solely" caused by the falling luggage, as provided for at Article 21(2)(b), but was aggravated by the first aid. But the part of the pleadings and the evidence that talked about the 2nd plaintiff managing the blood flow from the wound without gloves was concerned with the possibility of the appellant infecting the 2nd plaintiff with HIV, Hepatitis and other diseases and nothing was mentioned about the possibility of the appellant's wounded eye getting infected from the handkerchief of the 2nd plaintiff. There was no pleading or evidence that connected the damage suffered by the appellant to the first aid provided by the respondent.

It must be remembered that the fact that a defendant does not appear to contest a case does not mean that the plaintiff would be granted all that he asks for by the court. The rule in civil cases is that he who alleges must prove on the balance of probabilities and the burden is not lightened by the absence of the defendant at the trial. The absence of the defendant will aid the plaintiff only where he introduces sufficient evidence to establish a prima facie case of entitlement to his claim.

Consequently, in our opinion, the Court of Appeal did not err when they applied Article 21(2)(a)&(b) to limit the damages payable, except that they ought to have awarded the appellant 113,100 SDR since at the time of the accident that was the cap.

The final objection taken against the judgment of the Court of Appeal by the appellant is their holding that Article 29 of the Convention preempts any cause of action he had in tort for which he could claim damages in excess of the limit in the Convention. Article 29 has a predecessor in the Warsaw Convention at Article 24(1) thereof. It was as follows;

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

This provision was interpreted by the United States Supreme Court in the case of **El Al Israel Airlines Ltd v Tsui Yuan Tseng, 525 U.S. 155 (1999)**. In that case, Tseng was subjected to a highly intrusive security check lasting about 25 minutes before boarding the defendant's flight from New York to Tel Aviv, Israel. On her return to the US she sued for damages for psychosomatic and emotional trauma suffered from the search. Since the Warsaw Convention covered liability for only "bodily injury" she could not maintain an action under the Convention so she based her claim on New York State common law. In the Supreme Court, the issue was whether Article 24(1) of the Warsaw Convention preempted all claims based on national law and conferred a rule of exclusivity on the Convention. The opinion of the court was rendered by Justice Ginsburg (with Stevens J dissenting). She reviewed earlier decisions on the matter, the drafting history of the provision and comparative decisions from other jurisdictions including the House of Lords and concluded as follows;

"Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect. In Sidhu,([1997] 1 AllER 193) the British House of Lords considered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an "accident" under Article 17. See 1 All E. R., at 201, 207. Reviewing the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed to "ensure that, in all questions relating to the carrier's liability, it is the provisions of the [C]onvention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action." Ibid. Courts of other nations bound by the Convention have also recognized the treaty's encompassing preemptive effect.....The text, drafting history, and underlying purpose of the Convention, in sum,

counsel us to adhere to a view of the treaty's exclusivity shared by our treaty partners. For the reasons stated, we hold that the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention. Accordingly, we reverse the judgment of the Second Circuit."

The above case was applied in the case of **Paradis v Ghana Airways Ltd; 348 F. Supp. 2d 106, 111 (2004).** In that case the plaintiff and his colleague law students travelled by Ghana Airways from New York to Freetown, Sierra Leone via Accra in May, 2004. On the day of their return flight to New York, they waited at Freetown airport to board the connecting flight to Accra but were informed about one hour after the departure time that the flight had been cancelled. They enquired as to when a flight would next be available but they got no satisfactory answer from Ghana Airways. They therefore bought tickets from other airlines and managed to return to New York to be on time for other commitments. As their claim for compensation could not succeed on the basis of the provisions of either the Warsaw Convention or the Montreal Convention, which had then just come into force, the plaintiff brought the claim under New York State law of contract. Ghana Airways applied for the action to be dismissed on the ground that the Conventions preempted any claims relating to air carriage based on national law. The objection was upheld and the case dismissed. The court based on the **Tseng Case** (supra) and held that under either the Warsaw Convention or the Montreal Convention, in claims for damage arising in the course air travel all other causes of action are excluded except they can be based on the provisions of the Conventions.

In fact, Article 29 of the Montreal Convention amplified Article 24(1) of the Warsaw Convention to cover all other causes of action and makes it plain that all other forms of relief are excluded. It is as follows;

Article 29 - Basis of claims

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.

The appellant has not provided any decided cases or cogent arguments to convince us to rule contrary to the well established interpretation of the above referred to provisions of the Conventions. In our considered opinion, the Montreal Convention is the exclusive mechanism for claims for personal injury suffered in the course of air carriage so if a claim cannot be founded on the provisions of the Convention, then it cannot be founded at all. The Convention preempts all other causes of action based on national laws, and the common law for that matter, so we dismiss the objection of the appellant based on Article 29 too.

The truth of the matter is that the Convention affects the rights of passengers to claim for damage suffered in the course of air travel in significant ways so before a passenger makes a claim in that regard the provisions of the Convention and the international jurisprudence on them have to be studied very well.

Though we have all the sympathy for the appellant in this case, as a court of law our decisions are based on the facts before us and the relevant law which we have sworn to uphold. The law and the manner cases are presented by parties occasionally lead us to conclusions that do not conform to the wishes of our hearts but there is very little that we can do. On this occasion, on the facts presented by the appellant himself, we are led by the law to dismiss his appeal. Subject to ordering that the appellant shall be paid 113,100 SDRs as damages, the appeal is dismissed.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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