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Curley, Sean

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Hard to beat

Hard cases make good law in the Privy Council, says Sean Curley

The old saying that hard cases make bad law is one is not always true is a recent case in the Privy Council demonstrates in a laudable effort to do justice to a litigant in person the Privy Council (Lords Mance and Neuberger and Sir Jonathan Parker) appear to have extended the application of *res ipsa loquitur*. This has been done without any detailed analysis or application of the facts of the case to the law in question which in the long run may undo their effort. The case is *George v Eagle Air Services Limited* [2009] UKPC 21, [2009] All ER (D) 33 (Aug) on appeal from The Court of Appeal of The Eastern Caribbean (St Lucia).

Mrs George was claiming as Administratrix of the estate of her late partner Hughes Williams. Mr Williams was a mechanic working for the respondents and was a passenger in one of the respondent's aircraft that crashed killing both him and the pilot. The accident occurred on 12 July 1990 and the crash was investigated by the relevant authority. It is the report of this investigation and the mishandling of it as evidence that resulted in the case reaching the Privy Council.

In dispute

The report appears to have been the applicant's document and it is indisputable that it was disclosed and served on the respondents. For reasons that are not clear Mrs George's legal team did not call the maker of the report nor did they ensure that the report was in some other way admitted as evidence. The result was that the trial judge, Mrs Justice Auvergne, when she gave judgment dismissed the case for lack of evidence and summarised what was left of the applicant's case as follows: "Learned counsel submitted that on the admission of the managing director of the defendant's company, that pilot Clavier was in control of the plane and was carrying out the work he was employed to do; and that the accident

occurred in the course of the pilot's employment, therefore, the defendant is liable for injury sustained by the deceased and consequently has the responsibility to pay damages to the deceased's estate and dependants." It will immediately be noted that this is not the same as raising *res ipsa* as a substantive point and indeed at first instance it did not form part of the case.

Success

The Court of Appeal of the Eastern Caribbean dismissed the appeal and Mrs George appealed to the Privy Council. The appeal succeeded on the basis of *res ipsa*. This had been raised as a substantive point before the Court of

effect of the maxim is in some dispute with some authorities requiring only that an alternative explanation be raised as in *Colvilles v Devine* [1969] 1 WLR 475, [1969] 2 All ER 53 requiring the defendant to prove they were not negligent as in *Henderson v Jenkins and Sons* [1970] AC 282, [1969] 3 All ER 756.

Radical extension

Unusually perhaps for what at first glance seems to be a radical extension of the application of the maxim there is little analysis of the application with the court relying on Shawcross and Beaumont's treatment of the maxim in relation to aviation cases in the leading text on the subject of air law which quotes an American case that of *Higginbotham v Mobil Oil Corp'n* [1977] 545 F 2d 422.

Unfortunately there was no systematic attempt to analyse the facts and apply them

“On the face of it there is no reason why this decision should not extend to rail crashes”

Appeal but as we have seen not at first instance, the Court of Appeal appears to have dismissed the issue without consideration or comment.

In his judgment, Lord Mance deals with the question of the report and suggests several ways in which the report could have been admitted but concludes that none of these were adopted. This then leaves the only issue outstanding being that of *res ipsa*.

At this stage it is worth reminding ourselves what the requirements are to succeed on this basis. The three separate elements arise from the line of cases following *Scott v London and St Katherine's Dock Co* [1865] 3 H & C 596 and are:

- The thing causing the damage was under the exclusive control of the defendants.
- The accident must be of the sort that does not happen in the absence of negligence.
- There must be no explanation for the accident.

This seems to be clear and may well have some application to this case. The

and while that may well have resulted in the same outcome it may have given the decision more robustness particularly in view of the fact that this is a persuasive rather than a binding precedent.

The board had a hard task as the defence tactic does seem to have been to sit back and make Mrs George prove negligence while attempting to frustrate this at every turn but the board seized on *res ipsa* rather than leaving Mrs George without a remedy.

First hurdle

If we attempt to analyse the few facts that seem to be known, the first part of the test is relatively easy to overcome in that it is clear that the aircraft was under the respondents control, there was an attempt by the respondents to argue the point on the basis that Mr Williams was on a gratuitous joy ride which had not been sanctioned by them.

There was also an interesting attempt to deny any vicarious liability on the basis that the pilot was not authorised to "mishandle or carry out any activities which was [sic] not consistent with normal and safe landing

procedure” and that “in the event such mishandling occurred, it was outside the scope of the pilots employment.”

As might be expected neither of these arguments found much favour with their lordships. Short of a thief stealing and making off with an aircraft it is hard to see when an aircraft in the air would not be under the control of the airline operating it and in respect of the second argument this would, if accepted, have overturned most of the law on vicarious liability.

It is the second point that causes some difficulty that is to say that without negligence the accident would not have happened. This is not necessarily the case as many complex causes can come together to cause an aircraft to crash and not by any means are these always due to negligence.

There have been a couple of high profile air crashes recently and in at least one of those cases it seems that at present that airline sent a perfectly serviceable aircraft manned by a competent crew into the air and it fell out of the sky into the South Atlantic. This is where the decision is most open to challenge in the future as a defendant may well be able to produce evidence of air crash analysis which at least raises a question over the issue.

There was of course no evidence on the point before the court and it appears that the court reached the conclusion with little persuasion.

The argument for the board is naturally that while there may be number of possible causes that could be to blame for the accident not all of which involve the respondent's negligence it is for the respondent to at least raise the prospect. None of this was done and as far as can be ascertained from the report little attempt was made by the respondents themselves to establish the cause of the crash. This was clearly a significant factor in the board's decision.

The board does not make it clear (and indeed in this case does not need to make clear) how far they would expect the respondents to go in their attempt to explain the crash but no attempt at any explanation is clearly unacceptable. The decision should be of assistance in cases where the tortfeasor holds all the cards in terms of investigating the incident and can simply sit back and invite the injured party to prove their claim or even establish that they have a claim at all. The decision is by no means watertight but it will be interesting to see what use it is put to by claimant's lawyers.

A far reaching decision?

The obvious practical implication of this for practitioners is that in every case involving an aircraft crash, the claimant would be best advised to raise *res ipsa* at the outset and leave all the running to the defendant. The interesting question is how far does this go, on the face of it there is no reason why this decision should not extend to rail crashes for example. 

Sean Curley, head of undergraduate academic courses, Law School, University of Huddersfield. E-mail: s.r.curley@hud.ac.uk