

THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG - PRETORIA

CASE 35719/99

CHARTER HI (PTY) LTD. AND OTHERS
PLAINTIFFS

V

23/10/2009

MINISTER OF TRANSPORT

DEFENDANT

(1) REPORTABLE: ~~YES~~ NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

23/10/09

DATE

SIGNATURE

CIVIL TRIAL
CORAM: SAPIORE AJ

JUDGMENT

Plaintiffs' claim arises from the destruction of an aircraft on 13th December 1996. A twin engine turbo prop Beechcraft King Air C90, in which the plaintiffs have joint financial interests, crashed, in the vicinity of Atlantis in the Western Cape. At the time the aircraft was being used for an instrument rating renewal test (the flight test) by Jonathan Grant (Grant) who was the pilot under test. One Grinstead was the official flight test examiner as contemplated in Regulation 3.3(5) (b) (ii) read with regulation 3.3(1) (c) (i) of the Air Navigation Regulations 1970. Aboard the aircraft when the disaster took place

was a third person, who has no part in these proceedings. All three were killed. The aircraft was a total wreck.

The Plaintiffs are claiming damages from the Defendant, representing the financial loss suffered by them caused by the total loss of the aircraft. The basis of the claim is alleged negligence on the part of Grinstead, for which it is contended the Defendant is vicariously liable. The Plaintiffs in their particulars of claim had also formulated their claim based on direct negligence on the part of the defendant. Defendant's liability so arising was specifically and expressly disavowed in argument.

The parties agreed that, only the question of liability on the part of the Defendant would be in issue for the present, and that the amount of damages if any to be awarded would be resolved and determined separately.

The issues before the court were therefor,

- a) Was Grinstead negligent? and
- b) Was the defendant vicariously liable for damage caused by his negligence?

The defendant has suggested that logically the second question should be answered first, as if the answer is negative the first falls away, and does not require an answer. I have decided to answer both, as there may be an appeal against my decision on question b).

Was Grinstead negligent?

After an amendment to Plaintiff's particulars of claim as originally framed was allowed, Plaintiffs' allegations of negligence on the part of Grimstead read as follows:-

"8.1 He failed to familiarise himself with the "Pilot's Operating hand book" (POH) and/or the "Aircraft Flight Manual" (AFM) which documents detail, inter alia:

8.1.1 the performance capabilities and limitations of the aircraft;
and

8.1.2 the aircraft's flight safety information concerning asymmetric flight manoeuvres, minimum control speeds when carrying out asymmetric flight or failed engine procedures and stall recovery procedures.

8.2 He failed to conduct the test flight in accordance with normal principles of airmanship;

8.3 He failed to conduct the test flight at a safe altitude in that he permitted the portion of the test flight involving asymmetric flight to be carried out at a height of approximately two thousand five hundred feet above ground level ("AGL") rather than a minimum of five thousand feet AGL;

8.4 He failed to ensure that the manoeuvres requested during the test flight would comply with the flight manual for the aircraft in that he failed to ensure that the pilot maintained a sufficient high speed so as to avoid the aircraft entering a spin, alternatively, failed to ensure that the pilot controlled the aircraft appropriately during the asymmetric portion of the test flight so as to avoid the aircraft entering a spin;

8.5 He failed to have any, alternatively sufficient, regard to the performance limitation of the aircraft so as to avoid the aircraft entering a spin;

- 8.6 He failed to have sufficient regard to the minimum control speed of the aircraft and the centre of gravity of the aircraft so as to avoid the aircraft entering a spin when instructing Grant to carry out manoeuvres during the test flight;
- 8.7 He failed to take over control of the aircraft timeously, or at all, following a failed asymmetric manoeuvre by Grant.”

Notwithstanding this ample description of the alleged negligence on the part of Grinstead, the plaintiff, in argument, relied only on two aspects which were stated in Plaintiffs’ counsel’s helpful heads of argument as follows:

- “10 Grinstead was negligent in that he:
 - 10.1 Initiated the simulated engine failure at approximately 2500 feet above ground level (“AGL”), an altitude that was manifestly unsafe and prohibited by the Pilots Operating Handbook (“POH”); and
 - 10.2 Failed to timeously intervene during the asymmetric phase of the flight so as to prevent the aircraft from entering a spin.”

Plaintiffs’ counsel was constrained so to limit the grounds of negligence relied on in argument, as there was no evidence to support the wider grounds described in the Particulars of Claim.

The argument for the plaintiff was that from all the proved or common cause facts the inference to be drawn was that Grinstead was negligent. The defendant has maintained throughout that Grinstead was not negligent and that no wrongful act or omission by him was causally connected to the loss of the aircraft.

Plaintiff's counsel in advancing the argument made reference to the maxim *res ipse loquitur*. This maxim as Appears from the authorities to which I was referred, is little more than shorthand for a truism. In the framework of the present case, from the fact that an aircraft in which no mechanical defect, malfunction, or non function, could be ascertained, crashed, an inference of pilot error could be inferred. The very fact of the accident in these circumstances speaks of pilot error.

Grinstead, however, was not the pilot. It is not alleged, either in the particulars of claim or in plaintiff's formulation of the grounds of negligence in the heads of argument, that Grinstead had the opportunity to avoid the accident. When negligence by omission is alleged to have caused damage, it is necessary to allege and prove that the circumstances occasioning the loss, cast a duty on someone to act in a particular manner which would have prevented the occurrence of the event and that there had been an opportunity so to do. Without knowing what transpired in the cockpit at the critical time any conclusion to which one may come in the absence of evidence is merely speculation. There was evidence that a pilot's reaction to the onset of asymmetric flight might be inappropriate. Inappropriate action if persisted in could acerbate the yaw and cause a spin to develop.

If, as he should have, Grinstead perceived that the pilot under test was acting erroneously, he could have been expected to intervene either by telling the pilot what to do or by assuming control of the

aircraft by applying the dual controls with which the aircraft was fitted. Grinstead was one of the most experienced top examiners, designated as such. He would it must be assumed have taken whatever steps available to him to prevent the disaster if he could have done so. Self preservation would have been a powerful incentive to avoid the disastrous consequences. But the pilot may have through disorientation panic or otherwise, "frozen" and "fought" with Grinstead for control of the aircraft. The pilot in panic, confusion and stress may have aggravated the consequences of his initial error. This of course is all speculation, but there is an inference, as strong as any other, that Grinstead may not have had the opportunity of preventing the disaster.

Both Plaintiff and Defendant presented expert testimony on the technical aspects of the disaster.

The Plaintiff called Lilith Seals Michael Kay Heyns Roy Charles Downes all of whom were experienced aviators who's opinions credible. The Defendant called Selwyn Levin who likewise is an aviator with a lifetime of experience, well qualified to testify on the issues which arise in this case.

The experts described with little significant difference between them the nature of the test which, it was common cause; the pilot was probably undergoing at the time. The pilot was required to demonstrate his continued ability while "under the hood" (i.e. flying by instrument only, without being able to refer to conditions outside the

craft) to recover from a yaw brought about through the failure of one of the aircraft's two engines. Yaw, the experts explained, was a circular motion of the aircraft about an axis running through its centre of gravity. Such circular motion is caused by the forward thrust of the engine which continued to function, and zero thrust and possibly drag from the engine which failed. For the purposes of the test, the failure of one engine was simulated by the testing officer, who would retard one of the throttle levers to decrease the thrust produced by an engine to zero. The conditions of imbalance brought about by the failure of one engine are referred to as asymmetrical flight. The pilot under test was expected timeously to restore straight and level flight. In this the pilot must have failed. But what happened thereafter is not known and is a matter for speculation.

Captain Downes called by the Plaintiff, testified through a television connection from where he was in the U K at the time, of the trial. At the time of the fatal flight which is the concern of this trial, he was an employee of the Civil Aviation Authority serving as chief accident investigator. In this capacity he undertook the investigation of the accident giving rise to Plaintiffs' claim. He made a report of his examination of all available relevant data pertaining to the flight and its disastrous end. He confirmed the correctness of the report; He also confirmed that the aircraft was travelling at a speed considerably above stalling speed immediately before it went into the fatal spin. Under cross examination he summarised his own conclusions, and those of his colleagues. He was referred to the report he had made and

on which he had been led. Turning to page 442 of the bundle before Court, his opinion there stated, was that the actual cause of the spin was a matter of pure speculation. He was when he testified still of the same opinion. There is no basis for the court to come to a different conclusion.

The other ground of negligence imputed to Grinstead is that he initiated the simulated when it was unsafe to do so. The thrust of the one engine was reduced to simulate failure at 2500 feet above ground level. The experts were unanimous in their opinion that there was nothing inherently dangerous in an examiner requiring the pilot under test being required to handle the failure of an engine while the aircraft was on cruise, approach, or landing.

The plaintiff argues that that because in the Pilot's Operating Handbook contains a warning under a rubric, *"Stalls, spins, slow flight, air minimum control speed (VMCA) and intentional one engine inoperative speed for multi-engine aeroplanes"*, that "this entire procedure should be used at a safe altitude of at least 5000ft above the ground in clear air only." it is inappropriate and negligent in itself to initiate asymmetric flight below 5000 feet. For defendants it was argued that this is a misreading of the words quoted, and has no application where the test is conducted at speeds well over Vmca or Vsse. The Defendants' reading is the correct meaning to be attached to the passage in question.

Liability from such negligence, if such it was does not in any event arise, as the plaintiffs have not been able to show that such negligence is causally connected to the loss of the aircraft.

I therefore conclude that the plaintiff has not demonstrated that Grinstead was negligent in either of the respects alleged.

I turn now to the question of vicarious liability.

The most recent decision on this topic in the Court of Appeal is to be found in *Charter Props 16 (Pty) Ltd and Another vs. Silberman 2009(1) SA 265 (SCA)*. In that case the court warned against the danger of inappropriately extending the concept of vicarious liability for acts of negligence.

In the present case the defendant and Grinstead do not stand in a particular relationship to one another where vicarious liability can be imputed to the defendant for acts of another. The court was referred to a thesis by Hartmut Wicke entitled "Vicarious Liability in Modern South African Law", in which the point is made that in some cases it is difficult to provide a completely satisfactory explanation for the visiting of vicarious liability on the employer or principal. But instances have become firmly embedded in our law.

Grinstead was not a servant of the defendant, its agent nor yet an independent contractor appointed by it. Within the framework of the legislation the official examiner of candidates for ratings is a person nominated whose judgment the department will accept as to the proficiency of pilots or intending pilots in particular aspects of aviation. Such official examiner in terms of Section 22(1) (a) bis of the Act is not a servant nor yet an independent contractor. So this was recognised in *The Minister of Transport and Others vs The South African Airways Pilots Association and Another* delivered in what was then the Appellate Division on 21st September 1995 under case number 23/94. Counsel for the Defendant who referred to the case was not able to give a report citation as the judgment has apparently not been reported.

When this case was first started the plaintiff relied on a master and servant relationship between the defendant and Grinstead to give rise to the vicarious responsibility of the defendant. Because this was factually incorrect the pleadings were amended but no relationship has been alleged or proved which would give rise to such vicarious liability on the part of the defendant for acts of an official examiner.

On this ground too the plaintiff's action must fail.

The question of liability must therefore be answered adversely to the plaintiff and the action is dismissed with costs, including the costs of two counsel.

A handwritten signature in cursive script, appearing to read "Dupin", is written in black ink.