IN THE REPUBLIC OF TRINIDAD AND TOBAGO:

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 27 of 2003
HIGH COURT ACTION NO. 2726 of 1998

BETWEEN

TAJO BEHARRY

Appellant

AND

BWIA INTERNATIONAL AIRWAYS LIMITED

Respondent

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Panel **W. Kangaloo J.A.**
S. John J. A.
A. Mendonca J.A.

Appearances: Mr. S. Maharaj, S.C. & Mr. D. Maharaj for the Appellant
Mr. R. Nanga for the Respondent

Date of delivery: **November 7th 2006.**

I agree with the judgment of Mendonca J.A. and have nothing to add.

S. John
Justice of Appeal

JUDGMENT

Delivered by A. Mendonca, J.A.

(1) This is an appeal from the judgment of the trial Judge dismissing the Appellant's claim. The gist of the Appellant's claim is that he suffered injury to his eye when hydraulic fluid from the Respondent's aircraft entered his eye when he was under the aircraft.

(2) The Appellant's claim was made in negligence and/or breach of duty and/or breach of his contract of employment. At the trial of the action the Appellant and three (3) witnesses called by him gave evidence. The Respondent opted not to call any evidence.

(3) The facts in this matter are really not complicated. On March 7, 1994 the Appellant was the flight engineer or third pilot on the Respondent's Tri Star L1011 aircraft on flight 981 from Frankfurt, Germany to St. Lucia. On the way to St. Lucia the Appellant discovered what he described as a "snag". He observed that the hydraulic fluid reservoir gauge showed depletion in the hydraulic fluid in the "C" hydraulic system of the aircraft. The C hydraulic system is one of four hydraulic systems in the aircraft and is considered the most important.

(4) It was policy that in the event of such an occurrence, if the aircraft is in range of its destination, that ground engineers at its destination should be informed of the problem. The Appellant in accordance with this policy notified the ground engineers in St. Lucia of the snag and recorded it in the aircraft's technical log.

(5) When a mechanical default is recorded in the aircraft's technical log that entry has to be cleared by ground engineers before the aircraft becomes airborne again.

(6) The aircraft landed safely in St. Lucia and parked at its ramp. According to the Appellant the normal procedure was for the ground engineers to board the aircraft to be briefed. This they did not do and so the Appellant accompanied by co-pilot Mr. Emmy Nathaniel came off the aircraft.

(7) The Appellant in examination in chief said that he came off the aircraft to look for the engineers in order to brief them about the snag. The Appellant also testified that he was concerned as to where the leak was because of certain notices to pilots that the Respondent had sent out. According to the Appellant the notices warned that hydraulic fluid leaking on a "hot component" such as a pump could cause a fire. His major concern, he said, was to find out where the leak was and if there were any "burns" or damage to the aircraft and to see the engineers. In cross-examination, however, the Appellant agreed with Counsel that while in transit he had briefed the engineers and that there was nothing further for him to tell them. He agreed with a suggestion put to him by Counsel that he had gone under the aircraft out of curiosity.

(8) The Judge, however, accepted that the Appellant was not a busy body. The Judge stated:

> "I do not interpret that "curiosity" to mean that the [Appellant] was being a busybody. The [Appellant] made it plain in his evidence that he was concerned about a fire hazard as a result of a warning previously issued by the [Respondent] about hydraulic fluid leaking onto hot surfaces."

(9) When the Appellant came off the aircraft he went under it in the vicinity of the hydraulic bay. There are two access panels or doors to the hydraulic bay

and the Appellant observed both doors opened and a ladder was under one of them. The Appellant went under one of the doors to see what he could see. As soon as he got there he heard a “hum” and a “jet stream” of hydraulic fluid went straight into his right eye. The Appellant then re-entered the aircraft and washed his eye in accordance with the Respondent’s standard procedure for dealing with such an occurrence.

(10) After he washed his eye the Appellant stated that it was burning a lot and he had blurred vision. The next day however the burning subsided but the eye was still a little sore. The Appellant as a consequence saw a doctor and he was advised that his eye would be okay. However, the condition of the eye did not improve but on the contrary it deteriorated. It turned out that as a consequence of the incident the Appellant suffered a detachment of the retina of the right eye leading to permanent diminished vision in that eye. Dr. Mahabir, an ophthalmologist, testified that the loss of vision in the Appellant’s eye is to the extent of 6/18. The Appellant has lost binocular function and has difficulty in judging height, length, distance and speed. As a result of his injury the Appellant has lost his pilot’s licence.

(11) The Judge held that the Respondent was not liable, gave judgment for the Respondent and dismissed the Appellant’s claim. He stated that there was no evidence of negligence in the maintenance of the hydraulic system. He found that at the time of the incident that the C hydraulic system was pressurized, but that there was no evidence to indicate that the system was pressurised when it ought not to have been pressurised. He also held that the Appellant did not use ordinary reasonable care for his own safety. He reasoned that the Appellant was aware of the danger of hydraulic fluid coming into contact with his body. The Appellant was aware that the problem with the hydraulic system was being attended to when he went under the aircraft, yet without regard for his own safety he proceeded to the hydraulic bay area and looked up into it. Further the Appellant had the opportunity of using smoke goggles that were in the cockpit at

the material time but did not do so. Also the Appellant, by coming off the aircraft when he did, deprived himself of the benefit of the system that the Respondent had in place to warn the flight crew of the maintenance work that was being undertaken.

(12) The Appellant now appeals to this Court. He contends that the Judge was wrong and that the judgment ought to be set aside and the Respondent held liable in negligence. The Respondent has also cross-appealed with respect to the finding of the Judge that at the time of the injury the C hydraulic system was pressurised. Given what I perceive to be the importance of that finding to this appeal, I shall first refer to the Respondent's cross-appeal.

(13) The Respondent contends that the Judge erred in coming to that finding. There is not sufficient evidence from which a reasonable conclusion could be drawn that at the material time the hydraulic system was pressurised. I however do not agree that the Judge fell into error in coming to that finding.

(14) It is clear on the evidence that the C hydraulic system of the aircraft is pressurised when the engines of the aircraft are on. Conversely, when the engines are off the system depressurises in a matter of seconds. It is not in dispute that at the material time the engines were off. But the system may be pressurised from an external point described as the ground pressure attachment point by electrical or mechanical means and a ground engineer has access to this. So the C hydraulic system could have been pressurised by the maintenance crew attending to the snag.

(15) According to the evidence of the Appellant, as he looked up into the hydraulic bay he heard a "hum" and a "jet stream" of the hydraulic fluid entered his eye. In other words the fluid did not simply fall into his eye but came at some speed and force suggesting that it was under pressure. The hum that the Appellant heard is consistent with the start of an apparatus necessary to

pressurise the system. But as the Judge noted the Appellant's evidence did not stand by itself.

(16) There was first of all the evidence of Nikera Seepersad. He described himself as an aircraft engineer and gave evidence to the effect that when one is checking for leaks or replenishing the fluid in the hydraulic reservoir the system must be pressurised. There was, however, a twofold attack on his evidence by the Respondent. First the Respondent sought to say that Mr. Seepersad was not competent to give such evidence. He simply lacked the necessary qualifications. There was, however, no real challenge at the trial to the quality of his qualifications to give the evidence he did. According to his evidence he has an F.A.A. certificate "which is what every engineer in the [United] States [of America] has". He worked as an aircraft mechanic for a number of years and did a course in fluid lines and fittings and troubleshooting where there are hydraulic leaks. He also said that he was familiar with the maintenance manual for the L1011 aircraft. I see nothing on the face of that evidence that suggests that he could not give the evidence he did of the C hydraulic system. In fact the evidence suggests the contrary. The second line of attack was that the Respondent did not do a leak check on the system. Counsel submitted that the Court should come to this conclusion because there is no entry in the technical log of the aircraft that a leak check was done. There is, however, no evidence, nor does the evidence point to the fact, that every analysis of the problem is recorded in the log. The absence of such an entry therefore does not mean that it was not done. The submission also flies in the face of the stipulated procedure in the maintenance manual for the aircraft. The manual is quite detailed as to procedure for a leak check and cautions that no leakage is allowed from a cracked housing. What I understand by that is that a leak from a cracked housing is clearly considered to be a safety hazard and the aircraft should not be put into service unless the Respondent is satisfied that there is not leakage from a cracked housing. The Respondent should at least satisfy itself of that. It is difficult in those circumstances to conclude in the absence of more probative evidence that the Respondent would

have risked the safety of the aircraft and put it back into service without performing a leak check. In any event even if a leak check was not performed it is clear on the evidence that the C hydraulic system was replenished and that in order to do so the hydraulic system should be pressurised so as to give "a true aspect of the fluid level".

(17) There was also the evidence of Dr. Mahabir. According to him the most likely cause of the injury to the Appellant was trauma to the eyeball. He stated that if hydraulic fluid enters the eye you might get an allergic reaction but not a detached retina. He stated that what makes the difference is the pressure at which the fluid hits the eye. The evidence was that the C hydraulic system is pressurised at 3,000 p.s.i. According to Dr. Mahabir retinal detachment is not surprising if fluid were to hit the eye at that pressure.

(18) This evidence is also consistent with the evidence of the Appellant of what he knew of the hydraulic fluid used in the aircraft. He stated that if the hydraulic fluid got into his eye he could expect severe pain but no permanent damage.

(19) In the face of this evidence, it is not surprising, and indeed it is quite proper, that the Judge should conclude:

> "There is sufficient evidence from which a reasonable conclusion can be drawn that at the time of the incident, the hydraulic "C" system in the aircraft was pressurised and that the hydraulic fluid therefore entered the eye of the [Appellant] under high pressure.

(20) In the circumstances I do not think that there is any merit in the cross-appeal.

(21) Counsel for the Appellant submitted simply that the Appellant was owed a duty of care by the Respondent. The duty was to ensure that when pressurising

the hydraulic system that the area was clear. The Respondent was in breach of this duty and the Appellant suffered damage as a consequence. Counsel for the Respondent on the other hand argued that there was no duty owed by the Respondent to the Appellant. Alternatively, he argued that if a duty was owed it was no more than to warn of risks that were not known to the Appellant and the Appellant in this case knew of the dangers of hydraulic fluid. The occasion to exercise the duty of care therefore did not arise. The Respondent further submitted that the Appellant failed to take care for his own safety in that he did not wear the smoke goggles that were provided by the Respondent.

(22) There are three (3) criteria for the imposition of a duty of care and these are foreseeability of damage, proximity of relationship and justice and reasonableness. In **Caparo Industries v Dickman** [1990] 2 W.L.R. 358 Lord Bridge of Harwich (at p. 365) put the position this way:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other."
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> Lord Bridge went on to observe:
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> "… the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the

circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."

Lord Oliver (at p. 379) was of a similar view when he said:

"Thus the postulate of a simple duty to avoid any harm that is, with hindsight, reasonably capable of being foreseen becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement by what has been called a "relationship of proximity" between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be "just and reasonable". But although the cases in which the courts have imposed or withheld liability are capable of an approximate categorisation, one looks in vain for some common denominator by which the existence of the essential relationship can be tested. Indeed it is difficult to resist the conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. "Proximity" is, no doubt, a convenient expression so long that it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists."

(23) In this case the question of whether a duty of care exists I think can be answered by the application of the following test which may be found in the speech of Lord Lloyd in **Page v Smith** [1995] 2 W.L.R. 644, 668-669.

> "The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury. If so, he comes under a duty of care to that plaintiff. If a working definition of "personal injury" is needed, it can be found in section 38 (1) of the Limitation Act 1980: 'Personal Injuries' includes any disease and any impairment of a person's physical or mental condition' ".

(24) The question therefore is whether the Respondent ought reasonably to have foreseen that his conduct would expose the Appellant to the risk of personal injury so as to come under a duty of care to him.

(25) It is not in dispute that pressurising the hydraulic systems of the aircraft carried with it a certain amount of risk. Counsel for the Appellant pointed to the operating manual for the aircraft that allowed for the pressurisation of the hydraulic systems by the flight crew but only after a three-chime signal that was to be given only after ground clearance was assured. Counsel for the Respondent also acknowledged that care had to be exercised when the C hydraulic system was pressurised and accepted that, particularly where the system could be leaking, there was a risk in pressurising the system as persons under the aircraft could be injured. He accepted that the Respondent owed a duty of care to the baggage handlers and other ground crew who the Respondent might reasonably expect to be in the area of the aircraft while it was on the ground. This however, submitted Counsel, did not include the Appellant. The Respondent could not reasonably foresee injury to the Appellant, as the Respondent did not require him to do what he did at the time. It was simply not his job to go under the aircraft at the material time and consequently the Respondent could not reasonably foresee that he would be near the hydraulic bay so as to be injured when the C hydraulic system was pressurised. In this case therefore the answer to the question whether the Respondent ought reasonably to have foreseen that its conduct would expose the Appellant to the

risk of personal injury comes down to the question whether the Respondent ought reasonably to have foreseen that the Appellant might be under the aircraft, in harm's way, when the C hydraulic system was pressurised.

(26) It is clear on the evidence that the Appellant was rostered to fly to St. Lucia. In St. Lucia the flight crew, of which the Appellant was one, was to be changed. The Appellant had to remain on the aircraft on its onward journey to Grenada and finally to Trinidad. While on the aircraft he would fly as a member of the supernumerary crew. As such he is not part of the crew flying the aircraft. Although any period he is a member of the supernumerary crew counts as part of his duty time, he is not in that capacity involved in flying duties.

(27) It is relevant to notice that the industrial agreement between the Respondent and the Trinidad and Tobago Airlines Pilots' Association provides that duty time in connection with flying duties is measured one (1) hour before the scheduled departure to a minimum of thirty (30) minutes after the last landing in the duty period. One can easily understand the need for such a provision. It can hardly be expected that if the existing crew is to be replaced with a new crew at any place where the aircraft may land that the new crew would be in control of the aircraft the second it lands. In those circumstances it would be entirely reasonable for the Respondent to foresee that a member of the crew that was about to be replaced by a new crew member might perform flying duties for a period after the aircraft has landed. It is not disputed that the flight engineer as part of his duties is required to perform an external inspection of the aircraft during which he must specifically check for leaks in the aircraft. Such an inspection would take the flight engineer under the aircraft and more particularly in the area of the hydraulic bay. It is common ground that the injury occurred within thirty (30) minutes of the aircraft landing in St. Lucia. In other words the injury occurred in the period when the flight engineer on the crew about to be replaced might still be expected to be involved in flying duties. In those circumstances, since he could reasonably be expected to be performing flying

duties, in my judgment, it cannot be said that it could not have been reasonably foreseeable that he might be under the aircraft in the vicinity of the hydraulic bay.

(28) In this case I do not think that it can be doubted that having gone under the aircraft, as the Judge found, out of concern that there may be a fire hazard that he went there in execution of his duties as a flight engineer.

(29) To argue that the Respondent is not liable because the Appellant was not required to be where he was at the time he was injured is, in the circumstances, not factually correct. It is also a technical argument and one that is not sound in law. It conjures up notions that an employer will not be liable to an employee if he is engaged in a frolic of his own. This concept has no relevance to the liability of the employer to his employee in negligence (**Allen v Aeroplane and Motor Aluminium Castings Limited** [1965] 3ALL E.R. 377). An employer may be liable even when the employee was injured when engaged in an activity for the employee's use and not directly connected with his work (see **Davison v. Handley Page Limited** [1945] 1ALL E.R. 235). Whether the Appellant is performing a duty or not does not exclude him from the class of persons to whom a duty of care is owed by the Respondent. The fact of the matter is that the Respondent should have had in its contemplation that flight engineers including those from a crew going off duty might go under the aircraft in execution of their duties. The Respondent ought therefore to have such persons in their contemplation and ought to have reasonably foreseen that its conduct could expose such persons to personal injury. It is not relevant in those circumstances that the Appellant may have had nothing further to tell the ground engineers when he came off the aircraft or (which is not the case) that he may have even gone under the aircraft out of simple curiosity.

(30) In my judgment therefore the answer to the question whether the Respondent ought reasonably to have foreseen that its conduct could expose the Appellant to the risk of personal injury so as to come under a duty of care to him,

must be answered in the affirmative. The Respondent was therefore under a duty of care to the Appellant not to expose him to the risk of personal injury.

(31) As I mentioned Counsel for the Respondent submitted that in the event that the Appellant is owed a duty of care by the Respondent the duty is only one to warn the Appellant of risks of which he did not know. The Respondent contends that the Appellant knew of the risk of coming into contact with hydraulic fluid. In this case therefore the occasion to exercise the duty of care did not arise.

(32) It is correct to say that on the evidence the Appellant knew that there would be some danger in the event that hydraulic fluid came into contact with the body. According to him if it entered his eye it could cause pain but no permanent damage. It can also be inferred that when he went under the aircraft he must have been aware that hydraulic fluid could fall on him in the circumstances where the C system might be leaking. That, however, is different from having hydraulic fluid shot at your person under pressure. The risk of serious injury arises in those circumstances and the risk arises not from simply falling hydraulic fluid but the pressurisation of the fluid. The scope of the duty owed by the Respondent to the Appellant should be looked at from that perspective and should be described in terms to remove that risk. It seems to me that the standard of care required of the Respondent would have been no less than to warn the Appellant that the C hydraulic system is about to be pressurised. On the evidence the only possible conclusion is that he was not warned. Counsel for the Respondent referred to the evidence of the Appellant that when he arrived under the aircraft he saw the access panels to the hydraulic bay opened and a ladder under one of them. This according to Counsel for the Respondent should have suggested to the Appellant that the maintenance crew was attending to the problem and should have provided the appropriate warning to the Appellant. I agree that this could have suggested to the Appellant that the snag was being attended to but it does not provide evidence of any warning to the Appellant that the system was about to be pressurised. This might be so if the Appellant ought to have known that in the

normal course of attending to the snag that the hydraulic system had to be pressurised. But there is no evidence that the Appellant ought to have known of this.

(33) The Judge also referred to the system that the Respondent had of placing a placard in the cockpit. The Judge stated that the purpose of the placard was to identify what work was to be done and what in the cockpit was not to be touched. He indicated that the Appellant, having come off the aircraft, did not know whether someone had in fact placed such a placard in the cockpit and the Appellant therefore denied himself the opportunity of knowing what maintenance work was being done. But, with due respect to the Judge, I think that he did not properly assess the evidence here. What the Appellant said of the placard is that it will indicate to the cockpit crew that work is being done and what they are not to touch. No mention was made in the evidence of the placard indicating what work the crew intended to execute. There is, in any event, no evidence that the placard was placed in this case. In fact a reasonable inference which maybe drawn in this case, from the evidence that the ground crew did not enter the plane on landing in St. Lucia and the ground crew had the responsibility of placing the placard in the cockpit, is that it was not placed.

(34) Counsel for the Respondent, however, submitted that even if the Appellant were owed a duty of care the Respondent is still not liable because the Appellant was wholly to blame for the injury that he suffered. As I mentioned the Judge concluded that the Appellant did not use reasonable care for his safety and that he knew the danger of hydraulic fluid coming into contact with him, but still went under the aircraft. He also had the opportunity of using smoke goggles. Counsel in essence sought to defend this conclusion. Counsel's submission really raises the question of contributory negligence where the damage recoverable maybe reduced to such extent having regard to the claimant's share in the responsibility for the damage (see section 28(1) of the **Supreme Court of Judicature Act** Chapter 4:01) The Court must here have regard to both causation and to the

relative blameworthiness of the parties (see **Brown v Thompson** [1968] 2 ALL E.R. 708). It is in this context that I propose to examine the factors which the Judge held, and which Counsel submits, amounted to the failure of the Respondent not to take care of his own safety.

(35) I have already mentioned that the real danger here was not the simple fact of hydraulic fluid coming into contact with the Appellant but the pressurisation of the C hydraulic system. Here the Appellant did not know that the system was about to be pressurised or would be pressurised. It therefore cannot be said that he knew or appreciated the risk involved. So far as the use of smoke goggles is concerned the Appellant did accept a suggestion put to him by Counsel in cross-examination that he could have used the smoke goggles to protect his eyes. The Respondent not surprisingly seized on this answer and has drawn attention to it in advancing its submission. But this answer by the Appellant was given, no doubt, with the benefit of hindsight. I do not doubt that the Appellant "could have" worn the goggles as no doubt he could have, in hindsight, taken a number of other protective measures. There is, however, no evidence that smoke goggles were provided by the Respondent for the use by flight engineers when leaving the aircraft to carry out inspections. The description "smoke goggles" carries a certain connotation and suggests that they are to be used in circumstances of a smoke filled cabin. The name of the goggles does not suggest that they are to be used in external inspections of the aircraft. It seems that flight engineers were required to check for leaks on a routine basis and to do so without eye wear. What evidence there is does not indicate that the goggles were used in external inspections of the aircraft. In those circumstances I do not think that any criticism can be directed at the Appellant for not wearing the goggles even where he acknowledges that he could have worn them. I would think that if having left the cockpit to see if there was a fire threat as a consequence of the leak it would not have been apparent to him that he should have protected his eyes from injury. This is particularly so in this case where the Appellant said that on approaching the hydraulic bay at the material time he saw no evidence of a leak. The position

would may very well have been different had the Appellant been told that the system was to be pressurised. It would have brought home to him that fluid might come shooting at him under a “jet stream” from the possible leak in the system and hence the need to protect his eyes. This was not done. In the circumstances I see no basis on which to hold the Appellant contributorily negligent.

(36) In the circumstances I would dismiss the cross-appeal, allow the appeal, set aside the judgment of the Judge and enter judgment for the Appellant. The Respondent shall pay to the Appellant the costs of the appeal and cross-appeal as well as the costs in the court below to be taxed. The costs of the appeal and cross-appeal are certified fit for senior counsel.

(37) The Judge unfortunately did not deal with the question of damages although the evidence was led before him. He therefore did not assess the evidence and make any relevant findings. This Court, with the intention of assessing damages (an approach to which the parties readily agreed), had invited submissions on the question of damages in the event that they became relevant. However, having looked at the evidence on the question I find myself unable to quantify the damages as there are material aspects of the evidence relating to pecuniary loss that are unclear. In the circumstances I have come to the position that the assessment of damages should be remitted to the Judge. It is now approximately 12 years since the incident that has left the Appellant with permanent partial loss of vision and eight years since the commencement of these proceedings. In those circumstances the assessment of damages should be dealt with speedily.

Dated this 7th day of November 2006

Allan Mendonca J.A.