

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2006/019

BETWEEN:

[1] HAVIS FRANCOIS  
[2] JOYCE SHARPLIS & EVANS LAKE  
[3] GLENNIS JOHN BAPTISTE  
[4] MURRAY GUYE  
[5] MARY ANTHONY  
[6] URSULA JOSEPH  
[7] JOSEPH JOHN  
[8] KENNY JOHN

Appellants/Claimants

and

[1] CARDINAL AIRLINES LIMITED  
[2] AIR ANGUILLA INCORPORATED  
[3] HARTFORD HOLDING COMPANY  
[4] HARTFORD FINANCIAL CORPORATION  
[5] OGDEN GROUND SERVICES (ST. MAARTEN)  
[6] OGDEN GROUND SERVICES INCORPORATED  
[7] OGDEN GROUND SERVICES INTERNATIONAL

Respondents/Defendants

Before:

The Hon. Sir Brian Alleyne, SC  
The Hon. Mde. Ola Mae Edwards  
The Hon. Mr. Errol Thomas

Chief Justice [Ag.]  
Justice of Appeal [Ag.]  
Justice of Appeal [Ag.]

Appearances:

Ms. Deborah Moore-Miggins with Mr. David Bruney for the Appellants/Claimants  
Mr. Gerald Burton with Ms. Lisa DeFreitas for the Respondents/Defendants

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2007: November 29;  
2008: September 22.

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*Civil Appeal – Contract Law – International Law - Limitation of Liability for death – whether the Warsaw Convention 1929 is part of the domestic law of Dominica – meaning of “product liability” under the Transnational Causes of Action (Product Liability) Act No. 16 of 1997 – applicability of*

*the Florida Wrongful Death Statute – The Dominica Modification of Enactments Order 1978 Statutory Instrument No. 1030 of 1978*

*Civil Procedure – Statements of Case – whether striking out was reasonable in the circumstances – rule 26.3 of the Civil Procedure Rules 2000*

In 1998, a Cessna aircraft crashed in Dominica causing the death of all ten passengers. The dependants of 5 of the deceased passengers filed claims against the respondents in the Circuit and District Courts in Florida, which claims were dismissed on the ground of lack of subject-matter jurisdiction under the **Warsaw Convention**. The appellants subsequently commenced proceedings in Dominica. The first respondent applied to strike out the appellants' statements of case on the grounds that there were no reasonable grounds for bringing the actions and the claims constituted an abuse of process. The first respondent also sought a declaration that the **Transnational Causes of Action (Product Liability) Act No. 16 of 1997** ("the **TCAPL Act**") and the Florida Wrongful Death Statute had no applicability to these claims. The Master struck out the claim but did not make the declaration sought, holding that the appellants' rights are those available under the **Warsaw Convention**, which was applicable to Dominica. The appellants appealed against the decision to strike out the statements of case and argued that the **Warsaw Convention** was not applicable. The respondents cross-appealed, challenging the Master's failure to declare that the **TCAPL Act** and the Florida Wrongful Death Statute were inapplicable.

**Held:** dismissing the appellants' appeal, allowing the respondents' cross-appeal and directing that the parties file submissions on costs:

- (1) Article 5, subparagraphs 1 and 2 of **The Dominica Modification of Enactments Order 1978 Statutory Instrument No. 1030 of 1978** ("the **1978 Order**") provides for pre-independence laws of the U.K. Parliament and Orders in Council made under such enactments which applied to Dominica before independence to continue in force and have the same operation in Dominica after independence. Such laws include the **Carriage by Air Act 1932, U.K** and the **Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953** which provided for the **Warsaw Convention 1929** to be given the force of law in Dominica. By virtue of the **1978 Order** and the **Carriage by Air Act 1932, U.K**, Dominica on attaining independence is bound to maintain in force the **Warsaw Convention 1929** under the domestic laws of Dominica until there has been a statutory change to this law. Absent such a statutory change, the **Warsaw Convention 1929** is part of the law of Dominica.
- (2) The first principle of statutory interpretation requires that the court give the words of a statute their clear and ordinary meaning and avoid absurd results if the language allows it. A literal reading of the **TCAPL Act** would not permit an overloaded Cessna aircraft being flown with passengers who die when it crashes to fall within the definition of the word "product". Accordingly, the appellants do not have a cause of action under the **TCAPL Act**.
- (3) Since the relevance of the Florida Wrongful Death Statute depended on the appellants' misplaced perception and interpretation of the **TCAPL Act**, the Florida Statutes would be

irrelevant to any subsequent claims brought under the **Warsaw Convention 1929** in Dominica.

- (4) The statements of case which were before the Master failed to disclose a claim which was sustainable as a matter of law. Further, there were no draft amendments to the pleadings which would have permitted the Master to consider an alternative to striking out if there was any reasonable prospect of establishing the amended case. As such, there were good reasons for striking out the statements of case.

## JUDGMENT

- [1] **EDWARDS J.A. [AG.]:** This was an appeal and cross-appeal from a decision of the Master, which granted the application of the first respondent Cardinal Airlines Limited ("**Cardinal**") to strike out the appellants' statements of case in their consolidated claims instead of permitting an amendment to the appellants' pleadings. This application sought: (1) an order that the claimants' statements of case be struck out on the basis that they do not disclose any reasonable grounds for bringing the action and that the statements of case are an abuse of process; (2) a declaration that the **Transnational Causes of Action (Product Liability) Act No. 16 of 1997** ("the **TCAPL Act**") and the **Florida Wrong Death Statute** have no applicability to these claims; (3) in the alternative, that Cardinal be granted 14 days following the hearing of the application in which to amend its defence.
- [2] The learned Master did not make the declaration sought in (2). He held that the claimants' rights are those available only under the **Warsaw Convention** which applied to Dominica prior to independence, and had continued in force after Dominica's independence. He concluded that it was not necessary to make a determination on the applicability of the **TCAPL Act** in light of his decision. This has sparked a cross-appeal from all of the respondents.

## Issues

- [3] The main issues arising from the appeal and cross-appeal are: (1) whether the **Warsaw Convention** is part of the domestic law of Dominica; (2) whether the circumstances surrounding the death of the deceased passengers and prior legal proceedings in Florida

can support a cause of action under the **TCAPL Act** and the Florida Wrongful Death Statute; (3) whether the learned Master erred in not allowing the appellants to amend their statements of case.

### **Background Facts**

- [4] The claims arise out of the tragic death of all of the 10 passengers in the crash of a Cessna aircraft near the Melville Hall Airport, whilst traveling from St Maarten Netherland Antilles to Dominica, on the 23<sup>rd</sup> August, 1998. The dependants of five of the deceased passengers filed these claims against the respondents on the following basis. Cardinal, a private company registered in Dominica sold the deceased passengers their round-trip airline tickets in Dominica for a flight from Dominica to St Maarten, and from there back to Dominica. Cardinal at the material time carried on in Dominica the business of air transport, and had an arrangement with Air Anguilla Incorporated (“Air Anguilla”) to carry out this flight operation. There is apparently no dispute that, at the material time, Air Anguilla was the operator of the crashed Cessna aircraft owned by Hartford Holding Company (“Hartford Holding”), which was purchased from the funds of Hartford Financial Corporation. Air Anguilla which is registered in St. Thomas, United States Virgin Islands had leased this aircraft from Hartford Holding the registered owner of Wilmington, Delaware, United States of America. Cardinal had secured the services of Ogden Aviation Services in St Maarten for the ground handling aspects of its airline transportation business, including the checking-in of passengers and the loading of the aircraft. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents (“the Ogdens”) were obviously affiliated with Ogden Aviation Services at the material time.

### **Liability According to the Airline Ticket Notices**

- [5] The notice on the back of the Cardinal Airline tickets informed each passenger that if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the **Warsaw Convention** may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in

respect of loss of or damage to baggage. This notice referred the passenger to another notice headed "Advice to International Passengers on Limitation of Liability" which states:

"Passengers on a journey involving an ultimate destination or a stop in a country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US \$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts, or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US \$10,000 or US \$20,000. The names of carriers parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention of such special contracts of carriage. For further information please contact your airline or insurance company representative. NOTE: The limit of liability of US \$75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of US \$58,000 exclusive of legal fees and costs."

### Procedural History

- [6] The claimants had previously, on the 22<sup>nd</sup> August 2000, filed an action in the Circuit Court for Miami-Dade County, a Florida state court, against the defendants and Mr. Erwin Ferreira who was a principal of Cardinal and its chief pilot. These proceedings were removed into the United States District Court which is a federal court, on the application of the Hartford defendants who asserted that the Federal Court had jurisdiction because the **Warsaw Convention** applied to the accident flight. On the 25<sup>th</sup> September 2001 a district judge ruled that the Warsaw Convention was inapplicable to the plaintiff's claim because the Commonwealth of Dominica was not a High Contracting Party to the Convention. The judge remanded the case back to the Circuit Court for Miami-Dade County.

- [7] It appears that such a remand order was not subject to appellate review, had no binding effect in the jurisprudence of the United States of America, and did not preclude Cardinal from contending in its subsequent Circuit Court motion in April 2002 that the action should be dismissed because Dominica was a High Contracting Party to the **Warsaw Convention** which applied to the accident flight. This motion asserted that the action was improperly commenced in Florida which lacked subject-matter jurisdiction, because Article 28 of the Convention specifically required that any action for damages must be brought, at the option of the plaintiff in the territory of one of the High Contracting Parties, either: (a) before the Court where the carrier is ordinarily resident or has its principal place of business; or (b) before the Court where the carrier has a place of business through which the contract for carriage was issued; or (c) before the Court at the place of destination. The Circuit Court in a judgment dated August 29<sup>th</sup> 2002 granted the motion to dismiss upon lack of subject-matter jurisdiction, but reserved jurisdiction to determine after evidentiary hearing whether the action had been properly commenced. On appeal, the District Court of Appeal on the 22<sup>nd</sup> September 2004 affirmed the court's order granting the defendants' motion to dismiss based upon lack of subject-matter jurisdiction.
- [8] The affirmation by the Court of Appeal was "based upon this court accepting the appellees' statement in open court that they will not raise or assert a defense of statute of limitations in the event this case is filed in the nation of Dominica." The "appellees" did not include the defendant Air Anguilla. This was because following on the Circuit Court's judgment (dated 29<sup>th</sup> August 2002) the plaintiffs removed the case back to the federal jurisdiction - the United States District Court - for the second time, for resolution of the conflicting decisions on the **Warsaw Convention**. Whereupon, Air Anguilla filed a motion in the Federal Court to dismiss Air Anguilla from the action for lack of personal jurisdiction. The plaintiffs responded by filing and serving a Notice of Voluntary Dismissal of Defendant, Air Anguilla Inc., without prejudice from the action dated 10<sup>th</sup> October 2002. Thereafter, the Federal Court again remanded the proceedings back to the state court without addressing the existing conflicting decisions on the **Warsaw Convention's** applicability. Over 10 months later the appellants filed their statements of case which are the subject of the Master's order.

[9] In striking out the appellants' statements of case the learned Master observed that his ruling does not leave the claimants without a remedy; that a claim under the **Warsaw Convention** can still be brought, and no issue of any relevant limitation of actions will be taken as all the defendants excluding Air Anguilla have agreed, that they will not avail themselves of any point on the limitation of actions should a claim under the Convention be brought by the claimants.

### **The Warsaw Convention**

[10] On the 12<sup>th</sup> October 1929 the United Kingdom, together with many other states signed at Warsaw a multilateral international treaty formally titled the **Convention for the Unification of Certain Rules Relating to International Transportation by Air**. This Convention is commonly referred to as the **Warsaw Convention**. It applies to all international transportation of persons, baggage, or goods performed for hire. It created a uniformed regime to govern the international carriage of passengers, baggage, cargo, and documents of carriage, and regulates the liabilities of carriers. The United Kingdom ratified the **Warsaw Convention** on the 14<sup>th</sup> February 1933.

[11] There is no written constitution defining the internal status within Britain of international law. In **Chung Chi Cheung v The King** Lord Atkin, speaking of customary international law as distinct from treaty law, said that the courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by Statutes.<sup>1</sup> Any rule of customary international law which is inconsistent with a British statute will not be enforced in British courts. As regards treaty law, a treaty does not become part of British domestic law unless and until it is specifically incorporated as such by a legislative measure, an enabling Act.<sup>2</sup>

[12] The **Warsaw Convention** came into force in the United Kingdom on the 15<sup>th</sup> May 1933. The provisions of the **Carriage by Air Act, 1932 U.K.** gave effect to the **Warsaw**

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<sup>1</sup> [1939] A.C. 160

<sup>2</sup> Rebecca M.M. Wallace "International Law" 3<sup>rd</sup> ed. at pages 39 and 42.

**Convention 1929** as part of English law. By the **Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 (U.K.)**, which came into operation on the 1<sup>st</sup> January 1954, sections 1 and 2 of the **Carriage by Air Act 1932 U.K.**, subject to certain adaptations and modifications to the territory, was extended to Dominica which was then a British colony. These provisions are set out in the First Schedule of the Order.

[13] Section 1 (1) of the **Carriage by Air Act 1932** states that:

“The provisions of the Convention as set out in the First Annex to this Schedule shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the Colony in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.”

[14] Section 1 (2) of the **Carriage by Air Act 1932** states that:

“Her Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the Convention, in respect of what territories they are respectively parties and to what extent they have availed themselves of the provisions of the Additional Protocol to the Convention, and any such Order shall, except in so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified.”

[15] Since its inception, there have been modifications or supplements to the **Warsaw Convention**. Among the amendments to the Convention which in treaty terms are called Protocols, was the **Hague Protocol 1955**, which came into force on the 1<sup>st</sup> August 1963. The United Kingdom ratified the **Hague Protocol 1955** on the 1<sup>st</sup> June, 1967. By then Dominica's status as a colony had ended on the 1<sup>st</sup> March 1967, with the passing of the **West Indies Act 1967 (1967c.4)**, and the **Appointed Days Order 1967**. Dominica then became an Associated State (together with Antigua, Grenada, St Christopher Nevis and Anguilla, St Lucia and St Vincent), assuming a status of association with the United Kingdom. As a result of this association, it appears that from the 1<sup>st</sup> March 1967 the United Kingdom could no longer automatically extend laws of the nature of Protocols to the **Warsaw Convention** to Dominica for them to have the force of law in Dominica.<sup>3</sup>

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<sup>3</sup>Section 3 of the West Indies Act 1967 provided that no Act of the U.K. Parliament with the exception of those relating to nationality, citizenship and succession to the throne) passed after Dominica became an Associated State could be

- [16] The **Carriage by Air Act 1961 U.K.** gave effect to the **Hague Protocol** which created Article 25A of the Warsaw-Hague Convention. This Article provides that if a servant or agent of the carrier is sued in respect of “damage to which this Convention relates” he is entitled in certain circumstances to enjoy the benefit of the same limits of liability as are open to the carrier under Article 22. Moreover, Article 25A (2) provides specifically that the aggregate of the amounts recoverable from the carrier and his servants and agents shall not, in such circumstances, exceed the limits stated in Article 22. I will set out the relevant Articles in the **Warsaw Convention** when dealing with the third issue.
- [17] **The Carriage by Air (Parties to Convention) Order 1999** made on the 11<sup>th</sup> May 1999<sup>4</sup> confirms that the Commonwealth of Dominica was never certified by the United Kingdom to be a High Contracting Party to the **Hague Protocol 1955** or as a State that is a party in respect of Dominica to the **Hague Protocol 1955**. Dominica, since its independence, has not acceded to the **Hague Protocol 1955**.<sup>5</sup>
- [18] The statute laws that were passed by the Legislature while Dominica was an Associated State do not support a conclusion that sections 1 and 2 of the **Carriage by Air Act 1932 U.K.** and the unamended **Warsaw Convention** ceased to have the force of law in Dominica up to the 3<sup>rd</sup> November 1978 when Dominica attained its independence. In fact, the Laws of Dominica Revised Edition 1991 Volume 1 at page 8, record the **Carriage by Air Act 1932 U.K.** among the list of statutes from 1775 to 1992 which comprise the Laws of Dominica, despite its omission from the 1991 Revised Edition. The same 1932 U.K. Act is also listed in this Volume 1 among the list of Acts and Statutory Instruments of the United Kingdom which currently affect Dominica.

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extended to Dominica as part of its laws unless the Act was one dealing with the U.K.'s responsibility for defence and external affairs, or was made at the request and with the consent of the Legislature of Dominica.

<sup>4</sup> See : S/I 1999 No. 1313 Civil Aviation and the Note to this Order

<sup>5</sup> The Master had before him as documentary evidence, a diplomatic note dated 2<sup>nd</sup> June 1980 from the British Embassy in Warsaw apparently to the Depositary in Poland. The note requested that Dominica be omitted from the List of Territories to which the Warsaw Convention 1929 and the Hague Protocol 1955 were extended by the United Kingdom, as Dominica is independent since the 3<sup>rd</sup> November 1978.

[19] The appellants' learned counsel Ms. Moore-Miggins in support and in the terms of the grounds of appeal, contends that on attaining independence Dominica was not bound to the **Warsaw Convention** as a former colony of Great Britain, unless and until the independent and sovereign State of Dominica sent a written notice of Dominica's intention to be bound to the rights and duties of that treaty, addressed and delivered to the depositary of that treaty. Dominica did not send such notice to the depositary, she argued, and this has implications in customary international law, and under the **Vienna Convention on Succession of States in respect of Treaties 1978** ("the **Vienna Convention**"). These implications should be acknowledged and applied by the municipal court, counsel urged. Counsel's submissions find support in the exposition of text-writers on International Law,<sup>6</sup> the **Vienna Convention** which entered into force on the 6<sup>th</sup> November 1996, and case law.<sup>7</sup>

#### **The Vienna Convention 1978**

[20] The **Vienna Convention** was intended to codify the rules of customary international law on succession to treaty rights and obligations although, according to text-writer J.G. Starke, a closer examination of this Convention shows that a number of its provisions are not in point of fact declaratory of such law.<sup>8</sup> This multilateral treaty was opened for signature from the 22<sup>nd</sup> August 1978 to the 28<sup>th</sup> February 1979 in Vienna. Dominica acceded to this treaty on the 24<sup>th</sup> June 1988 and did not sign and ratify it as Ms. Moore-Miggins asserted.<sup>9</sup> The **Vienna Convention** can be regarded as 'self-executing' as counsel asserted, since its obligations may be fulfilled by Dominica without implementing domestic legislation. The effects of the independence of Dominica on treaties which at the date of independence were in force in respect of Dominica as a British colony, and later as an Associated State, are governed by the **Vienna Convention**.

[21] Article 2-1 of the **Vienna Convention** provides: "(b) "succession of States" means the replacement of one State by another in the responsibility for the international relations of

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<sup>6</sup> Wallace, *supra*; J.G. Starke **Introduction to International Law** 10<sup>th</sup> edition

<sup>7</sup> *West Rand Central Gold Mining Company Limited v The King* [1905] 2 K.B. 391,406-408.

<sup>8</sup> See Starke, *supra*, page 325 FN 6.

<sup>9</sup> See United Nations, Treaty Series, Vol. 1946; page 3.

territory; (c) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States; (d) "successor State" means the State which has replaced another State on the occurrence of a succession of States;... (f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible; (g) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty."

[22] Article 8 of the **Vienna Convention** states:

"1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States Parties to those treaties by reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State. 2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention."

[23] Article 9 provides:

"1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory. 2. In such a case, the effects of the succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention."

[24] Article 16 is as follows:

"A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."

[25] The rule which governs the participation of the Commonwealth of Dominica in the unamended **Warsaw Convention** is Article 17 which states:

“1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.” Paragraphs 2 and 3 are irrelevant to this appeal.

[26] Finally, Article 22 describes how the notification of succession should be done. It must be made in writing, signed by the Head of State, Head of Government or Minister for Foreign Affairs, and transmitted to the depositary (in this case the Government of the Republic of Poland). According to Article 23, a newly independent State which makes a notification of succession under article 17 shall be considered a party to the treaty from the date of the succession of the States or from the date of entry into force of the treaty, whichever is later.

[27] “There is no universal uniform practice stipulating how states should incorporate international law into their domestic legal systems and it is a state’s perception of international law which determines the way in which international law becomes part of municipal law. In other words, states differ in the way that their municipal courts are either required or allowed to give effect to international obligations.”<sup>10</sup> Unlike the practice in the United Kingdom, there appears to be no legislation in Dominica which has given effect to the **Vienna Convention**.

[28] **Oppenheim’s International Law** points out at pages 77 to 79 that in a number of States which were formerly British dependent territories and are now members of the Commonwealth, the law is similar to that of the United Kingdom. In Australia, India, and, Kenya, a treaty requires legislative action before it can have effect<sup>11</sup>. In New Zealand legislation is required if implementation of a treaty calls for change in existing law.<sup>12</sup> In South Africa treaties in the absence of legislation giving the relevant provisions the force

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<sup>10</sup> See Wallace, *supra*, page 36

<sup>11</sup> Ninth Edition Vol. 1

<sup>12</sup> *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] A.C. 308 ; *Oppenheim op cit* at page 78 FN. 113.

of law, do not affect the rights of individuals. In Canada a treaty requires legislative action before private rights are affected, and a statute will prevail notwithstanding that it may be in conflict with a treaty. In Cyprus the matter is regulated by the Constitution where Article 169(3) provides that treaties concluded in accordance with the provision in that Article "shall have, as from their publication in the Official Gazette of the Republic, a superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto".<sup>13</sup> A common thread in the fabric of the various national legal systems usually is the presumption that the legislature will not intentionally enact laws that conflict with international law.

[29] Learned counsel Ms. Moore-Miggins has urged us to conclude that the Commonwealth of Dominica by its accession to the **Vienna Convention**, committed the State to the principles of succession in the **Vienna Convention** which was incorporated into the law of Dominica as of the 6<sup>th</sup> November 1996 when it came into force. Acceptance of this "monistic" approach urged by counsel depends on whether this court applies the unitary concept of law which sees all law, and consequently international law and municipal law, as an integral part of the same system. "In the event of a conflict between international law and municipal law, most monists would contend that international law should unquestionably prevail."<sup>14</sup> The unitary concept of law seems somewhat incongruous in a legal system such as Dominica's where the Constitution is the supreme law and all law which is inconsistent with the Constitution is void to the extent of the inconsistency.<sup>15</sup>

[30] The "monistic" approach has been taken a step further by the appellants' appeal against the learned Master's findings of law that:

- "(2) The 1953 Order in Council which applied the 1932 United Kingdom Carriage by Air Act to Dominica, whilst a colony of Great Britain continued in force by virtue of Section 2 of the Constitution of Dominica.
- (3) The provisions of the Warsaw Convention form part of the Domestic Law since 1954 and have been preserved by the Constitution. Therefore, the provisions of the Convention have the force of Law in Dominica."

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<sup>13</sup> Oppenheim *op cit.* at page 79

<sup>14</sup> See Wallace, *supra*, at page 36.

<sup>15</sup> See section 117 of the Dominica Constitution.

## Grounds of Appeal

- [31] Ground of appeal (a) alleges that the Master erred in finding that section 2 of the Constitution continued the 1953 Order in Council in force after Dominica's independence on November 3, 1978. Ground (b) complains in the alternative, that if the Master was referring to paragraph 2 of Schedule 2 of **The Commonwealth of Dominica Constitution Order**, dated 3<sup>rd</sup> November 1978, the Master erred in applying that paragraph to this case.
- [32] The learned Master obviously misspoke in identifying the relevant constitutional provision which enabled the 1953 Order in Council and the **Carriage by Air Act 1932 U.K.** to continue in force after Dominica became independent. Section 2 of the Constitution deals with the fundamental right to the protection of and the right to life.
- [33] The learned Master in my view could not have intended to refer to **The Commonwealth of Dominica Constitution Order** Chap. 1:01: Schedule 2 to the Order, Transitional Provisions, section 2 which provides:
- "2.(1) The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
  - (2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section), that prescription or provision shall, as from the commencement of the Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution and the Supreme Court Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person.
  - (3) ...
  - (4) The provisions of this paragraph shall be without prejudice to any powers conferred by the Constitution or by any other law upon any person or authority to make provision for any matter including the alteration of any existing law.

- (5) For the purposes of this paragraph, the expression “existing law” means any Act, Ordinance, law, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as part of the law of Dominica or of any part thereof immediately before the commencement of the Constitution.”

[34] Learned counsel Mr. Burton referred to sections 2(2) and 2(5) of Schedule 2 of the **Constitution of Dominica Order 1978** as justifying the Master’s findings. He submitted that the 1953 Order in Council which extended the **Carriage by Air Act 1932 U.K.** and the **Warsaw Convention** to Dominica was existing law falling within these provisions and have not been repealed by the Parliament of Dominica. The Order could qualify as an existing law which continued in force.

[35] Ground (d) of the Grounds of Appeal urges that: “Qualifications and exceptions were made to all treaties and related Laws of Parliament by the Vienna Convention on succession of State[s] to Treaties which was made part of the Laws of Dominica in 1988 and had full force and effect internationally in 1996. Pursuant to the Vienna Convention Dominica is not bound to any Treaty which ... [bound Dominica] as a former Colony of Great Britain, unless and until the Independent and sovereign State of Dominica sent a written notice of Dominica’s intention to be bound to the rights and duties of that Treaty, addressed and delivered to the depositary of the Treaty.” Relying on section 2(4) of Schedule 2 to the Order in Chap. 1:01, the appellants contend in ground (e) that the Executive of Dominica altered the existing law of Treaties and the 1953 Order in Council which had extended the **Warsaw Convention** to Dominica when it acceded to the **Vienna Convention**.

[36] Ground (f) alleges that the learned Master made an error of law by applying the **Warsaw Convention** to the case without making a determination as to whether Dominica remained a party to the **Warsaw Convention** after independence.

## Is the Warsaw Convention Part of the Domestic law of Dominica?

[37] Learned counsel for the appellants alluded to post-independence developments reflected in the exhibited diplomatic notes exchanged between the governments of the United Kingdom and Poland, a letter from the United Nations, Internet Public Records of the United States as to the list of multilateral treaties in force to which the U.S. is a member, and a full documentation of the international status of the **Warsaw Convention 1929** and **Hague Protocol 1955** from the Canadian based International Civil Aviation Organization (ICAO). These exhibits disclose that since Dominica's independence on the 3<sup>rd</sup> November 1978, Dominica has not been regarded by the United Kingdom, Poland, the United Nations and the ICAO as a member of the **Warsaw Convention** and the **Hague Protocol 1955**. Article 38 of the **Warsaw Convention** states that the Convention shall remain open after it has come into force, for accession by any State. The accession shall be effected by a notification addressed to the Government of the Republic of Poland, which will inform the Government of each of the High Contracting Parties thereof. The accession shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

[38] This court ought not to ignore the attitude of Dominica towards the **Warsaw Convention** after independence. In her letter to the United Nations dated 23<sup>rd</sup> December 1982, Prime Minister and Minister of External Affairs for Dominica, the Honourable Dame Eugenia Charles, wrote the following in a letter to the Secretary General of the United Nations:

“... I have the honour to refer to the attainment of independence by the former British Associated of Dominica on the 3<sup>rd</sup> November, 1978, as the Commonwealth of Dominica, and to the question of status of conventions, treaties and other international instruments applied to, or entered into on behalf of Dominica by the United Kingdom Government prior to independence.

The Government of the Commonwealth of Dominica considers that questions of succession to such conventions, treaties and other international instruments should be governed by the accepted rules of international law and by the relevant principles contained in the Convention on Succession of states in respect of treaties done at Vienna on 23<sup>rd</sup> August, 1978.

The Government of the Commonwealth of Dominica hereby declares that with regard to multi-lateral treaties applied or extended to the former British

Associated State of Dominica, it will continue to apply the terms of each such treaty provisionally and on the basis of reciprocity until such time as it notifies the depositary authority of its decision in respect thereof. ...”

- [39] Also, in 1991 Parliament enacted the **Law Reform (Miscellaneous Provisions) Act** Chapter 7:99 which contained the following provision in section 3(4) : “Article 21 of the Convention contained in the First Schedule to the Carriage by Air Act, 1932 of the United Kingdom Parliament (which empowers the Court to exonerate wholly or partly a carrier who proves that the damage was caused by or contributed to by negligence of the injured person) and applied to Dominica by Order-in-Council shall have effect subject to the provisions of this section.” Learned counsel Mr. Burton submitted, quite correctly in my view, that this provision would also justify the finding of the Master although he did not refer to it in his judgment.
- [40] **Oppenheim’s International Law** states at pages 231 to 232 that declarations such as the Dominican Prime Minister’s are an alternative to a devolution agreement some former dependent territories have preferred on attaining independence. “These declarations, while not by themselves definitively regulating treaty relations with other states, and allowing the new state to select which treaties it wishes to continue in force (sometimes referred to as amounting to ‘optional succession’), nevertheless at least facilitate the provisional continuation of treaty relations pending the orderly establishment of more permanent arrangements, arrived at expressly or by implication, with the other states parties to the treaties in question.”<sup>16</sup> What seems quite clear however is that this unilateral declaration of the Prime Minister of Dominica is no valid substitute for the rules of the **Vienna Convention**.
- [41] The submissions of learned counsel Ms. Moore-Miggins have not taken into account that the **Warsaw Convention** contains rules of international law which directly involve the application of rules of national law. This Convention provides a uniformed law for matters relating to private law and private international law; and also incorporates concepts of municipal law generally accepted by municipal legal systems. **Oppenheim** points out that succession in matters of local law is in respect of matters pertaining to the territory attaining independence, probably to be regulated in accordance with broadly the same

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<sup>16</sup> Oppenheim’s International Law ninth edition (1992) Vol.1PART 1: edited by Sir Robert Jennings Q.C and Sir Arthur Watts KCMG, Q.C.

principles applying to secession.<sup>17</sup> In the discussion at paragraph 64 (page 222) the following is stated for the case where a state secedes and becomes a separate state:

“...with regard to treaties generally the position is essentially similar to that obtaining in the case of absorption...[T]here is more room for the view that in case of separation resulting in the emergence of a new state the latter is bound by - or at least entitled to accede to - general treaties of a ‘law-making’ nature, ...previously binding on it as part of the state from which it has separated.”

[42] In the case of succession in matters of local law, **Oppenheim** notes that:

“Where independence is attained in an orderly manner, agreed provision will usually be made for the pre-existing law to continue unless and until repealed or modified pursuant to the new constitutional arrangements applying in the newly independent state; and in the absence of such a provision there may be a presumption that the local law continues to apply, at least temporarily and insofar as it is not inimical to the constitutional structure of the new state.”<sup>18</sup>

[43] Dominica’s independence was obtained in an orderly manner, and an ‘agreed provision’ was made for the pre-existing **Carriage by Air Act 1932 U.K.** sections 1 and 2, and the unmodified **Warsaw Convention** to continue unless and until repealed or modified pursuant to the Constitution of Dominica. Although counsel for the parties did not refer to it, in our view this ‘agreed provision’ exists in article 5 paragraphs (1) and (2) of the Statutory Instrument 1978 No. 1030 DOMINICA: **The Dominica Modification of Enactments Order 1978**.<sup>19</sup> This Order came into operation on the 15<sup>th</sup> December 1978 but is deemed to have come into operation on 3<sup>rd</sup> November 1978.

[44] Article 5 of this **1978 Order** is captioned, “Operation of existing law” and provides:

“5. (1) Subject to paragraph (3) of this article, all law to which this article applies, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, which is in force on the appointed day, or having been passed or made before that day, comes or has come into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Dominica and persons and things belonging to or connected with Dominica, as it would have had apart from this paragraph if there had been no change in the status of Dominica.

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<sup>17</sup> Op. cit. at page 221-222

<sup>18</sup> Op. cit at page 233: FN29

<sup>19</sup> See Vol. 1 Laws of the Commonwealth of Dominica Revised Edition 1991 Appendix Item 8

(2) This article applies to law of, ...the United Kingdom,...and, in relation only to any enactment of the Parliament of the United Kingdom or any Order in Council made by virtue of any such enactment whereby any such enactment applies in relation to Dominica...

(3) ..."

[45] Article 5 (3) of this **1978 Order** relates to a statutory provision in the Immigration Act and so is not relevant to the discussion. This 'agreed provision' compels the conclusion that sections 1 and 2 of the **Carriage by Air Act 1932 U.K** and the original **Warsaw Convention 1929**, presently have the same operation in Dominica as they would have had if Dominica had not attained its independence until provision to the contrary has been made by the Parliament of Dominica or some other empowered authority. Any such 'provision to the contrary' must be done in accordance with the Constitution. The mode of exercising Parliament's legislative power is prescribed by sections 41 and 49 of the Constitution of Dominica. Any delegation of Parliament's legislative powers must of necessity be enabled by statute. The unilateral declaration of the Prime Minister the Honourable Dame Eugenia Charles in December 1982 cannot be regarded as a 'provision to the contrary' in the circumstances.

[46] It would seem that Dominica may not have had to strictly comply with Article 38 of the **Warsaw Convention** since customary law would not regard Dominica as starting with a 'clean slate' on the 3<sup>rd</sup> November 1978 in respect of a treaty which had been ratified by its parent predecessor the United Kingdom, and which had the force of law in Dominica. **Oppenheim** asserts the law to be as follows<sup>20</sup>: "As regards multilateral treaties previously applying to the former dependent territory (or previously applicable to it as a consequence of the parent state's ratification, even if the treaty has not entered into force by the date of its independence), the 'clean slate' rule is modified to the extent of not requiring the newly independent state to go through the formal process of accession as if it were a non-party state already in existence: the territorial nexus previously existing between it and the treaty has usually been regarded as sufficient to allow it (so far as is

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<sup>20</sup> Op. cit .At page 229

consistent with the aims and structure of the treaty) to be treated as a party on the strength of a less formal indication that it so wishes.”

[47] In seeking to reconcile the domestic law of Dominica with and give effect to the **Vienna Convention 1978**, a useful guide is **Oppenheim’s** discussion (at pages 82 to 83) where the following is stated:

“ Although the way in which international law applies within a state is a matter regulated by the law of that state, the outcome affects the state’s position in international law...From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices.”

[48] The constitutional practice of Dominica dictates that the provisions of the **Vienna Convention 1978** be applied in Dominica, as part of the law of Dominica, to the extent that its principles are accepted and adopted by our own domestic law, and are not in conflict with the Constitution of Dominica. The provisions in this Convention concerning Dominica’s position in respect of the **Warsaw Convention** as a successor State are in conflict with the domestic law of Dominica, which has incorporated sections 1 and 2 of the **Carriage by Air Act 1932 U.K.** and the unmodified **Warsaw Convention 1929** as part of the current law of Dominica. Consequently, contrary to Article 16 of the **Vienna Convention**, Dominica on attaining independence was bound to maintain in force the unmodified **Warsaw Convention 1929** under the domestic laws of Dominica until there has been a statutory change to this law. Absent such a statutory change, the original **Warsaw Convention 1929** is part of the law of Dominica.

#### **The Cause of Action and Appellants’ Statements of Case**

[49] Section 32 of the **Eastern Caribbean Supreme Court (Dominica) Act Chap.4:02** enables this court to make such orders as the High Court might have made on an appeal from any order of the High Court in any civil cause or matter. Issue (2) (stated at paragraph 3

above) is being considered under this heading. The appellants contend in ground (h) that the **TCAPL Act** superseded any conflicting earlier laws which may apply to this case.

- [50] The respondents in their cross-appeal complain that the learned Master ought to have found that the claims must fail in that neither the **TCAPL Act** nor the Florida Wrongful Death Statute (Fla. Stat. An 47:01 1) provide the claimants with any cause of action against the Defendants (or any of them) in relation to the events giving rise to the instant proceedings. Grounds 1 and 2 of the cross-appeal reflect their submissions regarding their complaint.

### The TCAPL Act

- [51] The **TCAPL Act** forbids the dismissal or stay of proceedings in a transnational cause of action involving a product liability claim in the High Court or Court of Appeal in Dominica, on the basis that Dominica is not the most natural, convenient and appropriate forum for the case to be tried (forum non conveniens).<sup>21</sup> Under the definition section 2 of this Act, "transnational cause of action" means an action which originated in a foreign jurisdiction; "product" means any manufactured good, chemical substance or equipment which is imported into Dominica". The Act applies "to all transnational causes of action brought against a foreign defendant where - (a) any such action was dismissed in a foreign forum on the basis of forum non conveniens; or (b) on the basis of comity or other similar basis the Courts in Dominica provide a more convenient forum for trial of the action."<sup>22</sup>

- [52] Section 8 of this Act states:

"(1) The provisions of this section shall apply to transnational torts governed by the laws of Dominica; (2) Any person, whether a national of or domicile, resident or incorporated in a foreign country, or otherwise carrying on business abroad, who manufactures, produces, distributes or otherwise puts any product or substance into the stream of commerce shall be strictly liable for any and all injury, damage or loss, caused as a result of the use or consumption of that product or substance."

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<sup>21</sup> See section 4 (1) and the Long title to the Act

<sup>22</sup> See section 3 of the Act

[53] The Act provides for the court to take judicial notice of evidence presented and accepted by foreign courts in similar proceedings involving the same or similar parties, or the same or similar causes of action; and determine the value and weight it shall attach to such evidence.<sup>23</sup> Section 6(2) further enjoins the court to give recognition to any international convention existing between the States of the parties so as to facilitate the expeditious and just settlement of the issues between the parties, and cooperate with other judicial authorities within the Caribbean or elsewhere. Upon a transnational cause of action being established to the satisfaction of the court, it may award general damages, special damages and under certain specified circumstances exemplary or punitive damages.

#### **The Claimants' Statements of Case**

[54] The respondents had filed an affidavit from Ms Hazel Johnson, an attorney-at-law in support of their application that the learned Master determined. The pleadings of the parties in the consolidated claims Nos. 0310 to 0313 of 2005 are not included in the record of appeal. Ms. Johnson's evidence chronicling the proceedings on these claims at paragraphs 15 and 16 of her affidavit has not been disputed by the appellants. The following evidence is contained in these paragraphs.

[55] The claimants filed their claims on the 15<sup>th</sup> September, 2005. The claimants have pleaded that the **TCAPL Act** applies to their claims because they first filed claims in Florida which were dismissed by the courts there on the basis of "the forum selection clause (Article 28) of the Warsaw Convention". The claimants have apparently sought to bring their claims against each of the defendants within the cause of action under the **TCAPL Act** without expressly saying so, where they assert that Cardinal, Air Anguilla and the Ogdens had "rendered" the Cessna aircraft "a defective product" by flying it in the condition that they did at the time of the accident flight, in particular in a "severely overloaded" state such that it was outside its normal weight and balance. The claimants are seeking damages pursuant

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<sup>23</sup> See section 9.

to the **TCAPL Act**, the **Florida Wrongful Death Act** and the **Fatal Accidents Act Cap 7.59**.<sup>24</sup>

- [56] Section 3 of the **Fatal Accidents Act** only extends to the dependants of the deceased, the right to bring an action in respect of any cause of action that the deceased would have had if their deaths had not ensued, subject to the qualification in section 4 that the dependants are entitled to damages for bereavement.

### **The Florida Wrongful Death Statutes**

- [57] Exhibit HJ 9 is the West Florida Statutes Annotated Title XLV. Ms Johnson deposed that Chapter 768 is of similar effect as the **Fatal Accidents Act**; and that in any event, as it is a foreign statute it could have no legal relevance to any proceedings being maintained in Dominica in respect of the accident unless it does so by reason of the **TCAPL Act**.
- [58] Looking at section 12 of the **TCAPL Act**, it authorizes the court in awarding exemplary or punitive damages to consider and be guided by awards made in similar proceedings or for similar injuries in other jurisdictions, in particular, damages awarded in the courts of the country with which the defendant has a strong connection whether through residence, domicile, the transaction of business or the like. For the purposes of section 12, the court shall take judicial notice of awards made in relevant foreign courts.
- [59] Chapter 738.21 of the Florida Statutes deals with the nature of the damages available under the Statutes.

### **Interpreting the Statute**

- [60] The respondents contend that the **TCAPL Act** only applies to foreign defendants which Cardinal is not. That since the claims against Air Anguilla were dismissed in Florida as a result of notices of dismissal filed by the appellants, and the claims against all other respondents were dismissed in Florida on grounds of lack of jurisdiction, the appellants have not satisfied the requirements under section 3 of the Act. They contend further that

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<sup>24</sup> See section 3

the Act only applies to product liability claims and none of the pleaded complaints against any of the respondents can properly be described as being a claim of that nature.

[61] The first principle of statutory interpretation requires that we do not apply rules of construction to clear unambiguous language in an Act. Sir Vincent Floissac C.J. reminded himself that in resolving an issue relating to statutory interpretation, he should start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention with regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard, the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention.<sup>25</sup>

[62] Our analysis must begin with the Legislature's clear unambiguous words in the critical provision which is section 8 of the Act (set out at paragraph 45 above). This section creates the cause of action. We will first consider the ordinary meaning of the words in the general context of the statute, relying on internal aids. In doing so, we look at the entire Act, and not a single section in isolation. On its face the words in section 8(2) are impose strict liability for any and all injury caused from using or consuming a product or substance that has been manufactured, produced, distributed, or put into the stream of commerce by 5 categories of persons: namely (1) a person who is a national of a foreign country; or (2) a person who is domiciled in a foreign country; or (3) a person who is resident in a foreign country; or (4) a person (meaning a corporate person) incorporated in a foreign country; or (5) a person otherwise carrying on business abroad.

[63] A limitation has been put on the meaning of "product" in section 8 by the definition of "product" in section 2. Hence for the appellants to ground their cause of action in section 8 as they have sought to do, each of the respondents must fall within one or more of the 5 categories of persons. None of the respondents can be said to have manufactured,

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<sup>25</sup> Charles Savarin v John Williams: Civil Appeal No. 3 of 1995 (Dominica)

produced, or distributed any manufactured good, chemical substance or equipment for use or consumption in my view, having regard to the factual matrix disclosed in the documentary evidence in the record of appeal. Support for this interpretation and conclusion is supplied by section 11(2) which provides for the court to take into account all the circumstances of the case and in particular: "(a) that the defendant continued to produce or sell any product or substance after the product or substance was banned or its use restricted in the country of manufacture or in any other country in which it was used or consumed; (b) that the defendant failed to issue a warning to the Government of Dominica or to any other relevant person of the harmful effects of the product or substance." Also in section 10(2), the court is empowered to make certain orders where liability is established under the Act and these orders include: (a) that an apology be made by the defendant to the plaintiff and (b) that the facts about the defendant's products be published in the newspapers, health magazines and journals in Dominica and abroad.

[64] The court's interpretation of sections 3 and 8(2) must avoid absurd results if the language allows it. The word "product" as defined has been used in 4 sections of the Act, which reveal that the legislature intended that the product that is manufactured, produced, distributed or otherwise put into the stream of commerce must be a product for which facts can be published in newspapers, health magazines and journals; it must be capable of being sold, banned, or its use restricted; and it must be a product for which a warning can be issued about its harmful effects. Counsel for the respondents contends that on a proper analysis of the circumstances, the air transportation services of Cardinal were what the deceased passengers were using and Cardinal's omissions, willful misconduct or default in providing such services are not within the definition of "product" under the Act.

[65] The appellants allege that Cardinal, Air Anguilla and the Ogdens had "rendered" the Cessna aircraft "a defective product" by flying it in the condition that they did at the time of the accident flight, in particular in a "severely overloaded" state such that it was outside its normal weight and balance. Their counsel Ms Moore-Miggins suggests that by so doing they put a defective product into the stream of commerce. She referred to section 3 of the Act which states that: "This Act shall apply to all transnational causes of action brought against a foreign defendant" in specified circumstances.

[66] In attempting to reconcile section 3 with section 8 it becomes obvious that there is inconsistency in these provisions of the statute. The court in its endeavor to adopt a purposive approach which seeks to give effect to the true purpose of the legislation is prepared to look at extraneous material that bears upon the background against which the legislation was enacted.<sup>26</sup> The appellants' counsel referred to the evidence of Dr. Winston Anderson, principal drafter of the legislation and Mr. Anthony La Ronde, a former Parliamentary draftsman who was the Attorney General at the time the Act was passed. The substance of their evidence regarding the purpose of the Act is reflected in the long title to the Act which states that it is:

"An Act to make provision for the expeditious and just trial in the Commonwealth of Dominica of Transnational Product Liability Actions where any such action was dismissed in a foreign forum on the basis of *forum non conveniens*, comity or on a similar basis."

They deposed about the historical setting of the Act. Mr. La Ronde referred to the Hansard debate on the Act in its Bill form, which is admissible where there are internal inconsistencies in the provisions of the Act. They both assert that the Act evolved from the plight of 94 Dominican farmers who claimed that they became sterile as a result of using a banana pesticide DBCP; and their claims were dismissed in the United States of America on the basis of *forum non conveniens*, as the defendants who were foreign multinational corporations preferred an advantageous trial in Dominica. They deposed that the **TCAPL Act** was not intended to be restricted to strict liability defective product claims.

[67] The Legislature's goal in crafting the **TCAPL Act** is manifest in its text. Section 3 of the Act does not create any cause of action. It merely establishes the circumstances in which the court will exercise its civil jurisdiction under section 4(1) for a claim disclosing a transnational cause of action relating to product liability under section 8. The long title of the Act reflects the scope of the Act, and the scope of the Act in short relates to product liability actions. The contention of the appellants that the Legislature intended that the Act should apply to all causes of action is not supported by the statute's legislative history and is contradicted by the statute itself. Only persons who have

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<sup>26</sup> Per Lord Griffiths in *Pepper v Hart* [1993] 1 All ER 42 at 50.

a cause of action under section 8 and satisfy the section 3 criteria can bring a claim under the **TCAPL Act**.

[68] A literal reading of the statute would not permit a hired overloaded Cessna aircraft outside its normal weight balance being flown with passengers who die when it crashes to be within the definition of the word "product" in this Act. The appellants counsel's interpretation would have the court judicially amend the statute by widening the definition of "product" in a manner not implicitly contained in the language of the statute. The court declines to do so. The appellants do not have a cause of action under the **TCAPL Act**. It is therefore unnecessary to consider the other issue raised by the respondents in relation to section 3 of the Act.

[69] The respondents contend that the Florida Wrongful Death Statute does not provide a cause of action to the appellants in Dominica. Since the relevance of the Florida Wrongful Death Statute depended on the appellants' misplaced perception and interpretation of the **TCAPL Act**, the Florida Statute would be irrelevant to any subsequent claims brought under the **Warsaw Convention** in Dominica.

#### **Did the Master err in not permitting an Amendment?**

[70] The appellants complain in ground (g) that the Master improperly dismissed the action and allowed the claimants to re-file under the **Warsaw Convention**, rather than permitting the Claimants to amend the same action.

[71] The learned Master was not in error when he found that the **Warsaw Convention** governed the appellants' rights under the airline contract that Cardinal had with the 5 deceased passengers. The carriage in question was an international one within the definition of Article 1(2) since the contract of transportation (the plane tickets) designated the travel destination between 2 High Contracting Parties.

[72] Article 17 states that the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident

which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

- [73] Having regard to Article 24, the appellants are deprived of the right to pursue a claim under common law or any other regime as it states that for cases covered by Article 17:

“any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention.”

Uniformity requires that passengers be denied access to the profusion of remedies that may exist under the laws of a particular country, so that they must bring their claims under the terms of the Convention or not at all.

- [74] Article 28 (1) proscribes:

“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.”

- [75] Article 29 stipulates that:

“(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. (2) The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.”

- [76] The provisions as to liability of the carrier in the event of the death of a passenger in the Second Annex to the Convention, state that liability shall be enforceable for the benefit of members of the passenger’s family including step-parent, grandparent, siblings, half-siblings, stepchild; and an illegitimate child or an adopted child is to be treated as a legitimate child of his/her parents or adopters. In respect of the death of a passenger, only one action may be brought in the appropriate forum, by the personal representatives of the deceased, or by any person who is to benefit, and this action must be for the benefit of all the beneficiaries.

[77] The learned Master in exercising his coercive and curative powers under the **Civil Procedure Rules 2000**, rule 26.3 (1) (b) and (c) had before him statements of case that failed to disclose a claim which was sustainable as a matter of law. The facts set out in the statements of case did not constitute the cause of action alleged. These are good reasons for striking out statements of case.<sup>27</sup> The notes of evidence of the Master do not reflect that the appellants had filed any draft amendments to their pleadings. Had they done so then at least there would have been an opportunity for the Master to consider an alternative to striking out, if there was any real prospect of establishing the amended case. It cannot be said in all the circumstances of this appeal that the Master did not take into account the overriding objective in striking out the appellants' statements of case. These were plain and obvious cases to strike out.

[78] We would dismiss the appellants' appeal and allow the respondents' cross-appeal. The parties' counsel having not addressed the question of costs at the hearing are directed to file their submissions within 30 days from the delivery of this judgment.

[79] This is a judgment of the Court.

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<sup>27</sup> See Blackstone's Civil Practice (2002) para. 33.6 at pages 328 to 329