

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B61 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF  
QUEENSLAND

10 BETWEEN: ROBINSON HELICOPTER COMPANY INCORPORATED  
Appellant

and

GRAHAM JAMES McDERMOTT  
First Respondent

and

JUANITA CAROL McDERMOTT  
Second Respondent

and

20 NTB PASTORAL HOLDINGS PTY LTD (ACN 078 593 469)  
Third Respondent



APPELLANT'S ANNOTATED REPLY

**Part I:**

This reply is in a form suitable for publication on the Internet.

**Part II:**10 Facts

1. The appellant embraces the respondents' submission<sup>1</sup> that the focus of the case was on why the looseness of the bolt was not detected.
2. As to paragraph 10 of the respondents' submissions, the appellant relies upon the Notice of Appeal as defining the scope of the appeal before this Court.
3. No substantive difference exists between the appellant's paraphrasing of reg 42V of the *Civil Aviation Regulations 1988*, as set out in paragraph 17 of the appellant's submissions, and the matters set out in paragraph 11 of the respondents' submissions. Plainly, the parties agree that the effect of that regulation is that the Manual was "approved maintenance data" and that any maintenance on the helicopter was to be carried out in accordance with the Manual.
- 20 4. The submission in paragraph 12 of the respondents' submission ought not be accepted. The respondents accept that the LAMEs must have ensured that maintenance on the helicopter was carried out "in accordance with" the Manual<sup>2</sup>. The Manual required that maintenance to be carried out only by  
30 LAMEs who had completed the appellant's maintenance course. As a matter of logic, if maintenance was carried out other than by such a person, it was not maintenance carried out "in accordance with" the Manual.
5. As to paragraph 13 of the respondents' submissions: the Manual specifically instructed that "torque seal (paint)" was to be applied to all "critical fasteners"<sup>3</sup>. It is uncontroversial that Bolt 4 was a "critical fastener". The purpose of that, according to the Manual, was "to show bolt rotation"<sup>4</sup>. Paragraph 19 of the appellant's submission is intended to say no more than that.
- 40 6. As to paragraph 18 of the respondents' submissions, not only did the other manufacturer's manual<sup>5</sup> concern a helicopter without a flex plate, but that helicopter uses old technology hardware (bolts, relevantly), quite different from

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<sup>1</sup> Respondents' submissions, paragraph 8.

<sup>2</sup> Respondents' submissions, paragraph 11.

<sup>3</sup> HCA Index 24, Vol 3, page 1228.

<sup>4</sup> HCA Index 24, Vol 3, page 1228.

<sup>5</sup> HCA Index 53, Vol 10, page 4375 and following.

that used in the helicopter with which this case is concerned – about which the principal author of the Manual gave evidence<sup>6</sup>.

7. As to paragraph 21 of the respondents' submissions: both Bray and Fisher were cross-examined on their usual practices, their reliance (such as it was) on the Manual, and their usual responses to broken or deteriorated torque stripes. They were asked about the specific inspections each performed on the Helicopter but neither had any recollection of it<sup>7</sup>. In those circumstances, further cross-examination on that issue would have been futile and improper.

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8. The distinction the respondents seek to draw, in paragraph 22 of their submissions, is artificial. Neither LAME was able to give evidence based on his memory of his inspection.

### Argument

9. The respondents seek to make much of the evidence they led as to the propensity for torque stripes to “deteriorate”<sup>8</sup>, and to torque stripes which “failed to cover the entire length of the bolt whether by inadvertence or deterioration”<sup>9</sup>.

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10. A torque stripe's purpose is not to demonstrate proper torque, but to serve as an alert that proper torque (leading to bolt rotation) may not exist. The words of the Manual support that<sup>10</sup>.

11. The respondents and, with respect, the majority below, overlook the specific instruction in the Manual as to the application of torque stripes – namely, that a torque stripe was to be applied “to all critical fasteners... in a stripe across both nuts and exposed bolt threads... to the part being fastened to show bolt rotation”. The appellant's case is that if a LAME encountered a “deteriorated” torque stripe or one “which failed to cover the entire length of the bolt”, that ought to have put a LAME on enquiry. The evidence of the LAMEs Bray<sup>11</sup> and Fisher<sup>12</sup> supports that. That being so, the suggestion that torque stripes were “effectively useless as indicators of bolt movement or slippage” is not supported by the evidence, and is, with respect, wrong.

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12. As to paragraph 39 of the respondents' submissions, the mere fact that there were other findings “open and no loss probable”, which had been identified by Alan Wilson J, did not provide a proper foundation for his Honour's overturning the trial judge's findings. “Open and no less probable” is a long way short of “glaringly improbably and contrary to compelling inferences”, as the *Fox v Percy* test requires<sup>13</sup>.

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<sup>6</sup> HCA Index 14, Vol 1, pages 281 to 282.

<sup>7</sup> HCA Index 10, page 163, line 1 to 10; HCA Index 11, page 169, line 40 to 50.

<sup>8</sup> Respondents' submissions, paragraph 34.

<sup>9</sup> Respondents' submissions, paragraph 35.

<sup>10</sup> HCA Index 24, Vol 3, page 1228.

<sup>11</sup> HCA Index 10, Vol 1, page 164, lines 9 to 12.

<sup>12</sup> HCA Index 11, Vol 1, page 170, lines 39 to 41.

<sup>13</sup> *Fox v Percy* (2003) 213 CLR 118 at 128, [29] per Gleeson CJ, Gummow and Kirby JJ.

13. As to paragraph 42 of the respondents' submissions, the evidence of Mr Lewis, which the respondents recite, demonstrates why his evidence (among others) may be cast aside: his inspection (a pilot's pre-flight inspection, not a LAME's 100-hourly) was, on the respondents' case, conducted "visually and tactilely" – there is no mention of a mirror (without which he would have been unable to see Bolt 4) and, as the respondents observe, "he was not so interested in torque stripes".
- 10 14. In paragraph 43, the respondents seek – as they do and have done elsewhere – to shift the onus to the appellant. It was open to the appellant (as the defendant) to argue its defence as it saw fit. It was not for the appellant to disprove the respondents' case.
15. As to paragraphs 44 to 46 of the respondents' submissions: the trial judge found (at [233]) that compliance with a the Pilot's Operating Handbook did not require a pilot to use a mirror, and that failure to use one would not demonstrate inadequacy of inspection by them. It follows as a matter of logic that, if a pilot did *not* have access to a mirror and use it in conducting an inspection of Bolt 4, then – given the location of Bolt 4 in the helicopter – it would have been impossible for such a pilot to visually observe the state of the torque stripe (or absence of one) on that Bolt.
- 20 16. It is for that reason that the appellant submits the pilots' evidence may be "cast aside" – or, at the very least, not be given greater weight than it deserves – as the respondents do and, with respect, as the majority in the Court of Appeal did<sup>14</sup> (without reference to the nature of a pilot's inspection, as distinct from a LAME's).
- 30 17. As to paragraph 45(d) of the respondents' submissions, the appellant infers the reference to paragraph 13 of the respondents' submissions is intended to refer to paragraph 12 of those submissions. That being so, the appellant refers to paragraph 4 of these submissions, above.
18. As to paragraph 49 of the respondents' submissions, Mr Fisher conceded that he was generally "pressed for time" at the time he was carrying out the inspection of the Helicopter<sup>15</sup>. Again, the respondents criticize the appellant for not putting certain matters to Mr Fisher, but that arose in circumstances where, as the appellant has previously submitted, Mr Fisher had no independent recollection of the work he carried out on the Helicopter.
- 40 19. As to paragraph 52 of the respondents' submissions, the trial judge enjoyed the special advantage of hearing the totality of the evidence, and the cross-examination of each of the experts in person. The trial was conducted over 25 days, during 6 sitting weeks, in two separate sittings, in two different years. By contrast, the Court of Appeal sat for a single day.

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<sup>14</sup> HCA Index 71, paragraphs {20}, [78] and [81].

<sup>15</sup> HCA Index 11, page 173, line 12 to 15.

20. In paragraph 55, in support of their proposition that torque stripes are an unreliable indicator, the respondents seek to latch upon the evidence of various experts - as to their responses to torque stripes presenting in different ways.
21. But that evidence is, with respect, academic. The two LAMEs who failed to detect the defect in Bolt 4 themselves gave evidence about the manner in which they would respond to deteriorated torque stripes – they were both clear that their response would be to check the torque on the bolt<sup>16</sup>.
- 10 22. As to paragraph 56 of the respondents' submissions, even if one accepts the proposition advanced there (and the appellant does not), which the respondents characterise as "probable" – namely, that the failure of the LAMEs to identify the defect because there was no sign of it – the alternative proposition (upon which the trial judge relied, and which the appellant continues to rely upon) - that the sign of the defect was overlooked by the LAMEs – was not glaringly improbable or contrary to compelling inferences.
- 20 23. Further, whether or not the Manual specifically stated (at the time of the accident) that a deteriorated or incomplete torque stripe on a critical fastener was a sign of possible rotation of the nut or bolt, which required the LAME to take further steps to investigate, is immaterial. The reason is that, by dint of their training and experience, both Bray and Fisher understood that's what they were required to do<sup>17</sup>.
24. As to paragraph 60 of the respondents' submissions, plainly Holmes JA (in [40]) was paraphrasing the effect of the evidence of Bray and Fisher, to which the appellant has referred in paragraphs 21 and 23, above. The point her Honour sought to make (in [40]) remains, with respect, correct.
- 30 25. As to paragraph 62(a) and (b) of the respondents' submissions:
- a. *First*, it is the effect of each of those elements identified in paragraph 56 of the appellant's submissions, taken together, which the appellant contends the majority failed to consider and address in its reasons.
  - b. *Secondly*, the appellant did not submit that Bray and Fisher's evidence was that "the way to ascertain the torque of the nuts on Bolt 4 was to use a torque wrench" *on a 100 hourly inspection* – rather, the effect of their evidence was that they knew that was the way to ascertain the torque of the nut on Bolt 4 *at any time*<sup>18</sup>.
- 40 26. As to paragraph 62(d), for reasons discussed in paragraph 21, above, the different approaches of LAMEs to various conditions of the torque stripe is immaterial in light of the evidence of Bray and Fisher themselves about their response to deteriorated torque stripes.

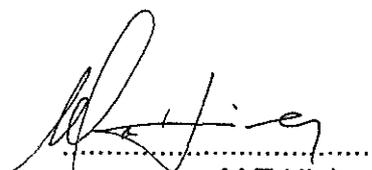
<sup>16</sup> HCA Index 10, page 164, lines 3 to 5; HCA Index 11, page 170, lines 33 to 50.

<sup>17</sup> HCA Index 10, page 164, lines 3 to 5; HCA Index 11, page 170, lines 33 to 50.

<sup>18</sup> HCA Index 10, page 165, line 35; HCA Index 11, page 172, lines 43 and 45.

27. As to paragraph 62(e) of the respondents' submissions, what the appellant intended to convey by paragraph 56(c) of its submissions is that Bray's usual practice was to apply a spanner to the head of Bolt 4 – he did not need the Manual to tell him to do that in order to "Verify Security".
28. As to paragraph 68 of the respondents' submissions, their characterization of what they were obliged to prove is not accepted by the appellant. They were obliged to prove that the failure of the Manual to contain the instruction they argue it ought to have contained was the cause of their loss and damage. That is different from the formulation of the onus they purport to have borne.
29. As to paragraph 70 of the respondents' submissions, the matters the respondents assert the appellant failed to plead were, in fact, pleaded in paragraph 36 of the Defence<sup>19</sup>.
30. As to paragraph 74 of the respondents' submissions, it was unnecessary for the appellant to address the issue of causation, because the learned trial judge had made no finding about it.
31. As to paragraph 76 of the respondents' submissions, the fundamental problem with the respondents' case on the question of causation – which remains unsolved - is that Bray and Fisher already knew it was necessary to do the very things the respondents assert the Manual ought to have told them.
32. That being so, the fact that the Manual did not specifically direct Bray and Fisher to do those things, cannot have caused the respondents' loss.

30 Dated: 15 January 2016



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<sup>19</sup> HCA Index 2, para 36.