[HIGH COURT OF AUSTRALIA.]

ROYAL VICTORIAN AERO CLUB . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1954.

MELBOURNE, *Oct.* 4, 5;

BRISBANE, *Nov.* 8.

Webb J.

Contract—Training of Air Force personnel by flying club in club's planes—Recompensing of club for damage arising from "wilful misconduct" of such personnel—Failure to recall instruction while acting in breach thereof.

Under an agreement for the training of Air Force personnel by the plaintiff club, it was provided that where damage arose from the "wilful misconduct" of such personnel the Commonwealth would recompense the club for damage etc. to its property.

An aeroplane owned by the club crashed while piloted by an Air Force trainee who was practising the technique required to make a forced landing. The trainee, who had carried out the practice several times and was well versed in judging a height of 200 feet, had been instructed that on fields of his own selection he was not to come below that height. On the occasion in question, which was on a field of his own selection, the trainee was not absolutely certain when he was about 200 feet from the ground, whether he would have made the field had he to come down or whether he was landing "dead into the wind". He accordingly came down "slightly" further to check. At about 50 to 70 feet he noticed two wires running across the boundary fence and attempted to regain height. The engine spluttered, however, in consequence of which the plane touched the wires and crashed. The trainee was aware that he was flying below 200 feet, but he did not think of the instruction to the contrary until after the crash.

Held, that, in the circumstances, the trainee was not guilty of "wilful misconduct".

Lewis v. *Great Western Railway Co.* (1877) 3 Q.B.D. 195, at pp. 206, 210-211; *Graham* v. *Belfast & Northern Counties Railway Co.* (1901) 2 I.R. 13, at p. 19; *Fordes* v. *Great Western Railway Co.* (1905) 2 K.B. 532; *Transport Commission* v. *Neale Edwards Pty. Ltd.* (1954) 92 C.L.R. 214, at p. 230, applied.

ACTION.

Royal Victorian Aero Club, a company incorporated in Victoria commenced an action on 17th June 1953 in the High Court of Australia against the Commonwealth of Australia. The plaintiff claimed under an agreement between it and the defendant dated 22nd February 1951 in respect of damage it had suffered by reason of an aircraft crash on 21st December 1951.

The action was heard before *Webb* J. from whose judgment the facts sufficiently appear.

A. H. Mann, for the plaintiff.

M. V. McInerney, for the defendant.

Cur. adv. vult.

Nov. 8.

The following written judgment was delivered :—

WEBB J. In this action the plaintiff club claims £1,067 16s. 0d. from the defendant Commonwealth for the destruction of the club's aircraft in a crash during a solo flight by an Air Force trainee and for other damage to property caused by the crash. This sum is made up as follows :—

Value of the aircraft	£1,000	0	0
Cost of salving	20	0	0
Amount claimed by State Electricity Commission for repairs to high tension wires	47	16	0

The claim is made under an agreement between the parties for the instruction and training by the club of Royal Australian Air Force personnel, including trainees who are to be trained by the club to the standard of private pilot licence, as set out in the Department of Civil Aviation Air Navigation Orders. The Commonwealth denies any liability to the club, and counter-claims for £47 16s. 0d. which it has paid to the State Electricity Commission for repairs to the high-tension wires. No question arises as to the accuracy of these amounts.

The rights of the parties depend on the answer to the question whether a trainee named Graeme Lowe, who was on a solo flight in the aircraft in the course of forced landing practice when it crashed near Laverton, Victoria, and in so doing fouled the high-tension wires, was in the particular circumstances guilty of wilful misconduct in flying below 200 feet, contrary to instructions. If guilty, then judgment is to be entered for the plaintiff club for the amount claimed (except I assume £47 16s. 0d.) ; if not, then

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judgment is to be entered for the defendant Commonwealth on the claim and for £47 16s. 0d. on the counterclaim.

Evidence was given for the plaintiff club by its chief flying instructor, Macpherson, and by its flying instructor, Tilbury. The trainee Lowe was also called by the plaintiff after I had intimated at the end of the plaintiff's other evidence that I did not see how the plaintiff could succeed without the assistance of the trainee's evidence. I had previously rejected as inadmissible a report and correspondence said to bear on the circumstances of the crash. As Lowe did not prove to be a hostile witness, he could not be cross-examined by Mr. *Mann* for the club. On the other hand Mr. *McInerney* for the Commonwealth had no occasion to subject him to any real cross-examination. The result was that the most important witness was not actually subjected to cross-examination. However, without that assistance, I readily formed the opinion that Lowe was truthful. Mr. *Mann* said that Lowe appeared to him to be " a very good type of frank young man ".

The evidence of these three witnesses, so far as material, was as follows :—

Chief flying instructor Macpherson was in charge of flying training at Laverton. Lowe was allotted to Tilbury, but Macpherson came into contact with Lowe, among other trainees, in the course of discussions on flying sequences, of which there were twenty-eight, beginning with " Familiarity with cockpit layout " and ending with " Formation flying ".

Each sequence was taken separately, but as training proceeded it was incorporated in later sequences, e.g., it was necessary for forced landing practice on which Lowe was engaged when the crash occurred to carry out gliding, descending, climbing and gliding turns, and side-slipping, all of which preceded " forced landings " in the sequences. It was very important that a trainee should do many forced landing descents. These were not complete landings: trainees were instructed not to fly solo below 200 feet, i.e., above any obstacles on the ground, if the field for the exercise has been selected by the trainee himself. The trainee's aim was to reach a position 1,000 feet above the ground on the approach side of the field from which point he could carry out a cross-wind descent to 500 feet immediately opposite the approach path into the field, where he completed his turn into the field, then making the simulated forced landing. By the time he reached 200 feet from the ground above obstacles he should have known whether he could safely land in the field if he continued ; but whether he knew this or not at that height he should then have opened the throttle and resumed

normal flying: he was not at liberty to go below 200 feet to make sure. Before undertaking this solo exercise, the trainees were instructed about this 200 feet limitation, because of "possible dangers of concentrating too hard on final approach". At the stage that Lowe had reached in his training when this crash occurred, a trainee was "well versed and practised in judging a height of 200 feet". Lowe in fact was very near completion of the whole course.

Flying instructor Tilbury supported Macpherson and said that prior to the accident Lowe would have done several periods solo on the forced landings sequence, and that the trainee was fully aware of the importance of not coming under 200 feet at any time during forced landing practice. Lowe had advanced beyond the forced landing sequence. The exercise on which he crashed was his second of the kind that day.

I accept Macpherson and Tilbury as truthful witnesses.

The trainee Lowe said he had instructions in "forced landings" and had carried out that practice several times, both dual and solo. "Dual" means with an instructor. Lectures were given to him not only by Macpherson and Tilbury but also by an officer of the Air Force. The trainees had been told that on solo forced landings on fields of their own selection, they were not to come below 200 feet. The field where the crash took place was one of Lowe's selection. At 2200 feet Lowe throttled back and put the aircraft into a glide and descended so as to position himself at one side of the field at 1000 feet. He came down on a cross-wind to 700 feet on the altimeter, then turned in on the final approach and continued down. At about 200 feet he was not absolutely certain whether he would have made the field had he to come down, or whether he was landing "dead into the wind"; so he came down "slightly" further to check on those two points. At about fifty to seventy feet he noticed two wires running across the boundary fence. He then opened the throttle and pulled back on the stick. This would ordinarily have cleared the wires; but the engine spluttered "and did not come on"; one of the wheel struts hit the wires, and the plane crashed nose down. He was aware that he was flying below 200 feet; it was part of the exercise to be aware of it; but he did not think of the instruction about not coming below 200 feet. This limit was mentioned by Macpherson and by the Air Force officer in lectures. It was a point, but by no means the most important point. It was emphasized, but perhaps no more than landing into the wind. The limit did not occur to him during this exercise; his concentration was wholly on the manoeuvre which required a great deal of concentration. Concentration must be wholly on it;

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his concentration was solely on it. At no time during the manoeuvre did he remember the instruction about the 200 feet limit. He first recollected it after the crash when he was going to a farm house to telephone Laverton.

As already stated, I accept Lowe as a truthful witness.

It is submitted by Mr. *Mann* for the club that Lowe was guilty of wilful misconduct within the meaning of the agreement sued on. The effect of that agreement as amended may be summarized as follows :—It provides for the training to the prescribed standard of Air Force trainees by servants of the club and for the suspension or termination of the training by the Commonwealth where the trainee is unsuitable, or for other reasons not necessary to state here. The trainee is required to observe the rules of the club and is subject to the discipline of the Royal Australian Air Force. By cl. 10 the Commonwealth is to pay £4 10s. 0d. for each hour flown by the club aircraft when operating from the club's home base and £5 per hour when operating from any other centre. In addition, the Commonwealth undertakes to set aside 10s. per hour for the purpose of assisting the club in the replacement of aircraft. By cl. 12 when R.A.A.F. personnel are injured during flying training other than as a result of the wilful misconduct of a servant of the club, the Commonwealth accepts liability. By cl. 13 as amended, where damage arises from the wilful misconduct of R.A.A.F. personnel, the Commonwealth undertakes to recompense the club for damage to its aircraft or other property, and indemnifies the club against claims and proceedings against the club. By cl. 14 and subject to cl. 13 the club indemnifies the Commonwealth against claims and proceedings by any person, not being an officer or employee of the Commonwealth, in respect of injuries or fatalities, or damage to property caused by the club or its members or R.A.A.F. personnel.

Mr. *Mann* submitted that the meaning of " wilful misconduct " depends on the context and subject matter of the particular agreement in which it is found, and that no direct assistance can be derived from the railway consignment note cases for which the meaning has long been settled. He also submitted that " suicide " cases, e.g., those where the trainee might deliberately crash into a building, were not contemplated by the parties to this agreement : the cases the parties had in mind would be on the one hand those arising from accidents, errors of judgment and negligence, which the club should be able to control by careful training and which would be covered by the payment of £4 10s. 0d. or £5 per hour,

and on the other hand those arising from the trainee's disobedience of orders, which no efforts or diligence of the club or its servants could be expected to overcome. However, as to this further submission, this is not a satisfactory *discrimen*, as Mr. *McInerney* pointed out, because the club and its servants would also be powerless to eradicate a trainee's stupidity or misunderstanding not amounting to disobedience.

In these aircraft cases, whether they deal with the carriage of persons or goods, as in *Horabin* v. *British Overseas Airways Corporation* (1), or with the training of pilots, as in this case, it is of course proper to have regard to the context of the particular contract of carriage by air or other contract in determining the meaning of any term used in it. That we can be sure is just what was done in the consignment note cases. Indeed it should be done in all cases. But subject to that, there is no reason why the meaning given to a similar term in contracts for carriage by railway should not be applied as *Barry* J. applied it in summing up to the jury in *Horabin's Case* (1). His Lordship treated the term " wilful misconduct " as meaning something blameworthy, intentional wrongdoing, as in the railway consignment cases. The consignment note cases have been applied to other forms of contracts, as appears in *In re Mayor of London and Tubb's Contract* (2), and *In re City Equitable Fire Insurance Co. Ltd.* (3), per *Pollock* M.R. Mr. *Mann* himself sought to rely on the cases on the meaning of " wilful default " in contracts of sale and mortgages, as in *In re Young and Harston's Contract* (4) and *In re Hetling and Merton's Contract* (5) in which it was held that that meaning also had been settled. In the former case *Bowen* L.J. said that " wilful " as used in courts of law implied nothing blameable, but merely that the person of whose act or default the expression was used was a free agent and that what was done arose from the spontaneous action of his will. Mr. *Mann* relied on this. However in *In re Mayor of London and Tubb's Contract* (6) *Lindley* L.J. expressed the opinion that the observations hereinafter set out of *Bramwell* L.J. in *Lewis* v. *Great Western Railway Co.* (7) were quite consistent with *Bowen* L.J.'s observations in *In re Young and Harston's Contract* (8), bearing in mind that *Bowen* L.J. presupposed knowledge of what was done and intention to do it and was not addressing himself to a case of an honest mistake or oversight.

(1) (1952) 2 All E.R. 1016.
(2) (1894) 2 Ch. 524.
(3) (1925) 1 Ch. 407, at p. 517.
(4) (1885) 31 Ch. D. 168.
(5) (1893) 3 Ch. 269.
(6) (1894) 2 Ch., at p. 536.
(7) (1877) 3 Q.B.D. 195, at p. 206.
(8) (1885) 31 Ch. D., at pp. 174-175.

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For the purpose of this agreement I think the meaning of "wilful misconduct" is best expressed by *Brett* L.J. in *Lewis* v. *Great Western Railway Co.* (1) as follows:—

"In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong . . . Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission" (2).

In the same case *Bramwell* L.J. had already made the observation referred to by *Lindley* L.J. in *In re Mayor of London and Tubb's Contract* (3) that—

"'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*-conduct, not the conduct, must be wilful . . . I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, 'Now this may or may not be a right thing to do'. He might say, 'Well, I do not know which is right, and I do not care; I will do this'. I am much inclined to think that that would be 'wilful misconduct', because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct" (4).

Bramwell L.J. and *Brett* L.J. gave to the term "wilful misconduct" its natural meaning and not its meaning in a particular context or for a particular subject matter. In fact in none of the English railway cases was the term given a meaning other than its natural meaning. From the first to the last of these cases the particular context or subject matter was never a determining factor: in all cases the natural meaning was given to the term, nothing more nor less. Neither the context nor the subject matter required a departure from the natural meaning.

To employ the language of *Johnson J.* in *Graham* v. *Belfast and Northern Counties Railway Co.* (5), the question is: did the

(1) (1877) 3 Q.B.D. 195.
(2) (1877) 3 Q.B.D., at pp. 210-211.
(3) (1894) 2 Ch. 524.
(4) (1877) 3 Q.B.D., at p. 206.
(5) (1901) 2 I.R. 13, at p. 19.

trainee know and appreciate that it was wrong conduct on his part in the existing circumstances to do or fail or omit to do a particular thing and yet intentionally did or failed to do or omitted to do it ? Or to employ the language of Lord *Alverstone* in *Forder* v. *Great Western Railway Co.* (1) : did the trainee act with reckless carelessness, not caring what the results of his carelessness might be ? The answer to both questions must be that he did not.

It is conceded by the Commonwealth, as I understand Mr. *McInerney*, that the trainee would have been guilty of wilful misconduct if he had recollected as he came below 200 feet that he was acting contrary to his instructions, but still continued to descend instead of going up again.

Reliance is not placed by the Commonwealth on the passage in the judgment of *Kitto* J. in *Transport Commission* v. *Neale Edwards Pty. Ltd.* (2) reading :—

" It is nothing to the point that he (the driver of the train) may have been aware that he was infringing restrictions as to speed which were binding upon him, for the accident was not caused by infringing these restrictions ; it was caused by allowing the train to enter the curve at a greater speed than that at which it was in fact possible for that train to take that curve. What is to the point is the question whether he was aware that he was subjecting the train to an actual danger of entering the curve at such a greater speed " (2).

In the Tasmanian case the speed limit had been fixed for each curve and moreover written notices had been issued by the transport commissioner requiring the train driver to observe those limits in the interests of safety. It was not then merely the case of a general speed limit, such as was sometimes found in traffic Acts or regulations made thereunder, fixed for all places and times and in all circumstances so that a breach would not necessarily create a situation of actual danger in every case. If in that case the commissioner's liability was rightly placed on that narrow ground, then there is no reason why the Commonwealth's liability in this case should not be similarly restricted as the need for the observance of the speed limit was as strongly emphasized in the Tasmanian case as was the 200 feet limit in this case. If the Commonwealth's liability is so restricted, then even if it should be found that the trainee Lowe knew he was disobeying instructions as he flew below 200 feet, still there is no evidence to support a finding that he also knew he was subjecting the aircraft to an actual danger in so doing. In neither case was it shown or suggested that the

(1) (1905) 2 K.B. 532.

(2) (1954) 92 C.L.R. 214, at p. 230.

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speed limit or the height limit was in fact more restricted than safety required; but the passage from the judgment of *Kitto* J. indicates that the onus of proof that the limit fixed the actual danger point was on the plaintiff and it was not discharged.

I think then that the claim fails and that the counterclaim succeeds.

I give judgment for the defendant Commonwealth on the claim and judgment for the defendant Commonwealth for £47 16s. 0d. on the counterclaim.

The plaintiff club will pay to the defendant Commonwealth the costs of the action.

Liberty to apply.

Solicitors for the plaintiff, *Pavey, Wilson, Cohen & Carter.*

Solicitor for the defendant, *D. D. Bell,* Crown Solicitor for the Commonwealth of Australia.

R. D. B.