# HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

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**Matter No S107/2009**

ACQ PTY LIMITED APPELLANT

AND

GREGORY MICHAEL COOK & ANOR RESPONDENTS

**Matter No S108/2009**

AIRCAIR MOREE PTY LIMITED APPELLANT

AND

GREGORY MICHAEL COOK & ANOR RESPONDENTS

*ACQ Pty Limited v Cook*
*Aircair Moree Pty Limited v Cook*
[2009] HCA 28
*5 August 2009*
S107/2009 & S108/2009

**ORDER**

**Matter No S107/2009**

1. *Appeal dismissed.*

2. *Appellant to pay the costs of the first respondent.*

**Matter No S108/2009**

1. *Appeal dismissed.*

2. *Application for special leave to cross-appeal dismissed.*

3. *Appellant to pay the costs of the first respondent of both the appeal and the application for special leave to cross-appeal.*

On appeal from the Supreme Court of New South Wales

**Representation**

B W Walker SC with G Curtin for the appellants in both matters (instructed by Riley Gray-Spencer Lawyers)

P Menzies QC with G Giagios for the first respondent in both matters (instructed by Whitelaw McDonald)

Submitting appearances for the second respondent in both matters

## CATCHWORDS

**ACQ Pty Limited v Cook**
**Aircair Moree Pty Limited v Cook**

Aviation – Liability for damage caused by aircraft – Crop dusting aircraft collided with conductor in cotton field – Electrical linesman dispatched to repair conductor tripped or fell near it – Injury occurring after electric arc – Whether injury "caused by ... something that is a result of an impact" with an aircraft in flight – *Damage by Aircraft Act* 1999 (Cth), s 10(1).

Words and phrases – "something", "caused by".

*Damage by Aircraft Act* 1999 (Cth), ss 10(1), 11.

FRENCH CJ, GUMMOW, HEYDON, CRENNAN AND BELL JJ.

The background facts

1 At about 5.30am on 28 December 2000 a crop dusting aircraft was spraying a cotton field known as Field 19 about 21.5km north of Moree. The aircraft was owned by ACQ Pty Limited. It was operated by Aircair Moree Pty Limited, a company which employed the pilot[1]. Field 19 had a power line – a 22kV conductor – passing over it. At the lowest point the line was about 6.2m above the ground. In the course of flying under the conductor, the aircraft collided with it and caused it to drop to a height of about 1.5m from the ground at its lowest point. NorthPower (now known as Country Energy), which was responsible for the conductor, was informed of the incident at about 6.04am. Less than a quarter of an hour later NorthPower despatched two of its employees, Mr Cook ("the plaintiff") and Mr Buddee, to deal with the problem. They each arrived at about 6.45am. They agreed that Mr Buddee would drive to a links site seven kilometres away and isolate the conductor. They also agreed that the plaintiff would wait until the conductor was isolated before commencing his assessment. Despite that agreement the plaintiff entered the field before the conductor was isolated in order to see what damage had been caused and assess what repair work might be required. On the field were planted cotton plants in rows one metre apart, the rows running in a north-south direction. The plants were more than half a metre high. They grew into each other, so that the rows formed low hedges. Between the rows were troughs in which water collected when the field was irrigated. Thus the ground in profile had the configuration of crests with troughs spaced one metre apart. The ground was uneven and extraordinarily boggy. The conductor, being thin, was difficult to see against the overcast sky. The plaintiff approached the conductor, about 65m from his truck, by crossing through lines of plants in a slightly diagonal direction. The plaintiff then stumbled or fell in the muddy conditions and came within 60mm of the conductor. An electric arc between the conductor and the plaintiff took place, injuring him badly.

The legislation

2 There were numerous controversies in the courts below, but the only claim which is relevant to these appeals is a claim which the plaintiff made against the

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**1** ACQ Pty Limited and Aircair Moree Pty Limited are referred to below as "the appellants".

appellants. He made the claim under the *Damage by Aircraft Act* 1999 (Cth) ("the Act"). Section 10(1) provides:

> "This section applies if a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by:
>
> (a) an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened; or
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> (b) an impact with part of an aircraft that was damaged or destroyed while in flight; or
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> (c) an impact with a person, animal or thing that dropped or fell from an aircraft in flight; or
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> (d) something that is a result of an impact of a kind mentioned in paragraph (a), (b) or (c)."

3 Section 10(2) provides that if s 10 applies, both the operator of the aircraft immediately before the impact happened, and the owner of the aircraft immediately before the impact happened, are jointly and severally liable in respect of the injury, loss, damage or destruction.

4 Section 11 provides:

> "Damages in respect of an injury, loss, damage or destruction of the kind to which section 10 applies are recoverable in an action in a court of competent jurisdiction in Australian territory against all or any of the persons who are jointly and severally liable under that section in respect of the injury, loss, damage or destruction without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants."

The trial

5 In the District Court of New South Wales, Johnstone DCJ found that the appellants were liable, and that s 9 of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) did not apply by reason of the fact that s 5A of the *Civil Liability Act* 2002 (NSW) was not enlivened, as the plaintiff's claim was not a claim in negligence. Consequently, there was no reduction in damages on the ground of any contributory negligence on the part of the plaintiff. The trial judge

entered a verdict for the plaintiff against the appellants for $953,141.00 and gave judgment accordingly[2].

6 The appellants submitted to the trial judge that s 10(1)(a)-(c) would only apply if the aircraft, or part of it, or something falling from it, struck the plaintiff, and that s 10(1)(d) would only apply if one of those objects struck an object that then struck the plaintiff. The trial judge rejected that submission. He held that the plaintiff had suffered personal injury caused by "something" that was the result of an impact of the aircraft, in flight, with the conductor. That "something" was the dislodgment of the conductor from a supporting pole, which created a foreseeable risk for persons near, or persons who might approach, the live conductor, such as linesmen from NorthPower.

The Court of Appeal

7 The Court of Appeal of the Supreme Court of New South Wales (Campbell JA, with Beazley and Giles JJA concurring) dismissed an appeal by the appellants[3].

8 The appellants repeated the submission they had made to the trial judge. However, the Court of Appeal considered that the impact of the aircraft with the conductor caused it to hang low over "a field that was uneven, extraordinarily boggy, and methodically strewn with obstacles in the form of the rows of cotton bushes." It said:

> "The conductor was extremely dangerous in itself; the impact caused it to be in a position where people were at risk of getting dangerously close to it, and [the plaintiff] was injured when he encountered that precise risk."

Thus the "something" which caused the plaintiff's personal injuries was the creation of a danger to persons who got close to the conductor[4].

9 The appellants, by special leave, have appealed to this Court. Each appeal should be dismissed for the following reasons.

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**2** *Cook v Aircair Moree Pty Ltd* (2007) 5 DCLR (NSW) 142; [2007] NSWDC 164.

**3** *ACQ Pty Ltd v Cook* [2008] NSWCA 161.

**4** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [140]-[142].

The appellants' primary arguments

10 The appellants did not repeat the argument which had been rejected by the trial judge and the Court of Appeal. Rather they submitted that the legislation did not provide a universal comprehensive scheme to award damages to every person who sustained an injury that was in some way connected to the impact of an aircraft, part of an aircraft, or something which fell from an aircraft whilst in flight. In particular they submitted that "something that is a result of an impact" of those kinds should be construed as being a thing (for example, a fire or a collapse of a building) which "has an immediate (or reasonably immediate) temporal, geographical and relational connection with an impact."

11 The appellants relied on the words "a person or property on, in or under land or water". They contended that those words created a "geographical limitation". They argued that those words could not have referred to all persons except those aloft, because that conception could have been much more straightforwardly expressed. They submitted that if that was all the phrase "on, in or under land or water" did, it was "puzzling" and "odd". It was "an extremely roundabout crabwise way of saying as long as you are not in an aircraft in flight." Hence the appellants submitted that the land or water had to be located in a place linking the impact and the claimed damage. The words did "not obviously include" persons brought to the scene by reason of the impact (including those who came to rectify or repair the state of affairs created by the impact). Thus, the words required plaintiffs to be at a place on, in or under land or water which was linked with the impact at the time of the impact.

12 The appellants claimed to disavow any attempt to contend that whatever the extent to which the plaintiff's own negligence had contributed to his loss, it was so high as to break the chain of causation. They criticised the Court of Appeal for analysing the case from the point of view of whether the plaintiff was "the sole author of his own misfortune"[5]. Rather they submitted that the chain of causation was too remote to apply to a well-trained worker who came a considerable distance to remedy a fault arising out of a static set of circumstances which would have caused no danger to the plaintiff had he not, voluntarily, fully appreciating the danger from the damaged conductor and the muddy field, and without the press of emergency, departed from his agreement with Mr Buddee to do nothing until the conductor had been isolated.

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**5** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [141].

13 The appellants further submitted that for s 10(1)(d) to operate, there had to be injury caused by "something" – not a series of things or a narrative of intermediate events or "the whole ensemble of circumstances that combined to bring [the plaintiff] from his home to within 60mm of the conductor." Paragraph (d) of s 10(1) had "to be useful and to add something", in the singular, and "caused by" did not "include … multistage narrative to link the impact with the outcome." Section 10(1)(d) added one more permissible stage between the impact and the outcome, but only one.

Narrow basis of this decision

14 The words of the legislation are brief and general. The circumstances to which arguably they may or may not apply are very numerous and diverse. The arguments of the parties raised for consideration many factual possibilities other than the one before the Court. This is, it seems, the first case in which it has been necessary for curial analysis to be given to the construction of the legislation. The field of debate, causation, is one of the most difficult in the law, and one about which abstract discussion is seldom valuable for courts and those who practise in them. It is thus undesirable to deal with possible applications of the legislation which are not essential for the decision of this case. Most cases on s 10(1) are likely to be intensely fact-specific. Certainly the present one is. Hence no endeavour should be made to resolve other cases while deciding this one.

The appellants' concession and its consequences

15 In the course of illustrating the scope of s 10(1) as they submitted it to be, the appellants gave an illustration of a plane exploding on landing, thus setting alight structures nearby and causing death or injury to a plaintiff whose house is burned down. They conceded that a fire fighter who was summoned to fight the fire and who was injured by it would be within s 10(1)(d), even if the scene of the fire was some distance from the fire station. That concession was correct because, as the appellants accepted, there was no reason not to conclude that the fire fighter's injury was caused by "something" that was a result of an impact between the aircraft and the ground, namely the fire. The appellants, however, distinguished that case from the present one:

> "There is the world of difference between a rescuer who is answering the call of either nature or society to save another person … from peril, on the one hand, and on the other hand, a person who comes to a scene of evident danger precisely because the danger is evident and because of their skills, experience and position, occupation, in order to

> repair or rectify that dangerous position where there is no peril to another person … requiring the risks to be undertaken in order to answer the calls of nature or social duty."

16 The distinction is not a valid ground on which to deny liability in the present case. First, it cannot be said that the damaged conductor involved "no peril to another person". One of the reasons why the plaintiff and Mr Buddee were sent to the scene was to nullify a peril to agricultural workers and others who might approach it. Secondly, given that the conductor did involve a peril to agricultural workers and others, there is no difference between the role of fire fighters in reducing perils from the fire and the role of linesmen in reducing and overcoming perils from the damaged conductor. The plaintiff was engaged in activities incidental to the reduction and abatement of those perils – inspecting the damage and assessing what repair work was necessary. He may have been negligent in breaching his agreement with Mr Buddee and in other ways, but, as noted above, the appellants did not contend that his negligence was such as to be the true or sole cause of his injuries.

17 The appellants' concession, and its application to the plaintiff here, involved an abandonment of their argument based on the words "on, in or under land or water" – for the land on which the hypothetical fire fighter and the plaintiff were at the time of the impact was some distance from the scene of the impact, and they had to travel that distance to get there. To call the drafting roundabout, puzzling, odd and crabwise is an exaggeration. The words "on, in or under land or water" serve to distinguish those accidents to which s 10(1) applies from accidents in the air, to which other legal regimes apply.

18 There is no linguistic strain in characterising what happened to the plaintiff as a personal injury caused by "something" that is "a" result of an impact between the aircraft in flight and the conductor. The plaintiff adopted the trial judge's conclusion that the "something" was the movement of the conductor into a dangerous place, 1.5m above the ground at its lowest point, creating a foreseeable risk for persons near it. The Court of Appeal appeared to treat the "something" as the movement of the conductor into a position where people were at risk of getting dangerously close to it. There is no substantive difference between these characterisations in this case, and they are correct. The injury was caused by the dangerous position of the conductor, and its dangerous position was the result of an impact between the aircraft and it.

The appellants' specific criticisms of the Court of Appeal considered

19 The appellants submitted that on the approach of the Court of Appeal there was "virtually no limit" to the liability created by s 10(1)(d) for results flowing from the impacts described in s 10(1)(a)-(c).

20 The appellants submitted that there were two particular errors in the reasoning of the Court of Appeal.

21 The first error lay in the following utilisation of the legislative history[6]: "Article 1 of the Rome Convention had provided for there to be no right to compensation '*if the damage is not a direct consequence of the incident giving rise thereto*'." The Court of Appeal said that s 10(1)(d) altered this so that not only the direct consequences of an impact attracted limited liability, but also the indirect or consequential results of an impact. The Court of Appeal said that this construction was consistent with the language, the legislative history, and the purpose of the Act.

22 The background is that Art 1(1) of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface agreed at Rome on 7 October 1952[7] ("the Rome Convention") provided:

> "Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless there shall be no right to compensation if the damage is not a *direct* consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations." (emphasis added)

Section 8(1) of the *Civil Aviation (Damage by Aircraft) Act* 1958 (Cth) provided that the provisions of the Rome Convention had the force of law in Australia. That legislation was repealed by the Act (s 13 and Sched 1). Section 3 of the Act provides:

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**6** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [136] (italics in original).

**7** 310 UNTS 181.

> "The main object of this Act is to facilitate the recovery of damages for certain injury, loss, damage or destruction caused by aircraft, or by people, animals or things that are dropped, or that fall, from aircraft that are in flight."

According to the Court of Appeal the word "facilitate" showed "an intention to improve the pre-existing situation."[8] The Court of Appeal also referred to various parts of the Minister's Second Reading Speech[9] which spoke of improving compensation and making it comprehensive, which identified drawbacks to the Rome Convention regime, and which described gaps in State and Territory legislation.

23 The appellants submitted that it was erroneous to conclude that the purpose of ss 10 and 11 was to include, "apparently without relevant limitations …, indirect or consequential results of an impact." In particular, they submitted that such a purpose was "unsupported by all the extrinsic material."

24 It is not proposed to analyse the Second Reading Speech or the use to which the Court of Appeal put it. Nor is it proposed to analyse the fairly numerous references which the parties made to that speech and to other extrinsic material. That is because whatever utility those materials might have in relation to other cases, they are not determinative of any particular construction which is decisive of this case[10]. The appellants were correct to say, at least in relation to this case, that there is nothing in the extrinsic materials definitively supporting the result at which the Court of Appeal arrived. The Court of Appeal, nevertheless, was correct to conclude that s 10(1)(d) does in a sense extend liability from "direct consequences" to "indirect or consequential results". What these two categories of expression may mean is another issue.

25 The second criticism which the appellants made of the Court of Appeal related to the relationship between s 10(1) and the common law. The Court of

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**8** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [114].

**9** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 March 1999 at 4163-4165.

**10** The same is true of an even more remote guide to which both parties appealed in different respects, namely this Court's decision in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568; [2005] HCA 26, a case on very different legislation.

Appeal applied to s 10(1) "the understanding of the concept of causation"[11] expressed in *March v E & M H Stramare Pty Ltd* by Mason CJ, Deane, Toohey and Gaudron JJ[12] in relation to the tort of negligence and applied in *Wardley Australia Ltd v Western Australia*[13]. As stated by the Court of Appeal[14], the relevant test is:

> "a test of causation whereby it was a question of fact to be answered by reference to commonsense and experience, and one into which considerations of policy and value judgments necessarily enter. When causation is so regarded, the law has no difficulty in recognising that there can be multiple causes of the one damage."

The Court of Appeal said that that understanding should be applied to the words "caused by" in s 10(1). It said[15]:

> "While the meaning that is given to an expression in one area of the law is not necessarily the same as the meaning given to that same expression in a different area of the law, [there is] nothing in the purpose for which a judgment about causal connection is made in the law of negligence that differentiates it from the purpose for which a judgment is made about causal connection for the purpose of the application of [the Act]. In both cases, the purpose is deciding how legal liability to pay damages for loss or damage should fall. Further, in [the Act] there is a particularly close connection between the way in which causation works to attribute that responsibility, and the way causation works in the law of negligence. It arises in [s 11 of the Act], where it provides that damages of a kind referred to in [s] 10 are recoverable '*as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants*'."

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**11** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [139].

**12** (1991) 171 CLR 506; [1991] HCA 12.

**13** (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ; [1992] HCA 55.

**14** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [137].

**15** *ACQ Pty Ltd v Cook* [2008] NSWCA 161 at [139] (italics in original).

The appellants criticised the last sentence on the ground that the words "as if" in s 11 could not point to any particular causation test: s 10(1) dealt with causation as a "self-contained code", while s 11 assumed satisfaction of s 10(1).

26 The appellants also criticised the Court of Appeal for failing to act on a passage which it quoted from Mason CJ's reasons for judgment in *March v Stramare*[16]:

> "[A] factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured is not causally connected with the injury, unless the risk of the accident occurring at that time was greater".

27 Not every lawyer has found the analysis of causation in *March v Stramare* helpful. But, without casting doubt on anything that was said in *March v Stramare* or in *Wardley Australia Ltd v Western Australia*, it is not necessary in construing s 10(1) to rely on any analogy with what was said in those cases, at least in the course of resolving the present appeals. To this limited extent there is some force in the appellants' submissions. And quite independently of the Court of Appeal's translation of *March v Stramare* to s 10(1), one of the principal points extracted by the Court of Appeal from that case is uncontroversial, and was not controverted by the appellants – the proposition that there can be multiple causes of the damage suffered by a plaintiff. Further, the context of the passage quoted from Mason CJ's reasons for judgment in *March v Stramare* reveals that Mason CJ was concerned merely to reject the "but for" test as an exclusive criterion of causation. It is true that but for the impact of the aircraft on the conductor the plaintiff would not have been injured; but the causal relationship between the impact and the injury was much closer than that, and did not rest exclusively on a "but for" analysis.

The appellants' reliance on arguments from absurdity

28 A final argument by the appellants was that on the Court of Appeal's approach, the plaintiff could have recovered damages if, after he had been summoned to the scene of the accident, he had injured himself hurrying from his house to his truck, or driven off the road on his journey, or injured himself while alighting from the truck on arrival. This conclusion (and other illustrations which the appellants gave), they said, would rest on an "absurd, extraordinary,

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**16** (1991) 171 CLR 506 at 516.

capricious, irrational or obscure" construction[17]. It is far from clear that those epithets would be correct: but, in any event, decisions about the injuries postulated can be made when it is necessary to make them. The problems they pose are different from the problems posed in these appeals.

Proposed cross-appeal

29 For those reasons the appeals should be dismissed. The plaintiff filed an application for special leave to cross-appeal against the Court of Appeal's allowing of an appeal against the trial judge's conclusion that the operator was in breach of a duty of care owed to the plaintiff. The application was defensive in the sense that it was filed only against the possibility that the appeals by the appellants succeeded. Since those appeals must fail, there is no need to consider the application for special leave to cross-appeal, and it should be dismissed. Because that application took up very little time, and because it was only triggered by the appeal of the operator, it is appropriate that the operator pay the costs of the application for special leave to cross-appeal.

Orders

30 The following orders should be made.

No S107 of 2009

1. The appeal is dismissed.

2. The appellant is to pay the costs of the first respondent.

No S108 of 2009

1. The appeal is dismissed.

2. The application for special leave to cross-appeal is dismissed.

3. The appellant is to pay the costs of the first respondent of both the appeal and the application for special leave to cross-appeal.

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**17** Citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ; [1981] HCA 26.