

WORK HEALTH AUTHORITY v OUTBACK BALLOONING PTY LTD & ORS (D4/2018)

Court appealed from: Court of Appeal of the Northern Territory
[2017] NTCA 7

Date of judgment: 19 October 2017

Special leave granted: 20 April 2018

On 13 July 2013 Ms Stephanie Bernoth was among passengers boarding a hot air balloon operated by the First Respondent (“Outback”). As Ms Bernoth was boarding, her scarf was sucked into the balloon’s inflation fan. Ms Bernoth sustained neck injuries from which she later died.

The appellant (“the WHA”) laid a complaint charging Outback with an offence under s 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (“the NT Act”) of failing to comply with a duty of care (imposed by s 19(2) of the NT Act) to ensure, so far as was reasonably practicable, that Ms Bernoth’s health and safety were not put at risk. On 6 November 2015 a magistrate dismissed the complaint, holding that the NT Act could not operate because Commonwealth civil aviation legislation “covered the field” of all aspects of the safety of air operations.

The WHA sought judicial review by the Supreme Court and on 24 April 2017 Barr J quashed the magistrate’s decision. His Honour found that the Commonwealth legislative and regulatory scheme for air safety in Australia did not evince an intention to completely state the law governing the pre-flight operations of balloon aircraft. The magistrate therefore had jurisdiction to hear and determine the complaint under the NT Act.

The Court of Appeal (Southwood, Blokland & Riley JJ) unanimously allowed an appeal by Outback, after reviewing relevant Acts, regulations and legislative instruments. Their Honours observed that the Civil Aviation Regulations 1988 (Cth) (“the CA Regulations”) empowered the Civil Aviation Safety Authority (“CASA”) to give directions on the loading of persons on aircraft and that CASA had given such a direction in relation to manned balloons. Southwood and Blokland JJ found that under Commonwealth law Outback’s pilot was obliged to take all reasonable steps to point out the dangers of the balloon’s inflation fan and to supervise the area around it. That was pursuant to duties imposed by the operation of ss 20A, 28BA(1), 28BD(1), 28BE(1), 29(1) and (3), and 98(5) of the *Civil Aviation Act 1988* (Cth) (“the CA Act”), regs 215 and 235(7) and (7A) of the CA Regulations, and Appendix 2 of Civil Aviation Order 82.7. The pilot was amenable to prosecution under s 29 of the CA Act for any failure to carry out those duties or for carrying them out recklessly. The Court of Appeal held that the Commonwealth law was a complete statement of the law governing the loading of passengers on to a passenger balloon. Consequently the NT Act did not operate through s 19(2) to impose a duty on Outback.

The WHA and Outback have each filed a notice of a constitutional matter. The Attorneys-General of the Commonwealth, Victoria, Queensland, Western Australia and Tasmania are all intervening in the appeal.

The grounds of appeal include:

- In erroneously deciding that, by the *Air Navigation Act 1920* (Cth), the CA Act, the CA Regulations, Civil Aviation Safety Regulations 1998 (Cth), Civil Aviation Orders, and various “normative instruments” (being instruments issued by CASA under s 98(5A) and falling within s 98(5AA) of the CA Act) (“Civil Aviation Law”), the Parliament intended to deal completely and exclusively with the law governing the use by Outback of the inflation fan, used to inflate its hot air balloon, into which the deceased’s scarf was drawn, causing her death, whilst approaching the balloon’s basket for the purpose of embarking as a passenger, with the effect that the NT Act had no operation in respect of the incident, the Court of Appeal failed to take into account the *Work Health and Safety Act 2011* (Cth), which comprises the Commonwealth’s contribution to a national legislative scheme (of which the NT Act was part) to regulate the health and safety in workplaces, including aircraft, and so confirms the Parliament’s intention not to deal completely and exclusively by the Civil Aviation Law with the law governing the use of the fan in Outback’s workplace.

Outback has filed a notice of contention, the grounds of which include:

- The Court of Appeal should also have found that ss 19(2), 27 and 32 of the NT Act in their application to flight operations of the holder of an Air Operator’s Certificate varied, detracted from or impaired the operation of ss 28BD and 29(1) of the CA Act together with reg 215 of the CA Regulations and Civil Aviation Order 82.7.