TRANSPORTATION & LOGISTICS GROUP NEWSLETTER

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In the August issue:

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Federal Court of Appeal Upholds Canadian Transportation Agency Decision to Allow CN to Construct Railway Line in the Town of Milton – *Halton (Regional Municipality) v. Canada (Transportation Agency), 2024 FCA 122 (CANLII)*

By Rui M. Fernandes

The Canadian National Railway Company applied to the Canadian Transportation Agency under subsection 98(2) of the *Canada Transportation Act*, S.C. 1996, c. 10, for the approval of the location of certain railway lines it intends to construct in the Town of Milton, Ontario. These railway lines were part of a larger project, the construction of a terminal that would be used to transfer goods.

Subsection 98(2) provides that "The Agency may, on application by the railway company, grant the approval if it considers that the location of the railway line is reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line." The Agency was satisfied that the location of the lines was reasonable, and granted the application. The Regional Municipality of Halton and other public authorities appealed to Federal Court of Appeal in 2024 FCA 122 (CanLII).

The Appellants submitted that the Agency erred in determining what constitutes an interest of the locality in response to a particular application under subsection 98(2) of the Act. The Federal Court of Appeal disagreed.

The words of subsection 98(2) specifically contemplated that the Agency is to "[take] into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line". There is nothing in the context of the section in the wider Act or the purposes of the Act to suggest otherwise. The Federal Court of Appeal found that the Appellant's real concern was a mere disagreement with the Agency's weighing of various factors and its conclusion that the location of the railway line was reasonable.

The Court held that the Agency properly looked at the text of subsection 98(2). The Agency noted that it had to determine whether the location of the railway line is "reasonable", in part by considering the interests of the localities that would be affected by the line. The Agency had also noted that "what constitutes an interest of the locality is not determined in advance, either by the statute or by any guidelines". So, it decided to determine the interests of the localities on the facts. The Court found that this was entirely consistent with *Canadian National Railway Co. v. Canadian Transportation Agency,* 1999 CanLII 20684 (F.C.A.) *(CNR 1999)* and *Sharp v. Canada (Transportation Agency)*, 1999 CanLII 9356 (FCA), [1999] 4 F.C. 363. The Federal Court of Appeal saw no error of law in the Agency's approach. The Court also found that Halton has not identified any topic that the Agency failed to consider under the rubric of "the interests of the localities".

At paragraph 20, the Federal Court of Appeal stated:

> A fair, holistic reading of the Agency's reasons shows that it did weigh and balance these subsection 98(2) considerations, just as the subsection seems to require it to do.

> At one point in its reasons (para. 242), the Agency was quite explicit on the point, stating that it "has a broad discretion to decide what weight to give the evidence of a given interest of a locality" when it is "balancing that interest against the requirements for railway operations and services".

The Appellants submitted that the Agency's reasons were insufficient. The Court disagreed. It noted at paragraph 23:

> All decision-makers, particularly administrative decision-makers to whom the legislature has assigned a decision-making task for reasons of efficiency and expedition, aim to synthesize their reasons down to the essential factors that led them to decide the way they did. They are not to create an encyclopedic account of all of the evidence and all of the parties' positions, as if their task is to report in detail everything that happened during the numerous days of the hearing. Instead, they are to distill and synthesize, ensuring that the parties, reviewing courts and the public observing the matter can discern where the administrative decision-maker was coming from and why it decided the way it did.

The Federal Court held that the Agency's reasons were adequate. The Appellant also submitted that the Agency was procedurally unfair in two respects: (1) it did not entertain submissions concerning the possible impact of a planned merger between CN and an American railway company; and (2) it denied the appellants the opportunity to adduce more evidence.

The Federal Court noted the law in this respect, at paragraph 45 and determined the Agency met the test of fairness:

> The overall test for procedural fairness in a case such as this is whether, considering the context, the parties knew the case to meet and had a full and fair chance to respond: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 56. Further, procedural rights must be balanced against the public interest in effective, expeditious and efficient decision-making. Those are judge-made tests.
>
> But, absent constitutional concern, and there is none here, it is open to legislators to pass legislation expanding or restricting judge-made tests. Here the legislator has spoken and has supplied a legislative standard that we must keep front of mind when evaluating procedural fairness. The Agency must "conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed": *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104, s. 4. I conclude that the process followed by the Agency, which built upon the joint panel process, including the reasons it wrote, passes this test.

The Appellants also challenged how the Agency dealt with issues such as municipal revenues, air quality, land use planning, the requirements

for railway operations and services, and the mitigation of effects—in other words, how the Agency applied legal standards to the evidence before it. The Federal Court of Appeal noted that these issues dealt with questions of mixed fact and law, which the Court did not have jurisdiction to consider on an appeal. It dismissed the issues.

The Federal Court of Appeal also noted (at paragraph 50):

> At other times during oral argument, perhaps out of understandable enthusiasm, the appellants seemed to exhort us to interfere on behalf of the residents of Halton to prevent them from suffering ill-effects from CN's planned facility. However, under this legislative regime passed by our democratically elected government, the assessment of those ill-effects is for the Agency, not us. We would be acting contrary to law if we were to wade in and make our own assessment. Our task is limited to reversing the Agency's decision for legal error or procedural unfairness. Here, we see no legal error and no procedural unfairness. The Federal Court of Appeal dismissed the appeal with costs.

The Tragedy of Ukraine International Airlines Flight PS 752 and the *Montreal Convention*: A Case Study

By M. Gordon Hearn

The recently published decision by Madame Justice Akbarali of the Ontario Superior Court in *S. v. Ukraine International Airlines JSC*, 2024 ONSC 3303, involves a detailed review of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (the "*Montreal Convention*") in the context of the tragic events of January 8, 2020, when, shortly after take-off from the Tehran airport, Ukraine International Airline flight PS 752 was hit by two surface-to-air missiles. The missiles were launched by members of Iran's Islamic Revolutionary Guard Corps ("IRGC").

Tragically, all 176 passengers and crew aboard PS752 lost their lives. Included in the ensuing international response and calls for accountability were a series of lawsuits by aggrieved family members of the deceased, filed in the Ontario Superior Court seeking damages against Ukraine International Airlines ("UIA"). The actions, comprised of a class action as well as numerous individual lawsuits asserted that that airline had been negligent in allowing flight PS 752 to depart Tehran amid heightened security concerns.

A common question arose in the Ontario based lawsuits: under the governing *Montreal Convention*, was any liability as established on the part of Ukrainian International Airline to be capped at a certain limit per passenger? Article 21 of the *Montreal Convention* provides that the liability of an airline is limited to "128,821 Special Drawing Rights", if the airline could prove that:

a. such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

b. such damage was solely due to the negligence or other wrongful act or omission of a third party.

The published decision offers helpful insight into the framework of the Montreal Convention. The factual context is complex as was the analysis of the issues, calling into question geopolitical risk assessments and industry practices concerning

aviation safety and security.
A hearing took place over 18 days in Toronto where the decision by UIA to have let PS 752 depart from the Tehran airport was effectively on trial. The parties agreed that the claims were governed by the *Montreal Convention.*[1]

The *Montreal Convention*

The *Montreal Convention* allows victims or their families of an aviation accident to sue foreign carriers where the claimants maintain their principal residence. Accordingly, the series of related lawsuits were commenced in Ontario. The *Montreal Convention* establishes airline liability in the case of death or injury to passengers, as well as in cases of delay, damage or loss of baggage and cargo. It unifies all of the different international treaty regimes covering airline liability that had developed haphazardly since 1929, when the first aviation liability treaty (the "Warsaw Convention") came into existence. The *Montreal Convention* is designed to be a single, universal treaty to govern airline liability around the world. Its aim is establishing uniformity and predictability of rules relating to the international carriage of passengers, baggage and cargo.

Under the *Montreal Convention*, air carriers are *strictly liable* for proven damages up to 128,821.00 "Special Drawing Rights" ("SDR"), a mix of currency values established by the International Monetary Fund ("IMF") equal to roughly US$175,000.

1 While the most common international air carriage liability regime in place, the *Montreal Convention* will not necessarily apply to a contract for carriage by air. The *Montreal Convention* is but one (being the most recent) liability regime in effect for international air carriage. Once the international aspect of the travel is determined, the most recent international liability regime in force in the origin and destination nation as specified in the contract documentation will apply to the carriage. As mentioned, this will usually involve the *Montreal Convention* as that treaty is adhered to by most nations. There are however other treaties or source of law that might apply, including, principally, i) the original 1929 Warsaw Convention, ii) the Warsaw Convention as amended by the Hague Protocol of 1955, iii) the Warsaw Convention as amended by the Montreal No. 4 Protocol of 1975 or v) domestic law, if the transportation is not international in nature or if the states of origin and departure have not ratified the same liability convention. The different possibilities as listed involve differing liability rules for airlines. (For a much more analytical review on point, see: *Aviation Liability Law*, Paul Stephen Dempsey, Lexis Nexis at 8-1 and following). Canada adheres to the *Montreal Convention* by virtue of our federal *Carriage by Air Act*, RSC 1985 c C-26 at Schedule VI.

In other words, the mere fact of loss of life or injury occurring from an "accident by air" will involve automatic liability on the airline up to the amount of this per passenger limit. Where damages of *more* than 128,821.00 SDR are sought, the airline may avoid liability for such greater claim amount by proving that the accident which caused the injury or death was not due to its negligence or was attributable solely to the negligence of a third party.The parties to this trial agreed that an "accident" as defined in the *Montreal Convention* had taken place.

UIA argued that a "wrongful act or omission" contemplates intentional harm and wrongdoing other than negligence, none of which was alleged in this case. As a result, UIA focused its submissions on the issue of negligence. The plaintiffs also focused on negligence in their submissions. No one contended that any other "wrongful act or omission" was at issue in this case. As a result, the trial judge focused her liability analysis on the concept of "negligence". Accordingly, it was agreed that UIA was strictly liable for the accident, which liability would be unlimited unless UIA could prove that it was not negligent in allowing PS752 to depart Tehran on the morning of January 8, 2020.

The Issues at Trial

Accordingly, in what amounted to a "reverse onus" equation on UIA, the following were the issues addressed at the trial:

a. Could UIA prove that it did not breach the applicable standard of care in making its assessment of risk in permitting PS752 to take off from the Tehran airport on January 8, 2020?

b. If UIA could not prove that it did not breach the standard of care, has UIA proven that its breach of the standard of care did not actually cause the passengers' damage, that

is, but for UIA's breach of the standard of care, would the passengers still have been killed?

c. If UIA cannot disprove causation in fact, are the passengers' losses too remote to be recoverable? That is, has UIA proven that there is no causation in law?

Comprehensive factual evidence was led at trial, including evidence from various experts, in the nature of:

- The geopolitical history and related military and political tensions along the flight path route (being between Tehran and Kyiv);
- The steps taken, and criteria employed, in UIA initially establishing the flight path including its initial security assessment;
- The history of UIA transiting the flight path;
- UIA's security risk assessments over the course of time, culminating in the day in question, concerning acts of unlawful interference that may jeopardize the safety of civil aviation, (including unlawful seizure, hostage-taking, introduction of weaponry on board an aircraft or at an airport, use of an aircraft for the purpose of causing harm, communication of false information to jeopardize the safety of an aircraft, and destruction of an aircraft in service);
- The hazard identification and safety assessments done before each flight to ensure, for example, that an aircraft has the minimum required equipment or that there are no weather patterns that could endanger the flight;
- The role of international organizations, states, and airlines in ensuring aviation security, as well as the documents that set out industry standards for aviation security and safety;
- Expert and factual evidence on the framework of the aviation industry, and concerning the relevant practices, statutes, and professional standards to assist in determining the content of the standard of care; and
- The routine security related practices of UIA and the fact that UIA did not routinely undertake security assessments with respect to its flights.

The flight path route in question underwent four separate security assessments up to January 8, 2020: one at the inception of the route, and the others when UIA determined that a change in circumstances warranted an updated security assessment. Those updated security assessments occurred: (i) in June 2019, after Iran shot down an unmanned American drone; (ii) on January 6, 2020, after the assassination of General Soleimani, a leading Iranian military figure; and, (iii) on January 8, 2020, after Iran's missile attack on US forces at Iraqi bases, before PS752 took off from the Tehran airport. The sufficiency of UIA's aviation security assessments in view of the foregoing was hotly contested at trial.

Issue #1: Could UIA Disprove that it was Negligent?

Following a very detailed review of the evidence the judge found that UIA has failed to prove, on a balance of probabilities, that it was not negligent in allowing PS752 to depart Tehran on January 8, 2020. As such, its liability under the *Montreal Convention* was unlimited. The judge's analysis serves as a helpful review of the key elements of "negligence", citing the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, that establishing a negligence case requires: (i) a duty of care; (ii) the defendant's behaviour breached the standard of care; (iii) the plaintiffs suffered damage; and (iv) the damage was caused,

in fact and in law, by the defendant's breach.[2] As noted above, Article 21 of the *Convention* created a reverse onus on UIA to establish that it was not negligent. The judge cited Alberta Court of Appeal decision in *Bradford v. Snyder* that addressed the nature of the burden created by a reverse onus provision finding that if the evidence shows that the party who bears the reverse onus is at fault, or if the evidence is too meagre or too evenly balanced for a court to determine the issue, the presumption will not be rebutted.[3] The court's ruling also cited the United States decision in *Nelson v. Lorenzo* holding that where a third party's negligence contributes to a passenger's injury, principles of apportionment are inapplicable: it is only when the injury is solely due to the negligence of the third party that the *Montreal Convention* limits an airline's liability. Thus, if UIA is even 1% responsible in negligence for the passengers' death, its liability[4] under the *Montreal Convention* is unlimited.

For purposes of this trial, UIA admits that it owed the passengers and crew aboard PS752 a duty of care. UIA also admits that the passengers and crew aboard PS752 suffered damage. The legal analysis also noted that the standard of care in negligence is that of the reasonable person in similar circumstances. Where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling": *Hill v. Hamilton-Wentworth Regional Police Services Board*.[5] Further, "the standard is not perfection, or even the optimum, judged from the vantage of hindsight. … The law of negligence does not require perfection of professionals; nor does it guarantee desired results[6]".

In *Ryan v. Victoria (City)*, the Supreme Court of Canada described the standard of care as follows:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.[7]

The question was thus whether UIA and its personnel met the standard required of a reasonable airline and its personnel in similar circumstances as those underlying this action.

In the *Ryan* case the Court described the relationship between legislative standards and the standard of care as follows:

> Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. … Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence.… By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil

2 2008 SCC 27, [2008] 114 AT PARA 3.
3 2016 ABCA 94, 37 Alta. L.R. (6th) 102 at para. 21.
4 2021 WL 930163 (J.D. Hartford 2021), at p. 4.
5 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 69; see also para. 73.
6 Hill, at para. 73.
7 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201, at para. 28.

> liability. ...Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.[8]

External indicators of reasonable conduct relevant to determining the content of the standard of care also include custom, industry practice, professional standards, and regulatory standards in addition to statutory standards.[9] Following her detailed review of the industry and legal standards applicable to airline security and safety risk assessments, Justice Akbarali then considered whether UIA met the standard of care required of it on the morning of January 8, 2020. The judge concluded on the basis of the volume of evidence that UIA had not shown that it was not negligent. Essentially, there were the following failures:

- A lack of information sharing between elements within UIA
- There were analytical failings on the information available
- There was a failure to properly conduct a hazard identification and safety assessment
- There was a failure to conduct a security threat risk assessment for the day in question.

Issue #2: Did the Negligence on the Part of UIA Cause, as Matter of Fact, the Damages Claimed in the Lawsuits?

The parties agreed that the appropriate test for determining causation in fact is the "but for" test; that is, but for the defendant's negligent act, would the plaintiff's damages have occurred? To find causation in fact, the defendant's negligence must have been necessary to bring about the plaintiff's injury: *Clements v. Clements.*[10] The "but for" test must be applied "in a robust common-sense fashion", with no need for "scientific evidence of the precise contribution the defendant's negligence made to the injury". There are three steps in the process that a judge or jury uses to determine causation.

The first is to determine what likely happened. The second is to consider what likely would have happened if the defendant had not breached the standard of care. The third step is to allocate fault among the negligent defendants (although, in the circumstances of this case, the third step is not relevant): *Sacks v. Ross.* [11] The judge found that there was no debate that Iran's conduct was a but for cause of the plaintiffs' loss. This analysis rather focused on whether UIA's conduct was also a "but for" cause. Although normally it is the plaintiff's burden to prove causation in fact on a balance of probabilities, given the reverse onus, the burden in this case was on UIA to disprove causation in fact. The judge found that UIA had failed to prove that its breach of the standard of care was not a but for cause of the plaintiffs' damages. The judge found on the evidence that there was a direct causal relationship between the failures cited on the part of UIA and the damages suffered. Accordingly, this second necessary element for an actionable negligence case against UIA was satisfied.

8 *Ryan*, at para. 29.
9 *See: Hill*, at para. 70. *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 125; *R. v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205, at pp. 227-228.
10 2012 SCC 32, at paras. 8 and 13.
11 2017 ONCA 773, at para. 47.

Issue #3: Were the Passengers' Losses too "Remote" to be Recoverable?

In her analysis, the judge recognized that a finding of negligence requires that the defendant's breach of duty must not only have caused the loss as a matter of fact, but that it must have also caused the plaintiff's harm *in law.* The question is whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable, or, put another way, whether the plaintiff's harm was too *remote* to warrant recovery.

To determine whether the harm is foreseeable, and not too remote, the court applies the standard of the foresight of the reasonable person. The degree of probability to satisfy the reasonable foreseeability requirement is one which would occur to the mind of a reasonable person in the position of the defendant, and which they would not brush aside as far-fetched. It is the general harm that must be reasonably foreseeable, and not its manner of incidence: *Bingley v. Morrison Fuels.*[12] While it is usually for the plaintiff to prove causation at law on a balance of probabilities, in this case due to the reverse onus that applied, it was the defendant's burden to prove that the injury was too remote to warrant recovery.

UIA argued that the degree of probability of the deliberate attack or human error that resulted in the shoot-down of PS752 (that is, the overall missile risk and/or any confusion of a passenger airliner not being a military plane) did not meet the foreseeability requirement. The judge disagreed – noting that the focus should not be on the foreseeability of a particular chain of events that occurred rather than on foreseeability of the general harm. The precise chain of events did not need to be reasonably foreseeable.

The question was whether the risk of PS752 being struck by a surface-to-air missile ("SAM") would occur to a reasonable person, and they would not brush it aside as far-fetched.

In the judge's view, the risk of PS752 being struck by a SAM was reasonably foreseeable:

a. Available software and analysis warned of the very risk that transpired;

b. The United States Federal Aviation Administration had warned of the very risk that transpired in its published "NOTAM" (Notice to Airmen);

c. There had been a relatively recent example of a flight, MH17, being struck unintentionally by a SAM when flying in a conflict zone;

d. UIA's risk assessment officer had decided the risk was worth undertaking a security threat risk assessment and concluded the risk was medium;

e. A passenger on the plane texted her brother expressing fear of the very risk that materialized.

On the basis of the foregoing, the judge concluded that UIA has failed to establish that the plaintiffs' losses are too remote.

Conclusion

The Court ultimately found that UIA had been negligent in respect of the losses being the subject of the lawsuit and that the airline would be liable for the damages claim (to be proven during a different phase of the lawsuits) without any limitation on that liability.

12 2009 ONCA 319, at para. 24.

New Pay Equity Regulations come into effect September 3, 2024 for Federally Regulated Employers

By Saisha Mahil

The Pay Equity Act, S.C. 2018, c. 27, s.416 (the "**Act**") received Royal Assent on December 13, 2018, and came into force on August 31, 2021. Under the Act, federally regulated employers (i.e. banks, marine shipping, cross-border transportation and telecommunications employers) who have been subject to the Act since it came into force in August 2021, must develop and implement a pay equity plan for their workplace by **September 3, 2024.**

Under the Act, federally regulated employers are required to proactively analyze compensation practices to ensure equal pay is provided for work of equal value. The Act requires employers with 10 to 99 employees, where some or all of employees are unionized, and employers with more than 100 employees to form a pay equity committee made up of employer and employee representatives. This committee will be responsible for developing and updating the pay equity plan. Employers with 10 to 99 employees, with no unionized employees, can develop and implement a pay equity plan without having to establish a pay equity committee, although they can choose to form a committee voluntarily.

The pay equity plan must:

- Identify job classes in the workplace (i.e. positions that share certain similarities);
- Determine which job classes are commonly held by women and which ones are commonly held by men;
- Value the work done in each of these job classes;
- Calculate total compensation in dollars per hour for each predominantly male and female job class; and,
- Determine whether there are differences in compensation between jobs of equal value.

Employers must then post a draft of the pay equity plan and a notice to employees of their right to provide comments on the draft plan. Employees must be given 60 days to provide written comments on the plan.Employers can find guidance on comparing compensation within their workplace by reviewing the "Interpretations, Policies and Guidelines" published by The Pay Equity Unit of the Canadian Human Rights Commission.[13] These guidelines provide useful technical details of compensation comparison required in a pay equity plan. For example, employers will need to ensure that they are assessing total compensation by looking at direct compensation (i.e. base pay, variable pay, incentive pay) and indirect compensation (i.e. benefits, paid time off, and indirect payments).

In addition, the guidelines (as well as the Act) outline the two different methods that employers can use to compare the total compensation of predominantly female job classes with the total compensation of predominantly male job classes of equal value to determine whether there are differences in total compensation. These two methods are (1) the equal average method and (2) the equal line method.

The equal average method involves the creation of value-of-work bands (i.e. a range of values of work that the employer or pay equity committee considers comparable).

13 https://www.payequitychrc.ca/en/publications

Once the bands have been created, the employer must then identify the predominantly female and predominantly male job classes that fall into each band. This means that those job classes that demonstrate equal or comparable values of work are grouped together in the appropriate band. Job classes that are gender-neutral are not considered for this purpose.

The equal line method involves the creation of two regression lines: one for female job classes and one for male job classes. Each regression line represents the relationship between the value of work and total hourly compensation. The compensation associated with a female job class is to be increased if:

- The female regression line is entirely below the male regression line; and,
- The female job class is below the male regression line.

The Act will require employers to submit annual statements to the Pay Equity Commissioner regarding their pay equity plans and maintenance activities. In addition, the Act also requires all federally regulated employers to review and update the version of their pay equity plans at least every 5 years to identify and close potential wage gaps. It is important that federally regulated employers start turning their minds to creation of a pay equity plan sooner rather than later so as to ensure that they are compliant with the Act.

Who is liable when an AI chatbot tells a customer to phone a scammer

By Noah Bonis Charancle

Use of AI chatbots as an alternative to traditional customer support has dramatically increased over the last few years. Their appeal is understandable in that these artificial intelligence programs are able to provide rapid and coherent answers to client questions thereby cost-effectively reducing a company's need for human customer support staff. However, and despite their widespread adoption, owner liability for false or misleading statements made by a chatbot remains uncharted territory.

Because AI chatbots are able to offer coherent answers, their mistakes are often difficult to spot unless they are patently ridiculous such as when Google's AI told users to add glue to pizza to make cheese stick better. These false or inaccurate statement can easily become dangerous where they appear so legitimate that a consumer could easily rely on them to their detriment. This was the case in May of 2024 where CBC news reported that Meta AI, an artificial intelligence chatbot owned by Meta Platforms Inc. ("**Meta**"), the parent company of Facebook, told a user that a fake customer support phone line operated by scammers was an authentic Facebook phone number.

Mr. Gaudreau, a former Manitoba MPP, was having difficulty transferring his Facebook account over to a new phone he had just purchased. His wife searched for solutions online and ended up finding a phone number purporting to be that of Facebook customer support. Initially weary, Mr. Gaudreau attempted to verify this number by asking Meta AI whether the number was actually associated with Meta to which he received the following response:

> The phone number 1.844.457.0520 is indeed a legitimate Facebook support numer. Meta, the company that owns Facebook, lists this number as a contact for Meta Support, which includes support for Facebook, Instagram, and more.

Facebook does not have a customer support phone number. Rather than being legitimate, the number Meta AI said belonged to Meta Support was operated by scammers pretending to be from Meta. Accordingly, Mr. Gaudreau had been led straight into a scam. Relying on the AI chatbot's statements, Mr. Gaudreau called the number and was convinced by the scammers that his IP address was being hacked and that he needed to install an app onto his phone to rectify this. Although Mr. Gaudreau eventually caught on and hung up, this was not before the scammers were able to use his PayPal account to purchase a $500.00 Apple gift card on a recurring monthly renewal.

After the call, Mr. Gaudreau had to call his bank to cancel his credit cards and lock his bank accounts to prevent further potential losses. Although PayPal refunded the Apple gift card, Mr. Gaudreau still had to file fraud complaints with PayPal and Visa and set up alerts with Equifax and TransUnion.

Although Mr. Gaudreau did not suffer any apparent harm, this incident is a prime example of just how much damage can be caused by a consumer's reliance on a chatbot's erroneous statement. Liability for AI chatbot errors is still a novel concept in Canada.In fact, the only common law decision on topic is the BC Civil Resolution Tribunal decision in Moffatt v. Air Canada, 2024 BCCRT 149. In this case, Mr. Moffat was erroneously told by Air Canada's AI chatbot that he could apply for a reduced bereavement fare after completing his travel despite Air Canada's official policy stating that bereavement fare requests could only be made before travelling.

Air Canada declined to grant him the bereavement fare stating it was not liable for information provided by its chatbot. The Tribunal disagreed with Air Canada's position, stating that Mr. Moffat was entitled to rely on the bot to provide him with accurate information and that Air Canada's duty of care required it to ensure that the bot's representations were accurate and not misleading.

If the logic in that decision were to be followed in Mr. Gaudreau's case, Meta would presumptively be liable for any fallout that could be attributed to his reliance on Meta AI. Although the damages suffered by Mr. Gaudreau were minimal, it is easy to appreciate how a scammer convincing an individual to install malware on their phones could potentially produce devastating effects. Companies that use client facing chatbots must understand that their liability for their chatbot's erroneous or misleading statements is potentially limitless in Canada in that the sole legal decision on this topic states that clients are entitled to rely on an AI Chatbot's statements.

Those who decide to use chatbots should implement systems to prevent their bots from making misleading statements and have a method for flagging any misleading or false statements so that they can be corrected before they are relied upon.

Contact us

If you have a Transportation & Logistics Group matter and are in need of legal advice, please do not hesitate to contact the authors or Rui M. Fernandes, at 416.203.9505 or rfernandes@grllp.com.

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