Appeal DISMISSED with *costs*

"Appeal dismissed with costs" were the four fateful words that brought to a disappointing end a battle by an ordinary Australian family to obtain compensation for their injured son.

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Travis Scott was only 11 years of age on 29 July, 1990 when he suffered injuries as a result of a light plane crash in the Barossa Valley in South Australia. Travis's father, Geoff, worked as a plumber in the family business while his mother, Gaynor, worked as a hairdresser. On that day they had travelled to a property owned by a Mr and Mrs Davis who were related to them. Mrs Davis was the sister of Geoff Scott. The purpose of the visit was a general family get-together.

Mr Davis, who was a successful Adelaide businessman, owned a number of old planes which he kept at the property for the purpose of restoration and

flight. He was a qualified pilot.

In any event, on that day, one of his planes, namely an Aeronca 65HP high-wing monoplane was being flown by a Mr Bradford who was a licensed aircraft mechanical engineer. Mr Bradford had been involved with Mr Davis in some of the restoration work that he had performed in the past on aeroplanes and had flown his aeroplanes, including this one, on earlier occasions Mike Bradford was very briefly introduced to the Scott family when they arrived. At that time, Mr Davis was busy working on his planes and the Scott family went to the house where they socialised with Mrs Davis and other guests. After a time, lunch was served and Mr Davis was dragged away from his planes to attend.

In the course of the afternoon Travis was invited to go for a ride in the Aeronca plane. A dispute occurred at trial as to whether or not any request had been made by his parents for Travis to be taken for a ride. At the end of the day the trial Judge found that Mr Scott had asked another person whether it be possible for the boys to have a ride in a plane. Mr Davis, who was present, had replied that he would think about it. Mr Scott denied making that request or hearing an answer to that effect but the trial Judge found that that is what had occurred.

There were other visitors who were being taken for rides in other planes. As Mr Davis was organising this, he asked his wife to see whether Mike Bradford would take the boys for a ride in the Aeronca. The Aeronca had one passenger seat. Mr Davis and his guest then departed in another plane. There were three planes in the air at this time and there was considerable dispute at trial as to how those planes were being flown. The evidence called on the part of the plaintiff suggested that the Aeronca had earlier been observed doing:

sort of like a stall turn, which is what I think they call a wing over, where the aeroplane doesn't quite stall, but goes over with the wing tip high in the air and several slow steep turns at low levels.

A Bureau of Air Safety investigator gave evidence that the defendant Davis had said in a discussion that:

He was aware that Mike (Bradford) flew some tight manoeuvres and used to fly the aircraft tight...

He said that he had heard that Bradford was "known to do rash things". Some witnesses suggested the Aeronca was being put through aerobatic manoeuvres for which neither it nor the pilot were licensed.

After considering all the evidence the trial Judge was not satisfied that the defendant Davis was aware or should have been aware that the pilot of the plane was *"an untrustworthy pilot"* and was not satisfied that the evidence in any event established that *"nasty allegation"*. Nor was he satisfied that, on that day, the Aeronca was flown before the crash in anything other than an appropriate manner.

Accordingly, a critical finding of the trial Judge was that in the circumstances of the accident, no blameworthiness could be attached to Mr Davis.

What happened is that when Mike Bradford landed the Aeronca from one of his flights, he was approached by Mrs Davis who asked him if he would take one of the boys for a ride. She then signalled to some boys waiting by the fence and Travis went forward and was placed in the cockpit behind the pilot. The Aeronca took off and made several low passes above the air strip and then was in the process of performing a low slow turn to the left to line up with the strip, presumably to land, when it stalled and crashed nose first into the ground. As a result of this Mr Bradford was killed and Travis was severely injured.

Both parents saw the plane go down not far from the Davis house. They were driven to the scene and saw Travis in his injured state. After various investigations, proceedings claiming damages were issued for Travis and his parents against the owners of the plane.

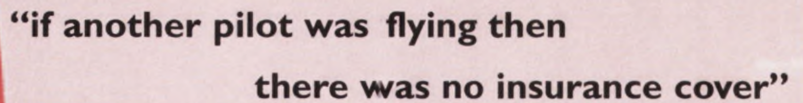
An event of significant importance occurred at the beginning of the trial. The defendants discontinued a third party notice against the insurers. The defendant, Mr Davis, had apparently recently discovered a proposal form limiting insurance cover to circumstances where he was the pilot in charge. In other words, if another pilot was flying then there was no insurance cover.

After a lengthy trial, the trial Judge found that the cause of the crash was essentially pilot error and pilot negligence. He went on to find that Mr Davis was vicariously liable for the negligent conduct of the pilot pursuant to the principle enunciated in *Launchbury v Morgans* (1973) AC 127. He referred to a passage from Lord Cross at page 144 where Lord Cross remarked as follows:

Before this case the law as to the vicarious liability of the owner of the chattel for damage caused by its use by another person was, I think, well settled. The owner of the chattel will be liable if the user of it was using it as his servant or his agent; Hewitt and Bonven *(1940) 1KB 188. As* Ormrod v Crossville Motor Services Ltd (1953) 1WLR 1120 *and* Carberry v Davies (1968) 1WLR 1103 *show, the user need not be in pursuance of a contract. It is enough if the chattel is being used at the relevant time in pursuance of a request made by the owner to which the user has acceded. In deciding whether or not the user was or was not the agent of the owner, it may no doubt be relevant to consider whether the owner had any interest in the chattel being used for the purpose for which it was being used. If he had no such interest that fact would tell against the view that the user was his agent while conversely the fact that the owner had an interest might lend support to the contention that the user was acting as the owner's agent. But despite the way in which the matter is put by Denning, L J in* Ormrod's *case at page 1123, I do not think that the law has hitherto been that mere permission by the owner to use the chattel coupled with the fact that the purpose for which it was being used at the relevant time was one in which the owner could be said to have an interest or concern would be sufficient to make the owner liable in the absence of any request by the owner to the user to use the chattel in that way".*

The Trial Judge said:

All of the judges in that case (Launchbury v Morgans) *made it plain that permission to use is not, alone, enough to found liability. There must also be a request by the owner to the driver and some benefit to the owner, though it need not be pursuant to any arrangement so specific as to amount to*



a contract. The conferring of an unrequested benefit on the owner by a driver will not, alone, constitute him agent of the owner.

His Honour ruled that in the Scott case the relevant flight was not one in which the pilot merely had permission for it, he was rather complying with a request of the owner for a purpose of the owner. In those circumstances His Honour held Mr Davis vicariously liable for the negligence of Mr Bradford. Judge Bright assessed damages for Travis in an overall sum of just under $210,000.00.

Both Mr and Mrs Scott had seen the plane go down, they had been taken to the site and had seen Travis removed from the plane in a very bad state, they had both suffered nervous shock, and both were awarded modest amounts by way of damages for nervous shock.

The owner lodged an appeal against the findings and rulings of Judge Bright. The appeal was heard by the Full Court of the Supreme Court of South Australia in April, 1998 with the decision being delivered on 26 June, 1998. By that decision the Chief Justice, Justice Doyle and the Honourable Justice Nyland allowed the appeal and found that the first appellant was not liable for the pilot's negligence on the vicarious liability principle and that the principle in *Launchbury v Morgans* should not be extended beyond the use of motor vehicles. There were some coincidental findings in relation to the assessment of damages.

The majority judgment reviewed a number of cases and found that:

an approach similar to that taken by the House of Lords in Morgans *is fairly well entrenched in Australia in cases dealing with the use of motor vehicles. While the cases are not entirely consistent we consider that they support the view that an owner of a vehicle is vicariously responsible for the negligence of a driver if the owner has requested the driver to drive the vehicle, and if the vehicle is driven for a purpose in which the owner has an interest.*

The majority noted however that:

a striking feature of the cases to which I have referred is the fact that they are confined to the use of motor vehicles. As a matter of logic it is difficult to limit the approach taken in those cases to motor vehicles. The underlying principle appears to be that if an owner requests another to use the owner's chattel, and the other agrees, and the task is one in which the owner has an interest, the owner will be responsible for damage caused by the negligence of the person using the chattel.

But the development of the law is not always strictly in accord with logic. We consider that if this principle were to be applied generally to chattels it has the potential to have an unsettling effect on the law. It is by no means easy to predict just where it would take the law.

The Chief Justice said:

We consider that the better approach is to confine the wider approach to vicarious liability to cases involving motor vehicles.

It seemed to be a not insignificant factor in the reasoning that in relation to motor vehicles there was a wide availability and use of insurance that protected the owner against a vicarious liability claim with that insurance being compulsory in relation to any personal injuries claims.

The appeal was allowed, all claims were dismissed and the plaintiffs were ordered to pay the owners' costs.

An Application for Leave to Appeal was lodged in the High Court and leave was granted on 18 June, 1999. The matter came before the High Court constituted by Chief Justice Gleeson and Justices McHugh, Gummow, Hayne and Callinan. The appeal was dismissed with costs.

Chief Justice Gleeson, in a short judgment, dismissed the appeal. He found that the pilot was not the agent of the owner. His Honour said:

At the time of the pilot's negligent act, the respondent was not in a position to assert a power of control over the manner in which the pilot was flying the aeroplane. The pilot was neither in fact, nor in law, subject to his direction and control at the critical time.

His Honour said:

All that the pilot did was to render, on a social occasion, a voluntary service at the request of the respondent. He was not a representative or delegate of the respondent.

The Chief Justice was not prepared to accept that there was a principle of wider application such that:

Even if the pilot was not under the respondent's control at the time of the accident, he was using the aeroplane at the respondent's request and for the respondent's purposes, and on that ground the respondent is vicariously liable.

His Honour said:

The wider principle for which the appellants contend should not be accepted in this country.

His Honour Justice Gummow reviewed the authorities and in his reasons remarked:

Here, one is left with the suggestion that Mr Davis may have, or should have, by

the means of insurance, a deeper pocket than the estate of Mr Bradford. However, the Court was told that, at the time of the accident which injured Travis in 1990, there was no statutory requirement for compulsory third party insurance by owners in respect of non-commercial flights, and that the registration system of private aircraft did not require evidence of such insurance. In the absence of such a requirement, it is difficult to impose an absolute liability upon a person such as Mr Davis in respect of non-commercial activities.

Justices Hayne and Callinan in separate judgments agreed with the conclusions of Chief Justice Gleeson and Justice Gummow.

His Honour Justice Hayne said:

In particular I reject the contention that an aircraft owner is vicariously responsible for the negligence of the pilot when the pilot was operating the aircraft with the owners' consent and for a purpose in which the owner had some concern. If the decision of Soblusky (Soblusky v Egan *[1960] 103 CLR 215) is still good law (and that is a question I need not decide) its foundations are such that I would not extend it beyond its application to the vicarious responsibility of the owner of a motor vehicle. Even if* Soblusky *were to be applied to the circumstances of this case, [with] the respondent not being on board the aircraft when it was flown negligently, I do not consider the management of the aircraft was in fact subject to his direction and control.*

His Honour Justice Callinan agreed that:

The principles in Soblusky v Egan *should not be extended beyond motor cars.*

His Honour said at page 143 of the published reasons:

The conditions necessary to establish liability of an owner of a motor car for the acts of its driver are these. First, there must be an appointment, engagement or request. That appointment, engagement or request needs to be a real appointment, engagement or request. The request must be made in something other than a merely domestic or social context. It must be made in circumstances in which the owner will derive a real benefit. The benefit need not be a financial benefit but it must be more than, as here, the deriving of a sense of satisfaction from the bestowal of a social favour or kindness. Secondly, there must be the reality of an actual power of control. The existence of a power of control can be of no relevance unless its exercise is, or is likely to be, effective. That is why so many of the early cases to which I have referred stressed the presences of the owner and his [or her] relationship with the person, usually a coachman or driver, who was actually managing the chattel, as relevant factors, even though any ability to exercise any effective control was probably a fiction, as it often would have been with horses, and, as indeed it will usually be, with a car or any other fast moving object, that may cause or suffer damage in a split second. The use of the word "always" by their Honours in Soblusky *is therefore significant and important as implying the need for a real and continuing power of, and capacity for effective intervention. Furthermore, an owner not actually personally using or managing the car can hardly be expected to intervene to exercise effective control unless there become apparent circumstances which call for intervention of a kind which is likely to be effective. These are, in my opinion, the minimum conditions to be satisfied and should constitute the rules to apply to the liability of owners (or bailees) of motor cars being used or operated by others in a non-commercial context on a proper reading of* Soblusky v Egan.

In a dissenting judgment His Honour Justice McHugh said:

In my opinion, the District Court was correct in finding that the owner was liable for the pilot's negligence, that is because the owner had delegated to the pilot a task which the owner had agreed to perform, the pilot was not acting as an independent principal but was subject to the owner's general direction and control and the pilot was acting within the scope of the authority conferred on him by the owner. The pilot was therefore an agent for whose negligence the owner was responsible.

His Honour at page 41 of the published Reasons for Judgment said:

Once it is accepted that the owner of a motor car may be liable for negligent conduct of a driver who is not an employee and whose conduct was neither authorised, instigated nor ratified, that principle must also apply to planes and boats. Nothing about planes or boats provides any logical reason for finding them outside the scope of the principle. It is no doubt true, as Holmes previously said, that the "life of the law has not been logic but experience." (The Common Law, *1882 at 1). Still "no system of law can be workable, if it has not got logic at the root of it."* (Hedley Byrne & Co Ltd v Heller & Partners Ltd *[1964] AC 465 at 516 per Lord Devlin). That being so the appellants must succeed."*

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It could be suggested that the critical, pragmatic findings in this matter were that there was no "blameworthiness" on the part of the owner of the plane, and that no insurance in this case nor generally is required of non-commercial aircraft such as exists generally in relation to motor vehicles.

With light aircraft accidents continuing to occur, perhaps it is time that consideration be given to requiring all owners of light aircraft capable of carrying passengers to be insured against any injuries that might be suffered by those passengers in the course of the use of the plane.

At the end of the day, Travis Scott suffered severe injuries for which he will not be compensated. Geoff and Gaynor suffered injuries for which they will not be compensated. The negligent pilot was not covered by insurance. The owner's insurance covered only his personal liability. The end result will perhaps provide the spark for law reform in this area. PL