COURT OF APPEAL FOR ONTARIO

CITATION: N.S. v. Ukraine International Airlines PJSC, 2025 ONCA 587
DATE: 20250811
DOCKET: COA-24-CV-0726

Lauwers, Favreau and Dawe JJ.A.

BETWEEN

N.S. in her personal capacity and as Trustee of the Estate of H.A., deceased, and as Litigation Representative of the Estate of K.A., deceased

Plaintiff (Respondent)

and

Ukraine International Airlines PJSC

Defendant (Appellant)

AND BETWEEN

Omid Arsalani in the capacity of Estate Trustee Without a Will of Hiva Molani, Fathollah (Vahid) Hezarkhani in the capacity of Administrator of the Estate of Naser Pourshabosibi, Fathollah (Vahid) Hezarkhani in the capacity of Administrator of the Estate of Firouzeh Madani and Habib Haghjoo

Plaintiffs (Respondents)

and

Islamic Republic of Iran, Islamic Revolutionary Guard Corps, Ukraine International Airlines PJSC*, and John Doe Missile Operator

Defendants (*Appellant)

Proceeding under the Class Proceedings Act, 1992

AND BETWEEN

The Estate of Behnaz Ebrahimi-Khoei,
The Estate of Rahmtin Ahmadi,
Hadi Ahmadi, Farnaz Moinzad, Manijeh Maali,
Mahmoud Ahmadi and Hossein Ebrahimi-Khoii

Plaintiffs (Respondents)

and

Ukraine International Airlines*
and John Doe

Defendants (*Appellant)

AND BETWEEN

Razia Dhirani, Rehana Dhirani and Arif Dhirani,
Jibraan Dhirani, Isa Dhirani, Deen Dhirani, minors by their Litigation Guardian, Arif Dhirani, Kian Hossain, Qais Hossain, minors by their Litigation Guardian Rehana Dhirani, and the Estate of Asgar Dhirani,
by its Executor Razia Dhirani

Plaintiffs (Respondents)

and

Ukraine International Airlines PJSC

Defendant (Appellant)

AND BETWEEN

Ali Ahmari-Moghaddam, Administrator of the Estate of Mojtaba Abbasnezhad, Gholamhossein Abbasnezhad and Sina Abbas Nejad

Plaintiffs (Respondents)

and

Ukraine International Airlines PJSC

Defendant (Appellant)

AND BETWEEN

A.H.P. and P.E.P. by their Litigation Guardian, K.K.

Plaintiffs (Respondents)

and

Ukraine International Airlines

Defendant (Appellant)

AND BETWEEN

The Estate of Seyed Mehran Abtahi Foroushani, by its Litigation Administrator, Seyed Arman Abtahi, Seyed Arman Abtahi, personally, Behnoosh Mohammadi Jazi, Seyed Mahdi Abtahi, Fatemeh Hatami Varnosfaderani, Seyed Iman Abtahi, and Amooshahi Varnosfaderani

Plaintiffs (Respondents)

and

Ukraine International Airlines

Defendant (Appellant)

Clay S. Hunter and Jiwan Son, for the appellant

Joe Fiorante, Jamie Thornback and Paul Miller, for the respondent N.S.

Tom Arndt and Geoffrey Adair, for the respondents Omid Arsalani et al.

Vincent Genova, Peter Jervis, Douglas Worndl and Pritpal Mann, for the respondents The Estate of Behnaz Ebrahimi-Khoei et al.

Roderick S.W. Winsor and Steven Kelly, for the respondents Razia Dhirani et al.

Jordan D. Assaraf, for the respondents Ali Ahmari-Moghaddam et al.

Frances Shapiro Munn and Hamish Mills-McEwan, for the respondents A.H.P. et al.

Stephen Birman and Lucy G. Jackson, for the respondents The Estate of Seyed Mehran Abtahi Foroushani et al.

Heard: April 16-17, 2025

On appeal from the judgments of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated June 10, 2024, with reasons reported at 2024 ONSC 3303.

Lauwers J.A.:

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A. OVERVIEW

[1] On January 8, 2020, flight PS752 operated by Ukraine International Airlines (“UIA”) took off from Imam Khomeini International Airport (“IKI Airport”), Tehran, with 167 passengers and 9 UIA crew members onboard. Minutes later, the aircraft was shot down by two short-range surface-to-air missiles (“SAMs”) fired by an air defence unit under the control of Iran’s Islamic Revolutionary Guard Corps (“Revolutionary Guard”). All onboard perished.

[2] The appellant is Ukraine International Airlines. The plaintiffs in the court below and the respondents on the appeal are N.S. et al.; Omid Arsalani et al.; The Estate of Behnaz Ebrahimi-Khoei et al.; Razia Dhirani et al.; Ali Ahmari-

Moghaddam et al.; A.H.P. et al.; and The Estate of Seyed Mehran Abtahi Foroushani et al.[1]

[3] As ordered by Glustein J. on August 23, 2023, the plaintiffs agreed to a modified trial process to expedite a trial to determine the negligence and fault, if any, of UIA. At trial, the parties agreed that UIA was strictly liable for the deaths of the passengers under the *Montreal Convention for the Unification of Certain Rules for International Carriage by Air*, May 28, 1999, 2242 U.N.T.S. 309, Article 21. Under the *Montreal Convention*, if UIA is found to not have been negligent in allowing flight PS752 to depart Tehran, then its liability for each passenger would be limited to roughly $235,000 per passenger. But if UIA does not establish that it was not negligent, then its liability is unlimited and would be determined in accordance with the ordinary principles of tort law.

[4] The trial judge explained the trial context, at paras. 2 and 3 of her reasons. UIA has been "named as a defendant in one class proceeding, and 101 individual actions arising out of the accident":

> These reasons relate to the trial of the class proceeding, and six representative individual actions, all of which are governed by the *Montreal Convention*. The parties have agreed that the result of this trial will apply across all actions commenced in the Ontario Superior Court of Justice to the extent that the claims in those actions are

[1] I have attached an appendix at the end of this decision naming all respondent parties involved.

> governed by the *Montreal Convention*. These reasons do not affect the actions governed by the *Warsaw Convention*.

[5] Thus, to succeed in limiting its liability, UIA must prove, on the balance of probabilities, that it was not negligent in permitting flight PS752 to depart Tehran. In the terms of Article 21, UIA is required to establish that the "damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents," or that the "damage was solely due to the negligence or other wrongful act or omission of a third party."

[6] The trial judge found, at para. 5, 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" so that its liability under the *Montreal Convention* is unlimited. UIA appeals.

B. FACTS

[7] Iran has two military forces: the Artesh and the Revolutionary Guard. The latter focuses on threats to the Iranian regime. In April 2018, the United States Government designated the Revolutionary Guard as a foreign terrorist organization. There have since been escalating tensions between Iran and the U.S.

[8] On December 29, 2019, the U.S. launched airstrikes on targets in Iraq and Syria against an Iranian-backed group, Kata'ib Hezbollah. Two days later,

supporters of the group and other Shia militias surrounded and entered the American embassy in Baghdad, and only withdrew on a promise from the Iraqi parliament that it would hold a vote on expelling U.S. forces from Iraq.

[9] A few days later, on January 3, 2020, the U.S. launched an airstrike in Iraq that killed Major General Qasem Soleimani, a prominent leader in the Revolutionary Guard, and Kata'ib Hezbollah, leader Abu Mahdi Al-Muhandis. The Iranian Supreme Leader Khamenei threatened to retaliate for the killings. The U.S. president at the time, Donald Trump, warned on Twitter that if Iran retaliated, the United States military had identified 52 sites, "some at a very high level & important to Iran and Iranian culture", and would hit them "VERY FAST AND HARD."

[10] On January 8, 2020, at about 2:00 a.m. local time in Tehran, Iran launched approximately 16 ballistic missiles at two Iraqi bases at which U.S. soldiers were stationed.[2] After the attack, the Iranian military went into a state of high alert, fearing retaliation. At around 3:37 a.m., the United States' Federal Aviation Administration ("FAA") issued a conflict zone Notices to Airmen ("NOTAM") prohibiting U.S. aircraft from entering Iranian airspace "due to heightened military activities and increased political tensions in the Middle East, which present an

[2] All times noted within these reasons are in local Tehran time.

inadvertent risk to U.S. civil aviation operations due to the potential for miscalculation or mis-identification."

[11] UIA flight PS752 flies from IKA to Boryspil International Airport in Kyiv. While UIA did not routinely undertake security assessments with respect to its flights, it updated security risk assessments on January 6, 2020, after the assassination of General Soleimani, and again on January 8, 2020, after Iran's missile attack on U.S. forces at Iraqi bases. At the time, Petro Martynenko was UIA's Deputy President and Director of Aviation Security and the head of the team in charge of conducting the security assessments. A safety risk assessment was not conducted following the security risk assessment on either January 6 or January 8: at. para. 306[3]

[12] After the January 8 security risk assessment, Mr. Martynenko determined that the risk to flight PS752 to depart Tehran was higher than as assessed on January 6, but still acceptable. Around 6:12 am, PS752 departed Tehran. It did not deviate from its approved flight path. Mere minutes after takeoff, PS752 was struck

[3] Security and safety risk assessments are related but distinct evaluations. A security risk assessment analyzes plausible threats, likelihoods and consequences; conducts a residual risk assessment; and produces recommendations for further risk-based work and possible mitigation. It addresses possible threat scenarios, likelihood of attack, consequences of the attack, residual vulnerability and risk, and possible additional mitigation. A safety risk assessment asks the likelihood that a safety consequence or outcome will occur looking to historical occurrences and exposure to the identified hazard, and examines the safety risk severity in terms of the extent of harm reasonably expected to occur as a consequence of the identified hazard. It determines the safety risk tolerability.

by two SAMs fired in succession by an Air Defence Unit operated by the Revolutionary Guard. Flight PS752 crashed, killing everyone aboard. After three days of denials, Iran finally admitted that it had shot down the aircraft.

C. THE ISSUE ON APPEAL

[13] The key issue at trial was whether UIA had successfully proved that its responsible agent, Mr. Martynenko, was not negligent in permitting the flight to depart Tehran.

[14] The trial judge found that UIA had failed to prove that Mr. Martynenko was not negligent. In particular, she found that UIA failed to meet the required standard of care because Mr. Martynenko had failed to access necessary and available information, which resulted in analytical failings in his risk assessment; had failed to conduct a hazard identification and safety assessment; and had failed to communicate with the Commander of PS752 before the flight departed Tehran: at paras. 352-405.

[15] The trial judge also held that UIA failed to prove that its breach of the standard of care was not a “but for” cause of the plaintiffs’ damages and that UIA failed to establish that the plaintiffs’ losses are too remote: at paras. 406-434 and 435-444.

[16] In the result, the trial judge found that UIA failed to prove, on a balance of probabilities, under Article 21 of the *Montreal Convention*, that the plaintiffs’

damage was not due to the negligence or other wrongful act or omission of UIA or its servants or agents; or that such damage was solely due to the negligence or other wrongful act or omission of a third party.

[17] The actual damages will be established separately, as this trial solely concerned UIA's liability. The trial judge ordered UIA to pay the respondents' costs plus HST and disbursements in the amount of $4,964,580.72.

[18] UIA appeals all of these findings. UIA also seeks leave to appeal the trial judge's decision on costs.

[19] I would dismiss the appeal, for the following reasons.

D. THE GOVERNING PRINCIPLES

[20] UIA does not take issue with any of the trial judge's statements of the principles of the negligence law, only with the application of those principles to the facts. I begin by restating those principles.

[21] The parties did not dispute the elements of negligence as stated in *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3; the plaintiff must prove that: (a) the defendant owes the plaintiff a duty of care; (b) the defendant's behaviour breached the standard of care; (c) the plaintiff suffered damage; and (d) the plaintiff's damage was caused, in fact and in law, by the defendant's breach of the standard of care.

[22] At trial, UIA admitted that it owed the passengers and crew aboard PS752 a duty of care and that the passengers and crew aboard PS752 suffered damage.

[23] The remaining questions to be answered at trial and on appeal are: 1) whether UIA breached the standard of care, keeping in mind that UIA must prove that it was not negligent, and if so, 2) whether the passengers' damages were caused, in law and in fact, by UIA's breach, and 3) whether the damages were too remote. I address each question in turn.

[24] UIA also seeks leave to appeal the high quantum of costs awarded against it.

E. THE PRINCIPLES APPLIED

(1) The Standard of Care

[25] The trial judge used the Supreme Court's decision in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, to guide and structure her legal analysis of the standard of care, which she set out at paras. 150-158. She did not err in so doing. She drew on para. 28 of *Ryan*, where Major J. stated:

> 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.

[26] The trial judge examined various sources to determine the legal and industry standards that inform the standard of care and heard expert evidence on them, including: International Civil Aviation Organization ("ICAO") documents, International Air Transport Association Operational Safety Audit ("IOSA") documents, the laws of Ukraine, the regulations of the State Aviation Administration of Ukraine, and the policies, procedures, guidelines and manuals of UIA.

[27] The trial judge found that compliance with UIA's manuals or the laws of Ukraine was not sufficient to meet UIA's standard of care in deciding whether to permit the flight of PS752 on the morning of January 8, 2020. To meet the standard of care, UIA was required to follow the guidance provided by the ICAO with respect to security risk assessments, safety risk assessments, and flying over or near conflict zones.

[28] More particularly, the trial judge determined that ICAO Document 10084 ("ICAO 10084"), entitled "Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones", was the most relevant document applicable in the context of a security risk assessment relating to flights over or near conflict zones involving SAMs.

[29] ICAO 10084 prescribes standards, practices, procedures and guidance for assessing whether to permit flights over or near conflict zones. Appendix A of ICAO 10084 sets out the five factors most likely to be associated with an elevated level of risk of an intentional SAM attack on a civilian aircraft: (1) the use of military aircraft in a combat role; (2) the use of military aircraft and aircraft to transport troops or military equipment; (3) poorly trained or inexperienced personnel operating SAMs; (4) the absence of robust command and control procedures and air traffic management over the airspace; and (5) routing flights over or close to locations of assets of high strategic importance that might be considered vulnerable to aerial attack in a conflict situation.

[30] UIA acknowledged that ICAO 10084 was a relevant document for it to consider when conducting its security assessment of PS752. UIA had a Directorate of Aviation Security with three employees qualified to undertake security assessments. All three employees worked on the January 6 security assessment. Mr. Martynenko alone conducted the January 8 security assessment, apparently because it was the morning after Ukrainian Orthodox Christmas, and he did not want to disturb other employees who had spent the holiday with their families. He

did consider ICAO 10084. The essential role of ICAO 10084 was confirmed by other experts who testified: John Edwards and Jonathan Gillespie.[4]

[31] The trial judge's task was to interpret ICAO 10084 in the specific context of flight PS752. The task of interpretation, which in my view applies to texts generally, requires the court to consider the text of ICAO 10084, the context within which it operates, and its purpose: *Piekut v. Canada (National Revenue)*, 2025 SCC 13, 502 D.L.R. (4th) 1, at paras. 42-43, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 117-18.

[32] I will turn to the text of ICAO 10084 momentarily. Its context is clear from its title: "Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones". Its general purpose is set out in Chapter 1 in s. 1.1.1:

> 1.1.1 This manual contains advice to States, aircraft operators, (civil and military) air navigation service providers (ANSPs), and other entities deemed appropriate on the subject of risk assessments for civil aircraft operations over or near conflict zones. It contains consolidated guidance to support implementation of relevant ICAO Standards and Recommended Practices (SARPs), ICAO guidance material and industry best practices. It covers the risk from both deliberate acts and unintentional hazards to civil aircraft operations over or near conflict zones.

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[4] Mr. Edwards was qualified as an expert on aviation security threats and risk assessments. Mr. Gillespie was qualified at trial as an expert in aviation safety management systems and the conduct of aviation safety risk assessments.

[33] The purpose of the manual is to assist airlines like UIA to assess risk and thereby to ensure the safety of civilian aircraft flying over, through, or near conflict zones. It focuses “primarily on the risk posed by long-range surface-to-air missiles (“SAMs”) as these are currently considered to pose the most significant risk to civil aircraft operating over or near conflict zones”: at s.1.1.3.

[34] The trial judge looked at the distinction between security assessments and safety assessments, at para. 221:

> When conducting risk assessments for flying over or near conflict zones, para. 4.1.2 of ICAO 10084 provides that “the characteristics of armed conflicts require a risk assessment process that should appropriately consider both security and safety elements”. Although security and safety assessments are different in nature, “they need to be complementary”:
>
> > Security deals with the intentional act to commit an act of unlawful interference, whereas safety is concerned with the management of hazards stemming from unintentional negative impact on the performance of the systems related to the operation. A comprehensive risk assessment process will address all potential actions involving implications for civil aircraft operations over or near conflict zones.
>
> [Emphasis added.]

[35] She concluded that, under ICAO 10084, a safety and a security assessment were both required in assessing the risk to PS752 when in or near a conflict zone:

at para. 229. This conclusion was supported by Mr. Gillespie's evidence, and also the IOSA Standards Manual.

(2) The Trial Judge's Findings on Whether UIA Met the Standard of Care

[36] The trial judge considered whether UIA had met the standard of care over many paragraphs – at paras. 352 to 405. Her most trenchant findings are set out at paras. 395-397:

> By failing to contact anyone in flight operations or [the Operational Control Centre] to advise of the missile attack on Iraq from Iranian airspace, Mr. Martynenko ensured that no one at UIA could fulfil their obligation to conduct a hazard identification and safety risk assessment that was required when flying in or near a conflict zone.
>
> While I accept the evidence of UIA employees, Mr. Martynenko and Mr. Sosnovskyi, that they did not consider it necessary for a hazard identification and safety risk assessment to be undertaken, I have already explained why, in my view, industry standards and indeed UIA's own manual required exactly that.
>
> By failing to ensure a hazard identification and safety risk assessment was undertaken, UIA fell below the standard of care.

[37] In short, the trial judge found that UIA failed to meet the required standard of care because: Mr Martynenko failed to access necessary and available information, which resulted in analytical failings in his risk assessment; he failed to conduct a hazard identification and safety assessment; and he failed to communicate with the Commander of PS752 before the flight departed Tehran: at

para. 405. These UIA failures are all findings of fact or mixed fact and law. Most are factually uncontested. UIA has not identified any instances of palpable and overriding error.

F. ANALYSIS

(1) Did UIA breach the standard of care?

[38] UIA makes four arguments on the standard of care. First, UIA asserts that Tehran FIR, the airspace in which PS752 was flying, was not a conflict zone as defined by ICAO 10084. Second, it contends that the application of ICAO 10084 by the plaintiffs' experts, in carrying out their own retrospective risk assessments, was not compliant with the document's text. Third, UIA asserts that it had a continuing discretion as to whether to permit the flight to take off regardless of the outcome of the risk assessment under ICAO 10084. Fourth, UIA maintains that the trial judge erred in failing to give weight to the fact that other airlines were flying out of the same airport at or around the same time. I address each argument in turn.

(i) Was Tehran FIR a "conflict zone" as defined by ICAO 10084?

[39] Tehran FIR encompassed the airspace over Tehran. UIA argues: first, that Tehran FIR was factually not a conflict zone at the time flight PS752 departed; and second, that the conflict zone guidance applies only to planes at altitude, and not those taking off or landing in the proximate airspace over IKI Airport.

[40] The trial judge spent many paragraphs of her reasons on this issue. Because I agree with her, I see no reason to repeat that exercise. The central elements of her reasons come out clearly in several paragraphs. First, she noted that she found "no traction in UIA's argument that Tehran FIR was not a conflict zone, which seems to hinge on the notion that a conflict zone must be officially declared in order to exist": at para. 197. To the contrary, as she noted at para. 199:

> In the hours before PS752 took off, Iran launched ballistic missiles through its airspace over a period of hours towards American troops in Iraq, after the then-President of the United States had threatened to retaliate "FAST AND HARD" against Iran for any attack responding to the killing of General Soleimani. UIA's own expert, Dr. Bronk, gave evidence that, prior to the take-off of PS752, Iran would have been in a heightened state of military alert or tension, as it would have been anticipating retaliatory strikes from the United States. <u>On the morning of January 8, 2020, Tehran FIR was a textbook example of a conflict zone.</u>
>
> [Emphasis added.]

[41] The trial judge noted, at para. 450, that:

> [C]ertain of UIA's positions were difficult to understand. In particular, it is hard to understand why UIA took the position for most of the trial that ICAO 10084 was not a relevant source of guidance for it on January 8, 2020, when Mr. Martynenko testified that he considered it, and given its clear application to flights over or near conflict zones. As I noted, UIA also took the position that Iran was not a conflict zone, when it clearly was. UIA also failed to agree that tensions escalated in the region after the killing of General Soleimani, when they clearly had,

> based on the open-source information in the record and the evidence of the witnesses.

[42] In oral argument on appeal, UIA took the position that ICAO 10084 only applied to flights at altitude, not to takeoffs and landings. This makes no sense in light of the document's purpose. As the trial judge noted: "Although geared to flights at altitude, it is the guidance that most closely addresses the situation UIA was faced with assessing on January 8, 2020": at para. 191. Indeed, the document's use of the expression, "over or near," carries that implication. That the experts all considered it to be applicable, as did Mr. Martynenko in candid moments, reinforces the trial judge's conclusion that: "On the morning of January 8, 2020, Tehran FIR was a textbook example of a conflict zone."

[43] Contrary to UIA's submissions, Tehran FIR was a conflict zone and ICAO 10084 was applicable. The trial judge did not err in making this finding.

(ii) Were the security risk assessments carried out by Mr. Gillespie and Mr. Edwards compliant with ICAO 10084?

[44] The plaintiffs led the expert evidence of Mr. Gillespie and Mr. Edwards, who filed reports and were cross-examined. UIA advances two arguments challenging the evidence of Mr. Gillespie and Mr. Edwards. UIA agreed at trial that they were properly qualified. UIA's first argument is, essentially, that it seeks to resile from this concession on appeal. This change in position seems to have come about because the plaintiffs refused to accept, at trial, that UIA's proffered expert,

Edmond Soliday, was properly qualified. The trial judge heard Mr. Soliday's evidence but eventually disqualified him.

[45] UIA argues that the disqualifying deficiencies the trial judge noted in Mr. Soliday's evidence also appear in the evidence of Mr. Gillespie and Mr. Edwards. This is not a submission that this court can accept in light of UIA's trial concession as to their qualifications. The qualification of experts is uniquely within the purview of trial judges to which appellate deference is due, absent an error in principle or a material misapprehension of the evidence: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 36.

[46] In its second argument challenging the evidence of Messrs. Gillespie and Edwards, UIA seeks to have this court parse the language of ICAO 10084 and construe it differently than Mr. Gillespie and Mr. Edwards. In this area of specialized knowledge, it would be folly for this court to do so. The onus and burden were on UIA to lead the evidence of a properly qualified witness to contradict Mr. Gillespie and Mr. Edwards if it wished to contest their evidence, which it failed to do. That said, because this is a case of first impression and without Canadian or international precedents, I would not want this court to be taken as endorsing the approaches taken by Mr. Gillespie and Mr. Edwards to the interpretation and application of ICAO 10084 as conclusively correct. The

methodology will need to be scrutinized in an appropriately adversarial context with experts on both sides of the question.

[47] It was open to the trial judge to accept the evidence of the plaintiffs' experts; she fully explained her reasons for doing so, and noted their credentials.

(iii) Did the standard of care leave discretion to fly with UIA?

[48] UIA argues that it retained a residual discretion to permit flight PS752 to depart Tehran, regardless of the outcome of the assessment required by ICAO 10084. Assuming without deciding that UIA retained such a residual discretion, there is no basis to find that the exercise of that discretion in the circumstances would have been reasonable. I see no error in the trial judge's findings on this issue. Based on the events that unfolded on and before January 8, and the context in which Mr. Martynenko was making this assessment, it was not unreasonable for the trial judge to find that a proper assessment following the guidance provided in ICAO 10084 would not have allowed a commercial airline to take off.

[49] Mr. Martynenko did not have the required information to perform a competent security risk assessment on January 8, 2020 and did not acquire the necessary information as he conducted it. Rather, Mr. Martynenko assumed that the absence of information from certain sources like Iran, Ukraine, or the Commander of flight PS752 supported a decision to fly. But the absence of information diminished the quality of his assessment.

[50] There was no evidence that Mr. Martynenko considered any one of the factors set out in ICAO 10084 as key risk factors to consider when flying over or near conflict zones where it may be assumed that SAMs are available to a party engaged in the conflict. As the trial judge noted, at paras. 355-359:

> In particular, there is no evidence that [Mr. Martynenko] considered the use of military aircraft in a combat role or for hostile reconnaissance by at least one party in the conflict, although he was aware that Iran had used SAMs to attack an American UAV about six months before.
>
> Nor is there any evidence that he considered the likelihood of the use of aircraft to transport ground troops or military equipment by at least one party, although on January 6, 2020, it was reported that six American bombers were being repositioned for possible operations in Iran, if ordered.
>
> Crucially in my view, there is no evidence that Mr. Martynenko considered whether UIA's flight route passed over or close to locations or assets of high strategic importance that might have been considered vulnerable to aerial attack in a conflict situation.
>
> Mr. Martynenko acknowledged that he did not have any information about whether there were SAM missile crews along the flight route, or how well-trained they were. He did not know about the Iranian military structure. He admitted that he did not know if Iran had an aggressive shoot-down policy. He did not know PS752's flight route passed close to an Iranian missile base. And Mr. Martynenko did not attempt to access the broader swath of sources of information recommended in ICAO 10084 that would have shed light on these matters.
>
> Although there was open-source information available, at no time did UIA or Mr. Martynenko try to find it. Had he done so, he would have learned from that open-source

> information that commanders in Iran's dual military structure may delegate authority to shoot down in times of crisis, which can lead to complications and mistakes. He would have learned that Iran has an aggressive shoot-down policy. He would have learned that UIA's flight route passed close to Alghadir missile base.

[51] The trial judge noted that Mr. Martynenko made several questionable assumptions: at paras. 380-384. First, he assumed that the security risk to flight PS752 lay in the potential U.S. response to Iran's ballistic missile attack that would be targeted at the source of the missiles. There was no reasonable basis on which Mr. Martynenko could conclude that Iran would not launch more missiles and did not consider how and whether Iran might respond to U.S. retaliation.

[52] Second, Mr. Martynenko assumed that the Iranian military was sophisticated, would not unintentionally target a commercial airline, and would be involved in clearing PS752 for take-off. While there might have been some military involvement in clearing flight PS752 to take off, even if that was true, there was no basis to conclude that PS752 would be safe given deconfliction problems experienced by all militaries: at paras. 382-383.

[53] There were two sources of third-party information available to Mr. Martynenko when he conducted the risk assessment that he did not access. These sources are the U.S. FAA NOTAM and the latest publicly available information notices released by Osprey Flight Solutions, a "commercial service provider that provides specialized risk assessment advice to the global aviation

industry with a particular focus on the risks of operation in or near conflict zones.”. Had he accessed these sources and taken them into account, he would not have been able to find flight PS752 could take off without falling below the standard of care.

[54] As already noted, at around 3:37 a.m. on January 8 the FAA issued a conflict zone NOTAM prohibiting U.S. registered aircraft from entering Iranian airspace due to heightened military activities.

[55] Around 4:15 a.m., Osprey released to the public via Twitter and its email subscription service its advice that the risk assessment of Iranian airspace was raised to “EXTREME” and noted that Iran “has a history of not issuing adequate notice of activities in its airspace that could affect flight safety”. Osprey recommended to “[d]efer all flights subject to an operation specific assessment” and to “ensure crews scheduled to operate to or over the country in the near term were fully aware of the latest security situation.” Osprey repeated its advice in a second advisory released approximately 45 minutes later: at paras.339-348.

[56] Mr. Martynenko also failed to consult with the Commander of flight PS752, who could have had relevant “on-the-ground” information as the situation was unfolding for the security assessment: at paras. 398-405. The impact is twofold because this failure prevented the Commander from having and assessing relevant information in deciding whether to delay or cancel the flight. Instead,

Mr. Martynenko testified during cross-examination that there were no military activities ongoing in Iran at the time PS752 was scheduled to take off; he denied that Iran firing ballistic missiles constituted “military activity” but asserted inconsistently that U.S. retaliation would have been “military activity”.

[57] The requirement to contact the flight Commander during the risk assessment process is codified in s. 3.2.4 of ICAO 10084, and also in a July 2019 UIA memorandum entitled “Instructions for the Aviation Security Service personnel regarding Informing and interviewing crews on high-risk flights,” which was released by Mr. Martynenko himself. The memorandum labelled the Kyiv-Tehran route flown by PS752 as a “high-risk” flight. Mr. Edwards testified that, in his opinion, notifying the Commander of flight PS752 of the missile attack was “absolutely essential”. Mr. Gillespie found it was a “very, very strange thing” not to do so.

[58] In failing to consult these sources, UIA not only deviated from ICAO 10084’s recommendation to access a service that provides risk assessments but failed to consider crucial information which would indicate a commercial airline should not take off that morning. UIA cannot reasonably argue its failure to collect relevant available sources of information allowed it to come to a different conclusion that could justify the exercise of discretion in letting flight PS752 take off.

[59] I do not suggest that airlines must always consult FAA NOTAMs and Osprey notices to the public in order to meet the standard of care. The error here is that Mr. Martynenko was negligent in his information gathering, as the trial judge found. For example, Mr. Martynenko had accessed and reviewed Osprey's publicly available information as the conflict between Iran and the U.S. escalated days before, when preparing the January 6 risk assessment. However, in preparing the January 8 risk assessment, Mr. Martynenko did not attempt to access Osprey or any other private risk assessment service for available information, nor did he rouse his colleague who had better command of English in order to access these sources. The FAA is an American entity, and in conducting the risk assessment for a conflict where the U.S. is a party, it is reasonable to believe American sources might have access to better, non-public, information, which ICAO 10084 identifies as being particularly valuable, and could have been reflected in any NOTAM that it issued.

[60] Lastly, Mr. Martynenko failed to contact anyone that morning in flight operations or UIA's Operational Control Centre to advise of the missile attack from Iranian airspace: at paras. 395-397. As a result, no one at UIA could fulfil their obligation to conduct a hazard identification and safety risk assessment, and the overall risk assessment was not completed. Mr. Martynenko himself agreed that the recommendation in ICAO 10084 that both a security and a safety assessment

be done was not followed. While Mr. Gillespie conceded that UIA could theoretically have deemed the safety risk to be "tolerable," such an assessment would still require additional mitigation measures be taken, which, in this case, would have required the flight be delayed.

[61] Mr. Martynenko failed to do a sufficient search for information in conducting his security risk assessment. He also failed to provide necessary information to the flight Commander and UIA's Operational Control Centre. This prevented other UIA actors from making informed decisions when assessing the best way forward in the unfolding situation, including not alerting them to the need to conduct a hazard identification and safety risk assessment as would have been required to meet the standard of care. I see no error in the trial judge's assessment that the performance of UIA's security risk assessment, which led to the decision to allow flight PS752 to take off at 6:12 a.m. without further delay or mitigation measures, fell below the standard of care.

(iv) Did the trial judge err in failing to give weight to the fact that other airlines were flying at the same time?

[62] Between the commencement of Iran's ballistic missile attack and PS752 taking off, 8 planes departed from IKI Airport and 15 planes landed.[5] The trial judge

[5] It seems the trial judge made a transposition error here: at para. 43, she states that 15 planes departed from IKI Airport, and 8 landed. She later states, at para. 372, that 8 flights departed IKI Airport.

noted that "[s]ome of those planes flew routes of a similar trajectory to the usual flight path of PS752", and other airlines flew over Tehran FIR generally. However, the evidence also shows that other airlines altered their flight paths, both in the days before and after January 8, with at least some doing so due to the security risk.

[63] In terms of the flights that landed at IKI Airport, David Nicholson, one of the founders of Osprey, testified at trial that re-routing flights could be more dangerous than landing. The trial judge found that this made sense for several reasons, at para. 371:

> First, in a situation when missiles might be flying, one would want to be out of range of the missiles as soon as possible to minimize risk. Second, a plane on a regularly scheduled flight to [IKI Airport] would have other considerations, including where to divert to, and what hazards or risks an alternate route would present, including whether there was sufficient fuel on board to get to the alternate airport safely. While a regular pre-flight safety risk assessment includes identifying alternate airports to which a flight can divert if necessary, there is no evidence as to whether the airlines that landed at [IKI Airport] had identified alternate airports that were in locations more dangerous than [IKI Airport], given the then-current unfolding state of affairs.

[64] Iran began its assault on the U.S. military bases in Iraq around 2 a.m. local Tehran time. The attack lasted about three hours. Mr. Martynenko learned of the missile strike between an hour and a half and two and a half hours after the assault

began. He began the January 8 security risk assessment at about 4:00 a.m., and PS752 took off at 6:12 a.m.

[65] Of the eight flights that took off between the start of the missile assault at 2 a.m. and flight PS752's departure at 6:12 a.m., two flights took off before the FAA first issued a NOTAM at 3:37 a.m. (one at 2:43 a.m. and one at 3:36 a.m.). The timing of the other six flights follows:

1. Austrian Airlines Flight OS872 at 4:23;
2. Aeroflot Flight SUI513 at 4:32;
3. Qatar Airways Flight QR491 at 5:00;
4. Turkish Airlines Flight TK873 at 5:07;
5. Atlas Global Flight KK1185 at 5:17; and
6. Qatar Airways Flight QR8408 at 5:39.

[66] Mr. Martynenko considered these departures while conducting his security risk assessment. In cross-examination, he admitted:

> Q. And, I take it from your previous evidence, that you did not specifically inquire of other airlines to see if anyone had in fact, responded to the political and military events, and cancelled or changed flights. Is that correct?
>
> A. Yes.
>
> Q. Now, if I understand your thinking correctly. The reason you keep mentioning the operations of other aviation operators, was because you made the following assumptions. You assumed that they had done a

> competent risk assessment in accordance with the ICAO recommendations.
>
> A. Yes.
>
> Q. However, you had no actual evidence of that. That was an assumption on your part, correct?
>
> A. I had the proof on the Flight radar, and the online board.
>
> Q. You had the proof that they were flying.
>
> A. I didn't have the time to send out inquiries and wait for a response.
>
> Q. So the – but my point is, that you had no evidence that they had done a competent risk assessment in accordance with ICAO recommendations.
>
> A. Not correct. In case the airlines keep flying, it is absolutely obligatory for them to conduct their risk assessment of the air flight security.

[67] The trial judge determined that Mr. Martynenko's assumption that other airlines had judged the security risk of flying in Iranian airspace to be acceptable was wrong in fact, at least with respect to some airlines that had reached the opposite conclusion.[6] Furthermore, he had no basis to assume that those airlines that continued to operate in Tehran FIR had judged the risk of doing so to be acceptable.

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[6] For example, both Air Canada and KLM Royal Dutch Airlines altered their flight paths over Iran and Iraq because of their unfavourable risk assessment.

[68] Mr. Gillespie testified, and the trial judge accepted that the fact that other airlines continued operating out of IKI Airport does not indicate that it was safe to do so, without liaising with these other airlines to determine on what basis they were conducting operations: at para. 378. Mr. Gillespie explained in his cross-examination:

> A. Because as I stated in my report, the fact that other airlines are operating is no indication that it is safe to do so without liaising with them to determine whether they conducted safety risk analysis or not, and on what basis they are conducting their operations. Elsewhere in the Dutch Safety Report, it says that there is a goldmine of airlines in difficult situations where they weren't where airlines -- the default position is to go rather than to stay.
>
> …
>
> Q. So, your understanding is when I asked you the question as it set out in the flowchart at 10084, what are other operators airlines doing? You say it should be a further step that those airlines should be contacted?
>
> A. I think there is scope to do that. So, elsewhere in document 10084, I think it actually suggests that.
>
> Q. And so if you know in your experience that airlines are operating to your knowledge as usual, why are you calling them?
>
> A. Because in this case, UIA had become aware [of] some missiles being launched. It would be worthwhile discussing with your peers why they are continuing to operate.
>
> Q. That's why you'd be calling? You're flying, why are you flying?
>
> A. Yeah.

Q. Essentially.

A. Essentially.

[69] Canada also conducted its own investigation of events, and its Forensic Team's report found that Iran had put anti-aircraft systems on high alert near IKI Airport without closing the airspace or notifying airlines. The report concluded that all planes flying into or out of Tehran's airport were at risk and specifically named the last four flights that took off from IKI Airport before flight PS752, finding they had been at "significant risk" of being misidentified.

[70] UIA provided no evidence as to whether these airlines conducted security risk assessments and whether their decisions to take off despite what was unfolding were supportable. The fact other flights took off before flight PS752, without more, does not establish that those airlines met the standard of care required in flying out of a conflict zone and does not support UIA's argument that it met this standard.

(2) Were the passengers' damages caused in fact by UIA's breach of the standard of care?

[71] The trial judge correctly identified the "but for" test for causation as the governing principle: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13. The trial judge utilized a three-step approach: (1) determine what likely happened; (2) consider what likely would have happened if the defendant had not breached the standard of care; and (3) allocate fault among the negligent

defendants: *Sacks v. Ross*, 2017 ONCA 773, 417 D.L.R. (4th) 387, at para. 47, leave to appeal refused, [2017] S.C.C.A. No. 491. The third step is not applicable in this case because UIA is vicariously responsible for the negligence or other wrongful acts or omissions of the carrier or its servants or agents.

[72] UIA argues that the five risk factors listed in ICAO 10084 had "no or very little relevance to the circumstances and, in any event, any consideration/non-consideration of these had no causal relationship to the probability of misidentification/shooting down of flight PS752 and therefore does not satisfy the test for causation." This conclusory assertion restates UIA's argument that even if the security risk assessment had been done properly, PS752 would still have taken off.

[73] Given the quality of Mr. Edwards' expert evidence at trial and the standard of care discussed above, little need be repeated here. Mr. Edwards considered the five risk factors in his report and determined that certain of those threats had high likelihood and high consequences. In particular, he noted that (i) the likelihood of use of military aircraft in a combat role or for hostile reconnaissance or use of missiles, (ii) use of aircraft to transport ground troops or military equipment ("such aircraft may be more difficult to distinguish from civil aircraft, particularly where operating near air corridors and close to civil aircraft cruising altitudes"), and (iii) flight routing passes over or close to locations or assets of high strategic

importance, all should have been scored as a “High” risk. Taking into account sources such as Osprey and the FAA NOTAM, he concluded that the ultimate “Consequences” score in the assessment should have been a score of “High”, meaning there was a “‘realistic worst-case scenario’ of an attack on the commercial aircraft with hundreds of deaths.”

[74] Mr. Edwards also gave the opinion that no mitigating measures were taken. He determined, and the trial judge accepted, that, had the security risk assessment been done properly with all of the relevant information, there would be no possible mitigating measure apart from cancelling the flight: at para. 427.

[75] The trial judge accepted Mr. Edwards’ evidence, finding at para. 429 that:

> [E]ven if Mr. Martynenko’s January 8, 2020 assessment of the security threat risk of a SAM attack were correct, having raised the probability level of an attack to medium, and the risk category to medium, there can be no explanation for [Mr. Martynenko’s reasoning that] the risk acceptance criteria remaining unchanged at the lowest level of “acceptable”. Even on his own analysis, he should have at least delayed the flight.

[76] UIA has shown no error in the trial judge’s acceptance of Mr. Edwards’ opinion.

[77] The trial judge added, at paras. 431-433:

> While I have focused above on the impact of the failure to conduct a security threat risk assessment, I note that UIA offered no evidence that a safety risk assessment

> would have supported a decision to fly; it maintained its position that no safety risk assessment was required.
>
> Nor did UIA offer any evidence that the flight would have departed had the commander of PS752 been advised of the situation. That is, perhaps, unknowable.
>
> Regardless, UIA has also failed to prove that a safety risk assessment would have yielded a conclusion that the risk to PS752 was acceptable, or that the flight would have taken off even if the commander was fully informed of the situation in Iran.

[78] UIA has not established that the trial judge made an error in law or a palpable and overriding error in her analysis of the causation issue.

(3) Were the damages too remote?

[79] The test is whether the harm suffered is too remote to warrant recovery, that is, whether the harm is "one which would occur to the mind of a reasonable man in the position of the defendant … and which he would not brush aside as far-fetched": *Mustapha*, at paras. 12-13.

[80] In the immediate background to this assessment was the relatively recent example in 2014 of a commercial flight being struck unintentionally by a SAM when flying in a conflict zone that led to the drafting of ICAO 10084. Malaysia Airlines Flight MH17 took off from Amsterdam flying to Kuala Lumpur and was shot down by a SAM over Eastern Ukraine, where there was military conflict in Donbas. All crew and passengers perished on board.

[81] The final report for the flight PS752 investigation also identified four other instances in which a commercial airline was shot down when flying near areas where there was a military zone or military disputes:

1. Korean Airlines Flight No. 007 in 1983
2. Islamic Republic of Iran Airlines Flight No. 655 in 1988
3. Siberia Airlines Flight No. 1812 in 2001
4. African Express Airway 5Y-AXO in 2020

[82] A commercial flight can be the unfortunate victim of a SAM strike when flying near a conflict zone. Risk assessments are an essential tool for airlines and must not be rushed or based on insufficient information.

[83] UIA submits that the trial judge improperly found that the possibility that a combatant might misidentify flight PS752 as a military target could not ground a finding of foreseeability because the probability of misidentification by either Iran or the U.S. was low. There was not, argues UIA, a sufficient degree of probability of risk that a missile hit would occur in the mind of a reasonable man in the same position. As Brown J. observed: “Reasonable foreseeability represents a low threshold and is ‘usually quite easy to overcome’”: *Rankin (Rankin’s Garage & Sales) v. J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587, at para. 78, in dissent but not on this point.

[84] The trial judge found that many actors predicted a risk of a flight in the area being struck by a missile: Osprey and the FAA both warned of this risk in their notifications; Mr. Martynenko conducted a new security risk assessment and concluded that there was a “medium” risk; and a passenger on flight PS752 texted her brother expressing this very fear: at para. 443.

[85] UIA has not established that the trial judge’s finding that the harm was not too remote constitutes a palpable and overriding error.

(4) Should leave to appeal costs be granted?

[86] The governing principle is set out in *Bongard v. Bullen*, 2025 ONCA 473, at para. 13:

> Leave to appeal costs is granted sparingly, recognizing that the fixing of costs is highly discretionary and that trial and motion judges are best positioned to assess costs, taking into account the dynamics of a case: *Canadian Tire Corporation, Limited v. Eaton Equipment Ltd*., 2024 ONCA 25, 95 C.C.L.T. (4th) 175, at para. 13. An appellate court may set aside a trial or motion judge’s costs award only if the judge made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[87] UIA submits that leave should be granted because “there are strong grounds upon which to find the [t]rial [j]udge erred in exercising [h]er discretion with respect to at least six groups of plaintiffs’ counsel.” UIA argues that the trial judge failed to fix an amount based on the actual expenses incurred by these groups, did not

have sufficient information to make this calculation, and instead awarded costs for duplicative and inefficient work as a result of the many teams of respondent counsel. Parties are entitled to appoint counsel of their choice. The trial judge was alive to the issue of efficiency and took it into consideration.

[88] The trial judge received a bill of costs from each counsel group and assessed the extent of counsel's role throughout the trial. She then fixed costs on a partial indemnity basis for most groups.

[89] However, the trial judge awarded costs for Howie Sacks & Henry LLP and Camp Fiorante Matthews Mogerman LLP at a slightly higher rate than what would be warranted on a partial indemnity basis because these firms led most of the respondents' evidence and conducted many of the cross-examinations. She also found Rochon Genova LLP's costs claimed on a partial indemnity basis to be excessive and awarded costs in a reduced amount.

[90] I see no reason to interfere with the trial judge's nuanced and discretionary assessment of the costs awarded.

[91] Lastly, I would reject UIA's complaint that it was not given an opportunity to respond to the respondents' submissions on costs. UIA never asked for such an opportunity.

G. DISPOSITION

[92] I would dismiss the appeal with costs payable by the appellant to the respondents. I would deny leave to appeal costs.

[93] The parties are encouraged to reach an agreement on costs of the appeal. If they cannot, they may file written submissions. The respondents' submissions shall be limited to three pages, plus a bill of costs, filed within 10 days of the date of release of these reasons. UIA's submissions shall be limited to five pages filed within 10 days of the filing of the respondents' submissions.

Released: August 11, 2025 "P.D.L."

"P. Lauwers J.A."
"I agree. L. Favreau J.A."
"I agree. J. Dawe J.A."

APPENDIX

Respondents to Appeal	
Abbreviation	**Party**
N.S. et al.	N.S. in her personal capacity
	N.S. as Trustee of the Estate of H.A., deceased
	N.S. as Litigation Representative of the Estate of K.A., deceased
Omid Arsalani et al.	Omid Arsalani in the capacity of Estate Trustee Without a Will of Hiva Molani
	Fathollah (Vahid) Hezarkhani in the capacity of Administrator of the Estate of Naser Pourshabosibi
	Fathollah (Vahid) Hezarkhani in the capacity of Administrator of the Estate of Firouzeh Madani
	Habib Haghjoo
The Estate of Behnaz Ebrahimi-Khoei et al.	The Estate of Behnaz Ebrahimi-Khoei
	The Estate of Rahmtin Ahmadi
	Hadi Ahmadi
	Farnaz Moinzad
	Manijeh Maali
	Mahmoud Ahmadi
	Hossein Ebrahimi-Khoii
Razia Dhirani et al.	Razia Dhirani
	Rehana Dhirani
	Arif Dhirani,

	Jibraan Dhirani, Isa Dhirani, Deen Dhirani, minors by their Litigation Guardian, Arif Dhirani
	Kian Hossain, Qais Hossain, by their Litigation Guardian Rehana Dhirani
	The Estate of Asgar Dhirani, by its Executor Razia Dhirani
The Estate of Mojtaba Abbasnezhad et al.	Ali Ahmari-Moghaddam, Administrator of the Estate of Mojtaba Abbasnezhad
	Gholamhossein Abbasnezhad
	Sina Abbas Nejad
A.H.P. et al.	A.H.P. and P.E.P. by their Litigation Guardian, K.K.
The Estate of Seyed Mehran Abtahi Foroushani et al.	The Estate of Seyed Mehran Abtahi Foroushani, by its Litigation Administrator, Seyed Arman Abtahi
	Seyed Arman Abtahi, personally
	Behnoosh Mohammadi Jazi
	Seyed Mahdi Abtahi
	Fatemeh Hatami Varnosfaderani
	Seyed Iman Abtahi
	Amooshahi Varnosfaderani