Acting for the plaintiff

in an overseas

In 1991 I received instructions to act for the two survivors of the crash of a single engine Cessna Aircraft near Sydney on 22 December, 1990. The aircraft, whilst operated and owned in Australia, had been manufactured in the United States.

The aircraft was participating in a search and rescue operation for another small aircraft that had gone down the previous day in a nearby lake. The search aircraft had two pilots and four observers on board. The engine failed in flight and the plane crash landed in heavy timbered terrain. My clients, who occupied the back seat, survived, albeit with serious injuries.

At the time it was thought the plane had crashed due to pilot error. At the ensuing Coroner's Inquest, the conduct of the pilot was exonerated. The Coroner determined that the deaths had occurred due to the crash of the plane following total engine failure. No other findings were made.

In the circumstances it was a difficult task to know whether the survivors had a claim for damages and, if so, against whom the claim could be made. There was no point in suing the estate of the pilot, in light of the Coroner's findings, nor the overhaulers of the plane for faulty workmanship because they were uninsured and bankrupt. The only possible avenue was the manufacturer of the engine, although there was no suggestion that there was anything amiss in the manufacture of the engine.

By sheer luck the investigators into the accident were able to find, retrieve and preserve parts of the engine. Had the plane crashed in a lake or at sea or in rugged terrain, the parts may never have been retrieved. As it turned out, expert metallurgists inspected the bits and pieces to ascertain the torque setting applied to the connecting rod bolt at the time of the engine overhaul between the rod and rod cap. This allowed movement which resulted in the fretting of both the mating services and of the central guide service of the connecting rod bolts, resulting in a fatigue crack in the bolt. Unknown to the overhaulers the manufacturer had increased the specified torque from 425-475 in.lbs to 475-525 in.lbs, but had failed to update the service manual used by the overhaulers.

It took over a year from the accident for this information to be obtained. By then the limitation periods in many States in the U.S. had expired. Fortunately the limitation period in Alabama had not. After making extensive enquiries I found a trial lawyer in the U.S. who had experience in aviation cases and who was prepared to forego the usual 40% contingency fee but rather charge on an hourly basis, although still on "spec". Roger Clark of Beinstock & Clark had a pilot's licence. His office in Santa Monica was next to the Santa Monica Air Field.

Proceedings were commenced in Alabama against the manufacturer of the engine and Cessna just inside the two-year limitation period. Thereafter the Attorneys instructed by the defendants filed motion after motion for the proceedings to be struck out for want of jurisdiction. To withstand and repel the constant barrage of strike motions, it was necessary to engage a top lawyer in Alabama. Fortunately Fred Killion fitted the bill. He had the skill and the resources not only to withstand and repel the onslaught but also to become actively involved in taking depositions from some of the key personnel employed by the defendants.

The relevant engine parts were kept safe and sound and were later transported to the U.S. for analysis and scrutiny by experts for both the plaintiff and the defendants in the U.S. The wreckage of the Cessna was also preserved and was subsequently boxed and shipped to Alabama for use in the trial (had the cases not settled).

The cases were ultimately listed for hearing before an Alabama jury in April 1995. In the preceding two years depositions were taken not only in the U.S. but also from all relevant persons, doctors and experts in Australia. It was a

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aircraft product liability case

mammoth undertaking with a bevy of U.S. lawyers representing both the plaintiffs and the defendants, staying in Sydney for over a month to take depositions on liability and damages. The depositions were taken in the conference rooms of a major Sydney law firm and all evidence was captured on video.

The presiding Judge, Judge McDermott of Mobile County Court, insisted on being kept informed of proceedings and progress and he was not infrequently contacted at around 3.00am (Sydney time) for updates and rulings. The difficult time differences made for exhausting work.

It was determined that the law in relation to liability and damages to be applied in Alabama would be the law in New South Wales. This required a preliminary hearing before Judge McDermott in Alabama to educate him in New South Wales law. Former Supreme Court Judge, Andrew Rogers, was engaged as the Common Law expert for the defendants whilst Andrew Morrison, Senior Counsel gave evidence on behalf of the plaintiffs in a hearing in Alabama in July, 1994.

After the cases had been listed for hearing the defendants' attorneys approached me to arrange a mediation before a retired Judge in Los Angeles in January, 1995. The defendants paid the associated expenses of setting up the mediation including the travelling and accommodation expenses of the plaintiffs and their lawyers.

After two days of tense negotiations, during most of which neither side was prepared to budge, the cases finally settled for significant sums. Had the cases not settled, the trial would have taken approximately six to eight weeks and would have been fraught with risks for the plaintiffs. The local jury may have had difficulty in awarding damages to foreign plaintiffs against Mobile's major employer. Had the claims failed the financial losses suffered by the plaintiffs' lawyers, both here and in the U.S., would have been immense.

The total disbursements alone carried by the plaintiffs' lawyers in the U.S. and locally exceeded $600,000.00. Had the cases been fought to the bitter end, the disbursements would have at least doubled.

Damages

The plaintiffs sought compensatory and punitive damages. I discovered that awards of punitive damages in the U.S. are the exception rather than the rule, despite what we read in the papers.

Jurisdiction

Alabama is a Lex Loci State, thus the law of NSW would have applied on all substantive issues of liability and damages whilst the laws of Alabama applied for procedures and remedies.

Tips for new players

1 Ensure that the relevant engine parts are preserved and that any examination of the parts on behalf of a defendant is closely monitored to ensure the parts are not tampered with or lost.

2 Engage experienced and competent trial lawyers in the U.S. as soon as possible to ensure compliance with the time limitation periods. Don't assume that the same limitation periods apply in the U.S. as they do here. Also you need trial lawyers who can drop everything to meet the inevitable motions to strike.

3 Establish the banking facility to be able to bankroll the cost of experts' reports and the inevitable laborious depositions. A favourite tactic of defendants and their attorneys in the U.S. is to try and bleed the plaintiff dry.

4 Avoid showing the other side any weakness of resolve. Defendants' attorneys in the U.S. are an extremely tough breed.

5 Warn your experts that the cross-examination at the deposition hearings are likely to be rough. U.S. defendants' attorneys thrive on attacks on credibility (how much money have you made testifying for plaintiffs this year Dr. Yeo?)

6 Don't be fooled into thinking that U.S. jurors are sympathetic and the awarding of punitive damages is inevitable. Juries can be tough and mean and punitive damages are relatively exceptional PL