MUST AIRLINES COMPENSATE MINOR IN-FLIGHT INJURIES?

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Baggage falling from an overhead locker is one of the five most common causes of injuries to passengers in-flight, the others being turbulence, rolling food and bar carts, drink spills and tripping or slipping hazards.

Airlines will give injured passengers their best attention during the flight and offer medical assistance at the airport. If the injury is minor and there are no ongoing issues, airlines will leave it to their consumer relations department to offer a voucher for a meal or loyalty points or a flight upgrade. But is that enough?

In the recent decision of *Bradshaw v Emirates* [2021] FCA 1407 (12 November 2021) (Federal Court of Australia), Justice Stewart decided that in these circumstances, Emirates must pay general damages (for pain and suffering) and could not invoke the local civil liability law to avoid paying compensation for an in-flight injury which was minor.

Background

Stephen Bradshaw (aged 28) was a passenger on Emirates flights from Dublin to Brisbane via Dubai on 1 & 2 January 2019. He was sitting in an aisle seat in economy class on an Airbus A380 aircraft.

On the DUB-DXB leg, before the aircraft commenced its descent into Dubai (which was before the seatbelt light was activated), another passenger stood up and opened the overhead locker above Mr Bradshaw. Almost immediately afterwards, the aircraft banked and a suitcase fell out of the overhead locker and struck Mr Bradshaw on the head. It was a 'Trunki suitcase for kids' with a hard shell and weighed 1.7kg when empty. It was almost empty because its contents of soft toys had been removed so the passenger's daughter could have them during the flight.

The cabin supervisor prepared this KIS Report:

"Description:

- While the customer who was seated on 23D securing her bags for landing one of her bags fell off on the customer who was occupying 24C and hit him on his forehead. - The forehead looked bit red. - Customer disembarked unaided.

Purser Action:

- Applied ice wrapped with towels on his forehead. - Gave him a small water bottle. - He stated his pain is 5 on a scale of 10 no dizziness. Offered him panadol however he denied, claiming he has panadol. Offered him medical assistance and informed him that we can arrange a doctor to check him on ground however he denied stating it's only a bit of headache where the bag hits him. After landing went to the customer and again offered him to be checked with the doctor and he again denied stating "I'm fine" Purser was informed.

  Mr Bradshaw proceeded to the flight connection at Dubai."

A second KIS Report was prepared on the Dubai to Brisbane leg, after the passenger complained "he feels very cold, and in severe pain and is about to faint". He was administered oxygen on high flow and took two tablets of panadol hydrate. He was monitored and prioritised to leave the aircraft on landing.

The medical evidence was that Mr Bradshaw had no "lasting injury, pain or difficulty".

In his email to Emirates of 21 January 2019, he made "no complaint about any ongoing effects of the incident or of any injury, or of having had difficulties at work or having had to miss work."

The Court found that "this complaint is limited to having experienced "a very painful and uncomfortable journey.""

The Claim for compensation

Being an international flight, the claim for compensation was made under Article 17(1) of the *Montreal Convention* which states:

> "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 17 is given the force of law in Australia by s.9B of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth). It is no-fault liability – that is, a passenger does not need to prove the airline was negligent to make a claim. The passenger's claim is complete if they sustain bodily injury, as a result of an accident on board an aircraft.

Does the local law apply to limit that liability? Section 9E states:

> " … the liability of a carrier under the Convention, in respect of personal injury suffered by a passenger that has not resulted in the death of the passenger, is in substitution for any civil liability of the carrier under any other law in respect of the injury."

The Court quickly rejected the Emirates contention that general damages for pain and suffering and loss of amenities of life (i.e. damages for no-economic loss) were not recoverable, because there was no such limitation under Article 29 of the *Montreal Convention* which states:

> " … any action for damages … can only be brought subject to the conditions and such limits of liability as are set out in this Convention … "

The more forceful Emirates contention was that the low threshold under s 16(1) of *Civil Liability Act 2002* (NSW) (the CLA) applied to exclude the claim. Section 16(1) states:

> "No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case." (Note: the low threshold amount is currently $104,025)

If s.16(1) applied, Mr Bradshaw's claim would be defeated.

The argument as to whether the CLA applied, framed in legal terms, is whether "s.79 or s.80 of the *Judiciary Act 1903* (Cth) operates to pick up and apply the relevant provisions of the CLA as surrogate federal laws.

The Court concluded that "s 16(1)) of the CLA cannot be picked up and applied to an Article 17 claim" under s.80 or s.79 of the Judiciary Act. In reaching these conclusions, the Court:

Adopted the reasoning of Justice Keogh in *Di Falco v Emirates* [2018] VSC 472; 57 VR 394, in which he found that the *Wrongs Act 1958* (Vic) was not 'picked up' by ss.79 & 80. For my commentary on that decision see *Airlines need to provide water to passengers often to avoid in-flight injuries*.

And rejected the obiter observations of Justice Griffiths in *Grueff v Virgin Australia Airlines Pty Ltd* [2021] FCA 501 in which His Honour found that the CLA might apply (the decision was based on other grounds). For my commentary on that decision see *Is it an in-flight injury if you have stomach pain and nausea?*

Therefore, Mr Bradshaw's claim for compensation was not excluded because the CLA did not apply.

The Court found (*obiter*) that the CLA did not apply for another reason. That is, the CLA applies only to fault-based liability. Whereas Article 17(1) of the *Montreal Convention* provides for no-fault liability.

Mr Bradshaw claimed $43,600, consisting of general damages (non-economic loss) of $35,000, out-of-pocket expenses of $1,000, lost wages of $600 and lost economic opportunity of $7,000. He presented no evidence for the expenses or loss of wage and opportunity claims.

The Court awarded a small amount of compensation:

> "The ... damages suffered by Mr Bradshaw were pain and suffering and the loss of amenities of life in the limited way … In my assessment, an award of $5,000 will quite adequately and appropriately compensate him for that pain and suffering."

Comments

Emirates dealt with the incident appropriately during the flight, as can be seen from the KIS Reports.

But with the benefit of hindsight, Emirates did not deal well with the complaint made afterwards. As the Court observed:

> "The terms of the [complaint] email [of 21 January 2019] indicate that its objective was to try and secure an upgrade or a discount on a future flight because Mr Bradshaw was "displeased … with the treatment [he] received from the airline".

Emirates responded by requesting medical bills/ receipts and reports. No offer was made.

Mr Bradshaw responded by repeating his dissatisfaction. Emirates did not reply.

Feeling ignored by Emirates, Mr Bradshaw obtained legal advice and commenced the proceedings in December 2019.

The lesson airlines flying to Australia need to know is that they should consider offering an upgrade or a discount on a future flight, or loyalty points, or similar, where a passenger complains about a minor injury from falling baggage. And if the circumstances are comparable to this decision, the value of the offer should be in the region of $5,000.

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