AIRLINE PASSENGER DISCOMFORT NOT COMPENSABLE

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Following an increasingly long line of decisions adverse to airline passengers, the Supreme Court of Queensland, Australia has rejected a claim for compensation made by a passenger who complained of injury or illness as a result of a cramped airline seat in a decision handed down on 29 October 2013 (*Nguyen v Qantas Airways Ltd* [2013] QSC 286).

Case

Dr Nguyen, a general medical practitioner by occupation, brought a claim against Qantas Airways Limited over injuries allegedly sustained whilst travelling on an international flight between Australia and the United States of America in December 2008. He complained that whilst on board the flight from Brisbane to Los Angeles, and whilst seated in seat 55G of the aircraft, the last full width row of seats in the second zone of the economy class cabin, his seat did not fully recline while the passengers seated in the row immediately in front of him kept their seats reclined for the entire flight. He alleged that his leg room space was further restricted by the positioning of an audiovisual box and said that as a result the seat became very cramped and he was forced to contort and strain his body for lengthy periods. Approximately seven hours into the flight he began to feel pain in his lower back as well as nausea and general unwellness and he alleged that his right leg began jerking uncontrollably.

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He further alleged that he became distressed and asked the cabin crew if he could change seats but that this request was refused. He also alleged that he made several other attempts to obtain help and assistance from the cabin crew and his further requests were ignored.

Dr Nguyen alleged that this constituted an 'accident' within the meaning of the words as used in Article 17 of the Montreal 4 Convention.

Qantas in its defence did not admit that Dr Nguyen was seated in 55G as he was allocated seat 55H pursuant to his boarding pass. Qantas denied that seat 55G did not fully recline and says it operated to the full extent permitted in its normal operating capacity.

While Qantas admitted that there was an audio-visual box situated underneath the seat immediately in front of his seat, it was said that this was not unusual or unexpected and did not prevent the plaintiff from placing his feet and legs to the left of the audiovisual box and that it did not occupy any part of the space ordinarily available to the plaintiff.

The law

Article 17 of the Montreal No. 4 Convention provides that an airline carrier

> " ... is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The term 'accident' in Article 17 has been the subject of much judicial consideration. The leading decision is that of the Supreme Court of the United States of America in *Air France v Saks* (1985) 470 US 392 at 405 where the Court said:

> "We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all of the circumstances surrounding a passenger's injuries...
>
> ...when the injury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident, and Article 17 ... cannot apply...
>
> Any injury is a product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger."

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The decision was subsequently applied in Australia in the case of *Povey v Qantas Airways Limited* (2005) 23 CLR 189 in which the High Court of Australia was called upon to apply the *Saks* test in the context of a test case in relation to a claim for deep vein thrombosis suffered by a passenger. Justice Kirby noted that the *Saks* test required three elements:

1. There must be a cause separate from the 'injury' itself.
2. There must be a 'event or happening' that is unexpected or unusual.
3. There must be an event that is external to the passenger.

The evidence

Dr Nguyen acknowledged that he was allocated seat 55H but says that as he was travelling with his family he sat in seat 55G beside his partner. He said that the seat was the 'most cramped' he had had on any other flight and that after the plane took off the person in front reclined the seat as far back as it would go and it remained in that position for the rest of the flight except during meal times. He said that his own seat did not recline as far back as the other seats in the same row and he considered that it reclined no more than about 50% of the recline of his partner's seat – 'about 3 inches less'. He gave evidence that approximately 8 hours into the flight he felt his right leg jerking uncontrollably every 5–10 minutes and he began to feel very unwell. He felt very cramped and claustrophobic and became very panicky. He also said that he developed a sensation of mild lower back pain that he had never experienced before.

Dr Nguyen said he sought assistance from two male flight stewards telling the older flight steward that he felt 'very cramped, very claustrophobic' and needed to get out of that seat and

have a seat he could recline in. However the steward was not very helpful. The younger flight steward returned approximately 15 minutes later, felt his pulse and explained he was dehydrated and returned with a bottle of water and some electrolytes which the plaintiff took with no impact whatsoever. A promise from the younger steward to return in about 45 minutes to check on the plaintiff never occurred.

Dr Nguyen said that he and his wife sought further assistance from the flight attendants over the next one or two hours, pressing the call buzzer three or four times. All the calls remained unanswered. When the plaintiff requested an air sickness bag, the younger male steward said he would return with one but never did, forcing the plaintiff to go to the toilet where he was physically sick.

No defect was recorded with respect to the seat

Although the plaintiff says he swapped seats at one stage with his wife where there was more leg room, he returned to his old seat as he needed to get up more often. He was unable to get comfortable during the flight. When the plaintiff was finally able to disembark he says that his lower back pain really began to set in and he ranked his pain as '10 out of 10'. He says he became nauseous, his mobility was poor, he was hobbling or limping with the help of his wife and was unable to assist with the luggage or to drive the hire vehicle. In the following days after the flight he was 'literally house and bed bound'.

His wife Mrs Belinda Nguyen confirmed the facts as recounted by Dr Nguyen and said that when she was sitting in his seat she could not stretch her legs properly because of the box underneath the seat. She also gave evidence that she noticed that the back of the seat did not recline as much as her seat.

Evidence was also given by the plaintiff's brother in law and sister to assert that the plaintiff's seat did not recline as much as others.

An aeronautical engineer employed by Qantas gave evidence that no defect was recorded with respect to the seat and routine inspection of the seat found no defect.

The evidence of the flight stewards conflicted with that of the plaintiff and his relative. One steward said that he did not remember the particular flight and had no recollection of ever being spoken to by the plaintiff during that flight and had no recollection of being informed by the plaintiff that he was feeling unwell, cramped, panicky or uncomfortable. He noted that there were a few spare economy class seats on the flight so the plaintiff could have been moved should he have requested this.

Findings

In determining the credibility of the witnesses, the judge noted that Dr Nguyen did not impress as being a reliable historian of the events of the flight and he noted that his evidence appears to be tailored to suit his present recollection.

Dr Nguyen had apparently completed a request in Los Angeles for an upgrade to a business class seat on his return flight stating:

> "The reason as to why I require an upgrade to my seat is due to the fact that the economy seat was extremely uncomfortable and cramped (I have flown internationally on numerous occasions over the last 15 years and have never experienced a seat so uncomfortable as this!) ... returning in the same standard of seat will only add further injury and pain. With a business class seat I will be able to recline and take pressure off my lower back".

The judge noted that no mention was made in that request of the previous seat having

malfunctioned. He also did not mention any seat malfunction in the travel insurance claim form which he completed. The judge noted that the first occasion on which Dr Nguyen complained as to the defective nature of the seat is when he instituted proceedings almost two years after the flight. As to the plaintiff's request for a sick bag, the judge noted:

> "It defies common sense that a flight attendant, with responsibility for cleaning up the consequences of a passenger being sick, would ignore a request for an air sickness bag from a plainly unwell passenger".

In summary, the judge concluded that the plaintiff's evidence as to seat 55G lacking full recline was inconsistent with the documentation completed by Dr Nguyen whilst in Los Angeles. He also did not accept the plaintiff's evidence regarding the positioning of the audio entertainment box as the evidence established it was to the side.

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His conclusions meant that the injuries sustained by the plaintiff arose in circumstances in which the seat on the flight was operating in its normal matter. In those circumstances it could not be said that the injuries sustained by the plaintiff constituted 'an unusual and/or unexpected event that was external to the plaintiff'. As such, it does not constitute a 'accident' within the meaning of Article 17 of the Montreal 4 Convention.

Conclusion

While clearly much turned on the plaintiff's evidence and that of his family members travelling with him, the case nevertheless provides another useful example of the difficulties which are faced by a plaintiff seeking compensation for injuries sustained during a flight which operates in apparently normal circumstances.

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