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‘Cramped’ plaintiff fails in claim against Qantas

By Shannon O’Hara, Senior Associate

In the matter of *Son Nguyen v Qantas Airways Limited*[1] the plaintiff (**plaintiff**), a 37 year old male Australian resident, sought to pursue a claim against Qantas for damages allegedly arising from carriage by air between Australia and the United States in December 2008.

The claim

In his claim documents, the Plaintiff contended that he sustained bodily injury because his seat did not fully recline, the passengers seated in the row immediately in front of the Plaintiff kept their seats reclined for the duration of the flight, and an audio-visual box occupied part of the space available to the Plaintiff. The Plaintiff alleged that for these reasons his seat became cramped and he was forced to contort and strain his body for lengthy periods. It was claimed that approximately seven hours into the flight the Plaintiff began to feel pain in his lower back as well as nausea and general unwellness and that his leg began to jerk uncontrollably. Despite his request to cabin crew, he was not permitted to change seats.

Qantas denied a number of aspects of the Plaintiff’s claim on the following basis:

1. The seat reclined to the full extent permitted in its normal operating capacity.

2. Qantas denied that the Plaintiff’s seat became cramped because ‘*even if the seat immediately in front of the Plaintiff was reclined* [which Qantas did not admit, having been unable to ascertain the truth or otherwise of that statement] *this was not unusual or unexpected and the space between the seats is the same for every economy class seat*’.[2]

3. There was no requirement that the Plaintiff assume a fixed position whilst on-board the aircraft; the Plaintiff was not prevented or prohibited from moving about the cabin whilst the fasten seat belt sign was off; and Qantas encouraged passengers, including the Plaintiff, to undertake certain exercise for three to four minutes per hour while seated and to move about the cabin occasionally to avoid muscle stiffness.

In addition, Qantas denied the allegations raised by the Plaintiff constituted an ‘*accident*’ within the meaning of the *Civil Aviation (Carriers’ Liability) Act*.[3]

Determination

In 2012, the Queensland Supreme Court ordered the separate determination of the following questions[4] relevant to the matter (while three questions were posed by the Court, ultimately only two required consideration):

1. *Whether the events occurred as alleged by the Plaintiff* [5]

In its findings, the Court observed that the Plaintiff did not appear to be a reliable historian as to the events of the flight and his evidence appeared tailored to suit his present recollection.[6]

The Court found the Plaintiff failed, at any time, to complain to the flight attendants of an inability to recline his seat but that he had instead placed emphasis on the seat being cramped and claustrophobic.[7] The Plaintiff admitted during the hearing he was trying to obtain an upgrade to business class and as such, the Court found the Plaintiff's complaints to the Qantas flight attendants confirmed this to be true, and was thus consistent with his seat being cramped rather than being defective.[8]

The Court placed emphasis on inconsistencies between the Plaintiff's oral evidence and the contents of documentation prepared by the Plaintiff in Los Angels in support of a claim for an upgrade to a business class seat on his return flight. Specifically, the Court noted that at no time did the Plaintiff mention that there had been a defect or fault with his seat, and rather he had focused only on the fact the seat was cramped.[9] The Court found it significant that the first occasion on which there was a complaint as to the defective nature of the seat was when proceedings were instituted some two years post-incident.

Qantas in rebutting the Plaintiff's claim introduced engineering evidence to confirm the subject aircraft had been serviced regularly over a period of time spanning the alleged accident, and that at no time had a fault been identified with the recline in regards to the subject seat. Further, the Court was particularly impressed by the evidence of Qantas' flight attendants, accepting their evidence in preference to both the Plaintiff and the Plaintiff's wife and other family members.

In reliance on the abovementioned reasons, the Court was satisfied no mention had been made of any malfunction with the seat by the Plaintiff, because no such malfunction existed in the seat's recline.

The Court found the seat operated correctly and in accordance with its usual function and as such, concluded the events pertaining to the claim did not occur as alleged by the Plaintiff.[10]

2. *If the events occurred as alleged by the Plaintiff, whether they constituted: an unusual and/or unexpected event external to the Plaintiff and/or comprised an 'accident' within the meaning of Article 17 of the Montreal No.4 Convention.*[11]

In its judgment, the Court outlined the legislative regime applicable to the Plaintiff's claim, noting both the domestic Act and the International Convention. The Court confirmed the High Court's analysis of the elements of Article 17 in the *Povey*[12] decision (noting *Saks*[13]) and *Air Link v Paterson*.[14]

In view of the effect of the Court's conclusion in favour of Qantas' position regarding the seat's recline, the injuries allegedly sustained by the Plaintiff did not constitute an unusual and/or unexpected event that was external to the Plaintiff, and further did not constitute an accident within the meaning of the Act and/or the Convention.

As noted earlier, it was unnecessary for the Court to consider the third question for determination, being whether the Plaintiff's injuries (if found to have existed and to have been caused by an 'accident' within the meaning of the Act/Convention) were caused by the Plaintiff failing to take precautions for his own safety.[15]

Comment

The plaintiff found his economy class seat to be cramped and claustrophobic during the long haul flight. What is notable is that this matter progressed to the point of judicial consideration, particularly given neither the configuration of economy class seating, nor the fact other passengers in economy class seating may recline their seat for extended periods of time, would appear to be unusual or unexpected events. Sensibly the Court required the determination of the three questions canvassed in this article before allowing the matter to progress further, no doubt at significant cost to both parties.

While the case does serve as a timely reminder that claims are won or lost on the back of credible witness and documentary evidence, it unfortunately adds little to the present position in regards to the interpretation and application of the domestic Act and International Convention. As such, the three phase test laid out by the High Court in *Povey* remains the leading authority in this area of aviation law.

[1] [2013] QSC 286.
[2] Ibid [8].
[3] *1959* (Cth).
[4] Pursuant to R483 of the Uniform Civil Procedure Rules 1999 (Qld).
[5] [2013] QSC 286 [2(a)].
[6] Ibid [66].
[7] Ibid [73].
[8] Ibid [75].
[9] Ibid [67] - [69].
[10] Ibid [86].
[11] [2013] QSC 286 [2(b)].
[12] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189.
[13] *Air France v Saks* (1985) 105 S Ct 1338.
[14] *Air Link v Paterson* (2) 75 NSWLR 354.
[15] [2013] QSC 286 [88].

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CASA decision to cancel aircraft maintenance certificate of approval upheld by AAT

By Glenn Biggs, Partner and
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***GB Shaw & Co Pty Ltd trading as Dalby Air Maintenance and Civil Aviation Safety Authority* [2013] AATA 736 (11 October 2013)**

The Administrative Appeals Tribunal (**AAT**) has recently affirmed a decision by the Civil Aviation Safety Authority (**CASA**) to cancel an aircraft maintenance certificate of approval, pursuant to regulation 269(1) of the *Civil Aviation Regulations 1988* (Cth). In upholding CASA's decision the AAT concluded the applicant's deliberate breach of a condition of stay, requiring the applicant to notify CASA of aircraft maintenance performed outside the applicant's usual maintenance location, demonstrated an absence of fitness and propriety on the applicant's behalf.

The facts

The applicant, a general aviation maintenance provider, in Dalby Queensland was issued with a certificate of approval in November 2008. The certificate of approval was issued by CASA and authorised the applicant to undertake maintenance on aircrafts and their components.

In July 2011, a CASA inspector arrived at Dalby Air Maintenance to undertake an audit of the applicant's work. CASA's audit found the applicant's processes had fallen below the acceptable standard. CASA cancelled the applicant's certificate of approval pursuant to regulation 269(1) of the *Civil Aviation Regulations 1988* (Cth). CASA's power under the regulations allows CASA to cancel a certificate of licence when:

> *'(d) the holder of the authorisation is not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such an authorisation.'*

Proceedings were then commenced in the AAT seeking a review of CASA's decision to cancel the applicant's certificate of approval. On 7 August 2012, directions were made in anticipation of a hearing over five days in January 2013. The implementation of CASA's decision was stayed pending the hearing and determination of the earlier order. The stay was made subject to certain conditions, namely the applicant was required to notify CASA of the registration number of any aircraft involved in maintenance performed outside its usual premises at Dalby. In such circumstances the applicant was to provide CASA with copies of the paperwork associated with that maintenance '*at the earliest practical time*'.

This stay was breached in September 2012 when the applicant performed maintenance on an Ayres Thrush agricultural aircraft (Aircraft VH-ZOE (**ZOE**)) in Geraldton in Western Australia. Mr Glen Shaw (a licensed aircraft maintenance engineer and the applicant's chief engineer and manager) travelled to Geraldton with one of the applicant's employees to undertake a 100 hourly periodic inspection on ZOE. Whilst the conditions of the stay did not prevent this, it did require the applicant to notify CASA of the maintenance provided and to deliver paperwork associated with that maintenance to them. The applicant did not do either of these things.

The decision

Although the AAT affirmed the decision of CASA, the AAT provides different reasons to those of the original decision-maker choosing to consider only one narrow and undisputed aspect of evidence. In this regard the AAT did not address the vast array of evidence that touched upon other allegations made by CASA against the applicant (even though the AAT considered '*those matters also demonstrated egregious breaches of the applicant's duty*').

The AAT concluded the actions of Shaw confirmed the applicant was not a fit and proper person in that Shaw had deliberately set out to avoid the obligation imposed by the stay condition.

Whilst Shaw maintained he had forgotten to complete the required paperwork and this failure was '*a genuine oversight*', the AAT rejected his evidence and found Shaw concealed the applicant's failure to comply with the stay condition by deliberately not completing his own internal records in his job register.

> The AAT concluded Shaw had consciously intended to deceive CASA and concealed not just the work but the location the work had been performed in.

The AAT found that cancellation of the applicant's certificate of approval was the only appropriate regulatory response given the applicant displayed actions of being neither a fit nor proper person. The AAT concluded Shaw had:

'...demonstrated he is either unwilling or unable to abide by the rules, that is, the duties of the holder of a certificate of approval. The rules that approval holders are expected to obey have been designed to protect aviation safety. It is not open to the holder of an approval to choose not to obey the rules. Were that to become a norm aviation safety would be put at considerable risk.'

Comments

There is no doubt in coming to its decision the AAT remained concerned with issues of public policy and the potential floodgate that could be opened should other breaches by approval holders be overturned. It is also timely given the recent media attention on the regulator particularly in regards to decisions pertaining to whether approval holders are fit, proper persons. The decision sends a strong message to approval holders to ensure compliance with the rules provided by CASA given the aviation safety risks associated with a disregard for civil aviation regulations.

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Drones to deliver text books!

By Glenn Biggs, Partner and Sadia Stathis, Solicitor

Flirtey (an aerial technology company founded at the University of Sydney) and Zookal (a textbook rental service) have joined forces in what may be a world first for the use of unmanned aerial vehicles (**UAVs**) for commercial courier services. The innovative companies intend to allow students to order text books using an Android smartphone app following which a Flirtey drone will deliver their order to their homes (and/or in designated '*drop off*' area) in Sydney.

The UAVs are said to deliver a parcel within two or three minutes and will hover and lower the parcel through a customer retrieval box attached to a retractable cord. The UAVs will be fitted with real-time tracking devices, are autonomous, and use '*collision avoidance*' technology. It is intended they will fly above pedestrian height, but below 122 metres (the law prohibits the use of UAVs above 122 metres without the Civil Aviation Safety Authority (**CASA**) approval).

Flirety hope to obtain regulatory approval from CASA. Although, it is yet to be seen whether CASA will provide approval for fully automated commercial UAVs. In this regard, whilst the use of UAVs may be both cost effective and efficient, it still raises issues in terms of safety and privacy.

We will continue to keep you updated in this developing area of aviation commercial logistics services.