DISTRICT COURT OF QUEENSLAND

CITATION:	*Bassos v Etihad Airways* [2015] QDC 185
PARTIES:	**James Andrew BASSOS** **(plaintiff respondent)** **V** **ETIHAD AIRWAYS PJSC (ACN 123 078 688)** **(defendant applicant)**
FILE NO:	BD3944/2015
DIVISION:	Applications
PROCEEDING:	Applications to strike out Statement of Claim and for Summary Judgment
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	29 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2015
JUDGE:	Kingham DCJ

ORDERS:

1. **The applications to strike out the statement of claim and for judgment for the defendant are refused.**
2. **The plaintiff must submit to medical examination by Dr Paul Licina on 17 December 2015 on the following terms that:**
    - **(a) The defendant reimburse the plaintiff for the reasonable travelling costs incurred in Brisbane (e.g. taxi or parking expenses);**
    - **(b) A copy of the instructions to or request to the specialist to examine the plaintiff with any accompanying**

comments and attachments be provided to the plaintiff's solicitors;

3. **In the event that the plaintiff fails to attend the examination by Dr Licina, either party is at liberty to apply to the court on giving not less than 7 days prior written notice to the other party.**
4. **Costs of the application are costs in the cause.**

CATCHWORDS: PROCEDURE – STRIKE OUT STATEMENT OF CLAIM – SUMMARY JUDGMENT FOR DEFENDANT – CARRIER'S LIABILITY – where plaintiff claimed injury arose because he was required to occupy a seat encroached upon by another passenger, requiring him to contort and twist his body to avoid contact with the other passenger – where repeated requests to be re-seated were only partly satisfied - whether facts alleged give rise to a cause of action – whether any real prospects of establishing an accident as that term is interpreted in relation to carrier's liability – whether there is any need for a trial of the claim – where found that the pleading should not be struck out and judgment should not be entered.

Civil Aviation (Carriers' Liability) Act 1959 (Cth) s9B (Montreal Convention No. 4 Article 17).

Uniform Civil Procedure Rules 1999 r293

Air France v Saks 470 US 392 cited
Brannock v Jetstar Airways P/L [2010] QCA 218 cited
Olympic Airways v Hussain (2004) 540 US 644 considered
Povey v Qantas Airways Ltd (2005) 216 ALR 427 applied

COUNSEL: R Morton for the Applicant/Defendant

T Lambert for the Respondent/Plaintiff

SOLICITORS: CBP Pty Ltd as town agent for Norton White for the Applicant/Defendant

Carter Capner, Law for the Respondent/Plaintiff

[1] James Bassos travelled economy class on an Etihad Airways flight from Abu Dhabi to Sydney in October 2011. He claims he was forced to twist and contort his body to avoid contact with his neighbouring passenger, a very large man whose body encroached into his seat. After repeated requests of cabin crew, Mr Bassos was given limited access to a crew seat, but was still required to spend long stretches of time in

a position which he claims caused a back injury and aggravation of an existing back condition.

[2] His claim is for damages for personal injuries resulting from an *accident* within the meaning of Article 17 of the 1999 Montreal Convention. The *Civil Aviation (Carrier's Liability) Act 1959 (Cth)* s9B gives that Convention the force of law in Australia. It is common ground that the term *accident* in the context of Article 17, has been consistently interpreted to require *an unusual or unexpected event or events, external to the passenger.*[1]

[3] Etihad has applied to strike out the statement of claim for failure to disclose a cause of action and for summary judgment in its favour. Judgment may be entered for a defendant if there is no real prospect of succeeding on a claim and if there is no need for a trial.[2]

[4] The defendant argues the claim ought to be dismissed summarily because the facts alleged by Mr Bassos do not constitute an *accident*. The presence of overweight passengers who take up too much space in the cramped conditions of economy class is not unexpected or unusual. Nor is a passenger coughing an unexpected or unusual event.

[5] Mr Bassos strenuously contested those propositions. His counsel identified the relevant events as all the facts pleaded at [2] of the Statement of Claim. In summary, they are:

(a) Mr Bassos was assigned to a seat next to a grossly overweight person;
(b) That passenger's body encroached into Mr Bassos' seat;
(c) The passenger frequently coughed and expelled fluid from his mouth;
(d) Mr Bassos was forced to twist and contort his body in order to avoid contact with that passenger;
(e) Mr Bassos complained after 5 hours and his request for another seat was refused by a cabin crew member;
(f) 30 minutes later, when he made a second request, he was allowed to use a crew seat for an hour;
(g) Then he was required to return to his seat where he remained for another hour;
(h) After he re-seated himself in a crew seat for an unspecified period, a crew member invoked a security procedure and he was required to return to his allocated seat for 1.5 hours before landing.

[6] I was referred to a number of carrier's liability cases, in Australia and internationally, which turned on their own facts and do not assist me in determining the applications.

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[1] This test, derived from *Air France v Saks* 470 US 392 at 405 (1985) was accepted by the High Court in *Povey v Qantas Airways Ltd* (2005) 223 CLR 189; applied in *Brannock v Jetstar Airways P/L* [2010] QCA 218

[2] *Uniform Civil Procedure Rules 1999* Rule 293

The citations are included in the submissions filed during the hearing and it is not necessary to include them here.

[7] There are two authorities, which I turn to now, that are instructive.

[8] The first is the High Court decision in *Povey v Qantas Airways Ltd*.[3] There the passenger claimed he suffered from deep vein thrombosis (DVT)because of the cramped conditions, the impediments to passenger movement, the offer and supply of alcohol and caffeinated beverages, the encouragement to remain seated and the failure to warn of the risk of DVT. The passenger ultimately failed because he did not allege the conditions were unusual and unexpected.

[9] In their reasons, the majority accepted that an accident may occur because of some combination of acts and omissions.[4] Mr Bassos's allegations are a mixture of acts and omissions forming a chain of causes leading to an injury: the acts of allocating him to a seat encroached upon by an adjoining passenger and requiring him to return to that seat on two occasions; the omissions being their failure to provide an alternative seat when requested. The distinction between his claim and that of *Povey* is that he asserts the circumstances in which he was required to take and return to that seat were unusual and unexpected.

[10] The second authority which assists is the case of *Olympic Airways v Hussain*[5]. Mr Bassos relies on this as authority for the proposition that his claim reveals a cause of action to be tried. In that case, a passenger died from an asthma attack which occurred after his wife's repeated requests that the passenger be allocated a seat further away from the smoking section of the cabin. The Supreme Court of the Unites States rejected the airline's appeal from a finding by the District Court that it was liable for the passenger's death.

[11] An important factor in the Supreme Court's reasoning was the position adopted by Olympic Airways in the appeal. The airline did not contest a finding by the District Court that the flight attendant's repeated refusals to relocate the passenger was unusual or unexpected, in light of the relevant industry standard or its own company policy. It asserted the finding was irrelevant because the *injury causing event* was the presence of ambient smoke in the aircraft's cabin (which triggered the asthma attack).

[12] The Supreme Court considered the focus on an injury producing event was misplaced. Multiple interrelated events could combine to cause an injury. It was sufficient to establish an accident if there was a factual event that was unexpected or unusual. The Court said:

> "In *Saks,* the Court recognized that any one of these factual events or happenings may be a link in the chain of causes and – so long as it is unusual or unexpected – could constitute an "accident" under Article 17. 470 U.S. , at 406. Indeed the very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event as *the* "injury producing event".[6]

[3] (2005) 223 CLR 189
[4] (2005) 223 CLR 189 at p205 [35]
[5] (2004) 540 US 644
[6] (2004) 540 US 644 p9

[13] The court found the exposure of the passenger to smoke and the refusal to assist him are happenings that both contributed to his death. It found the flight attendant's refusal on three separate occasions to move the passenger was a factual *event*.[7] For the purpose of the appeal, the Supreme Court assumed, without deciding the point, that the flight attendant's conduct was unusual or unexpected.[8] It affirmed the judgment below.

[14] That reasoning in *Hussein* was referred to by the majority in *Povey.* They observed that the course of events surrounding an injury to an airline passenger may present difficulties in determining whether there has been an accident.[9] In *Povey*, the parties did not challenge the reasoning in *Hussein*. However, questions of that nature did not arise in *Povey* because the plaintiff did not allege the conditions were in any way out of the ordinary or unusual.

[15] That is not the position Mr Bassos takes in his claim. He alleges it is an unusual and unexpected event to be required to sit in a seat partly occupied by another person to the extent that he had to twist and contort his body to avoid contact with the other passenger. It is not accurate to dismiss the claim as one arising from cramped conditions which are usual and to be expected.

[16] I am not satisfied that Mr Bassos has no reasonable prospects of establishing his claim. The factual scenario he has pleaded is more consonant with *Hussein* than with *Povey*. Although the reasoning of the Supreme Court in *Hussein* has not been tested in Australia, neither has it been rejected.

[17] As the majority in *Povey* observed, the course of events surrounding an injury may present difficulties in determining whether there has been an accident. Mr Bassos's prospects may depend on conclusions about matters that cannot be determined in a summary way, such as:

(a) the precise circumstances of the seating arrangements, including the degree of encroachment;
(b) when Mr Bassos brought his discomfort to a crew member's attention and what information he provided to them; and
(c) applicable airline standards and company policies at the time of the incident.

[18] I am not satisfied the statement of claim reveals no cause of action. Nor am I satisfied that Mr Bassos has no real prospects of success and that there is no need for a trial of the claim. Accordingly, Etihad's applications must fail.

[19] The parties have agreed on certain directions in the event that Etihad's applications were refused. They also wish to be heard on the question of costs. I will hear from the parties before finalising orders on the applications.

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[7] (2004) 540 US 644 at pp9-10
[8] (2004) 540 US 644 p8
[9] (2005) 223 CLR 189 at p205 [37]

[20] Having heard from the parties, I make the following orders:

1. The applications to strike out the statement of claim and for judgment for the defendant are refused.
2. The plaintiff must submit to medical examination by Dr Paul Licina on 17 December 2015 on the following terms that:
    (a) The defendant reimburse the plaintiff for the reasonable travelling costs incurred in Brisbane (e.g. taxi or parking expenses);
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