

# SUPREME COURT OF QUEENSLAND

CITATION: *Nguyen v Qantas Airways Limited* [2013] QSC 286

PARTIES: **SON NGUYEN**  
(plaintiff)  
v  
**QANTAS AIRWAYS LIMITED**  
ACN 009 661 901  
(defendant)

FILE NO/S: BS 3673 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 29 October 2013

DELIVERED AT: Brisbane

HEARING DATE: 17, 18 and 19 July 2013

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders, and as to costs.**

CATCHWORDS: AVIATION – CARRIAGE BY AIR – CARRIERS’ LIABILITY – DEATH OR PERSONAL INJURY OF PASSENGER – ON INTERNATIONAL FLIGHT – where the plaintiff claims damages arising from carriage by air between Australia and the United States of America – where the plaintiff contends he sustained bodily injury because his seat did not fully recline – where the plaintiff contends this and other events constituted an unusual and/or unexpected event and/or comprised an ‘accident’ – where the defendant denies the events pleaded and that they constitute an ‘accident’ – where the Court ordered the separate determination of whether the events occurred as alleged by the plaintiff – whether the events occurred as alleged by the plaintiff – whether those events constituted an unusual and/or unexpected event and/or comprised an ‘accident’ within the meaning of Article 17 of the Montreal No 4 Convention

*Civil Aviation (Carriers’ Liability) Act 1959* (Cth), s 28, Sch 5

*Uniform Civil Procedure Rules 1999* (Qld), r 483

*Air France v Saks* (1985) 105 S Ct 1338; (1985) 470 US 392, cited

*Air Link v Paterson* (2) 75 NSWLR 354; [2009] NSWCA 251, cited

*Brannock v Jetstar Airways Pty Ltd* [2010] QCA 218, cited  
*Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, cited

*Povey v Qantas Airways Ltd* (2005) 223 CLR 189; [2005] HCA 33, cited

COUNSEL: A J H Morris QC, with R Davis, for the plaintiff  
 D J Fagan SC, with R Morton, for the defendant

SOLICITORS: Carter Capner Law for the plaintiff  
 HWL Ebsworth for the defendant

- [1] The plaintiff claims damages for personal injuries allegedly sustained whilst travelling on an international flight between Australia and the United States of America on 9 December 2008. The claim relies upon Article 17 of Montreal No 4 Convention, which is incorporated into Australian law by Part IIIC of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (as amended) ("the Act").
- [2] On 31 May 2012, this Court ordered the separate determination of three questions pursuant to r 483 of the *Uniform Civil Procedure Rules 1999* (Qld). Those questions are:
- (a) whether on 9 December 2008, whilst the plaintiff was on board Qantas flight QF15, there occurred events as alleged by the plaintiff in paragraphs 1 and 2 of the statement of claim (as put in issue by paragraphs 1-8 of the defendant's notice of intention to defend);
  - (b) to the extent (if any) that events as alleged by the plaintiff in paragraphs 1 and 2 of the statement of claim occurred, whether they constituted an unusual and/or unexpected event that was external to the plaintiff and/or comprised an "accident" within the meaning of Article 17 of the Montreal No 4 Convention (as alleged in paragraphs 1(g) and 3 of the statement of claim and as put in issue by paragraphs 8 and 9(a) of the defendant's notice of intention to defend);
  - (c) whether the plaintiff failed to act in any of the respects particularised at items (c), (d), (e) or (f) under paragraph 10(c) of the defence (and not including particulars (a) and (b) which parties agree shall be litigated as matters of conclusion, to be determined with issues of causation in the balance proceeding).

### **Background**

- [3] The plaintiff was born in Vietnam on 28 July 1977. He was primarily educated in the United Kingdom. The plaintiff came to live in Australia in 2003. He is a general medical practitioner by occupation.
- [4] The defendant operates an airline. As part of its business, it provides airline services for international routes for reward. One of those routes involves the carriage of passengers from Brisbane to Los Angeles.

## Pleadings

- [5] Paragraphs 1 and 2 of the amended statement of claim plead:
- “1. At all times on 9 December 2008:
    - (a) The defendant:
      - (i) Was engaged in the ‘international carriage’ of the plaintiff ‘for reward’ as a ‘passenger’ on an ‘aircraft’ (namely a Boeing 747-438 model aircraft with the flight number QF15) engaged in air transit from Brisbane to Los Angeles;
    - (b) The said carriage of the plaintiff by the defendant was carriage to which The Montreal No4 Convention applies (as that term is used in Part IIIC of the Commonwealth *Civil Aviation (Carriers’ Liability) Act 1959*) (‘the Act’);
    - (c) The plaintiff was and is a male person having been born on 28 July 1977.
  2. On 9 December 2008 whilst onboard Qantas flight QF15 bound from Brisbane to Los Angeles (the ‘Aircraft’):
    - (a) At all times the Plaintiff was seated in seat 55G of the aircraft, the last full-width row of seats in the second zone of the economy class cabin.
    - (b) The Plaintiff’s seat did not fully recline.
    - (c) The passengers seated in the row immediately in front of the Plaintiff kept their seats reclined the entire flight.
    - (d) In the leg room space that would otherwise have been fully available to the plaintiff below the seat immediately in front of him, there was positioned an audio-visual box occupying part of that space.
    - (e) As a result the Plaintiff’s seat became very cramped and he was forced to contort and strain his body for lengthy periods.
    - (f) Approximately 7 hours into the flight the plaintiff began to feel pain in his lower back as well as nausea and general unwellness. His right leg began jerking uncontrollably.
    - (g) The plaintiff became distressed and asked the cabin crew if he could change seats. This request was refused.
    - (h) The plaintiff made several other attempts to seek help and assistance from the cabin crew. His further requests were ignored.
    - (i) The events referred to in subparagraphs (b) to (h) inclusive (and any one or more of these subparagraphs in combination):
      - (i) Constituted an unusual and/or unexpected event or events that was external to the passenger;
      - (ii) Comprised an ‘accident’ within the meaning of the word as used in Article 17 of the Montreal No 4 Convention.
  3. Each said accident ‘took place onboard the aircraft’ and ‘caused’ the plaintiff to sustain ‘bodily injury’ and ‘damage’

within the meaning of those expressions as they are used in Article 17 of the Montreal No 4 Convention.”

- [6] In further and better particulars, delivered 12 May 2011, the plaintiff alleged, in respect of the allegation that the seat did not fully recline, that the seat did not recline at all. However, by letter dated 8 July 2013, the plaintiff amended his particulars of that allegation to assert the seat “did not recline more than about half of the recline available on the adjoining seat in that row”.
- [7] In its amended defence, the defendant admitted the allegations in paragraphs 1(a) and 1(b) of the amended statement of claim, and did not admit the allegations in paragraph 1(c). In respect of paragraph 2, the defendant:
- (a) does not admit the plaintiff was seated in seat 55G because the plaintiff was allocated seat 55H pursuant to the boarding pass issued in his name;
  - (b) admits row 55 is the last full width row of seats in the second zone of the economy class cabin;
  - (c) denies the plaintiff’s seat did not recline;
  - (d) says the seat reclined to the full extent permitted in its normal operating capacity;
  - (e) does not admit the plaintiff felt pain in his lower back, nausea and general unwellness, or that his leg began jerking uncontrollably.
- [8] In respect to the balance of the allegations in paragraph 2, the defendant pleads:
- “5. As to paragraph 2(c), 2(d) and 2(e) of the Amended statement of claim and paragraph 3 of the further and better particulars, the Defendant:
- (a) does not admit that the passengers seated in the row immediately in front of the Plaintiff kept their seats reclined the entire flight as despite reasonable enquiry, the Defendant remains uncertain of the truth or otherwise of the allegation and/or this information is solely within the knowledge of the Plaintiff and the other passengers;
  - (b) denies that the Plaintiff’s seat became very cramped because, even if the seat immediately in front of the Plaintiff was reclined (which is not admitted) this is not unusual or unexpected and the space between the seats is the same for every economy class seat;
  - (c) admits that there was an audio visual box situated underneath the seat immediately in front of the Plaintiff’s seat but says that:
    - (i) this is not unusual or unexpected;
    - (ii) is required for the operation of the inflight entertainment system, passenger seat reading light and call light;
    - (iii) did not prevent the plaintiff from placing his feet and legs to the left of the audio visual box; and

- (iv) the audio visual box was positioned on the right side or aisle side of the chair leg immediately in front and did not occupy any part of the space ordinarily available to the Plaintiff.
- (d) denies that the Plaintiff was forced to contort and strain his body for lengthy periods or assume restricted positions with legs tucked up into his chest or sitting curled up or sitting side on with his legs stretched into the aisle to his right because:
  - (i) there was no fault in the recline mechanism of the Plaintiff's seat; and
  - (ii) there was no unusual or unexpected event that caused the Plaintiff to assume a restricted position.
- (e) denies that the Plaintiff was required to hold the positions pleaded in paragraph 3 of his further and better particulars for extended periods of time with a total of more than 4-5 hours or at all because this is untrue and says that:
  - (i) there was no express or implied requirement of the Defendant that the Plaintiff, or any other passenger, assume a fixed position whilst onboard the aircraft;
  - (ii) the Plaintiff, or any other passenger, was not prevented or prohibited from moving about the cabin whilst the fasten seat belt sign was off;
  - (iii) it recommended that passengers, including the Plaintiff, undertake certain exercise for three to four minutes per hour while seated and to move about the cabin occasionally to avoid muscle stiffness; and

#### PARTICULARS

- (A) 'Inflight Workout' – Qantas Magazine
  - (iv) The recommendations contained in the Qantas Magazine were advised to passengers by the Customer Service Manager during his welcome announcement to passengers, including the Plaintiff.
  - (f) denies that there were no other seats in the Plaintiff's row which had an audiovisual box underneath the seated immediately in front of them because this is untrue and says that there was an audiovisual box underneath the seats immediately in front of seats 55B, 55D and 55J.
6. As to paragraph 2(g) and 2(h) of the Amended statement of claim and paragraph 5 of the further and better particulars, the Defendant:
- (a) does not admit that the Plaintiff became distressed due to his increasing pain and nausea as this is information that is solely within the knowledge of the Plaintiff;
  - (b) admits that there was a flight attendant onboard matching the description set out in subparagraph (b) of the Plaintiff's further and better particulars;
  - (c) denies the allegations paragraph 2(g) and 2(h) of the Amended statement of claim and in subparagraph (c) of

- the Plaintiff's further and better particulars because those things did not happen;
- (d) denies that there was a flight attendant onboard matching the description set out in subparagraph (d) of the Plaintiff's further and better particulars because despite reasonable enquiry, the Defendant cannot identify a person matching that description;
  - (e) denies the allegations in subparagraph (e) of the Plaintiff's further and better particulars because those things did not happen.
7. As to paragraph 2(h) of the Amended statement of claim and paragraph 6 of the further and better particulars, the Defendant denies the allegations therein because:
- (b) those things did not happen and says that:
  - (c) during this time, being 8 hours after the Plaintiff's symptoms allegedly commenced and for a period of 4 hours;
    - (i) fruit and water was offered to passengers approximately every 20 – 30 minutes; and
    - (ii) breakfast was served to passengers approximately 2 – 2.5 hours prior to the aircraft's arrival in Los Angeles.
8. As to paragraphs 2(i) of the Amended statement of claim, the Defendant denies that the matters pleaded in subparagraphs (b) to (h) constituted an 'accident' within the meaning of the *Civil Aviation (Carriers Liability) Act 1959* for the reasons set out in paragraphs 4, 5, 6 and 7 of this Amended defence."

### Legislative regime

- [9] The Act adopts into the civil law of Australia various international conventions, including the Montreal No 4 Convention. Article 17 of that Convention provides an airline carrier "is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injuries 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".
- [10] The term "accident" in Article 17 of the former Warsaw Convention (in all material respects identical to Article 17 of the Montreal No 4 Convention) was the subject of judicial consideration by the Supreme Court of the United States of America in *Air France v Saks*:<sup>1</sup>

"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

<sup>1</sup> (1985) 470 US 392 at 405.

aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply. ...

Any injury is the 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. Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents.”

[11] This analysis of the elements of Article 17 has been adopted by the High Court of Australia.<sup>2</sup> In *Povey*, Kirby J noted the *Saks*’ test required three elements.<sup>3</sup> First, there must be a cause separate from the “injury” itself. Second, there must be an “event or happening” that is unexpected or unusual. Third, there must be an event that is external to the passenger.

[12] In *Air Link v Paterson*,<sup>4</sup> Sackville AJA said that in order for a passenger to succeed in a claim under Article 17, it is not necessary to show that the event causing injury occurred independently of anything done or omitted by the passenger:

“The conduct of the passenger may disentitle him or her from recovery if, for example, it is so out of the ordinary that the operations of the airline cannot be expected to deal with the conduct. An airline, for example, cannot necessarily be expected to provide a portable step sturdy enough to withstand the weight of a passenger who chooses to leap from the aircraft door directly onto the step, bypassing the steps attached to the aircraft. But the mere fact that the passenger has brought himself or herself into contact with a piece of equipment that is not operating in the usual, normal and expected way does not prevent the event from being an ‘accident’ for the purposes of the Warsaw Convention and s 28 of the *Civil Aviation (Carriers’ Liability) Act* (Cth).

Equally, in my opinion, it is not essential for a passenger to establish the reason why the aircraft, or the airline’s equipment or services, did not operate in the usual or expected manner. What is required is proof that the injury was caused by an unexpected or unusual event that is external to the passenger: *Povey* (at 203 [28]).”<sup>5</sup>

[13] Once a passenger satisfies the elements of Article 17, the airline is strictly liable for damage suffered by that passenger. Liability does not depend upon any duty of care being owed by the carrier, or proof of any failure to exercise care by a carrier.

[14] Section 28 of the Act closely follows the wording of Article 17 of the Warsaw Convention.<sup>6</sup> Section 28 provides:

<sup>2</sup> *Povey v Qantas Airways Limited* (2005) 223 CLR 189 per Gleeson CJ, Gummow, Hayne and Heydon JJ at 204 - 205 [32],[33],[36], and Kirby J at 236 -240 [152] - [166].

<sup>3</sup> At 236 – 237 [153].

<sup>4</sup> (2009) 75 NSWLR 354.

<sup>5</sup> At 378 [120].

<sup>6</sup> For a useful summary of the history of the Convention and of judicial interpretation of Article 17 in Australia and internationally see *Brannock v Jetstar Airways P/L* [2010] QCA 218 at [21]-[39] per White JA (with whose reasons Fraser JA agreed).

“Subject to this Part, where this Part applies to the carriage of a passenger, the carrier is liable for damage sustained by reason of the death of the passenger or any bodily injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”

- [15] In *Povey*, it was accepted “accident”, in s 28, has the same meaning as in Article 17.<sup>7</sup>

### **Evidence**

- [16] The plaintiff said that in 2008 he planned to travel to Los Angeles with his wife, his sister, her husband and their young child. They were intending to stay for approximately one month on a holiday. They booked the same flight, departing on 9 December 2008. At check-in, the group were allocated two seats in the right-hand side of the middle aisle of the aircraft, and three seats across on the window side. The seat allocated to the plaintiff was 55H. However, as it was one of the three seats on the window side, the plaintiff did not avail himself of that seat. Instead, the plaintiff occupied one of the two seats in the right-hand side of the middle aisle. The plaintiff sat in seat 55G, beside his partner.
- [17] The plaintiff said when he first approached this seat the passenger in front had already partially reclined his seat. As a consequence, the seat was “the most cramped” he had had on any other flight. After the plane took off and was in a level operating position, the person in front reclined the seat as far back as it would go. It remained in that position for the rest of the flight, except during meal time when the flight attendant, at the plaintiff’s request, asked the person to put his seat forward. As soon as the meal was over, the seat was again placed in the full recline position.
- [18] The plaintiff said when he attempted to recline his seat, it did not recline as far back as the other seats in the same row. He made several unsuccessful attempts to have it recline as far as his partner’s seat. He estimated it reclined no more than about 50% of the recline of his partner’s seat, “about three inches less”.<sup>8</sup>
- [19] Apart from the lack of full recline in his seat, the plaintiff said an audio visual box, positioned underneath the seat in front, towards the right-hand side of the aisle, on the right strut of the seat, limited the positions he could sit in during the flight. Whilst this box was positioned outside of the leg of the seat, the plaintiff could only put his feet together directly in front of him.
- [20] Approximately eight hours into the flight, the plaintiff said he felt his right leg begin jerking uncontrollably every five to ten minutes. The plaintiff also began to feel very unwell. He felt very cramped and claustrophobic. He became very panicky. He also developed a sensation of mild lower back pain. The plaintiff had never experienced this sensation before this flight. He did not know what was happening at the time. In the following hours, the problems persisted and worsened. The plaintiff became more and more anxious and panicky.

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<sup>7</sup> At 199 [12].

<sup>8</sup> T1-13/35.

- [21] The plaintiff said he sought assistance from two male flight stewards. One was described as being in his early twenties, the second as being in his forties. The plaintiff first attracted the attention of the older flight steward. The plaintiff said he told him he was desperate for his help as he was unsure what was happening and felt very unwell. He told the steward he felt “very cramped, very claustrophobic”<sup>9</sup> and needed to get out of that seat and have a seat he could recline in. The steward’s response “was not very helpful”; the steward looked at the plaintiff “like he was disgusted”, “basically said everybody’s in the same boat”,<sup>10</sup> and walked off.
- [22] The plaintiff said the younger flight steward, who was present throughout this conversation, returned to the plaintiff approximately 15 minutes later. The steward felt the plaintiff’s pulse, and explained he was dehydrated. The steward returned with a bottle of water and some electrolytes. He asked the plaintiff to take all of them. The plaintiff said it had no impact whatsoever. The younger steward said he would return in about 45 minutes to check on the plaintiff but never did return.
- [23] The plaintiff said he and his wife sought further assistance from the flight attendants over the next one to two hours. They pressed the call buzzer another three or four times. All calls remained unanswered. Approximately one hour after seeking help from the male stewards, the plaintiff requested an air sickness bag. The younger steward said he would return with one but never did, forcing the plaintiff to go to the toilet where he was physically sick.
- [24] The plaintiff said for the balance of the flight, at least four hours, his condition worsened. At one point, he swapped seats with his wife. There was more leg room. He could have his feet apart, and he was able to recline the seat to a greater degree. However, he soon returned to his old seat as he needed to get up often. The plaintiff attempted to ease his pain by use of a pillow behind his back. He also attempted a few positions but could not get comfortable. Towards the end of the flight the plaintiff requested the older male steward’s help to exit the plane first, or soon thereafter. The steward replied the plaintiff would have to “wait your turn”.<sup>11</sup>
- [25] The plaintiff said when he was finally able to disembark, his lower back pain really began to set in. He ranked his pain as 10 out of 10. He became nauseous. His mobility was poor. He was hobbling or limping with the help of his wife. He was unable to assist with the luggage, and could not drive the hire vehicle. When the group reached their apartment, the plaintiff attempted to obtain pain relief by using painkillers in his doctor’s bag. They did nothing for the pain.
- [26] For the next two days, the plaintiff was “literally house and bed bound”.<sup>12</sup> The plaintiff decided to see a medical practitioner as he had never experienced this type of pain or symptoms in the past. He had only ever experienced significant back pain when he had Ross River Fever, in August 2008. That was short lived, for a day. He had never previously experienced the jerking knee.
- [27] In cross-examination, the plaintiff accepted his solicitors, in response to a request for further and better particulars of the allegation that his seat did not fully recline, had stated the seat did not recline at all and was prevented from reclining by reason

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<sup>9</sup> T1-15/35.

<sup>10</sup> T1-15/40.

<sup>11</sup> T1-17/25.

<sup>12</sup> T1-18/15.

of some unserviceability in its reclining mechanism. The plaintiff said those particulars were not in accord with his instructions. He was never asserting the seat would not “budge”.<sup>13</sup>

- [28] The plaintiff also accepted that in July 2011 he had given instructions for completing his statement of loss and damage. That statement of loss and damage recorded the plaintiff’s chair “could not fully recline due to the bulkhead behind it”.<sup>14</sup> The plaintiff said that was what he thought at the time but it was not true. The statement of loss and damage did not convey what he then believed to be the case.<sup>15</sup> His complaint was not that the seat was not comfortable even though it reclined back as far as it could go. He denied ever stating the chair would not move at all.<sup>16</sup>
- [29] The plaintiff said he told his solicitors the seat would only recline back by about three inches, which was about 50% of its recline. He first informed his solicitors of the three inch estimate in the course of this year. That was the first occasion he was asked to be specific about how much recline there was in the seat. He denied ever seeing a diagram which indicated full recline was six inches.
- [30] The plaintiff agreed he never told any of the flight stewards his seat was not moving back to the full extent it should, but said he was never given the chance to do so. The plaintiff was “literally, begging to be moved” and was telling the stewards he was very cramped but the stewards would not give him the chance to explain, saying “we were all in the same boat”.<sup>17</sup> The plaintiff said he was very anxious, very panicky and very distressed and wanted to be moved. He explained to the crew he did not know what was going on.
- [31] The plaintiff agreed it was alleged in his further and better particulars he had pressed the call button approximately every 15 to 20 minutes over the next four hours. Those particulars were not in accord with what he had told his solicitor. The plaintiff said he pressed the call button about three or four times over the next two to three hours but did not receive any assistance on any of those occasions.
- [32] The plaintiff also agreed it was alleged in those further and better particulars the audio visual box was situated directly underneath the seat in front, restricting the position of the plaintiff’s lower limbs and forcing him to assume restricted positions with his legs tucked up into his chest. Those were his solicitor’s words. They were not his instructions. An allegation he was tucking his legs up into his chest was not factually correct.<sup>18</sup>
- [33] Belinda Nguyen, the plaintiff’s wife, said when she approached her seat she noticed the seat in front of her husband was already reclined, making it difficult to enter from the aisle. After the seat belt signs had been turned off, she noticed her husband squirming, trying to get comfortable. She had travelled with him previously in economy and had not noticed any problems.
- [34] Ms Nguyen said approximately seven or eight hours into the flight the plaintiff began to look quite unwell and uncomfortable. The plaintiff asked the flight

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<sup>13</sup> T1-26/15.

<sup>14</sup> Exhibit 4.

<sup>15</sup> T1-28/10.

<sup>16</sup> T1-29/45.

<sup>17</sup> T1-31/15.

<sup>18</sup> T1-39/1.

- steward if he could be moved to a different seat as he was not feeling well and wanted to stretch his legs, as he could not stretch them properly in his seat. The plaintiff was in a cramped position at that time. The flight steward, a middle-aged male, responded “we’re all in the same boat”.<sup>19</sup>
- [35] About 20 minutes later, Ms Nguyen pressed the call button. A younger male flight steward came and checked the plaintiff. The steward said the plaintiff was “just dehydrated” and obtained some liquid for the plaintiff to drink.<sup>20</sup> He said he would return in 15 minutes to check on the plaintiff. The steward did not return.
- [36] Ms Nguyen said at one point she sat in the plaintiff’s seat to allow the plaintiff to sit in her seat. After approximately half an hour, the plaintiff returned to his seat because he felt unwell and needed the aisle. Ms Nguyen requested an air sickness bag from the younger male steward. Again, he did not return. Eventually, the plaintiff went to the toilet.
- [37] Ms Nguyen said when she was sitting in the plaintiff’s seat she could not stretch her legs properly as there was a box or something underneath the seat. She also noticed the back of the seat did not recline as much as her seat. She estimated the plaintiff’s seat reclined half as much as her seat. Later in the flight, the plaintiff’s brother-in-law unsuccessfully attempted to recline the seat. He did not sit in the seat. He pressed the button to make the seat recline, but it did not go back any further.
- [38] Ms Nguyen said she pressed the call button for assistance on multiple occasions. On each occasion she had to press it more than once before an attendant responded to the call button. A few hours prior to landing the plaintiff requested help in exiting the plane. The older male steward said the plaintiff would “just have to wait your turn”.<sup>21</sup> Ms Nguyen said when the plaintiff left the plane he was walking slowly and stiffly. He went to the bathroom to be sick again. The plaintiff remained in pain throughout the holiday. He spent a lot of time in bed. She had not previously seen him in that condition.
- [39] In cross-examination, Ms Nguyen agreed she had signed a statement dated 24 May 2010 in which she did not make any mention of a difference in the degree the plaintiff’s seat could recline relative to her own seat. Ms Nguyen said the statement, prepared by her solicitor, contained many errors. After correcting it several times, she felt under pressure to sign it in that form.
- [40] Ms Nguyen also agreed the statement referred to the seats pressing up against a bulkhead, and that as a result the seats did not recline back all the way. Ms Nguyen agreed that paragraph conveyed the seats were restricted by the bulkhead behind. However, the reference to the seats not going “all the way” back was intended to convey the plaintiff’s seat did not recline all the way back.
- [41] In re-examination, Ms Nguyen said in a signed statement dated 24 May 2012 she stated the plaintiff’s seat did not recline “even as far as mine did”, it “barely moved from its upright position”, and she had been unable to recline the plaintiff’s seat back as far as she was able to recline her own seat. This later statement was

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<sup>19</sup> T1-50/10.

<sup>20</sup> T1-50/30.

<sup>21</sup> T1-51/40.

prepared after the plaintiff and Ms Nguyen had been asked more specific detail about the events by the plaintiff's lawyers.

- [42] Yuk Wah Chan, the plaintiff's brother-in-law, said approximately half to three-quarters of the way through the flight, he noticed the plaintiff was not looking very well. The plaintiff and his wife said the plaintiff's seat would not recline. Mr Chan tried to recline the seat by pressing the button and pushing the backrest back. At the time the seat was in its upright position and moved "maybe an inch".<sup>22</sup> The plaintiff had complained he was uncomfortable in his seat, but did not ask Mr Chan to try to move the seat. Mr Chan saw the plaintiff speak to an attendant about being moved to another seat "several times" after he had attempted to recline the seat.<sup>23</sup> He did not speak to the attendant about the inability of the seat to move. It was "not my seat".<sup>24</sup> There was nothing behind the seat obstructing it.
- [43] Thuy Than Tran, the plaintiff's sister, said after her husband checked on her brother, she looked at the plaintiff's seat. It was obvious his seat was forward compared to that of the plaintiff's wife next door. The plaintiff's wife's seat was reclined, and the plaintiff's seat was "a little bit reclined".<sup>25</sup> As far as she could tell, the plaintiff's seat was in the most forward upright position or nearly so.
- [44] Andrew Simpson, an aeronautical engineer employed as the Manager of the defendant's 747/767 engineering services, held the position of Manager, Cabin Systems Engineering at the time of the alleged incident. As part of this role, he had responsibility for a maintenance program for the defendant's aircraft. This maintenance program required records to be kept of scheduled routine maintenance, and inspection of the cabin area. The aircraft used for flight QF15 had been the subject of regular inspection. Between 1 November and 31 December 2008, no defect was recorded with respect to the plaintiff's seat.
- [45] Mr Simpson said the routine inspection included checking certain economy class seats for condition and proper operation. Those seats included row 55 of the aircraft used for flight QF15. Seat 55G would have been checked for any defects prior to departure, and upon arrival in Los Angeles. The records revealed no defect was identified on either inspection. If there was any limitation on the seat's ability to recline its maximum distance of six inches, he would expect to see a note. There was no such note.
- [46] If a seat failure had occurred, it would have been identified and recorded in the maintenance records. If the failure occurred during a flight, the crew would identify the seat and nature of the defect for repair at the aircraft's next destination. If the defective seat could not be repaired at that time, the seat would have a sash placed over it saying "do not use, not for use" and would be unavailable for sale until it was repaired upon return to base.
- [47] Mr Simpson said how far back a seat reclined depended upon how long the button was held in its depressed position. If the button will not depress, the seat will not move. If the button was released before pressing back on the seat, the seat will not recline at all. If the mechanism failed, so that the button was continually depressed,

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<sup>22</sup> T1-70/40.

<sup>23</sup> T1-72/15.

<sup>24</sup> T1-72/40.

<sup>25</sup> T1-75/20.

the seat would be “self reclining”.<sup>26</sup> It would flop back and forth between positions. The only way there could be a limitation in the recline of the seat would be if the seat was incorrectly set at a reduced recline.

- [48] In cross-examination, Mr Simpson agreed the maintenance records revealed that in December 2008 two economy class seats, in a different aircraft, were reported by the flight crew as having “no recline” but found on subsequent inspection by maintenance staff to have correct recline action. Whilst Mr Simpson was unable to explain the circumstances of those matters, he did not consider it possible the seat had an intermittent fault which had rectified by the time the maintenance staff undertook their inspection. He also did not accept it was possible something may have been jammed in the hinge of the seat preventing it from moving for a time.
- [49] Mr Simpson said a false positive report of a seat not reclining was not common. The major failure of seats was self-reclining due to fluid leakage. He could not explain why there were two instances of a crew lodging a complaint that a seat would not recline, and the maintenance crew subsequently finding nothing wrong with the seat’s operation, when the seats were different seats, on a different aircraft, involving a different crew. He accepted that in respect of those seats, the relevant records had not been completed in accordance with the required procedure.
- [50] Mr Simpson said the person recorded as undertaking the testing of the operation of the economy class seats as part of the maintenance program would have been part of a crew of approximately eight members. It may be the test was not physically undertaken by the person who signed to indicate completion of the inspection, or undertaken in their presence. The person undertaking the testing of the seat would be aware of any limitation in the recline as at that time all seats on this type of aircraft were set at a six inch recline. It is very obvious if a seat did not recline the full distance. In that event, the only likely explanation would be that the recline distance had been set incorrectly, although it would be unusual as such an error had never been detected on any inspection.
- [51] Graeme Everington Jones was one of the male stewards looking after the economy class section of the plaintiff’s flight. He has worked on international flights for approximately 25 years. For most of that time he has flown the Brisbane - Los Angeles route. Mr Jones did not remember the particular flight, and had no recollection of ever being spoken to by the plaintiff during that flight. He also had no recollection of being informed by the plaintiff that he was feeling unwell, cramped, panicky or uncomfortable.
- [52] Mr Jones said based on his training and usual practices, if a passenger complained that his seat was not fully reclining, he would either move the passenger to another seat or try to recline the seat himself by pushing the recline button and manually pushing the seat back. If the recline was not working, he would tell the supervisor so that it could be logged, and move the passenger to another seat. The manifest for this flight revealed there were no spare business class seats, but there were three spare economy class seats.
- [53] Mr Jones said based on the records, at about eight hours into the flight the main services would have ceased, the cabin lighting would be dark and the stewards would be going through the cabin with water and fruit. At that stage of the flight,

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<sup>26</sup> T2-35/40.

which is probably the least busiest time, approximately half the crew may be on a break. The next service, breakfast, was provided approximately two and a half hours before landing in Los Angeles.

- [54] Mr Jones said if a passenger call bell was activated, his usual practice was to attend on the passenger as promptly as possible. When a call light is activated, a light is illuminated above the seat, and there is an audible sound in the galley area of the plane. If the passenger presses the button again there would be another audible sound in the galley. The light remains on until it is switched off, either by the passenger or the crew. It would be unusual for a passenger to keep repeatedly activating their call button over the space of three or four hours.
- [55] He did not recall any such event on this flight. He also did not recall any occasion when a request was made by the plaintiff for an air sickness bag. If such a request had been made, a spare could have been quickly obtained from the galley. A steward would avoid a person vomiting without a bag as the steward would have to clean it up. If a passenger complained of nausea, feeling cramped and disorientated, Mr Jones would investigate the person's complaints but would not necessarily record them as it was fairly common feeling for people on an aeroplane.
- [56] In cross-examination, Mr Jones agreed it was not uncommon for passengers to try "to get an upgrade". A person will not be upgraded "just because they feel cramped".<sup>27</sup> Mr Jones also agreed that from time to time passengers seek assistance to exit the aircraft ahead of the queue. However, passengers have to wait until the people in front of them start moving. If the passenger was having trouble with cramping and moving, he would ask the passenger to wait until the end so that wheelchair assistance could be obtained for them.<sup>28</sup>
- [57] Carolyn Maree Robinsen was also a flight attendant on the plaintiff's flight. Like Mr Jones, she had no recollection of the particular flight, or of the plaintiff. If a passenger complained of a faulty seat or a lack of recline function, her practice was to first look at the seat herself by asking the passenger to stand up and by pressing the button to see if the seat would recline. She would usually get another flight attendant to assist her. It was fairly obvious if a seat was working or not working. All the seats generally are in the same pitch and operate the same way. If the seat was not working, she would report it to her immediate supervisor. She has had the experience of a passenger complaining about a lack of recline but upon testing the seat found it was functioning correctly.
- [58] Ms Robinsen said her practice was to respond promptly to a call bell as it could be a sick passenger, or a passenger who is being bothered by someone else. It would be completely unusual for a call button to be activated and for no flight attendant to respond to it. The flight attendants work in a team based environment. It was their job to answer the call bells and make sure the passengers were "okay".<sup>29</sup>
- [59] Anthony Michael Jackson also was employed as a flight attendant on the plaintiff's flight. He does not have any recall of the flight, or of the plaintiff. He does not recall his attention being directed towards any deficiency in the recline function of seat 55G. If he had been notified of a seat recline problem, he would have asked the

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<sup>27</sup> T2-74/15.

<sup>28</sup> T2-75/30.

<sup>29</sup> T2-79/20.

passenger to stand up and test the seat himself by pushing the button in and pushing the seat back. If there was a recline issue, he would place a note in the cabin condition log. The passenger could be moved to a spare seat for the passenger's comfort. Mr Jackson's practice was to answer a call button "virtually straight away".<sup>30</sup>

- [60] In cross-examination, Mr Jackson agreed it was not uncommon for a passenger to complain of nausea. However, if a passenger complained of being cramped in their seat, Mr Jackson would look at it. If a person complained about their seat, it would be investigated. If there was a problem, a note would be placed in the log.
- [61] Denis Alan Morgan was the customer service manager for the plaintiff's flight. He had no independent recollection of the flight or of the plaintiff. His examination of the flight records revealed there were five economy class seats not being used on the flight. Three were vacant and another two were unused because a person nursing a child had been allocated one seat. If a defect was identified in any seat during the flight, it would be noted in the cabin condition log, either by the person who found it or by Mr Morgan. The passenger would be moved to a vacant seat.
- [62] Mr Morgan said there was a panel in his work area which indicated if a call button had been activated in any area of the plane. A chime would also sound. The indicator light would remain on until the passenger had been attended to by some attendant. If there was any delay in responding to the light, Mr Morgan would make a phone call to ascertain why, or physically go down to the area. Call bells are responded to immediately as it could be an emergency situation. If a passenger was located in a seat that did not have an air sickness bag, one could quickly be located in the storage area.
- [63] In cross-examination, Mr Morgan agreed if a passenger complained about a seat not reclining properly, he or another staff member would first check the seat before making any report. The records which revealed that on other flights there had been a complaint of two seats not operating correctly which were later found by engineers to be operating normally were not indicative of what ordinarily happened. Seats were either broken or operating correctly. Mr Morgan agreed it was not unusual for a passenger to try to obtain an upgrade to business class, or to try to get to the front of the queue when leaving the aircraft. Such passengers were not "going to be pandered to".<sup>31</sup>

## Findings

- [64] The determination of the separate questions involves a consideration of the reliability and credibility of the evidence given by the plaintiff, his wife, his sister and his brother in law as the defendant's witnesses, understandably, had no recollection of the plaintiff or of the particular flight.
- [65] In undertaking that assessment, it is important to consider any inconsistency in the accounts now being given to that contained in any documentation made at or around the time of the flight, or at a time closer to the flight. In this respect, the

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<sup>30</sup> T2-85/45.

<sup>31</sup> T3-15/5.

observations of Lord Pearce in *Onassis and Calogeropoulos v Vergottis*<sup>32</sup> are apposite:-

“‘Credibility’ involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though his is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.”

- [66] The plaintiff impressed me as being highly emotional as to the events on the flight in question. He did not impress me as being a reliable historian, of those events. His evidence appeared to be tailored to suit his present recollection. Importantly, his account in evidence was inconsistent with the contents of documentation prepared by him whilst in Los Angeles, in support of a claim for an upgrade to a business class seat on his return flight, and his initial pleadings.
- [67] In his request to the insurer, the plaintiff made no mention of his seat not functioning correctly. The plaintiff stated:

“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 would be able to recline and take pressure off my lower back.”<sup>33</sup>

<sup>32</sup> [1968] 2 Lloyd’s Rep 403 at 431.

<sup>33</sup> Exhibit 1, Tab 9.

- [68] The plaintiff sought to explain this answer by saying he did not think it was relevant to mention to the insurance people his seat had malfunctioned. The issue of the seat being uncomfortable “was secondary to being cramped, cramped being used as the collective term because of everything which had happened with the passenger in front of me reclining, the audio visual box, the recline of the seat, so I collectively put it together as being cramped. And because of the cramped conditions, it was very uncomfortable”.<sup>34</sup>
- [69] However, he also did not mention any seat malfunction in a travel insurance claim form, completed and signed on 22 January 2009, when he gave the following description of his injury:

“8 hours into flight felt unwell. Very cramped. Flight attendants ignored my request for a less cramped seat. Over next 24 hrs developed severe lower back pain.”<sup>35</sup>

The plaintiff again said he used the word “cramped” to incorporate all the problems. He thought it was irrelevant to mention to the insurer the seat was not functioning on the initial flight.

- [70] It is significant that in both those forms, the plaintiff did not make any reference to a defect in the recline of his seat. If there had, in truth, been an issue with the recline mechanism of his seat, it is extraordinary the plaintiff did not make reference to it. If the plaintiff’s current account is to be accepted it was the recline of the seat that was of particular concern to him.
- [71] The reference, in that documentation, to the plaintiff being cramped was, however, entirely consistent with the plaintiff finding the economy class seat cramped as was his initial impression when he first sat in the seat. A part of that feeling was claustrophobia. This was before any attempt to recline the seat.<sup>36</sup>
- [72] I do not accept the plaintiff’s explanation for the failure to mention a malfunction in his seat. I am satisfied no mention was made of any malfunction because there was no malfunction in the seat’s recline.
- [73] A conclusion that the cause of the plaintiff’s discomfort was crampedness, not seat recline, is also consistent with the plaintiff’s failure to at any time complain to the flight attendants of an inability to recline his seat. A central fact for the plaintiff to have told the flight attendant was that he needed a seat that reclined as well as his wife’s seat. The plaintiff did not tell any flight attendant of that need. Whilst the plaintiff said he was distressed, and was never given the opportunity to do so, I do not accept that explanation. Mr Jones impressed me as caring and competent. I do not accept he would not have afforded the plaintiff an opportunity to explain his concerns.
- [74] This conclusion is also consistent with the plaintiff’s acknowledgement that he was trying to obtain an upgrade to business class. The plaintiff said:

“I hinted that I needed a full reclining seat, but it’s very difficult because I’m aware that a lot of people – all this – a lot of people

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<sup>34</sup> T1-35/15.

<sup>35</sup> Exhibit 1, Tab 11.

<sup>36</sup> T1-33/25-40.

trying to score a business class seat and I didn't want to – to be putting that across and have him feel that that's what I wanted. I was just trying to put across that I was very, very unwell and needed to be moved".<sup>37</sup>

- [75] The plaintiff agreed that "ideally, I did want a business class seat, but as I explained, I didn't really want them to think I was just trying to score a free ride".<sup>38</sup> Further, whilst he wanted a seat that at least reclined as much as the other seats, he "did want more than that".<sup>39</sup> The plaintiff's acknowledgement that his request to the flight attendants was designed to obtain an upgrade to a business class seat, is consistent with the issue being that his seat was cramped and claustrophobic rather than being defective.
- [76] Significantly, the first occasion on which there is a complaint as to the defective nature of the seat is when the plaintiff instituted proceedings approximately two years after the flight. Whilst that complaint was that the seat did not recline fully, the further and better particulars given were that the seat did not recline at all. I do not accept the plaintiff's explanation that that inconsistency was due to his solicitor's error. Whilst there were a number of errors in the initial statement of claim, the further and better particulars were provided to a specific request, and the response was equally specific.
- [77] The plaintiff's evidence as to the events on the flight is also not credible. If the plaintiff is to be accepted, the flight attendants ignored a request for a sick bag in circumstances where, on the plaintiff's account, he was plainly extremely unwell.
- [78] Each of the flight attendants called, whilst not having any recollection of the flight, impressed me as caring people in the carrying out of their duties. Each was an experienced flight attendant who had worked extensively on international routes prior to the flight in question. I accept Mr Jones' evidence you would try to locate the sick bag quickly "because if people ask for a sick bag they need it".<sup>40</sup> 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.
- [79] The plaintiff submitted an adverse inference should be drawn from the failure of the defendant to call the younger male steward. However, the evidence at trial was that the younger male steward was a New Zealand based attendant who no longer worked for the defendant. Where, understandably, none of the flight attendants called to give evidence had any recollection of the flight, or of the plaintiff, and the particular witness no longer works for the defendant, the failure to call that male steward is not consistent with a conclusion the male steward's evidence would not support the defendant's case. I decline to draw any adverse inference from the defendant's failure to call that witness.
- [80] Whilst the plaintiff's wife gave evidence which was supportive of the plaintiff's version of events, I am not satisfied her evidence is reliable. Her evidence the plaintiff's seat reclined only half the distance of her seat was inconsistent with the

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<sup>37</sup> T1-31/45 – T1-32/5.

<sup>38</sup> T1-32/5.

<sup>39</sup> T1-32/14.

<sup>40</sup> T2-71/15.

contents of her initial statement. I do not accept her explanation that this statement was signed notwithstanding it contained known errors. Her email communication of 7 July 2013 reveals an attention to detail as well as a willingness to advise her solicitors of any known errors. Significantly, her evidence conveniently accorded with the plaintiff's most recent version, which was itself inconsistent with the plaintiff's original version as set out in the further and better particulars delivered early in the proceeding.

- [81] Ms Nguyen's evidence was also inconsistent with the contents of her further statement, provided two years after her first statement, and some three and a half years after the incident. In that statement, Ms Nguyen asserted the plaintiff's seat "barely moved from its upright position". This was contrary to her evidence that the seat moved about half as much as her own seat. I do not accept the plaintiff's wife's evidence as to the events on that flight.
- [82] The plaintiff contended significant support for his version of events was provided by the evidence of his brother in law. However, the plaintiff's brother in law's evidence was that when he checked the seat it hardly moved at all, and the seat was in its most upright position. That evidence is inconsistent with the plaintiff's evidence that the seat would move approximately three inches but no further.
- [83] The brother in law's evidence was also not consistent with common sense. If his evidence is to be accepted, despite the plaintiff being obviously extremely unwell and the plaintiff's seat not moving at all, the brother-in-law took no steps to assist the very unwell plaintiff by seeking to have him moved to another seat. Such a scenario is not consistent with the steps that would be taken by a family member if the plaintiff was as unwell as he contends, and his seat did not move. The failure to take any steps to seek the assistance of the flight attendants was entirely consistent with the issue being that the plaintiff found the economy seat cramped and claustrophobic rather than because the seat was defective.
- [84] Finally, the plaintiff's sister gave evidence that she also observed that the plaintiff's seat did not go as far back as his wife's seat. That evidence involved an observation, without any steps being taken to check the seat. Again the plaintiff's sister did nothing about assisting the plaintiff when it is said he was obviously unwell. For the reasons above, that evidence does not accord with the approach a family member would take if the plaintiff was as unwell as is being conveyed, and the seat was defective.

### **Conclusion**

- [85] The plaintiff's evidence as to seat 55G lacking full recline is inconsistent with the documentation completed by him whilst in Los Angeles, and inconsistent with his initial further and better particulars. I do not accept the plaintiff's evidence as to seat 55G having lack of recline. His complaint that the audio entertainment box was positioned in the space immediately in front of him is also not accepted. The evidence established it was to the side, on the other side of the leg strut. I am satisfied the plaintiff's evidence as to what occurred on the flight is not reliable.
- [86] I do not accept seat 55G was defective. I do not accept the recline of seat 55G operated other than correctly and in accord with its usual functioning mechanism. Question 1 is answered in the negative.

- [87] This conclusion means the injuries sustained by the plaintiff arose in circumstances where his seat on flight QF 15 was operating in its normal manner. In those circumstances, it cannot be said the injuries sustained by the plaintiff constituted an unusual and/or unexpected event that was external to the plaintiff. It also cannot be said it constituted an accident within the meaning of Article 17 of the Montreal No 4 Convention. Question 2 is answered in the negative.
- [88] These conclusions render it unnecessary to answer Question 3 which pertains to allegations that should the plaintiff be found to have suffered his injuries by reason of an “accident” within the meaning of Article 17, his injuries were caused by failure by the plaintiff to take precautions for his own safety.
- [89] The separate questions are answered as follows:
- |            |                         |
|------------|-------------------------|
| Question 1 | No                      |
| Question 2 | No                      |
| Question 3 | Not necessary to answer |
- [90] I shall hear the parties as to the form of orders, and as to costs.