Claim No. D26YY071

IN THE COUNTY COURT AT PONTYPRIDD

29th November 2018

Before:

District Judge Andrew Barcello

BETWEEN

STEPHEN HUW PROSSER

Claimant

and

BRITISH AIRWAYS PLC

Defendant

JUDGMENT

Introduction

1. This is a claim brought by Mr Prosser against British Airways PLC in relation to alleged bodily injuries, which he asserts were sustained during his carriage onboard flight BA10 from Bangkok to London Heathrow on 10th January 2016.

2. Mr Prosser contends that the passenger in a neighbouring seat was of such a size that his body encroached upon Mr Prosser, causing him to sit awkwardly and, in turn, sustain bodily injury. British Airways deny that the neighbouring passenger encroached upon Mr Prosser's seat and contend that even had he done so, this would not be sufficient to establish liability.

The trial and evidence

3. The claim was allocated to the fast track by an order dated 26th June 2018. The trial took place on 16th November 2018 at Pontypridd County Court. The Claimant was represented by Mr Jack Harding (counsel) and the Defendant was represented by Mr Timothy Salisbury (counsel). I am grateful to them both for the assistance provided to me throughout the course of the case.

4. Prior to the hearing, I was provided with skeleton arguments and a bundle of relevant caselaw submitted by each advocate. I also received and read a bundle of evidence which runs to 231 pages, including the pleadings, witness statements, each parties' bundle of relevant exhibits and a medical report (together with 2 additional documents) prepared by Mr Richard Evans, a consultant orthopaedic surgeon.

5. At the start of the hearing, 3 issues were raised and resolved:

    a) My bundle and the witness bundle were updated to include an additional document (an online complaint dated 11th January 2016), that had been omitted originally.

    b) The Claimant applied for permission to rely upon a letter produced by his accountant dated 7th November 2018. The Defendant opposed the application. I determined that the Claimant could rely upon the letter and gave a short ruling in this regard.

    c) I invited the parties to have consideration to part 32.13(1) of the Civil Procedure Rules (hereafter CPR) and to address me upon the application of the rule in this case. After a short adjournment, the advocates informed me that they had arranged to make available for inspection within the courtroom, a copy of each statement of the witnesses that would be giving evidence at the trial. I agreed that this proposal satisfied the requirements of the CPR.

6. I heard oral evidence from the Claimant. He had provided a witness statement dated 7th August 2018, which he adopted as his evidence in chief. He was cross-examined on behalf of the Defendant. I then heard oral evidence from Mr Chris McLindon, an employee of the Defendant. His witness statement, dated 27th July 2018 stood as his evidence in chief. He was cross-examined on behalf of the Claimant. I do not intend to repeat their evidence in detail within this judgment, but to refer only to such relevant aspects where appropriate.

7. I received oral submissions from each counsel which supplemented their skeleton argument, helpfully outlining the relevant caselaw and advancing appropriately, the arguments on behalf of their clients.

8. The hearing commenced at 10:30am. The parties concluded their submissions at approximately 3:30pm. I did not consider that there was sufficient time for me to deliberate and deliver an oral judgment on the day of the trial and, therefore, I reserved judgment. Prior to doing so, I indicated to the parties this intention and raised some practical issues. The parties agreed with my proposal that I send the judgment to the advocates in draft form, so as to permit them to raise any matters requiring correction, to seek to agree a final order and to inform me if they would wish to be excused from any hearing at which judgment would be formally handed down. I asked the advocates to consider the status of my written judgment, which would be placed upon the file. Each agreed that it would

become a document that could be obtained by non-parties pursuant to CPR 5.4C(1)(b) in accordance with the procedure at CPR 5.4D.

The law

9. The claim is brought pursuant to the provisions of the **Montreal Convention 1999 ("the Convention")**. Claims for bodily injury fall to be considered under Article 17 of the Convention which provides:

> ***Article 17 - Death and injury of passengers - damage to baggage***
> *1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*

10. As set out by Lord Scott in the matter of ***Deep Vein Thrombosis and Air Travel Group Litigation [2006] 1 AC 495:***

> *"It is to be noticed that the conditions for the imposition of liability on the carrier do not include any element of fault or blameworthiness or failure to observe a proper standard of care on the part of the carrier. The requirements of liability are, first, that the passenger has suffered a bodily injury (a requirement that gives rise to questions about psychiatric injury which, happily, do not need to be addressed in the present case), second, that the bodily injury has been caused by an "accident" and, third, that the accident took place on board the aircraft (or in the process of embarkation or disembarkation)."*

11. The word 'accident' in this context has an autonomous meaning. It has been held to include matters such as a collapsing seat-back, a defective seat causing a passenger to sit at an awkward angle, the spilling of hot food and drink, a terrorist attack and a sexual assault by another passenger. The universally accepted definition comes from the decision of Connor J in the US Supreme Court in ***Saks v Air France 470 US 392***:

> *"An unexpected or unusual event or happening that is external to the passenger"*

This is to be treated as being distinct from:

> "*the passenger's own internal reaction to the usual, normal and expected operation of the aircraft*".

12. Courts at the highest level have emphasised that this definition must be applied flexibly and generously. In ***Saks***, it was emphasised that the definition of an accident:

> "*should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries*".

13. In the United Kingdom, in the House of Lords, in ***Sidhu v British Airways [1997] AC 430***, Lord Hope stated:

> "*No doubt domestic courts will try, as carefully as they may, to apply the wording of article 17 to the facts to enable the passenger to obtain a remedy under the convention*"

14. This flexible and broad approach to Article 17 has also led to the courts making significant determinations in favour of the passenger:

    a) The Court in **Saks** held that since a personal injury is normally the product of a chain of causes it is only necessary for the passenger to prove that "*some link in the chain was unusual or unexpected event external*" to them.

    b) Whether something is an 'unexpected or unusual event or happening' must be judged solely from the point of view of the passenger. Lord Scott stated in the matter of ***Deep Vein Thrombosis and Air Travel Group Litigation [2006] 1 AC 495*** that:

    > *"the "unintended and unexpected" quality of the happening in question must mean "unintended and unexpected" from the viewpoint of the victim of the accident. It cannot be to the point that the happening was not unintended or unexpected by the perpetrator of it or by the person sought to be made responsible for its consequences. It is the injured passenger who must suffer the "accident" and it is from his perspective that the quality of the happening must be considered."*

    c) Within that same case, Lord Mance stated:

    > *"That is not of course the same as saying that an unexpected event during the flight must always be instantaneous and immediately noticeable, rather than continuous and unrecognised."*

    d) As noted above, the definition of 'accident' has extended to deliberate assaults by one passenger on another without any causative involvement of airline crew. Sitting in the Court of Appeal in **Morris v KLM [2002] QB 100**, Lord Phillips MR expressed the view that:

    > "*There is nothing in Saks that justifies the requirement that an "accident" must have some relationship with the operation of the aircraft or carriage by air*."

The issues

15. In the circumstances of this claim, for Mr Prosser to succeed, the following questions must each be answered affirmatively:

    a) Has he, as a passenger, suffered a bodily injury?

    b) If so, was the bodily injury caused by an "accident"?

c) If so, did the accident take place on board the aircraft or in the process of embarkation or disembarkation?

16. Insofar as the third question is concerned, there is no issue. The Defendant accepts that the alleged incident took place on board the aircraft. I must therefore determine the first two questions.

17. As Mr Prosser brings the case, the burden is upon him to establish the facts in respect of the matters relied upon. The standard of proof is the balance of probabilities, namely that I must be satisfied that each event in question is 'more likely than not' to have occurred.

Assessment of evidence and findings

18. I shall outline my findings by reference to the two issues I am required to determine.

Did the Claimant suffer a bodily injury as a passenger?

19. Mr Prosser attended a medical examination undertaken by Mr Evans, a consultant orthopaedic surgeon, on the 17th January 2018, some 2 years after the flight. In compiling his report, Mr Evans had regard to the account given to him by Mr Prosser, the available medical records and his own examination of Mr Prosser. Mr Evans, accepted Mr Prosser's account that during the flight he sat "tilted sideways" because of a larger passenger encroaching in to his seat; Mr Evans concluded that this was, on the balance of probabilities, "directly responsible for a simple soft tissue injury". Mr Evans' view was that Mr Prosser has "degeneration in his lower back which is not caused by this incident" and that "prolonged tilting posture of his lumbar spine has clearly exacerbated Mr Prosser's previous problems in his lower back." Mr Evans stated that it is difficult to quantify, but considered that this simple soft tissue injury can be "deemed entirely responsible for approximately 3 months of pain and suffering from the date of the incident", a period which he directly links to the amount of time Mr Prosser told him he was unable to work overtime for.

20. Mr Evans was subsequently asked questions in writing by each party. In response to a question from the Defendant, he agreed that it was possible "that prolonged sitting could have caused the flare-up and exacerbation of Mr Prosser's symptoms". However, Mr Evans remained of the view that it was most likely on the balance of probabilities (the civil standard of proof), that it was "sitting in an awkward position" that caused an exacerbation of Mr Prosser's symptoms of his degenerative condition. In reply to a subsequent question, Mr Evans agreed that, had Mr Prosser "mobilised more regularly from his seat then there is a possibility his symptoms would have been less severe." However, he does not consider that it would have altered the prognosis, simply that the pain may have been less severe.

21. The Claimant has consistently maintained that he suffered an injury because of the way he sat whilst upon the flight. In his online complaint made on 11th January 2016 (the day after the flight) he requested the details of a direct contact, in order that he could raise a formal complaint due to suffering a "musculoskeletal injury". Within his letter dated 14th February 2016 he described being in pain upon his drive home, making enquiries of medical

professionals and obtaining chiropractic treatment for an injury. He gave a similar account within his witness statement.

22. In his oral evidence, Mr Prosser's assertion that he became injured upon the flight was not challenged, but it was clear from his evidence that Mr Prosser did not agree with the limited nature of the injury diagnosed by Mr Evans. The thrust of the questioning was directed to Mr Prosser's failure to avail himself of the opportunity to mobilise upon the flight.

23. Mr Prosser's evidence was that he sat in an awkward position because of the physical encroachment of the body of the passenger in seat 37J. This, he says, was uncomfortable and after around 45-60 minutes, became painful, causing him to leave his seat to inform the cabin crew. Having told them of his need to sit elsewhere or for the passenger in 37J to move, he went on to tell them that he would be caused an injury which would require him to miss work if he were required to remain in the same seat. Following this conversation, he returned to his seat and says that some 20 minutes afterwards, pain and discomfort returned. Having made such a confident prediction as to the onset of injury, it is curious that Mr Prosser chose to remain within his seat for almost the entire 12-hour flight. Within his evidence, he initially told me that he did not get out of his seat after making the complaint, though he later stated that he believes he visited the toilet once. He suggested that he did not leave his seat to mobilise because leaving his seat caused "hassle" in requiring the passenger in 37J to get in and out of his seat. The explanation does not seem likely. Mr Prosser did not give me the impression that he was a person who would choose to knowingly suffer an injury. He is articulate, intelligent and forthright. He need only have explained to fellow passengers that he was finding the flight uncomfortable, rather than knowingly subject himself to an injurious event.

24. I am satisfied, on the basis of Mr Prosser's unchallenged evidence, supported by the expert opinion of Mr Evans, that on the balance of probabilities, Mr Prosser suffered a bodily injury upon the flight. Mr Prosser has consistently maintained that he suffered an injury, though his speculation as to it being a sacroiliac joint dysfunction is specifically discounted by Mr Evans, in favour of a soft tissue injury to the lumbar spine. The most cogent and reliable evidence as to the injury comes from Mr Evans, whose medical opinion I accept, which is that Mr Prosser, whilst on the aeroplane, more likely than not suffered an exacerbation to a degenerative injury. This was either caused by Mr Prosser sitting in an awkward position for prolonged periods of time or simply by him choosing to remain in his seat for very long periods of time. Though Mr Evans considers the second scenario the least likely cause of the injury, it is, in my view, a highly plausible explanation for the cause of the injury, given my findings in respect of the other matters in issue.

25. I add for completeness, that on a number of occasions Mr Evans made reference within his report to factual matters which were in dispute. It is clear that he formed his own opinion as to the reliability of the account given by the Claimant. I have not had regard to those comments within his report. The determination of factual issues and the assessment of witness evidence do not fall within his remit. They are matters that are for the court to determine having regard to all of the evidence available.

Was the injury caused by an "accident"?

26. Within the context of this case, this question gives rise to 3 matters. First, I must determine if the passenger in 37J encroached upon the Claimant's seating area. If so, was it to such an extent that the Claimant was compelled to adopt an awkward seating position. If so, does such an incident constitute an "accident" within the meaning of the Convention, having regard to the guidance derived from the caselaw.

27. Dealing first, with the issue of encroachment. It is important to provide an understanding of what I intend that word to mean within the context of the case. Aeroplanes are confined spaces. Each major flight operator offers a number of different classes of seating. On a long-haul flight, in general terms, the more a passenger is willing to pay (unless they are able to make use of a loyalty scheme), the larger their seating area and the more salubrious their surroundings. The seating area in question in this case, is the Defendant's equivalent to what is usually known as economy class, which provides the smallest seating areas upon the plane available to paying customers. Travelling in such seats gives rise to a number of common incidents which could ordinarily be termed as encroachments. Neighbouring passengers can be expected to inadvertently make physical contact with their neighbour any number of times throughout a flight, be that a stray elbow whilst someone makes themselves comfortable or a dropped object as someone sleeps. A neighbouring passenger might commandeer the arm rest, the passenger in front may recline their seat or the cabin crew might be required to pass items over a passenger's head. There are any number of events that could be termed as encroaching upon a fellow passenger. It is not however, incidents of this type to which I refer in using the word. I intend "encroachment" to mean the continued or consistent occupation of part of a neighbouring seat itself or of the space above it, such that it can be said that the Claimant did not have the benefit of being able to occupy the entire area which was allocated to him.

28. I had the benefit of listening very carefully to the Claimant and to Mr McLindon, the customer service manager upon the flight. Each was insistent that they had given an accurate version of events and that the passage of time had not caused them to have fallen into error. In general terms, their oral evidence was broadly consistent with their statements and, in the case of Mr Prosser, with his earlier letters of complaint. However, having assessed the detail of the evidence given by Mr Prosser I am concerned as to the reliability of key aspects of his account. I have already expressed some concern as to his apparent unwillingness to mobilise upon the flight, despite his belief that not doing so would cause him an injury. It is also of concern that he gave differing accounts in this regard, first saying he did not leave the seat at all (after the engagement with staff), later saying he did leave his seat on one occasion. There were other matters within his evidence which showed inconsistency as to the detail of the account and which suggested a propensity to exaggerate aspects of his evidence to bolster his claim. As examples, I considered his evidence in respect of the encroachment by the neighbouring passenger to be inconsistent and exaggerated. Within his witness statement he referred to "the rest of his body spilling into my seat by several inches", within his oral evidence, he stated at one stage that this was 3 inches, later said it was in excess of 3 inches and later stated that it was "a good few inches". In my view, his statements were intended to increase the size of the claimed encroachment and to create an exaggerated picture, rather than a genuine account. In respect of his evidence as to sleeping during the flight and being seen by Mr McLindon, I have similar concerns. At one stage he said he did not sleep, he later said he slept for 5-10 minutes on occasions, he also said that he listened to music with his eyes closed. Despite these statements, he was

insistent that Mr McLindon did not visit his area of the plane to observe him. He was adamant that he would have been aware of any member of the cabin crew walking down the aisle, despite there being two passengers between him and the aisle and despite him having his eyes closed, either through sleep or listening to music. I found this aspect of his evidence most unreliable. It appeared to be an attempt to discredit the evidence of Mr McLindon rather than to provide a truthful and clear account.

29. By contrast, I found Mr McLindon's evidence reliable. There were occasions within his evidence, where I considered him to be particularly forthcoming, at times where he must have known that his answers could cause a difficulty for his employers. First, though the Defendant's case had been put on the basis that the Claimant was wrong to suggest that a recording of a complaint was made upon the flight on an iPad, Mr McLindon (who sat through the entire hearing and heard the questions put to Mr Prosser), with little encouragement and under no challenge, appeared keen to disavow the court of this misunderstanding. He explained that he had taken a complaint from Mr Prosser which was sent to customer services via use of an iPad, but that the nature of the complaint had not been that an injury had been caused, so an alternative procedure designed to log incidents and/or injuries had not been undertaken. Second, Mr McLindon informed me that he disagreed with the assessment of other members of the cabin crew who were said to have suggested to Mr Prosser that it would be unsafe for him to sit in a crew seat. His view was that, as a matter of good customer service, it could have been allowed. Each of these passages suggested that Mr McLindon did not seek to put any gloss upon his evidence and that he was attempting to inform the court of his genuine recollection.

30. In addition to his willingness to accept such matters, Mr McLindon was very clear and consistent in his evidence. I accept that the incident was now almost 3 years ago. Mr McLindon says that his recollection is good because the complaint was so unusual. Though he has, on many occasions dealt with very large customers, who regularly require the use of extension seatbelts and/or for whom the armrests cannot be put into the usual horizontal position, he informed me that he has never dealt with a complaint such as this one, where a neighbouring passenger has claimed to be unable to sit properly in their seat. Such was the unusual nature of the complaint, that he told me that he had not known of anything similar in the 17 years in which he has worked upon aeroplanes for the Defendant and for a previous employer. I remind myself of the context within which he was working on board the plane. He was the customer services manager. He had a responsibility for ensuring the well-being of passengers upon the flight and had charge of dealing with any complaints. As part of his duties, he was required to inspect the cabin every hour and to make a report to the captain. Mr Prosser had raised a concern about the size of his neighbouring passenger both to the cabin crew and directly to Mr McLindon, which caused Mr McLindon to at first make an appraisal of the seating arrangements and to subsequently have careful regard to Mr Prosser upon his hourly inspections. Mr McLindon acknowledged in his written and oral evidence that the passenger in 37J was a large and broad man, though he did not accept the suggestion that he was obese. However, it having specifically been claimed that this caused an encroachment upon Mr Prosser's seating area, when Mr McLindon looked at the situation at the time of the complaint, he considered that there was no encroachment into the seating area of Mr Prosser. He specifically looked to see if part of the passenger "spilled over" the arm rest and was clear that no part did. Mr McLindon revisited the area on an hourly basis and each time, he observed Mr Prosser sitting in what appeared to be a normal

position, on many occasions appearing to be asleep. Challenged upon these statements however, he readily accepted that he could not know if Mr Prosser was comfortable and could not know if he was asleep or simply had his eyes closed. These were sensible concessions that did not undermine his evidence. If anything, they further enhanced his credibility as a witness.

31. Having considered the evidence of the two witnesses as to the issue of encroachment, though they were both adamant that their account was accurate, I find the evidence of Mr McLindon to be more reliable. Looking beyond their evidence to other factors that might assist me, there are two matters that, in my view seem to support the account of Mr McLindon that there was no encroachment. First, it is accepted by both witnesses that the passenger in seat 37J did not require an extension to his seatbelt, which he was able to fasten in the normal way. Second, it was accepted by both, that the passenger in 37J sat between the armrests with each side in the correct horizontal position. I have not been provided with the measurements and dimensions of the seating areas or the seatbelts, neither have I been provided with anything more scientific than the observation and perception of the witnesses as to the size and shape of the passenger in 37J. I must determine the case upon the evidence before me. The fact that a person can operate a standard seat belt in the normal way and can fit, albeit at a squeeze, between the arm rests, in my view lends further credence to the evidence of Mr McLindon, that there was no encroachment.

32. Having assessed the evidence before me, I am not satisfied that there was a continued or consistent encroachment upon Mr Prosser's seating area by his neighbouring passenger. I accept that the passenger in 37J was a large man, both in the sense that he was very tall, broad and carried significant bodyweight. It is likely that there were occasions when, as a result of his size or his movements within his chair that he did cause an inconvenience to Mr Prosser, but I do not accept the suggestion that his size was such that Mr Prosser was compelled to sit in an awkward way for the duration of the flight by virtue of him encroaching upon his seating area.

33. Having heard his evidence, I have formed the impression that Mr Prosser had expectations of his flight experience that were unrealistic, given the class of cabin that he chose. Within his evidence, when asked about some common events during flights, he suggested that he did not use the armrest because he is "a considerate" passenger and that others usually do not because "most people are considerate". I considered this to be a peculiar, indeed, unrealistic answer. It is common for people to use the armrests on aeroplanes. Doing so does not, in my view denote a lack of consideration on their part. I asked Mr Prosser if at any stage he spoke to the passenger in 37J, he replied that he did not as he did not want to engage in a confrontation. Again, I considered this a telling reply. There was, on the face of it, no reason to anticipate a confrontation and it would seem relatively unusual to go through a 12-hour flight without some sort of engagement with a neighbouring passenger. To my mind these matters illustrate Mr Prosser's approach to flying, namely that he wishes to quietly occupy his own area and to keep himself to himself. He does not intend to inconvenience anybody and does not expect to suffer inconvenience himself. In stark contrast to the passenger in 37J, who on all accounts was very tall and was large in stature, Mr Prosser himself is of a slight build and more than a foot shorter in height. There was a significant disparity in their sizes and it is possible that Mr Prosser felt that he was towered

over and may well have been of the impression that his space was being encroached upon. However, in my judgment, it was not. I have formed the conclusion that the likelihood is that Mr Prosser simply did not wish to come into bodily contact with his neighbouring passenger, a risk that was heightened owing to his neighbour being of a large stature. It may be that this caused him to sit in an awkward manner, however his sitting position was not forced upon him by there being any physical encroachment upon his seating area. Alternatively, there is a very real prospect that the injury was simply caused by Mr Prosser's apparent reluctance to mobilise whilst upon the flight. He is a man with a pre-existing back injury. One that Mr Evans agreed, could have been exacerbated by sitting in a normal position for long periods of time.

Was there an accident as defined by the Convention?

34. In my judgment, it must follow from my conclusions above that there was no such accident. When checking in for a flight on an aeroplane, it is (at least from the passenger's perspective), a matter of chance as to the physical characteristics of neighbouring passengers, or if indeed there are neighbouring passengers at all. In this instance, a large man sat next to Mr Prosser. As a result, Mr Prosser chose to remain in his seat for the entire flight (or near to) and may have sat in an uncomfortable position, wishing to avoid any contact with the neighbouring passenger.

35. For there to be an "accident" within the meaning of the Convention, there must be an unexpected or unusual event or happening that is external to the passenger, as opposed to the passenger's own internal reaction to the usual, normal and expected operation of the aircraft. In my judgment, there was nothing either unusual or unexpected about there being a large person sat next to Mr Prosser. The passenger in 37J fitted within the confines of the armrests, could use a standard seatbelt and did not encroach upon Mr Prosser's seating area. This was not an unusual event external to Mr Prosser. What may have been unusual were Mr Prosser's internal reactions, namely choosing to remain in his seat for almost the entire flight and potentially, choosing to adopt an awkward seating position.

<u>Conclusion</u>

36. I dismiss the claim.

District Judge Andrew Barcello — 29th November 2018

Pontypridd County Court