

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil
Case No. 21/2723 CVL

BETWEEN: Leo Richard
Claimant

AND: Air Vanuatu (Operations) Limited
Defendant

Date of Hearing: 8th September 2022
Before: Justice C.N. Tuohy
Counsel: Mr C. Leo for the Claimant
Mr G. Blake for the Defendant
Date of Delivery of Judgment: 13th September 2022

Judgment

Introduction

1. On 27 November 2019, Leo Richard was a passenger on Flight NF210 between Port Vila and Luganville in a Twin Otter aircraft operated by Air Vanuatu (Ops) Ltd (AVL). He claims that during the flight, his seat suddenly broke causing his left leg to be crushed under the seat and him to suffer both physical and emotional injuries.
2. He alleges that AVL is liable to compensate him for those injuries because it had a duty of care to ensure that the seats on the plane were well secured and in good mechanical condition and it breached that duty.
3. AVL denies that Mr Richard's seat broke during the flight. Indeed, it denies that anything untoward took place during the flight. It refused to accede to Mr Richard's demand for compensation. As a result, Mr Richard filed a claim which was the subject of a trial before me on 8 September 2022. This is the judgment on the claim.

The Evidence

4. Mr Richard and two other passengers on the flight, Enoch Bule and Kiro Taiwia, gave evidence in his support. He also called evidence from Dr Richard Leona, a senior surgeon at Vila Central



Hospital, who examined him on 20 September 2021 and provided a medical report for the purposes of the claim. All these witnesses were cross-examined at the trial.

5. Three of AVL's current or former employees gave evidence in support of the defence. These were Rankin Tarimataniki, the co-pilot on the flight, Noella Obed, AVL's Acting Maintenance Controller and Jocelyne Doro, the Operations Coordination Centre Manager. The latter two were cross-examined at trial but the co-pilot, who is overseas, was not.
6. A summary of each witnesses' evidence is set out below. More detail is provided in the Discussion section of this judgment.

Leo Richard

7. He boarded Flight NF1210 on 27 November 2019 bound for Sara airport in Pentecost via Luganville. He recognised another passenger Enoch Bule, a former VMF officer known to him.
8. He sat in an aisle seat on the right side of the cabin just forward of the entrance door. There was no one sitting in the window seat next to him.
9. In his sworn statement he said:

"6. Upon take off, and as the plane ascended to the sky, the seat which I occupied broke and I fell heavily on my legs which stationed under the seat. I then uttered words to the following general effect:

Me: Pilot, please stop, stop I am falling off.

Enoch Bule: The Pilot can't stop the plane. That's impossible.

Me: Please someone help me.

Enoch Bule: I will, hang on.

7. Further to paragraph 6 above, I wish to emphasize the seat in which I sat thereon, broke. I fell instantly and heavily upon my legs which were stationed under the seat.

8. That as a result of the fall I encountered a lot of pain on my legs and hips and I mourned with a lot of pain.

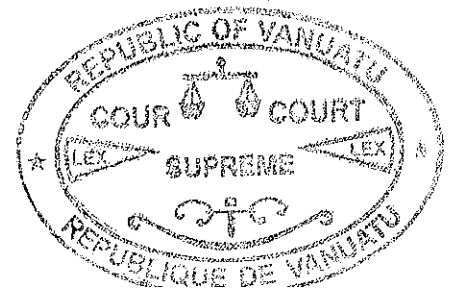
9. Given the plane was ascending towards the sky, I had to wait until the pilot stationed the plane in a stable condition when Enoch Bule came and assisted me out of the broken seat and lifted me and placed me on another available seat.

10. I felt a lot of pain and was traumatized by what actually happened to me and did not enjoy my flight at all.

11. Upon reaching Santo airport, Mr Bule, assisted me out of the plane, hanging upon Mr Bule's shoulders and walking and limping to the terminal area.

12. I walked in pain for my next flight to my final destination, Pentecost. I encountered a lot of pain when I travelled to Pentecost on the same day.

13. Upon arrival at Pentecost, Mr Bule assisted me to the terminal area in which I was to be transported home.



14. *At Pentecost, I was bed ridden for few weeks due to ongoing pain and later mobilized with crutches for few months.*

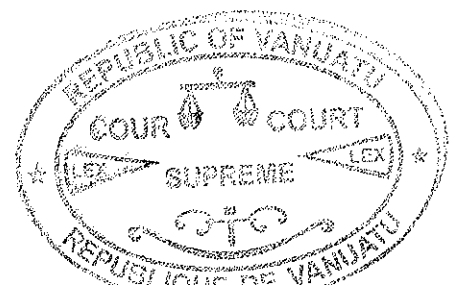
10. In his oral evidence at trial, he described the seat breakage in more detail. He said the legs at the back and the front on the left-hand side of the chair completely broke. He fell to the left with his leg under the seat. His seatbelt was still fastened. He said the seat was hanging down to the floor with the side of the seat and the side of his body touching the floor. He could not remember whether it happened on take-off from Vila or whether the aircraft was passing Malekula. (The flight takes about an hour).
11. He said that when he fell, everyone looked at him but no one helped him up. He said he was confused after the fall, he took his seat belt off and moved to the empty window seat beside his seat. When it was put to him that he had said in Para 9 of his sworn statement that Enoch Bule came and assisted him out of the broken seat and lifted him and placed him on another available seat, he said that he had perhaps forgotten and that the sworn statement was correct. Later in his re-examination he added that the co-pilot had come down the aisle and told him to calm down, to stand up and move to another seat.
12. He stated in his oral evidence that he had flown back from Luganville to Vila the same day on a different aircraft. (The AVL records showed that the aircraft on which he had returned was the ATR). He acknowledged that what he had said in paragraph 12 of his sworn statement was not correct. He said his memory was a bit confused.
13. He said he flew directly to Sara from Vila a few days later. (The AVL records confirmed that it was on 2 December 2019). He stated that he had remained in Pentecost for about a month spending Christmas there. He said he flew directly back to Vila in the same aircraft, asserting that the seat must have been replaced.
14. When questioned about where he had obtained the crutches he referred to in his sworn statement, he stated that he did not use crutches but used a stick.

Enoch Bule

15. Enoch Bule confirmed that he was on NF1210 on 27 November 2019, a fact confirmed by AVL records. In his sworn statement he said that he sat next to Mr Richard. In his oral evidence he said that he sat in the row in front of Mr Richard in the window seat. No one was sitting next to him. He said that he did not remember which seat in the row behind Mr Richard was sitting in. He explained that when he had said in a sworn statement that he was sitting 'next' to Mr Richard he meant directly in front of him.
16. In his sworn statement, Mr Bule stated:

"6. I confirm that upon take off and as the plane ascended to the sky, the seat in which Mr. Leo Richard occupied broke and he fell on his legs with his knees to the floor of the plane.

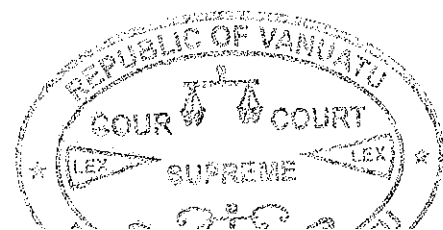
7. I recalled that Mr Leo Richard cried loud begging the pilot to stop the plane as he was shocked and traumatized by his fall.



8. *I recall that the pilot looked back but never say a word. I then told Mr Leo Richard that it is impossible for the pilot to stop the plane and to hang on until the plane is stationed in a stable manner.*
9. *I recall that I assisted Mr Leo Richard out of his seat as he was crying with a lot of pain and then placed him on an alternative seat on the plane.*
10. *I can tell that through the flight to Santo he was in great pain and was really suffering from the injuries he sustained but I told him to hold on.*
11. *At Santo airport, I assisted Mr Leo Richard out of the plane to the terminal area. I recall that he was mourning with pain when we were waiting for our next flight to Pentecost. And throughout the flight to Pentecost, he was mourning with pain.*
12. *At Sara airport, North Pentecost, I assisted Mr Leo Richard out of the plane to the terminal area and then made arrangements with a Public Transport to transport him to his village.*
17. In his oral evidence he said that after take-off but while the aircraft was still above Efate, he heard Mr Richard call out and saw that his whole seat had collapsed and that he was on the floor. He said that the chief pilot didn't hear but the co-pilot told Mr Richard to move to another chair. He said that Mr Richard was crawling around on the floor, he had the seatbelt on and that he pulled himself up at and sat himself in an empty seat on the left-hand side of the aisle.
18. He said that they were told at Luganville that they could not go on to Sara because of weather conditions and that they flew back to Vila the same day but he was unable to say whether it was on the same plane. He did say that he later flew to Sara with Mr Richard but said that the flight was via Luganville. He acknowledged that para 11 of his sworn statement was incorrect about that. He also said that he told Mr Richard when they were in Pentecost that he should go to the hospital.

Kiro Taiwia

19. Kiro Taiwia is a young man who was also a passenger on NF1210 on 27 November 2019. He said that he was sitting in the aisle seat two rows in front of Mr Richard.
20. In his sworn statement he said:
- "3. On the plane Mr Leo sat on the seat behind me.*
- 4. I recalled that upon take off, I heard a snap or breaking noise behind me when I turned around I saw Mr Leo lower down on the seat he sat on. The seat was wrenched down forcing him to sit on his legs.*
- 5. I could tell that Mr Leo was in a lot of pain when assisted by a fellow passenger to another seat.*
- 6. After a few minutes I turned around and had my earpiece to my ears and continued to flight to Santo.*
21. In his oral evidence, he stated that he did not see anyone helping Mr Richard. He did not confirm what he said in his sworn statement about the seat being wrenched down forcing Mr Richard to sit on his legs. He said that he just turned around in his seat and saw that Mr Richard's head was lower down. He added the detail that the co-pilot passed by him from the cockpit. He specifically confirmed that the aircraft was still on the ground at Vila when this took place.



Richard Leona

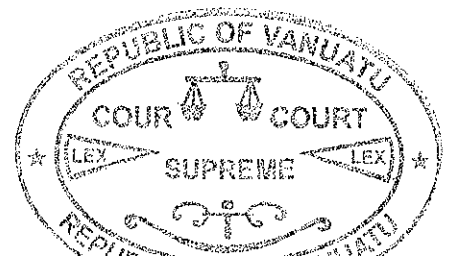
22. Dr Leona reviewed Mr Richards's medical condition on 20 September 2021. Annexed to his sworn statement was his medical report of that date. The reason for the report was stated to be 'Personal Injury Claim'. The headline diagnosis was 'left closed comminuted fibula fracture and left ankle mortise diastasis'. He explained what that meant in his oral evidence.
23. He recorded the history that Mr Richard gave him in respect of the injuries. This was 'during take-off at Port Vila airport the chair he sat on broke resulting in him falling onto his legs. He rolled on the floor while still attached to the part of the chair with the seatbelt as the plane ascends into the sky. The left leg swung and hit the opposite chair. He immediately suffers severe pain in his left hip, leg and ankle areas'.
24. The report went on to describe what he observed from the x-rays taken at the time of the report. This showed fracture lines still visible in the left fibula bone. Some healing process was observed but the fracture had not completely healed. In the left ankle there was displacement of bones. These injuries will result in ongoing pain and the risk of osteoarthritis of the left ankle which are permanent defects.
25. The report stated that the findings were the result of the injuries on the flight. In oral evidence Dr Leona acknowledged that he could not say that with certainty but he could say that the injuries were consistent with the history that he was given. He acknowledged that it was not possible to say precisely when the injuries were caused but they were older than a few weeks and could have been caused up to 2 years or more before.

Rankin Tarimataniki

26. He was the co-pilot on flight NF1210 on 27 November 2019. In his sworn statement he said that he recalled the flight in which he was first officer to Captain Yves Chevalier. He said that he did not recall any incident occurring on that flight and in particular did not recall any incident involving a broken seat within the aircraft.
27. He said that it is a pilot's responsibility to complete flight logs in order to notify management of any incident on the flight including in particular any incident involving damage to property on the aircraft such as a broken seat. He said that he had no record of any such incident on the flight and nor does AVL have any such record. He stated 'categorically' that he was not aware of any such incident of a broken seat until he was spoken to after this claim was filed.

Noella Obed

28. Ms Obed is responsible for management of the engineering department within AVL's operations. In that role she has access to information and records concerning all maintenance of any kind reported or undertaken on any aircraft operated by AVL.
29. She inspected AVL's maintenance records stored in the Aircraft Management System (the AMS) used by the engineering department to record, track and dispatch information including all maintenance issues which arise.



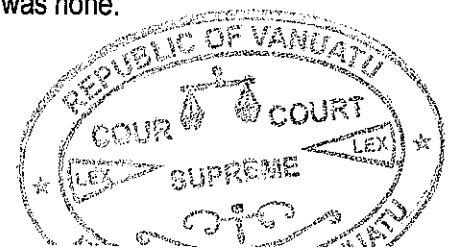
30. She checked the records for November 2019 in relation to the Twin Otter aircraft used for NF1210 on 27 November 2019. She produced an extract from the AMS for that aircraft for the period 1 November 2019 to 29 November 2019. It showed no entry relating to a broken seat either on 27 November 2019 or on any other date during that period.
31. She stated that if there had been an incident on board an aircraft involving a broken seat, it could not have gone undetected and unrepaired. If such an incident had occurred it would have been recorded in the AMS system. In her oral evidence she stated that even a torn seat cover would have been recorded.

Jocelynn Doro

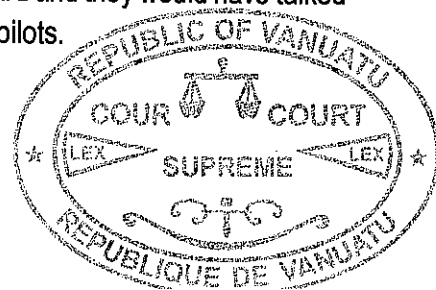
32. In her role Mrs Doro has access to all information and records concerning the flight operations of AVL's aircraft and all maintenance and repairs carried out on the aircraft.
33. She produced and explained the aircraft flight log for the Twin Otter aircraft used for flight NF1210 on 27 November 2019. It contains very detailed information relating to each flight undertaken by the aircraft on that day. Some of those details are related below.
34. She also stated that records showed that Mr Richard had flown directly from Vila to Sara in Pentecost on 2 December 2019 using his original ticket. She had not checked whether Mr Bule was also on that flight but he could have been.

Discussion

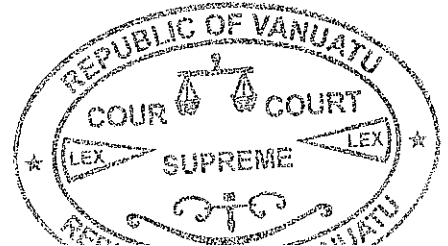
35. The onus is on the claimant, Mr Richard, to prove on the balance of probabilities that his left leg was injured during Flight NF1210 from Vila to Santo on 27 November 2019 as a result of his seat breaking. There is no dispute that Mr Richard was a passenger on that flight. There is no dispute that Mr Richard has suffered an injury to his left leg at some point in time. The dispute is whether his injury was the result of his seat breaking while he was sitting in it. A crucial fact which Mr Richard must prove on the balance of probabilities is that his seat broke on that flight. If he cannot satisfy the Court of that, then logically his claim must fail. For that reason, I intend to first examine the evidence relevant to that specific disputed fact.
36. Before scrutinising the relevant evidence in detail, it is worth recalling its general nature. To prove his case, Mr Richard gave evidence himself as to what he said happened on the flight and called evidence from fellow passengers to corroborate his account. He also called medical evidence which was designed to independently add support to his account by showing that he had suffered injuries which were consistent with it.
37. AVL also called evidence from a person on the flight, the co-pilot Rankin Tarimatani, to the effect that he had no memory of the event described by Mr Richard and, if it had happened, he would have remembered it and recorded it in the flight records. It also called evidence from two employees who produced and explained AVL's maintenance and flight records. Their evidence was designed to independently add support to the co-pilot's evidence by showing that if a seat had broken on that flight a record would have been made and there was none.



38. So, Mr Richard's case was primarily based on direct evidence with the addition of one piece of circumstantial evidence from Dr Leona. AVL's case was primarily based on circumstantial evidence with the addition of some direct evidence from the co-pilot.
39. At first blush, direct evidence may seem to have stronger force than circumstantial evidence because it relates to events that a witness says he directly saw or heard or felt. Circumstantial evidence is only indirectly relevant. However, experience shows that direct evidence is often unreliable because it is subject to human error and distortion, either deliberate or unintentional. Circumstantial evidence is generally not subject to those frailties. Contemporary written records which are made for reasons unrelated to a dispute which has not yet arisen are less likely to suffer from error or distortion.
40. The direct evidence comes from Mr Richard, Mr Bule and the co-pilot. Mr Taiwia did not say that he saw Mr Richard's seat break. He said at the trial that before the aircraft even took off from Vila, he heard a noise from behind his seat and turned to see Mr Richard several rows behind him with his head lower than normal. That evidence does not corroborate the evidence of Mr Richard or Mr Bule who both describe the seat breaking in flight, Mr Richard falling to the floor still strapped into his seat by his seatbelt and calling out to the pilots at the front of the aircraft to stop the plane. If anything, Mr Taiwia's evidence of what he saw and heard on the flight detracts from that evidence because he was on the flight and did not see or hear that happening.
41. Mr Richard's evidence is not consistent with Mr Bule's in significant respects and is internally inconsistent. Mr Richard said initially that the seat broke while the aircraft was still ascending and above Efate. Mr Bule said that it was while the aircraft was passing Malekula which must have been more than halfway through the flight. Mr Richard said that on the instruction of the pilot he moved to the seat immediately on his right, that is, the window seat of the two on the right-hand side of the aisle which would have been directly behind Mr Bule. Mr Bule said that he moved to the single seat on the left-hand side of the aisle forward of the row in which he had originally been seated.
42. Most significantly, the evidence of both of them was seriously inconsistent about whether Mr Bule helped Mr Richard up from the floor and into another seat and what seat Mr Richard moved to. Those are important parts of the incident which they were describing. It is possible for details to be confused but these are aspects which are central to the event.
43. As well as being inconsistent in this way, I consider the evidence of both Mr Richard and Mr Bule relating to the incident itself is implausible. The evidence that Mr Richard called out in pain to the pilots to stop the plane is not plausible. Whether the aircraft was above Efate or passing Malekula, there is no way to stop a plane in flight other than by landing it. Even if Mr Richard was in pain, he would have realised that. If this evidence was true, it would have been a dramatic event which all the passengers including Mr Taiwia would have heard and they would have talked about it later. It could not have gone completely unnoticed by the pilots.



44. On the other hand, the evidence of the co-pilot that if such an incident had taken place he would have remembered it and recorded it is very plausible. Safety is crucial in the aviation industry. So is proper recording which is a requirement of safety. All participants in the industry, particularly pilots, are trained to understand and comply with safety requirements. Indeed, their lives depend on it. I consider that it is highly unlikely that a seat could have broken as completely as Mr Richard alleges without it being noticed, remembered and recorded.
45. Furthermore, there is no reason why the co-pilot would fail to record it. If the seat broke it was not his fault. He had nothing to hide. Indeed, he had every reason to report the breakage if it happened because on Mr Richard's evidence the seat was broken to the degree that it could not be used. It had to be fixed so it had to be reported.
46. The evidence of the maintenance and flight logs strongly support the co-pilot's evidence. Neither show any evidence that a broken seat was either recorded or fixed. The maintenance records show that not only are there daily, weekly and pre-flight inspections carried out by the pilots of the aircraft, even relatively minor issues are noted. For example the entry on 12 November 2019 records "Flight deck cushion covers in bad state."
47. There is one other series of entries in the aircraft flight log for 27 November 2019, the importance of which only emerged during the hearing. These are the entries for the subsequent flights flown by the aircraft that day, the crews and the numbers of passengers on each. They show that the aircraft was fully occupied after NF1210 landed at Santo with Mr Richard and Mr Bule on board at 7.58 am. It flew continuously until its final landing in Vila at 16.54 hrs. Its schedule after NF1210 was Santo - Vila, Vila- Norsup, Norsup – Vila, Vila - Lamén Bay, Lamén Bay – Vila, Vila – Emae, Emae – Valesdir, Valesdir – Vila.
48. The chief pilot changed for the Lamén Bay flight and both pilots changed for the Emae flight. In other words, four other pilots apart from Rankin Tarimataniki flew on the aircraft that day and none noted a severely broken passenger seat.
49. Perhaps most significantly, on every flight the number of passengers was recorded. The evidence of Jocelyne Doro was that there are only 18 passenger seats on this aircraft (6 rows of three seats, one on the left side of the aisle and two on the right side). All the flights were reasonably full but the flight from Norsup to Vila was recorded as carrying the full complement of 18 passengers. That would have been impossible if one of the seats had been broken in the way described by Mr Richard.
50. The evidence of Dr Leona does provide significant circumstantial support for Mr Richard's account. It establishes that the non-recent injuries he observed on September 2021 were consistent with his description of his leg having been crushed under a broken seat. However, unsurprisingly he was not able to say from his examination when it happened except that it was not "recent". I understood that to mean that it must have been earlier than a few weeks prior to his examination. He did say that it needed a specific mechanism like the one described to him



by Mr Richard to produce the combination of injuries he observed. However, he acknowledged that other types of events, such as a motor accident could cause those injuries


51. Weighing up all the evidence, I am not persuaded that Mr Richard's seat broke during Flight NF 1210 on 27 November 2019. Indeed, I am satisfied on the balance of probabilities that it did not. I do not think there is an answer to the evidence of the co-pilot and the AVL flight logs and maintenance records. It is not possible that a passenger seat broke that morning and it was not noticed, not noted and not fixed or removed, either that day or later. It is not possible that the full complement of 18 passengers could have travelled on the aircraft later that morning if one of the seats was broken so badly.
52. Against that is the evidence of Mr Richard and Mr Bule which contained many inconsistencies and implausible aspects. I have referred above to those aspects in relation to their evidence about what happened on Flight NF1210. However, there were other peripheral aspects which raised issues of credibility in my mind: the fact that Mr Richard said nothing to anyone in AVL until his lawyer's letter dated 15 October 2020, nearly a year after the event.; the fact that he did not seek treatment for the injury until nearly two years later although he was in Vila for five days before flying on to Sara and then returned to live in Vila about a month later.
53. All those factors do not give me confidence in the reliability and credibility of Mr Richard's and Mr Bule's evidence. But in any event their evidence does not adequately explain the compelling direct and circumstantial evidence from the AVL witnesses and records. The evidence of Dr Leona can only support Mr Richard's evidence about the cause of his injury. It cannot establish its truth.
54. As the claim fails on the facts, it is unnecessary to decide whether it would have succeeded if the facts on which it is based had been proven. However, it may have had difficulties on this basis also. It seems to have been assumed that if the seat broke AVL would automatically become liable to Mr Richard. That does not necessarily follow. It depends upon factors which it is impossible to judge on the evidence, such as the cause of the failure, whether it was foreseeable and whether AVL took reasonable steps to prevent it.

Result

55. The claim is dismissed. AVL as the successful party is entitled to costs. If these are pursued, AVL must follow the process set out in Rule 15.7

Dated at Port Vila this 13th day of September 2022

BY THE COURT


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Justice C.N. Tuohy

