

Aviation
An Examination of Developing Liability
Issues in International Air Transportation

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Since 1934 the liability regime governing an international air carrier's responsibility for injuries sustained by its passengers has been based, in the United States, upon that carrier's presumptive liability rather than strictly upon fault. Beginning with the adoption of the Warsaw Convention,¹ through its various amendments and supplementation through the years, and culminating recently in the ratification of the Montreal Convention of 1999,² an air carrier's passengers were not, ordinarily, required to establish fault in order to recover for bodily injuries sustained during an international flight.

While it would seem that a non-fault based regime would appear, at first glance, to easily facilitate the necessary proof or showing required of any injured passenger, several unique issues have presented themselves, recently, that have made recovery by injured passengers against a presumptively liable air carrier less than certain.

Historically, under the Warsaw system, a passenger who sustained an injury during an international flight was presented with two preconditions for recovery against the presumptively liable air carrier. First, the injury must have been brought about as a result of an accident having occurred during the transportation by air.³ Second, the injury which was sustained, must have been a bodily injury.⁴

Generally, whether the incident complained of occurred during the transportation by air is normally a fairly uncomplex fact to establish. Under the provisions of the Warsaw Convention, and its progeny, the period of time comprising the transportation by air during which the accident

¹*Convention for the Unification of Certain Rules Relating to International Transportation by Air concluded at Warsaw, Poland, October 12, 1929*, reprinted in note following 49 U.S.C.A. §40105 (1997).

²*Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May, 1999)*, reprinted in CCH Aviation Law Reports, par. 27, 400, p. 24, 200 *et seq.*

³Warsaw Convention, Article 17; *Air France v. Saks*, 470 U.S. 392; 105 S.Ct. 1338 (1985).

⁴*Ibid.*

must occur, begins with the embarkation process, continues during that period of time the passenger is actually on board the aircraft, and ends when the disembarkation process has terminated.⁵

While there is voluminous case law which more exactly defines the limits of embarking and disembarking, the so-called Warsaw “envelope”⁶, a definitive establishment of this time period is possible without great difficulty. Thus, if an incident, qualifying as an accident, occurs within this “envelope”, and results in a bodily injury, the passenger has established his or her right to recover against the air carrier under the Convention.⁷

What is not as easily definable and what has been increasingly more difficult to establish, however, is first, whether the incident occurring is an accident; and, second, whether that accident has produced a bodily injury recognizable under the Convention.

Before examining the difficulties that have been encountered by passengers and carriers in establishing the existence or absence of a recognizable accident and bodily injury, it is productive to review the history of the Warsaw Convention,⁸ its amendments and supplements, and the recently adopted Montreal Convention of 1999⁹, together with their respective similarities and differences.

The Warsaw Convention

⁵*Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 , 111 S.Ct. 1489 (1991).

⁶See, *Martinez Hernandez v. Air France*, 545 F.2d 279 (1st Cir. 1976); *Evangelinos v. Trans World Airlines, Inc.*, 550 F. 2d 152 (3d Cir. 1977); *Day v. Trans World Airlines, Inc.* 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 490, 97 S.Ct. 246 (1976).

⁷See note 5.

⁸See note 1.

⁹See note 1.

The Warsaw Convention was the result of two separate international conferences. The first, held in Paris in 1925, and the second in Warsaw, Poland in 1929. Extensive preparatory work, including drafts, and reports were accomplished by an international group of aviation and legal experts known as the Comité International Technique d'Experts Juridiques Aériens (“CITEJA”) which had held meetings between the two conferences and had primary responsibility for preparation of the draft convention and the various reports relating to that drafting.¹⁰

The Warsaw Convention had as its dual goals, the creation of a limitation of liability regime applicable to international air transportation, and the establishment of uniform rules governing such international air transportation.¹¹ The Convention, being a product of 1929, was more concerned with protecting newly developing air carriers and fostering an infant industry than providing for full recovery to injured passengers.¹² In fact, the liability scheme created by the Convention was initially intended to modify what had been the prevailing practice at that time by air carriers in most civil law countries, of contractually disclaiming liability for passenger injuries and death.¹³ The Convention’s drafters stripped from the carriers their ability to disclaim liability and imposed a limited, both in nature and scope, system of liability for aviation accidents.¹⁴ The Convention was crafted as a compromise between the interests of the carriers and their passengers and represented a bargain between these two adverse interests. The

¹⁰See *Chan v. Korean Air Lines*, 490 U.S. 122, 109 S.Ct. 1676 (1989); *The United States and the Warsaw Convention*, Andreas F. Lowenfeld and Allan I. Mendelsohn, 80 Harvard Law Review 497 (1967).

¹¹*El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 115, 119 S.Ct. 662 (1999); *Zicherman v. Korean Airlines*, 516 U.S. 217, 116 S. Ct. 229 (1996).

¹²See, note 5.

¹³*Second International Conference on Private Aeronautic Law, October 4 - 12, 1929*, Minutes at 47 - 48 (R. Horner and D. Legrez, transl., 1975, “Warsaw Minutes”).

¹⁴See note 11.

carrier's benefit was found primarily in their limitation of liability, while the passengers benefitted from the clear presumptive liability which essentially eliminated the difficulty in proving fault on the part of the carrier.¹⁵

Limited to its essentials, the Warsaw Convention would apply to all international transportation between signatory parties.¹⁶ A carrier would be presumptively liable for all injuries or death to its passengers as a result of accidents occurring during the transportation by air.¹⁷ There would be a two year period of limitation to commence a suit for damages,¹⁸ and a carrier's liability for such injury or death would be limited unless it could be shown that the carrier was guilty of wilful misconduct.¹⁹ Jurisdiction over a carrier was to be available where the carrier was domiciled, where its principal place of business was located, where the carrier had a place of business through which the contract of carriage was made, or at the place of destination of the flight.²⁰ It was also provided that only the carrier actually performing the transportation was to be responsible for the damage caused²¹ and any attempt to relieve the carrier of liability or to fix a lower limit than that provided in the Convention was rendered null and void.²²

¹⁵*In Re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991); *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991); Warsaw Minutes at p. 252.

¹⁶Article 1, Warsaw Convention.

¹⁷Article 17, Warsaw Convention.

¹⁸Article 29, Warsaw Convention.

¹⁹Articles 26 and 25, Warsaw Convention.

²⁰Article 28, Warsaw Convention.

²¹Article 30, Warsaw Convention.

²²Article 23, Warsaw Convention.

Almost from the date of its entering into force, the Warsaw Convention was criticized and debates on its revision began as early as 1935.²³ The CITEJA had revision of the Convention on its agenda almost immediately following ratification. Conferences on the subject of revision were held in 1946, 1951, 1952 and 1953.²⁴ Countless articles appeared in nearly every country with an interest in international aviation.²⁵ Some argued that the definition of international transportation made no sense while others objected to the wilful misconduct provision. But the underlying and recurring theme of all discussions centered on what seemed to many to be an inadequate limit of liability.²⁶

After some ten years of discussions, meetings and conferences, a diplomatic conference was commenced at the Hauge in 1955 for the purposes of amending Warsaw, specifically to increase its liability limits from the \$8300 limit established in the Convention.²⁷ The agreement provided at this conference known as the Hague Protocol²⁸ included two major revisions to the Convention; the first, a modification to the willful misconduct provision of Article 25 of the Convention provided that the carrier would be subject to unlimited liability if the plaintiff could prove "...that its damage resulted from an act or omission of the carrier, his servants, or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result."²⁹ The second major modification to the Convention was an increase of the liability limit

²³*The United States and the Warsaw Convention*, Andrea F. Lowenfeld and Allan I. Mendelsohn, 80 Harvard Law Review, 497 (1967).

²⁴*Ibid.*

²⁵*The Limitation of Liabilities in International Air Law*, Martinus Nijhoff, The Hague, H. Drion (1954).

²⁶See, note 23.

²⁷See note 23.

²⁸*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw October 12, 1929, done at The Hague September 28, 1955.*

²⁹*Ibid.*, Article 25

two fold to \$16,600.³⁰

While the Hague Protocol had sought primarily to remedy a major cause of criticism of the Warsaw Convention, its liability limits, dissatisfaction with the Convention was manifest in the United States both politically and judicially.³¹

³⁰*Ibid.*, Article 22, See also, note 23.

³¹See, note 23.

The open dissatisfaction persisted and ultimately resulted in United States denunciation of the Convention in November of 1965.³²

Denunciation by the United States brought near panic in the international aviation community. Faced with what was perceived as an impending disaster as the effective date of the denunciation drew near, fifty-nine nations met in Montreal in 1966 in a last ditch attempt at rectifying the chaos that was expected.³³ The result, brought about under the auspices of the International Air Transportation Association (“IATA”), was the Montreal Agreement.³⁴

The Montreal Agreement was an intercarrier agreement, permitted under the provisions of Article 23 of the Convention, with the approval of the United States Civil Aeronautics Board. Its provisions raised the liability limits of the air carriers to \$75,000 and contained a waiver by the carriers of Article 20 of the Convention which had permitted the carriers to avoid liability if it could be established that the carrier had taken all necessary measures to avoid the injury to the passenger.³⁵ All remaining provisions of the Convention were unchanged, including the willful misconduct provision contained in Article 25.

Following implementation of the Montreal Agreement, several more attempts were made at modifying the Convention in various ways. In 1971 the Guatemala City Protocol³⁶ was

³²50 Department of State Bulletin 923 (1965).

³³See, note 23.

³⁴*Agreement Relating to Liability Limitations of the Hague Protocol and Warsaw Convention*, 13 May 1966, CAB Agreement 18900, 31 Fed. Reg. 7306 (1966), reprinted in 49 U.S.C.A. §40105, note (1977).

³⁵*Ibid.*

³⁶*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955*, March 8, 1971.

proposed as an amendment to both Warsaw and Hague. Its provisions modified several provisions relating to the carriage of passengers and baggage and sought to impose an unbreakable liability limit of 100,000 SDRs (approximately \$141,000). Its terms, however, have never been implemented.

In 1975 Montreal Additional Protocols, 1, 2 and 3³⁷ were proposed to amend, respectively, Warsaw, Hague and the Guatemala Protocol. Each protocol dealt with further amendments relating to liability limits expressed in SDRs but did not modify the actual limits.

Montreal Protocol No. 4,³⁸ intended to modernize the cargo provisions of Warsaw and Hague was ratified by the United States and had the unique effect of making the United States an adherent to Hague, but did little to modify passenger liability limits. In 1997, however, under the auspices of IATA, literally all carriers became signatories of the IATA Inter-Carrier Agreement³⁹ on liability limits. This compact created a two tier liability system in which air carriers became essentially absolutely liable for passenger injury and death up to a limit of 100,000 SDRs and liable in an unlimited amount if a plaintiff could establish negligence on the part of the carrier.⁴⁰

Each of the foregoing attempts at modifying Warsaw has been on the whole, unsuccessful. Based, as each amendment or supplement was, on an antiquated liability regime originally intended to protect an infant industry, failure or patchwork repair was all that could be expected. In 1999, however, a new attempt would be undertaken, seeking to consolidate the various texts and based upon a new approach. This new approach, ensuring protection of the interests of consumers and the need for equitable compensation based on the principle of restitution, incorporates the preceding texts into a single document. The Montreal Convention of

³⁷Additional Protocols nos. 1 - 4, ICAO Docs. 9145 - 9148 (1975).

³⁸See note 36, reprinted at CCH Aviation Law Reports, pa. 27,240 at p. 24,121 *et seq.*

³⁹See, DOT Order 96-10-7, October 7, 1996, 1996 WL 5638872.

⁴⁰See, *Intercarrier Agreement*, at note 38.

1999 seeks to create the uniformity and unification long overdue.

THE MONTREAL CONVENTION

On November 4, 2003 a new era in international air transportation law began with the entering into force of the 1999 Montreal Convention. The United States deposited, on September 5, 2003, with the International Civil Aviation Organization, its instrument of ratification of this new international treaty, the 30th nation to do so, thus heralding this new liability scheme for the world's airlines and its millions of passengers.

The Montreal Convention is intended to replace the Warsaw Convention which for 73 years, together with several subsequent protocols and agreements, had governed the liability rules applicable to the international transportation by air. As additional countries ratify the Montreal Convention, its terms will ultimately replace the Warsaw Convention worldwide. As stated by the United States Secretary of Transportation, Norman Y. Mineta:

“This is truly an historic occasion. For more than four decades, the United States has led the efforts of the world's aviation community to abolish the woefully inadequate limits on airline liability contained in the Warsaw Convention. The Montreal Convention of 1999 will ensure far more humane treatment of the victims of international airline accidents and their families than is possible under the current system. Thanks to this important new treaty, we will now have an international aviation liability regime appropriate to the second century of flight.”

The Montreal Convention, derived from the Warsaw Convention, its amendments and supplements, attempts to improve upon Warsaw, but preserve its structure and many of its substantive rules. Transport documentation and many other features contained in the Warsaw Convention have been modernized and streamlined. It is intended by its framers that the degree of continuity, which had been established under Warsaw, should be maintained through the use of accepted and familiar wording.

Recognizing that the Warsaw Convention was primarily a convention geared to the interests of international air carriers, the Montreal Convention represents a more expanded approach, it seeks to meld the competing interests of consumers and passengers as well as the interests of the air carriers and their insurers. This recognition of the liability regime to be replaced and the necessity to modernize that regime and ensure the protection of the traveling consumer, lead its framers to state their approach in the preamble as follows:

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriers by Air signed in Warsaw on 12 October 1929...

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments...

RECOGNIZING the importance of ensuring protection of the interests of consumers and international carriage by air and the need for equitable compensation based in the principle of restitution...

The Montreal Convention is intended to and in fact successfully consolidates the Warsaw Convention and the several attempts over the years to improve and modernize its provisions. The Montreal Convention has incorporated the beneficial provisions of several post Warsaw⁴¹ protocols as well as the increased liability limit intercarrier agreements of 1966 and 1995⁴². The main tenets of the Montreal Convention are as follows:

- Eliminates the arbitrary limits of liability applicable under prior conventions;
- provides for access to domiciliary courts for

⁴¹See, notes 28, 35 and 36.

⁴²See notes 33, 38 and 39.

passengers injured or killed in aviation accidents;

- requires air carriers to make advanced payments of up to approximately \$141,000 of provable damages on behalf of accident victims without regard to fault;
- establishes an escalation clause for monetary limits and thresholds adjusted for inflation;
- provides for the maintenance of adequate insurance covering carrier liability insuring compensation availability in cases of automatic payments or litigation;
- recognizes the provisions on carrier code sharing and similar carrier arrangements in providing for passenger recovery from either the operating or contracting carriers;
- streamlines and simplifies requirements relating to passenger, baggage and cargo documentation and facilitates the implementation of technological innovations for cargo carriers and shippers;
- provides for liability limit review every five years;
- maintains established law relating to the acceptable Warsaw Convention principles, subsequent protocols and prior intercarrier agreements.

Perhaps the most important provision, and the most problematic in the past, of the new convention incorporates the increased liability provisions of the 1995 IATA Intercarrier Agreement and the 1966 Montreal Agreement with respect to passenger injury and death.⁴³ The new convention reaffirms the two tier system introduced by the IATA Intercarrier Agreement. The first tier provides for absolute and strict liability up to a limit of \$100,000 SDRs or

⁴³*Ibid.*

approximately \$141,000, irrespective of a finding of fault.⁴⁴ The second tier, provides for compensatory payments above the initial threshold of \$100,000 SDRs and is based upon the establishment of fault on the part of the carrier and has no liability limits.⁴⁵ The carrier may, however, avoid liability in this second tier only if it can establish that it was not at fault for the passenger's injury or death. The necessary showing under Article 21.2 is either that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or that such damage was due solely to the negligence or other wrongful act or omission of a unrelated third-party.⁴⁶

Unlike its predecessor, the new convention, provides for advance payments by the carrier in the event of death or injury of a passenger. Such advance payments are made subject to national law and are deductible from any final settlement made between the parties.⁴⁷ It is thought that this new provision will ensure prompt settlement to accident victims and avoid long periods of uncompensated litigation time.

The new treaty reduces passenger liability limits for delay damages to 4,150 SDRs or approximately \$5,640.⁴⁸ In the carriage of baggage, delay damages for which the carrier is responsible is limited to 1,000 SDRs unless a special declaration of value was made by the passenger.⁴⁹ In the carriage of cargo, the liability of the carrier in case of delay or other loss or destruction is limited to the sum of 17 SDRs per kilogram unless the shipper has made a special

⁴⁴Article 21.1, Montreal Convention.

⁴⁵Article 21.2 Montreal Convention.

⁴⁶*Ibid.*

⁴⁷Article 28, Montreal Convention.

⁴⁸Articles 19 and 22.1, Montreal Convention.

⁴⁹Article 22.2., Montreal Convention.

declaration of value and paid the supplementary sum required.⁵⁰ In the latter cases the carrier would not be responsible for any sum exceeding that declared sum.⁵¹

A new, more desirable and innovative provision is made in connection with the jurisdictions in which a suit may be commenced against the carrier. Under the Warsaw Convention system a lawsuit could be entertained only in one of four places, the domicile of the carrier, the carrier's principal place of business, the place of destination or the place of business of the carrier through which the contract of carriage had been made.⁵² The Montreal Convention establishes a fifth jurisdiction which is the passenger's principal and permanent residence to or from which the carrier operates services for the carriage of passengers by air either utilizing its own aircraft or the aircraft of another pursuant to a commercial agreement. The Convention also provides that the nationality of the particular passenger shall not be the determining factor for the establishment of this fifth jurisdiction.⁵³ The new Convention also incorporates the Guadalajara Convention⁵⁴ so as to permit and cover code share relationships among carriers and the liability that may arise out of such relationships.⁵⁵

The Montreal Convention also requires signatory states to ensure that their carriers maintain adequate insurance covering a carrier's liability under the Convention in view of the fact that a passenger's recovery of damages is unlimited⁵⁶. The provision also mandates that a

⁵⁰Article 22.3, Montreal Convention.

⁵¹*Ibid.*

⁵²Article 28, Warsaw Convention.

⁵³Article 33, Montreal Convention.

⁵⁴*Convention Supplementary to the Warsaw Convention, for Unification of Certain Rules Relating to International Coverage by Air performed by a person other than the contracting carrier, Guadalajara, September 18, 1961.*

⁵⁵Article 39 through 48, Montreal Convention.

⁵⁶Article 50, Montreal Convention.

signatory state, into which a carrier operates, may require the carrier to furnish evidence that it maintains such adequate insurance covering its liability.⁵⁷

The new treaty contains an express provision that punitive, exemplary or other non-compensatory damages shall not be recovered.⁵⁸ Additionally, this article of the Convention maintains the old Article 24 provision contained in the Warsaw Convention that action for damages, however founded, may only be brought subject to the conditions and limits of liability set out in the convention without prejudice to the question as to who are the persons who have of the right to bring suit and what are their respective rights.⁵⁹

As the Montreal Convention continues substantive interpretations of various tenets under the Warsaw Convention, it is not likely that the implementation of this new treaty will generate substantial new law. It is hoped by the drafters that the Montreal Convention of 1999 is the answer to many nagging questions which remained under the prior liability regime. The drafters have successfully unified, modernized and consolidated existing rules in this new international compact. Article 24 of the new convention, with its review of liability limits every five years, corrects what was seen as a major drawback with the old regimes and their static artificially low liability limits. The new Convention establishes simplicity, flexibility and compatibility, utilizing new and improved technology and should serve the industry well for the future.

Having completed this short history of the Warsaw Convention and its recent replacement, the Montreal Convention, we turn to a discussion of topical developing issues, arising under the Warsaw Convention, but destined to become implanted into its successor. Because the basic structure and most of its substantive provisions of Warsaw have been

⁵⁷*Ibid.*

⁵⁸Article 29, Montreal Convention.

⁵⁹*Ibid.*

maintained in Montreal, it is anticipated that no radical change in interpretation of these issues will occur under Montreal.

DVT

Deep vein thrombosis, or DVT is a condition which presents with a blood clot formation, usually in the lower extremities which may cause heart attack, stroke or any number of other quite serious complications. At the present time it is the popular affliction monopolizing a great many carrier's claims departments and attorneys. Also known as economy class syndrome, it is thought to result from long periods of time sitting in a cramped position.

Any discussion of DVT as it relates to international transportation of necessity, requires an examination of the "accident" requirement under Warsaw. Article 17 of Warsaw and Article 17.1 of Montreal both require a passenger to prove that an accident has occurred as one of the preconditions of liability. Article 17 of Warsaw provides, in part, as follows:

"The carrier shall be liable for damage sustained...if the accident which caused the damage so sustained took place onboard the aircraft or in the course of...embarking or disembarking."

Article 17.1 of Montreal provides, in part as follows:

"The carrier is liable for damage sustained...upon condition only that the accident which caused the death or injury took place onboard the aircraft or in the course of...embarking or disembarking..."

Neither provision defines an accident but the Supreme Court has concluded that the term means an "unexpected or unusual event or happening that is external to the passengers".⁶⁰ The Supreme court further provided that "when the injury undisputably results from the passenger's own

⁶⁰*Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338 (1985).

internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident and Article 17 of the Warsaw Convention cannot apply.”⁶¹ Whether an incident is an accident “involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avoid the injury.”⁶² This definition is to be “flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.” In *Saks* the Supreme court held that the hearing loss sustained by a passenger indisputably resulted from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft and thus, was not an accident precluding imposition of liability on the carrier.⁶³

The most recent case decided in the United States in which a DVT injury was presented in an international setting is *Louie v. British Airways, Ltd.*⁶⁴ In *Louie*, the plaintiff, had recently undergone knee surgery had been warned by his doctor of the risk of blood clots as a complication of that surgery. Louie consulted his physician on an impending trip from Anchorage to London but was not warned by his physician of any increase in the risk of blood clots associated with international travel. As a result, Louie traveled on January 24, 2000 from Anchorage to Seattle connecting with a Seattle to Vancouver flight and than boarding British Airways on Vancouver for onward transportation to London. Louie was seated in the business class section on British Airways from Vancouver to London. The seats in business class were so called “cradled” seats ergonomically designed to allow for further reclining then was present in the ordinary economy class seating. During the flight Louie’s knee felt stiffer at some point although he did not mention it to any of the flight crew. Upon his arrival in London he spent the rest of the day in the hotel and attended a seminar the following day and thereafter had dinner with several colleagues. At that point in time Louie went to bed and when he did not show up

⁶¹*Ibid* at p. 406.

⁶²*Ibid.*

⁶³*Ibid*, at 396.

⁶⁴U.S. District Court, Alaska, A011-0329 CV, November 17, 2003, Singleton, J.

the next morning for the seminar his colleagues ultimately discovered him collapsed on the floor. He was taken to the hospital where he was diagnosed as having suffered a stroke.

An issue of fact arose in the litigation as Louie asserted that he suffered from DVT which formed in both lower extremities and that because of a preexisting condition the clot passed through his heart to his brain causing his stroke. Louie asserted in the District Court that the development of the DVT condition on board the aircraft constituted an accident within the meaning of Article 17 of the Convention. Louie further alleged that the airline's failure to warn him of the risk of DVT associated with long periods of sitting was also an accident within the meaning of Article 17. Finally, Louie contended that sitting in the seat for a long period of time was likewise an accident under Article 17. The court initially reviewed the Supreme Court's determination in *Saks* concerning the definition of an accident. The court concluded that the British Airways' cradle seat was neither an unexpected or an unusual event in business class and thus could not qualify as an accident.

In the course of its decision, the court noted that courts had held that preexisting medical conditions that cause illnesses on flights were not accidents.⁶⁵ Additionally the court noted that some courts have held that a flight crew's failure to respond appropriately to such illnesses may sometimes constitute an accident under Article 17.⁶⁶ The court made note of the *Fulop* case in which the plaintiff had sustained a heart attack and the flight crew had failed to divert the plane to get him medical attention. The court in *Fulop* held that the flight crew's decision not to divert the plane when the plaintiff complained of chest pains aggravated his condition and could be considered an accident within the meaning of Article 17. The court finding that the unusual and unexpected occurrence that caused the injury was the flight crew's departure from what objectively could be considered expected conduct on the part of the airline and its personnel.⁶⁷

⁶⁵*Fishman v. Delta Air Lines, Inc.*, 132 F. 3d 138 (2d Cir. 1998).

⁶⁶*Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651 (S.D.N.Y. 2001).

⁶⁷*Ibid.*

The Court also looked at the recent Ninth Circuit decision in *Husain*⁶⁸ which had held that a flight crew's failure to act under certain circumstances could constitute an accident. In *Husain*, a passenger seated near the smoking section suffered an asthma attack that resulted in his death. The court had determined that the flight attendants' failure to move the victim, despite three separate requests by the victim's wife, who had explained that her husband was sensitive to smoke and needed to move, constituted an accident. The 9th Circuit found that the failure to act in the face of a known serious risk satisfies the meaning of accident within Article 17 so long as reasonable alternatives existed that would substantively minimize the risk in implementing those alternatives and would not unreasonably interfere with the normal expected operation of the aircraft. The *Louie* court further examined the decision in *Blansett*,⁶⁹ which had held that an airline's failure to warn of the risk of DVT may constitute an accident. The court was somewhat critical of the *Blansett* decision finding that *Blansett* went further than was necessary when it found an accident on a violation of an alleged industry standard considering that there was evidence in the record that the flight crew responded unreasonably to the medical emergency, did not allow an onboard physician to examine the passenger after he became visibly ill, and refused to supply needed information to medical staff at the hospital to which the plaintiff had been taken.⁷⁰

The *Louie* court also examined a recent decision by a British Appellate Court, in which the British court had affirmed a lower court's finding that a failure to warn of the risks of DVT in cramped seating did not constitute an accident.⁷¹ The *Louie* court was somewhat critical of the

⁶⁸*Husain v. Olympia Airways*, 316 F.3d 829 (9th Cir. 2002); appeal filed and argued before the Supreme Court in November 2003.

⁶⁹*Blansett v. Continental Airlines*, 216 F. Supp.2d 596 (S.D. Tex. 2002).

⁷⁰*Ibid.* at p. 597 n. 2.

⁷¹*Deep Vein Thrombosis Air Travel Group Litigation*, EWCA, Civ. 1005, 2003 WL 21353471 (No. B) 2003/0386, July 3, 2003).

British decision insofar as the one area that was not addressed by the British court, but had been raised in the *Blansett* decision, was whether an adopted industry standard to warn of the risks of DVT existed at the time of the DVT incident at issue. The *Blansett* court had held that a memo circulated by an industry association in 2001 cautioning its members that they should warn of the risk of DVT was sufficient to establish a question of fact as to whether or not an industry standard existed at the time of the incident.

In ultimately deciding that Louie had failed to establish the occurrence of an accident on board the aircraft, the court noted that the failure to warn was not an unusual or unexpected event insofar as there was no evidence in the record to show that to provide such a warning was a standard industry practice at the time of Louie's injury. The court clearly intimated that in the event a standard industry practice existed requiring a warning of the risks of DVT, such an occurrence could very well constitute an accident under the Warsaw Convention.

As of the present time, the only case to ultimately hold that the occurrence of DVT may constitute an accident within the meaning of Article 17 of the Convention is *Blansett*. While several cases have refused to find an accident when presented with a DVT injury,⁷² the only case that actually contains a reasoned analysis of the issue is *Louie* which, as noted above, intimates that given the proper showing of the existence of a established industry standard to warn of the risks of DVT, a factual issue arises as to whether or not the violation of that industry standard constitutes an accident within the meaning of Article 17.

It would appear from an examination of the *Louie* and *Blansett* decisions, and given the exclusivity of the Warsaw Convention, and most likely, the Montreal Convention, courts faced with a DVT plaintiff are likely to find an accident where it can be established that a prior existing

⁷²*Damon v. Air Pacific*, CV 02-5307 (C.D.Cal. Sept. 8, 2003), Walter, J.; *Rodriguez v. Ansett Australia Ltd.*, No. 01-7882, 2002 WL 32153953 (C.D.Cal August 8, 2002); *McDonald v. Korean Air*, No. 01-330373, 2002 WL 1861837 (Ont. S.C.J. September 18, 2002).

industry standard requiring a warning had been in effect. Moreover, an accident finding in such cases is also likely if it can be shown that the flight crew responded unreasonably to any expressed medical emergency, there exists any crew failure to consult with available medical services, any failure by the carrier to relay or make available important information relevant to the occurrence or plaintiff's treatment, or a refusal to supply available medical care. Only time will tell whether a sufficiently established DVT case will result in an accident finding.

Bodily Injury

As noted previously, unless a plaintiff can prove that both an accident and a bodily injury has resulted from an international flight, the plaintiff may not recover damages. What actually constitutes an accident under Article 17 of the Convention was determined by the United States Supreme Court in the *Saks* case.⁷³ The second part of the equation, whether the plaintiff has sustained a bodily injury, was determined by the U.S. Supreme Court in 1991 in the case of *Eastern Airlines v. Floyd*.⁷⁴ *Floyd* concerned an international transportation between Miami and the Bahamas during which the aircraft's engines failed in flight and the passengers were advised to prepare for a possible ditching into the Atlantic Ocean. Fortunately for all concerned, the crew was able to restart the engines and the plane landed uneventfully in Miami. Subsequently, several passengers sued the carrier claiming damages for mental distress arising from the incident. The carrier conceded that an accident had in fact occurred but argued strenuously that no plaintiff had sustained a bodily injury as required under Article 17.

After reviewing the drafting history of the Warsaw Convention, the Supreme Court sided with the carrier holding that Article 17 does not permit recovery for purely emotional injuries, concluding that an air carrier may not be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury or a physical manifestation of a physical

⁷³See, note 59.

⁷⁴See, note 5.

injury.

Subsequent to *Floyd*, many cases have held that where a passenger alleges mental injury such as anxiety, irritability, loss of confidence, dizziness or sleeplessness, such claimed injuries are insufficient to meet the bodily injury requirement of Article 17.⁷⁵ In *Jack v. Transworld Airlines*,⁷⁶ plaintiff sought damages for injuries allegedly sustained during an evacuation of a TWA flight that had crashed on takeoff. There was no dispute that the crash was an accident and several passengers sustained minor physical injuries. A great deal of the plaintiffs, however, claimed only that they suffered purely emotional distress from the accident. The District Court for the Northern District of California, in examination of the case, noted that only emotional distress flowing directly from the bodily injury is recoverable under Article 17. The Court indicating that there were four possible approaches concerning emotional distress damages including; that no recovery would be allowed for emotional distress, that recovery would be allowed for all distress as long as a bodily injury occurs, that emotional distress must include distress about the accident and a bodily injury or, as ultimately determined, that only emotional distress flowing directly from the bodily injury is recoverable.

Subsequently, in *Longo v. Air France*,⁷⁷ a honeymoon couple had sustained minor injuries during an evacuation after their aircraft had slid off the runway. The plaintiffs' claim, including a fear of flying, was to the effect that recovery for the fear of flying and all other mental distress was permissible under Article 17 as long as some physical injury had in fact occurred. In rejecting this claim, the District Court for the Southern District of New York held

⁷⁵See, for example, *Terrafranca v. Virgin Atlantis Airways*, 151 F.3d 108 (3d Cir, 1998) (feelings of anxiety, fear and isolation do not qualify as bodily injuries); and *Asher v. United Airlines*, 70 F.Supp.2d 614 (D.Md., 1999) (no recovery unless plaintiff can establish physical injury or physical manifestation of injury).

⁷⁶854 F. Supp 654 (N.D. Cal. 1994).

⁷⁷1996 WL 866124 (S.D.N.Y. 1996).

that mental distress that is unrelated to physical injury, that is mental distress that does not flow directly from physical injury or does not flow from the physical manifestations of mental distress, are no different than pure mental injury claims which are prescribed by Article 17.

In *Alvarez v. American Airlines*,⁷⁸ the plaintiff had concededly sustained bruises and scrapes to his knees during an emergency evacuation from an American flight. Subsequent to the accident he came under the care of a psychiatrist who ultimately gave the opinion that the plaintiff was suffering from post traumatic stress disorder (PTSD). The plaintiff claimed both physical and psychological injuries as a result of the evacuation but failed to allege any connection between the two types of injuries claimed. In ultimately finding that the plaintiff could not recover for psychological injuries, the court indicated that recovery of psychological injuries are only permissible if there is a causal link between the physical and the psychological injuries. A plaintiff may recover compensation for psychological and emotional injuries only to the extent that those injuries are proximately caused by his or her physical injuries. The court further held that insofar as the plaintiff's PTSD was caused by the emergency evacuation of the aircraft and not as a result of any bodily injury sustained, his claims for psychological and emotional injuries had to be dismissed.

More recently, in *In Re Air Crash at Little Rock Arkansas*,⁷⁹ the plaintiff was a survivor of the crash of an American Airlines flight at Little Rock Airport. While she sustained some minor physical injuries and depression, she subsequently returned to her college studies. Her claim alleged that the physical injuries to her legs were a factor in her PTSD and her expert testified that those conditions were not necessarily caused by her knee injuries. The expert opined that in view of the nature of the incident and the plaintiff's thoughts that she could die,

⁷⁸1999 WL 691922 (S.D.N.Y. 1999).

⁷⁹291 F.3d 508 (8th Cir. 2002) aff'd in part, rev'd in part and remanding 118 F.Supp. 2d 916 (E.D. Ark 2000), cert. denied. *Lloyd v. American Airlines, Inc.* 537 U.S. 974 (2002).

she would have sustained PTSD and depression even without a knee injury. At the close of evidence at trial American moved for judgment as a matter of law, which was denied. On appeal to the Eighth Circuit, however, the court found that recovery for mental injuries is permitted only to the extent that the emotional distress proximately flows from the physical injuries caused by the accident. The court further found that allowing the physical injury no matter how minor or unrelated to trigger recovery of any and all post crash mental injuries would violate the Supreme Court's decision in *Floyd*.⁸⁰ Thus, the court concluded, the District Court's ruling that a showing of any physical injury is sufficient to trigger recovery for all emotional damages regardless of the causal connection was clearly in error. In other cases, courts have held that subsequent physical manifestations of previous emotional injuries, such as physical changes in the brain, sleeplessness or weight loss, are not compensable under the Warsaw Convention.⁸¹

Success, however, has not always been the case for air carriers in these types of cases. For instance, in *Weaver v. Delta Airlines*,⁸² the plaintiff was able to defeat a motion for summary judgment by the carrier with the submission of affidavits from her experts indicating that the terror that she had experienced during an emergency landing had a physical impact on her brain and neurological system. The court concluded that the expert affidavits and testimony produced by the plaintiff created an issue of fact sufficient to send the case to the jury on the issue as to whether or not the plaintiff had sustained a compensable Article 17 injury. In *Ligeti v. British Airways PLC*,⁸³ the Southern District of New York had before it a plaintiff's claim of PTSD after she had bumped her elbow while being locked in a lavatory aboard a British Airways flight. The court ultimately found that the plaintiff was not entitled to recover unless she could

⁸⁰See, note 5.

⁸¹*Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001); and *Tenafranca v. Virgin Atlantic Airways*, 151 F. 3d 108 (3rd Cir. 1998).

⁸²56 F. Supp.2d 1190 (D. Mont. 1999).

⁸³28 Av.Cas. (CCH) 15, 720 (S.D.N.Y. 2001).

establish that the bump, which constituted the bodily injury, actually caused her PTSD. Merely being locked in the lavatory and suffering PTSD, the court continued, was insufficient to permit recovery under Article 17.