**.LIABILITY FOR PASSENGER INJURY AND DEATH**

. Article 17 of the Warsaw Convention has been given interpretation by various

jurisdictions where damage or wounding or other bodily injury occurs after

embarkation aboard an air carrier. Applying Article 17 to psychological as distinct

from physical injury is exceptional and there is no clear support for its application

in order to make an air carrier liable to the passenger or passengers involved. Carriers

are liable to passengers and their personal representatives for damage sustained

in the event of passenger injury and death. Article 17 of the Warsaw

Convention provides that the Carrier is liable for damage sustained in the event of death or wounding of a passenger or other bodily injury suffered by the passenger if the accident

which caused the damage so sustained took place on board the aircraft or in

the course of any of the operations of embarking or disembarking.

This provision is adopted into Australian law by the *Civil Aviation (Carriers’ Liability)*

*Act* 1959 (Cth).

Legal liability of an airline for passenger injury or death raises issues of the type

of injury involved, the entitlement to sue, and what jurisdiction determines the

applicable law.

In October 1995. The IATA annual general meeting unanimously

adopted the IATA Intercarrier Agreement of Passenger Liability (IIA) initially

signed by seven airlines, including Qantas. Airlines participating in this

Agreement agreed to take measures for it to waive the limits in international agreements

for damages in the case of personal injury and death in 1996. IATA adopted

a supplemental agreement, the Agreement on Measures to Implement the IATA

Intercarrier Agreement (MIA). The MIA provides that participating carriers shall

impose the following provisions in their conditions of carriage and tariffs where

necessary:

736. No change is made to the Warsaw Convention by Montreal Protocol No. 4. *See* Civil Aviation (Carriers’

Liability) Act 1959 (Cth) Sch. 4. *See* G. Heilbronn, *Transport: Aviation, Laws of Australia*.

Thomson Reuters (Sydney) [34.2.4380]–[34.2.4840]; P. Martin (ed) *Shawcross and Beaumont: Air*

*Law* (4th ed., Butterworths subscription service) vol. 1, Div. VII at [522] *See* the IATA Intercarrier

Agreement (IIA) and the Agreement to Implement the Intercarrier Agreement (MIA). *See also* Hannappel

PCC, *The Right to Sue in Death Cases under the Warsaw Convention*, 6(2) Air Law 66

(1981). *See* T. Sakamoto, *The Fate of Passenger Liability Under the Warsaw Convention* and S.

Okake, *Aviation Personal Injury Claim Settlement in Japan* both given at the International Conference

on Air Transport and Space Application in a New World’ June 1993, Tokyo. *See* B. Cheng,

*Air Carrier Liability for Passenger Injury and Death and the Japanese Initiative and Response to*

*the Current EC Consultation Paper*, 18 Air & Space L. 109 (1993); L.R. Edwards ‘*Liability of Air*

*Carriers for Death and Personal Injury to Passengers*’, 56 Air & Space L. 108 (1982); S.J. Levy,

*The Rights of International Airline Passengers*, 1 Air & Space L. 275 (1976).

737. *Civil Aviation (Carriers’ Liability) Act* 1959 (Cth) Sch. 5 records that the text in the Schedule contains

the operative provisions of the Warsaw Convention as modified by Ch. 1 of the Hague Protocol

and Ch. 1 of the Montreal Protocol No. 4 together with the remaining provisions of the Hague

and Montreal Protocols. Pt IIIC of the Act (ss 25J–25N) deal with carriage to which Montreal No.

4 applies. Parts II, III, and IIIA deal respectively with carriage to which the Warsaw Convention

applies, carriage to which the Warsaw Convention alone applies, and carriage to which the Guadalajara

Convention applies. Pt VI of the Act (ss 26–41) deals with other carriage to which the Act

applies, including carriage by Australian domestic carriers interstate or between a place in a Territory

and another place in a Territory, and another place in Australia. *See also Povey v. Qantas*

*Airways Ltd and Another* [2005] ALR 427 at 431–438.

738. *Civil Aviation (Carriers’ Liability) Act* 1959(Cth) ss 12(3), (5)–(6), 24.

(1) (the carrier) shall not invoke any limitation of liability in Article 22(1) of

the(Warsaw) Convention as to any claim for recoverable compensatory damage

arising under Article 17 of the Convention;

(2) (the carrier) shall not avail itself of any defence under Article 22(1) of the Convention

with respect to that portion of such claim which does not exceed

100,000 SDR; and

(3) except as otherwise provided in paragraphs 1 and 2 (the Carrier) reserves all

defences under the Convention to any such claim. With respect to third parties,

the carrier also reserves all rights of recourse against any other persons, including

without limitation, rights of contribution and indemnity.

The MIA also provided that at the option of the carrier the following provisions

may be included in the conditions of carriage:

(1) (the carrier) agrees that subject to applicable law, recoverable compensatory

damages for such claims may be determined by reference to the law of the

domicile or permanent residence of the passenger;

(2) (the carrier) shall not avail itself of any defence under Article 20(1) of the Convention

with respect to that portion of such claims which do not exceed 100,000

SDR, except that such waiver is limited to the amounts shown below for the

routes indicated, as may be authorized by governments concerned with the

transportation involved; and

(3) neither the waiver of limits nor the waiver of defences shall be applicable in

respect of such claims made by public social insurance or similar bodies, however

asserted. Such claims shall be subject to the limit in Article 22(1) of the

Convention.

The Carrier will compensate the passenger or his dependents for recoverable compensatory

damages received from any public social insurance or similar body.

The scope of Article 17 is subject to ambiguities as to the meaning which applies

to the kinds of injuries and the circumstances in which they occur. Passengers, their

personal representatives, and others, may sue under Article 173. Although the Warsaw

Convention does not define ‘passenger’ it applies to all passengers whether

holding tickets or not, as well as stowaways.739 Article 17 applies to gratuitous as

well as carriage for reward by an air transport operator.

***Entitlement to sue:***

Who may sue on behalf of a deceased passenger and/or

relative is outside the Warsaw Convention and left to the law of the country exercising

jurisdiction in the matter. In Australia the right to sue is given to a wide range

of relatives, even illegitimate children, or an adoptive or reputed father, as well as

the deceased’s personal representatives.740

739. *Civil Aviation (Carriers’ Liability Act* 1959(Cth) s. 42 applying Pts II, III, and IV of the Act.

740. *See* n. 4.

In *McKenna v Avoir Pty Ltd*[1981] WAR 255 the plaintiff claimed damages for the death of her son in an aircraft crash.The operator admitted liability under the *Civil Aviation (Carriers’ Liability) Act* 1961–1976

(WA). The Federal Act provided by section 35(8) that in awarding damages the

court or jury were not limited to financial loss resulting from the death of the passenger.

The plaintiff experienced grief and mental anguish as a consequence of her

son’s death and lost the benefit of certain household services performed by him. The

West Australian Supreme Court held that damages were to be assessed on the basis

on the same principles as claims under the Fatal Accidents Act. The plaintiff was

entitled to damages for the lost benefit of household services performed by and

financial benefits received from the deceased but was not entitled to damages for

the grief and mental anguish she experienced as a result of his death.

***Physical v. Psychological Injury:***

In *South Pacific Air Motive Pty Ltd v. Magnus* (1998) 157 ALR 443 the case

arose from an aircraft ditching in Botany Bay, New South Wales in 1994 carrying

a group of students from Sydney to Norfolk Island. The operators of the

aircraft were sued by a representative of a group of passengers and their parents

who were variously alleged to have suffered physical and/or psychological

harm as a result of the accident.

. The majority of the Federal Court held that Part IV of the *Civil Aviation*

*(Carriers’ Liability) Act* 1959 (Cth) did exclude a cause of action in respect of

claims by passengers independent of any physical injury. It was also held that the

reference to ‘personal injury’ in section 28 of the Act rather than ‘bodily injury’ indicated

that it was parliament’s intention that the application of section 28 was not

confined to physical injuries but also included psychological injuries.

*-*. The Federal Court held that the claims of the passengers for psychological

damage independent of any physical injury were extinguished by section 34 of the

Act. Part IV of the Act was not intended to be a complete code in respect of non-passengers

who suffer loss or damage as a result of an air accident. Section 36 was

not intended to preclude claims by non-passengers seeking damages for nervous

shock under general law (e.g., tort). Therefore, these claims were not barred by the

*Civil Aviation (Carriers’ Liability) Act* 1959.741

In *Parkes Shire Council v South West Helicopters* [2019] HCA 14 the HCA in a majority decision in an appeal from the NSWDC disapproved the majority decision in *Magnus* and approved the dissenting decision of Beaumont J in that case who held in that the intent of s28 was to create uniform and exclusive rules as to the liability of a carrier for events involving injury or death to passengers under the Warsaw Convention.The HCA thus supports the proposition hearing that non-passengers are precluded from bringing common law nervous shock claims against a carrier when a passenger dies or is injured on a flight governed by the *Civil Aviation (Carriers’ Liability) Act* 1959..741.

**Accident**

Liability for death, wounding, and other bodily injury for liability under Art. 17 to apply to passenger death, wounding, or other bodily injury this must be caused by an accident which takes place on board the aircraft or while boarding or disembarking.

. In *Kotsambasis v. Singapore Airlines Ltd* (1997) 42 NSWLR 110 the appellant

boarded a Singapore Airlines flight in Athens scheduled to fly to Sydney via

Singapore. She was seated on the port side wing near the window. Shortly after

takeoff, she was leaning forward in her seat when a sudden jolt threw her back in

her seat. The pain she felt in her back was subsequently held at first instance not to

be accepted as an injury. Other passengers were screaming and she saw smoke coming

from a starboard engine which had caught alight. There was an inboard

announcement that there was an engine problem and that the aircraft would be

returning to Athens once fuel had been jettisoned. The judge at first instance

accepted the appellant’s evidence that she was anxious and distressed and that she

regarded the smoke from the engine as life-threatening and that she sustained a

severe fright and believed that she might die. The NSW Court of Appeal held that

the claim would not succeed as the term ‘bodily injury’ in Article 17 did not include

purely psychological injury.

In *Pel-Air Aviation Pty Ltd v. Casey* [2017] NSWCA 32 the background to the

claim against Pel Air arose in November 2009. Ms Karen Casey was a nurse who

travelled on a small aircraft operated by Pel Air. She was accompanied by a doctor

to Samnoa to evacuate a patient and her husband, and return to Melbourne. The aircraft

was scheduled to refuel at Norfolk Island on the return journey. However, bad

weather prevented the pilot from landing, as a result of which he ditched the aircraft

in the sea. All six of the persons on board survived the ditching and were rescued

after ninety minutes in the water off Norfolk Island. Ms Casey suffered

significant physical injuries, including damage to her spine and her right knee. Additionally,

she came to suffer from post traumatic stress disorder (PTSD), major

depression, and anxiety.

The first issue in Pel Air’s appeal to the NSW Court Appeal from the primary

judge was whether they erred in concluding Ms Casey’s PTSD constituted a ‘bodily

injury’. The second issue was whether that judge also erred in awarding damages to

Ms Casey for non-economic loss, past and present care and treatment expenses. The

central issue turned on the effect of excluding the consequences of her PTSD from

the assessment of damages if that condition was not held to constitute a ‘bodily

injury’.742

At first instance Pel-Air accepted that Ms Casey’s physical injuries constituted

‘bodily injury’ for the purposes of Article 17. The mental harm she suffered other

than her PTSD was properly characterized because the evidence indicated under the

Warsaw Convention that her physical injuries were at least in part a cause of her

major depressive and anxiety disorders, and pain disorders. On review of Australian,

English, and United States case authorities the primary judge concluded that a

diagnosis of PTSD did not exclude the possibility that evidence in a particular case

may establish that a person had suffered a bodily injury compensable under the

Montreal Convention. The primary judge held that the PTSD from which Ms Casey

suffered and had been unsuccessfully treated was a result of damage to her brain

and other parts of her bodily processes.

The Court, on appeal by Pel-Air noted the ruling in the *Kotsombosis* case (above)

that draftsmen in the Montreal Convention did not intend to impose absolute liability

for all forms of injury743. In *Kotsombosis* Stein J added that where mental

anguish followed and is caused by physical injury, recovery for both injuries is covered

by the Convention. The Court in Pel-Air noted in *Weaver v. Delta Airlines Inc.*

56F Supp 2d 1190 the US DC of Montana found that PTSD suffered by an airline

passenger as a result of an emergency landing constituted ‘bodily injury’ under

Article 17 744. However, the HL in *Morris v. KLM Royal Dutch Airlines; King v.*

*Bristow Helicopters Ltd* [2002] 2 AC 628 claims relating to PTSD and clinical

depression developed by a passenger after a forced helicopter landing did not succeed.

It was held that a psychiatric condition did not of itself constitute a ‘bodily

injury’ within Article 17 although their Lordships differed as to what is covered by

that term.745

In allowing the cross appeal by Pel-Air the NSW Court of Appeal rejected Ms

Casey’s submission that her physical injuries caused her PTSD as there was, in its

view, no evidence to support such an inference. As a result the award of damages to

Ms Casey in respect of non-economic loss, past and present care and treatment

expenses was denied.

Restricting the meaning of ‘bodily injury’ to the exclusion of PTSD and mental

distress or depression in the *Pel-Air Aviation Pty Ltd* and *Morris* cases does not

appear entirely logical. In *Pel-Air Aviation Pty Ltd* the NSW Court of Appeal chose

to discount the expert medical submission that made a clear casual link between the

claimant’s physical injuries and subsequent PTSD and clinical depression. In the

*Morris* case their Lordships, although prepared to limit the ambit of ‘bodily injury’

in Article 17 to physical injury, nevertheless, were unable to have an agreed interpretation

of that term. If Article 17 was amended to include PTSD and mental distress

this would result in uniformity and equitable application(but see the HCA decision in *Parkes Shire Council v South West Helicopters Pty Ltd*[2019] HCA 14).

742 *Pel-Air AviationPty v Casey* [2017] NSWCA 32 at [15],[16]

743 At [25]

744. At [31] The Montana District Court referred to ‘recent scientific research explains that post traumatic

stress disorder evidences actual trauma to brain cells structures’. *Weaver* was followed in In

*Re aircrash at* *Little Rock, Arkansas on 1 June* 1999 118 F Supp 2d 916 (2000). However, in *Rosman*

*v. Transworld Airlines* Inc 34 NY 2d 385[1974] the New York Court of Appeals held that passengers

in a hijack were entitled to damages for physical injury but not for mental injury (at 397).

In *Eastern Airlines Inc v. Floyd* 499 US 530 (1991) where passengers claimed damages for mental

distress the US SC held (at [30]) that an air carrier was not liable under Art. 17 where an accident

has not caused damage to a passenger not suffering death, physical injury, or physical manifestation

of injury. The US SC refrained from expressing a view as to whether a passenger could recover

for mental injuries as passengers in the case before it did not allege physical injury.

In *Paterson v. Airlink Pty Ltd* (2008) 7 DCLR (NSW) 373, the NSW DC

ruled that death or personal injury of a passenger must be an accident within section

28 of the *Civil Aviation (Carriers’ Liability) Act* 1959 (Cth) section 28 and be an

unexpected or unusual event or happening external to the plaintiff. Plaintiff’s reaction

to the normal and expected operation of an aircraft cannot constitute an ‘accident’

under section 28. In this case, a portable step was moved while the plaintiff was disembarking from a small aircraft causing them to fall was held to be an accident within the meaning of s28.

. In *Morris v. KLM Royal Dutch Airlines; King v. Bristow Helicopters* [2002] 2 AC 628 a claimantalleged he suffered from PTSD after a forced helicopter landing and a subsequent peptic ulcer,another passenger claiming clinical depression after an indecent assault by another passenger. TheHL allowed the claim for the peptic ulcer to succeed as ‘bodily injury’ but not the claims for PTSDand clinical depression as not constituting a ‘bodily injury. As the NSW Court of Appeal their Lordshipsin Morris although agreeing on the outcome of the appeal differed in their views as what wascovered by the term,’ bodily in injury’; Mcfarlan, Ward & J.A. Gleeson at [32].was disembarking from a small aircraft causing them to fall and sustain injuries washeld to be an accident within the meaning of section 28.

In *Yeomans v. Carbridge Pty Ltd* [2011] SWDC 221 the plaintiff flew from

Orange to Sydney on a Regional Express Airlines (Rex) flight which landed at Sydney

Airport. On coming to a halt at the Sydney domestic terminal Rex did not give

the benefit of an airbridge to take passengers from the aircraft directly into the terminal.

It was necessary for the passengers to travel on a bus owned and operated by

Carbridge. Having left the aircraft the plaintiff, in the course of entering the bus,

was allegedly injured as a result of a defect in the bus’s steps or perhaps its door.

The plaintiff claimed damages for her injuries. Carbridge accepted the facts of plaintiff’s

claim but requested a summary judgment. Carbridge also submitted that it

should be regarded as an agent of the carrier because it was taking the carrier’s passengers

from the aircraft to the terminal. The judge found that there was merit in

the argument that an airline can be seen to have the duty to provide safe transfer of

passengers from the aircraft to the terminal. He, therefore, held that the plaintiff was

injured in the course of disembarkation.746

746 Elkiam J at [15],[18]]

In *Barclay v British Airways plc* [2008] 241 FLR 218 it was held not to be an accident when a passenger fell after slipping on a plastic strip running under the seats covering the seat fix tracking which was a standard fitment on the aircraft and secured to its floor. In *Brannock v Jetstar Airways Pty Ltd* (2010) 241 FLR 218 an 84 year old man tripping on stairs having arguably been given inadequate embarkation instructions was not held to be an accident.

In *Lina Di Falco v Emirates (No 2) [2019] VSC 654* the plaintiff was a passenger on an Emirates flight from Melbourne to Dubai.Some hours into the flight Ms Di Falco got up from her seat to go to the bathroom.She fainted at the bathroom door fracturing her right ankle in the fall.She claimed she had asked for water on the plane but it had not been provided.The court found no accident had occurred as nothing unusual or unexpected happened on the flight.This was because the the plaintiff’s requests for water were dealt with by the airlines’ attendants in accordance with their usual practice and not in disregard of,,or contrary to.,airline policy.

In *Hanna v. Singapore Airlines* (2007) 6 DCLR (NSW) 288, the plaintiff

had a pre-existing medical condition, and so requested a seat in the emergency aisle

of the aircraft so she could raise her feet. Her seat allocation was changed due to a

computer malfunction, so she was given a cramped seat in the rear of the plane.

During the flight she claimed she suffered injuries, including pedal oedema due to

not being able to raise her feet. She sued Singapore Airlines under Article 17. The

plaintiff claimed the accident that occurred to her when embarking was the computer

malfunction causing the loss of her earlier seat allocation. The New South

Wales DC, in striking out her claim, held that checking in was not embarking.

Article 17 only applied when a passenger queued up to go through the boarding

gate. A natural human reaction to flying does not constitute an accident under

Article 17. The Court held that computer malfunction did not cause the plaintiff’s

medical condition, this was caused while she was on the aircraft in flight.

In *Gibson v. Malaysian Airline System Berhad* [2016] FCA 1476 a procedural

application was made of the Federal Court in a class action proceeding arising out

of the MH17 disaster in the Ukraine. On 17 July 2014, all 283 passengers and the

crew on board a Boeing 777-200 aircraft en route to Kuala Lumpur operated by

Malaysian Airlines were killed when it was shot down by a missile deployed by persons

unknown. The daughter of one of the Australian passengers in the statement of

claim did so as personal representative of the deceased. The proceedings by the

applicant were made on her own behalf, but her originating application stated the

claim was also a class action and she was suing in a representative capacity and on

behalf of the representatives of the deceased passengers.

In noting that the claim was one for compensation under the *Civil Aviation (Carriers’*

*Liability)* Act 1959 Perram J stated that the respondent airline’s liability was

governed by the provisions of the Montreal Convention to which Australia is party.

The applicant’s pleading of the class action gave rise, it was held, to matters which

were not recognized in the scheme of compensation. Article 17 created a cause of

action rather than recognizing a cause of action which exists independently747. Perram

J held that in respect of Australian law there is no other cause of action available

beyond that conferred by Article 17(1)748 and Article 33(1), (2) of the Montreal

Convention. Article 33 requires action for damage resulting from the death or injury

of a passenger may be brought, at the option of the plaintiff, in the court of the domicile

of the carrier or principal place of business, or where it has a place of business

through which the contract was made, or before the court at the place of destination.

749

Perram J found that Article 33 was not a procedural provision which could be

waived. Article 33 was concerned with the topic of jurisdiction, and even if the

respondent airline waived Article 33 this would not have the effect of clothing the

Court with jurisdiction it did not have750. The statement of claim defined the class

in a way that did not engage the ambit of Article 33 Therefore, the class was defined

in a way which means the group members have no rights the Court has jurisdiction

to enforce. What the applicant had pleaded revealed a lack of jurisdiction to hear

the claims of the class as defined.751

747 Perram J at [13] citing *United Airlines Inc v Sercel Australia Pty Ltd (2012) 266 FLR 37*

*748* PerramJ at [14]\749 Perram J at [15]

750 Perram J at [24] citing *Rothmans of Pall Mall (Overseas) ltd and others v Saudi Arabian Airlines Corporation* [1985] QB at 376

751 Perram J at [29]

**Deep Vein Thrombosis**

The liability of an airline for Deep Vein Thrombosis (DVT) of a passenger

was given detailed examination by the High Court of Australia in *Povey v. Qantas*

*Airways Ltd and Another* (2005) ALR 427. The appellant was a passenger on a Qantas

flight from Sydney to London via Bangkok and return by British Airways Plc

from London to Sydney via Kuala Lumpur. He alleged that during the course of the

outward and return flights he suffered from DVT caused by the conditions and procedures

relating to passengers on flights. These included what were said to be

cramped seating from which it was not easy to move, the discouragement of movement

about the cabin, and the offering of alcohol, tea, and coffee during the flights.

The appellant argued that the ‘accident’ in Article 17 should not be given a narrow

meaning and that it extended beyond operations of embarking and disembarking

and covered some kinds of omissions in particular. It was contended ‘accident’

extends to omissions of warning (or the failure to warn) of the known dangers of,

and precautions to be taken against the occurrence of DVT. ‘Accident’ also extends

to the flight conditions encountered or to the combination of the failure to warn and

the flight conditions.

The High Court noted that the *Carriage (Carriers’ Liability) Act* 1959 (Cth)

gives effect to the Warsaw Convention, the Hague Protocol 1955, the Guadalajara Convention, and the Montreal Protocol No. 4. The liability of a carrier when the carriage

is subject to the Montreal Protocol No. 4 is in substitution for any civil liability

of the carrier under any other law (emphasis added) in respect of the injury.

The High Court also noted that the parties had accepted certain propositions

which they took to be established by other courts, notably the *Supreme Court*

*of the United States in Air France v. Saks* 470 US 392 (1985), *El Al Israel Airlines*

*Ltd v. Tsui Yuan Tseng* 525 US 155 (1999), *Olympic Airways v. Hussain* 540 US

64(2004), and the *House of Lords in Sidhu v. British Airways Plc* [1997] AC 430.

The argument was confined to what ‘accident’ means in Article 17.

The appellant firstly argued that no distinction should be drawn between

‘events’ or ‘beginnings’ on the one hand and ‘non-events’ or ‘inaction’ on the other.

Second, that what was ‘unexpected or unusual’ was to be judged from the perspective

of a reasonable airline passenger, not according to what may be the particular

airline’s policies and procedures, or what may be general industry practice. Third,

it was argued that an ‘accident’ might occur during the whole flight where the reasonable

passenger would expect an airline, knowing of a life-threatening risk, to

warn passengers of that risk or the measure to avoid it, this would be an ‘accident’

that took place on the aircraft.

. The respondent carriers argued that although it was neither necessary nor

relevant to ask whether the cause of the accident was an act or omission or a combination

of both, there must have been some unintended and unexpected occurrence

which produced the hurt of loss by which damage was sustained. The carriers contended

that a ‘failure to warn’ was not an occurrence, it was something which did

not happen. What were alleged to be the relevant ‘flight conditions’ were not unintended

or unexpected-they were the conditions which the appellant alleged to be

‘the standard conditions and procedures relating to passenger travel’ on the relevant

flights.

. The High Court noted that Article 17 relates to three different concepts.

Article 17 refers to ‘damage’, to ‘death or wounding of a passenger or any other

bodily injury suffered by a passenger’, and to ‘the accident which caused the damage

so sustained’. The damage sustained is treated as being distinct from the accident

which caused the damage, and both the accident and the damage are treated as

distinct from the death, wounding, or other personal injury. ‘Accident’ in the view

of the High Court in the sense of ‘an unfortunate event, a disaster, a mishap’ is not

to be read as sufficiently described as an adverse physiological consequence which

the passenger has suffered. It might be asserted that its happening was not intended.

DVT is and was not an accident. As both parties to the appeal accepted ‘accident is

a reference to something external to the passenger’.

The High Court agreed, as *Saks* indicated, the concept of ‘accident’ should

not be over-refined. It is a concept which invited two questions: first, what happened

on board (or during embarking or disembarking) that caused the injury of which

complaint is made, and second was what happened unusual or unexpected. The

course of events surrounding death or injury to an airline passenger may present difficulties

in determining whether there has been an accident. In *Hussain* a passenger

died on board an aircraft as a result of exposure to cigarette smoke. A flight attendant

had refused requests to move the passenger to a seat further away from those

who were smoking on board.

. The United States Supreme Court acting as amicus curiae in supporting the

respondents (the relatives and legal representatives of the deceased passenger) had

put forward the question in proceedings as being whether the repeated insistence by

an airline flight attendant that an asthmatic passenger remain in an assigned seat

amidst life-threatening smoke in direct violation of standard industry practice and

the policy of her airline is an unusual occurrence constituting an ‘accident’ under

Article 17. The carrier, Olympic Airlines, on its part, described the question as being

whether the court below improperly held that ‘accident’ under Article 17 can be satisfied

when a passenger’s pre-existing medical condition is aggravated by exposure

to a normal condition in the aircraft cabin, even if the air carrier’s negligent omission

may have been in the chain of causation.

The High Court in *Povey* recognized *Hussain* as showing first, that each

party sought to emphasize particular circumstances surrounding the passenger’s

death. Second, each sought to identify if something unusual or unexpected had happened

on board the aircraft. The airline’ in effect’ sought to say that nothing had happened

on board that was unusual or unexpected; even if the flight attendant did not

react as she should, there was no accident.

. The High Court noted that questions of the kind considered in *Hussain* did

not arise in the case before it as central to the appellant’s claim is that nothing happened

on board the aircraft that was out of the ordinary or unusual. References to

‘failure’ to warn the High Court held were both irrelevant and unhelpful. These were

irrelevant as they had to proceed from unstated premises about the origin of some

duty to warn. There is no basis for introducing concepts of the common law of negligence

to the construction or application of an international treaty like Montreal 47.

The references to failure to warn are unhelpful as they suggest that the only point

at which some relevant warning should have been given was on board the aircraft.

It is not apparent that it should have been given at an earlier point in making travel

arrangements, than on board the aircraft. The allegations made by the appellant,

even if proved, would not establish a cause of action against the carriers.752

. This conclusion, the High Court held, was consistent with the decisions

reached in intermediate courts in the United States and in England about the application

of the Warsaw Convention and subsequent treaties to cases of DVT.

752. At, 431.

The decision by the Court of Appeal of England and Wales, *In Re Deep*

*Vein Thrombosis* [2004] QB 234, held that the word ‘accident’ in the Warsaw Convention

as modified by the Hague Protocol was to be given a natural and sensible,

but flexible and positive meaning in its context for there to be an accident within

the meaning of Article 17. The Court of Appeal held that inaction was a non-event

which could not properly be described as an accident. Not warning of DVT and not

giving advice on the precautions that would minimize that risk were not events. The

conditions in which the passenger travelled on flights (with cramped seating and the

like) were not capable of amounting to an event that satisfied the first part of the

accident definition which ‘took place on board the aircraft or in the course of

embarking or disembarking’.

. The High Court noted that the United States Courts of Appeal for the 5th

and 9th Circuits had held that development of DVT was not in the circumstances of

those cases an accident within Article 17. The High Court dismissed the appellant’s

claim against those airlines with costs.

**Further Case Guidance in Applying Article 17**

A number of cases have established further guidance for the establishment

of principles in applying Article 17 to air carrier liability. According to *Evangalinos*

*v. Trans World Airlines Inc* 550 F 2d 152 (1976) in borderline cases the basic factors

are:753

(1) the extent of the carrier’s control over the passenger;

(2) the activity being performed by the passenger; and

(3) the location of the passenger when the injury is sustained.

It has been argued that it is more in accord with the official French text to consider

that ‘lesion corporelle’ (literally) bodily lesion damage includes mental injury.754

In *Dias v. Transbrassil Airlines Inc* 8 Avi 16,048 (1998) (SD NY) where a passenger

contracted pneumonia from the poor quality of air in the cabin this was found

to be an unexpected and unusual event external to the passenger. Depressurization of an airline cabin755 and turbulent weather conditions causing passenger injury756

have been ruled as accidents under Article 17 as has a bomb scare and search.757

753. *See Blansett v. Continental Airlines Inc* 379 F 3d 177 (2004); *Rodriguez v. Ansett Australia Ltd* 383

F 3d 914 (2004).

754. *See* D. Stanculescu, *Recovery for Mental Harm under Article 17 of the Warsaw Convention: An*

*Interpretation of Leison Corporelle*, 8 Hastings Int & Comparative L. Rev. 399 (1985) and J.N.

Grippando, *Warsaw Convention-Federal Jurisdiction and Air Carrier Liability for Mental Injury:*

*A Matter of Limits*, Geo Washington J. Int L. & Econ. 59 (1985). *See also Kalish v. Transworld*

*Airlines* 14 Avi 17,936 (1997) (Civil Ct NY); *Husserl v. Swiss Transport Co* 13 Avi 17,936 (1975)

(Dist Ct NY); *Seguritan v. North West Airlines Inc* 446 NYS 2d 397 (1962) (SC App Div); *Fischer*

*v. North west Airline Inc 623 F Supp 1064 (1985) (Dist Ct III)*.

755 *See De Marines v KLM Royal Dutch Airlines* 433 F Supp 656 (1985)(Dist.Ct. NY) affirmed *De Marines v KLM -Royal Dutch Airlines*  580 F 2d 1193 (1978)(USCA).

756 *See Fleming v Delta Airlines Inc* 359 F Supp 339(1973) (Dist.Ct NY)

7577*Salerno v Pan American World Airlines Inc* 606 F Supp 656 (1985) (Dist Ct.NY).In *Mertz v KLM Royal Dutch Airlines* 15 Avi 17,843 failure by the carrier to take adequate steps to protect a passenger’s health after the onset of an attack was held to be negligence.

**Conclusion**

In conclusion, Article 17 needs to be interpreted consistently, as should all

international treaties incorporated into national domestic law. The cases dealt with

in this examination provide strong indication that Article 17 will be given a flexible

and balanced interpretation. However cases such as *Pel Air* raise issues where there is a clear connection between physical injury and post traumatic stress disorder.

The cases noted, particularly *Evangalinos*, set down the key elements determining

airline liability such as the extent of the carrier’s control over the passenger,

the activity performed by the passenger and their location in the aircraft.

The UK case *In Re Deep Vein Thrombosis* and the Australian High Court

decision in *Povey* have ruled that DVT is not an accident and that inaction by an

airline in giving advice on precautions to minimize DVT are not accidents within

the meaning of Article 17. Nevertheless, prudent airlines have taken steps to warn

long distance passengers of the need to undertake seated exercise and move about

the cabin when safe to do so.

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