

4-1-2005

Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated

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Recommended Citation

Andrew Field, "Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated" (2005) 28:1 Dal LJ 69.

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The 1999 Convention for the Unification of Certain Rules for International Carriage by Air (the "Montreal Convention"), came into force in 2003. It is the latest in a series of attempts to replace a number of variations on the 1929 Warsaw Convention with a single agreement which regulates the rights and liabilities of international air carriers, their passengers and shippers. At the time, the Montreal Convention was hailed as providing better protection and compensation for victims of air accidents. However, despite its recent adoption, in relation to claims for death and personal injuries the Montreal Convention is still firmly planted in the outdated terminology of its predecessor. The effect of this is that many passengers suffering injuries during international carriage are still left without a claim. For example, it is now well established that mental injuries are generally not recognized under the Convention. However, claims for certain injuries which are well associated with air travel – such as Deep Vein Thrombosis (also colloquially known as "economy class syndrome") – are also excluded. This is the recent finding of courts in a number of different jurisdictions, but most significantly in class actions in Britain and Australia. With such results, it is suggested that the basis for excluding these claims under the new Convention should be reconsidered

La Convention pour l'unification de certaines règles relatives au transport aérien international de 1999 (la « Convention de Montréal »), est entrée en vigueur en 2003. C'est la plus récente tentative pour remplacer une série de suppléments et d'annexes à la Convention de Varsovie de 1929 par un accord unique qui régit les droits et les responsabilités des transports aériens internationaux, leurs passagers et les expéditeurs. À l'époque, la Convention a été saluée comme améliorant la protection et l'indemnisation des victimes d'accidents d'avion. Toutefois, en dépit de son adoption récente, la Convention de Montréal reste fermement attachée à la terminologie désuète de l'entente précédente pour ce qui est des réclamations en cas de mort ou de lésions corporelles. Cela a pour résultat que beaucoup de passagers qui subissent des lésions pendant un voyage international ne peuvent toujours pas présenter de réclamation. Par exemple, il est maintenant bien établi que les préjudices psychologiques ne sont habituellement pas reconnus par les dispositions de la Convention. Par ailleurs, les réclamations pour certaines lésions bien associées à des voyages en avion – par exemple la thrombose veineuse profonde (couramment appelée « syndrome de la classe économique ») sont aussi exclues. C'est la conclusion à laquelle les tribunaux de divers ressorts sont arrivés, plus particulièrement dans des recours collectifs intentés en Grande-Bretagne et en Australie. Face à de tels résultats, il est suggéré de revoir les motifs de réclamation sous le régime de la nouvelle Convention.

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Introduction

On 5 September 2003, the International Civil Aviation Organization ("ICAO") announced with a degree of triumph that 1999 *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention*") would become operational on 4 November.¹ Quoted in the ICAO Press release, ICAO President, Dr. Assad Kotaite, said,

Victims of international air accidents and their families will be better protected and compensated under the new Montreal Convention, which modernises and consolidates a seventy-five year old system of international instruments of private international law into one instrument.²

With these words, Kotaite addressed two aspects of the international treaty system which governs legal rights of passengers, cargo owners and carriers (ie airlines) involved in international commercial air travel.

1. *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, [1999] A.T.N.I.A. 21, I.C.A.O. Doc. 9740 (entered into force 4 November 2003), online: Australasian Legal Information Institute <<http://www.austlii.edu.au/au>> [*Montreal Convention*]. The Convention became operational on account of the ratification of the treaty by the United States of America, the thirtieth ratification of the treaty which was the trigger for its entry into force as set down in Article 53(6).

2. International Civil Aviation Organization, News Release, "Montreal Convention of 1999 on Compensation for Accident Victims set to enter force", P.I.O. 14/2003 (5 September 2003), online: International Civil Aviation Organization <<http://www.icao.int/icao/en/nr/2003/pio200314.htm>> (date accessed: 22 January 2004).

Firstly, he summed up the effect of ICAO's attempts to remove the patchwork of treaties which granted different rights on different international flights – even if the flights were between states which were parties to various versions of the 1929 *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (the “*Warsaw Convention*”).³ This situation developed because over the years since the *Warsaw Convention* was agreed, as certain state parties considered its provisions to be outdated, it was amended, first at the Hague in 1955 (the “*Hague Protocol*”)⁴, then at Guadalajara in 1961, Guatemala in 1971, and finally in a series of protocols agreed at Montreal in 1975. The patchwork was created because not all parties to the *Warsaw Convention* had agreed to all or even some of these amending treaties. Indeed, as was recently decided in the United States, where two states are not parties to a common version of the *Warsaw Convention* then they are not parties to a common treaty and so no version of the Convention applies – thus adding a second “treaty-less” claim to the patchwork.⁵

It might be pointed out that there is an irony in Kotaite's statement in so far as the *Montreal Convention* came into force on the ratification by the thirtieth party: there are still many signatories to this treaty who have not ratified, and many other states which are parties to various versions of the *Warsaw Convention* which have not even signed the new treaty. Thus, the coming into force of the Convention would appear to have had the actual effect of adding one more treaty to the patchwork.⁶ In other words, it has contributed to further fragmentation. And yet, perhaps this is not such a telling observation, because it can also be observed that in the two years since the American ratification, further ratifications have seen the number of parties to the *Montreal Convention* more than double.⁷ If the pace of

3. *International Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, A.T.S. 1963 No. 18 [*Warsaw Convention*].

4. *Protocol amending the International Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929*, 28 September 1955, A.T.S. 1963 No. 18.

5. *Chubb & Son Inc. v. Asiana Airlines* 214 F.3d 301 (2d Cir. 2000). The first “treaty-less” situation is, of course, that which exists when carriage occurs to or from a country which is not a party to any version of the *Warsaw Convention*.

6. This is, in fact, the exact danger which was anticipated in the final words of an otherwise enthusiastic discussion of the *Montreal Convention* in Pablo Mendes De Leon & Werner Eyskens, “The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System” (2001) 66 J. Air. L. & Com. 1155 at 1185. Once again, as they concluded, only time will tell whether a general adoption of the *Montreal Convention* will lead to an international uniformity in such rules.

7. As of 25 July 2005, the *Montreal Convention* was in force in 66 different states, see online: International Civil Aviation Organisation <<http://www.icao.int/icao/en/leb/mtl99.htm>> (date accessed: 26 July 2005). However, it is important to recall that there are still over 150 parties to the un-amended *Warsaw Convention*, see online: International Civil Aviation Organisation <<http://www.icao.int/icao/en/leb/wc-hp.htm>> (date accessed: 26 July 2005).

this trend continues, then the patchwork will disappear, a possible scenario which should not be dismissed. Perhaps, the fragmentation will be of only a short duration.

However, the second matter to which Kotaite and ICAO sought to give prominence is perhaps of more interest because it concerns the substantive rights of victims and their families in international air accidents. Kotaite said that these people would be better protected, both in their rights to law suit and their rights to compensation. It is this suggestion which should not be taken at face value. The provisions of the *Montreal Convention* do clearly represent an improvement on the terms of the *Warsaw Convention* in all of its guises. However, there are certain crucial restrictions on the right to sue for death or injury which were in the *Warsaw Convention* and which remain in the *Montreal Convention*. At the very least, these restrictions provide claimants with a substantially more limited basis for suing than under the common law and probably under other legal systems well. This is the common conclusion in a number of common law jurisdictions as evidenced most recently in a series of decisions concerning actions against airlines in which plaintiffs have made claims for injuries resulting from Deep Vein Thrombosis ("DVT").

The purpose of this article is to argue that Article 17(1) of the *Montreal Convention*, the provision which allows claims for death and injuries, requires amending just as surely as did the equivalent provision – also Article 17 – under the *Warsaw Convention*. Section I of the article sets out in overview the rationale and scheme for such claims under the *Warsaw Convention*. As is explained in Section II, the *Montreal Convention* has made some very clear improvements to the plight of claimants in some areas, specifically as regards expanded limits to compensation. However, the continued use of the terms "bodily injury" and "accident" in Article 17 as evidenced by their interpretation by the courts still imposes great restrictions on plaintiffs' rights. The concept of "bodily injury" is discussed in Section III and draws attention to the exclusion of claims for any injuries which have no physical manifestation, such as psychological injuries. Section IV deals with the restriction created by the use of the word "accident," and specifically with the recent prominence given to this issue through the recent DVT decisions.

Indeed, the most recent of those decisions, by the English Court of Appeal in *The Deep Vein Thrombosis and Air Travel Litigation*⁸ and the Victorian Court of Appeal in *Qantas Ltd and British Airways PLC v. Povey*⁹ (confirmed by the High Court of Australia in *Povey v. Qantas Airways*

8. [2003] E.W.C.A. 1005 [DFT].

9. [2003] V.S.C.A. 227 [Povey, V.C.A.].

*Ltd*¹⁰), which dealt with DVT claims may in years to come prove to have been pivotal. As class actions involving many claimants in jurisdictions where such actions are still relatively uncommon, they attracted a broad degree of popular media interest. However, in seeing all of these claims fail, they also illustrated the inadequacy of the existing formulation of Article 17 and the language of the *Montreal Convention*. They demonstrated that these provisions are insufficient to deal with an injury which is so closely associated with air travel that it has been dubbed “economy class syndrome” (due to the propensity of such seats to promote such injuries). Therefore, they illustrate how clearly the language of the *Montreal Convention*, an agreement formulated on the eve of the twenty-first century, is still firmly planted in terms agreed in the 1920s at the birth of commercial flight. Further, in highlighting such deficiencies at a time when many states are still to decide whether to adopt the *Montreal Convention*, they have already provided a stimulus for a new regime. As was the case with *Povey*, the English litigation is also the subject of an appeal to that jurisdiction’s highest court (i.e., the House of Lords).¹¹ However, the judgments already delivered well illustrate the great dilemmas posed in such cases.

1. *Overview of personal injuries compromise under the Warsaw System*

One of the first characteristics identified when air travel was in its infancy was that it is a potentially dangerous and even fatal activity. Indeed, it is pertinent to recall that the world’s first aeroplane pilot, Orville Wright, after earning that title under the watchful eye of his brother Wilbur at Kitty Hawk in 1903, later also made another “first”: a few years later he was the first pilot of an aeroplane involved in a fatal air accident in which his passenger was killed.¹² Even a century later, travelling by air is still not without risk.

It can be understood that the survival of airlines in the early days of commercial air travel, when aircraft were less reliable than their modern counterparts, was precarious. It was recognized that aircraft were prone to accidents, and that passenger carriers were therefore prone to law suits. It was determined by those states who were parties to the *Warsaw Convention* that if the fledgling industry of international air travel was to survive it would need protection from the full weight of such suits as might

10. *Povey v. Qantas Airways Limited* [2005] H.C.A. 33 [*Povey*, H.C.A.].

11. U.K., House of Lords, Minutes and Order Paper - Minutes of Proceedings (Wednesday 14 July 2004), Session 2003-4, online: <http://www.publications.parliament.uk/pa/ld200304/minutes/040714/ldminut.htm> (date accessed: 17 September 2004).

12. The crash occurred at Fort Myer, Washington, D.C. on 17 September 1908, and the passenger was Lieutenant Thomas Selfridge. See John E. Walsh, *One Day at Kitty Hawk: The Untold Story of the Wright Brothers* (New York: Crowell, 1975) 234-235.

arise under domestic law. However, at the same time it was conceded that the interests of passengers injured or killed in accidents needed to be recognized as well.

A compromise was agreed for the benefit of the carriers, preventing them from excluding liability,¹³ but placing a monetary limit on compensation they might have to pay to claimants. Under Article 22, the limit was set at 125,000 francs,¹⁴ or approximately US\$8,300. The limit was subsequently doubled in the 1955 *Hague Protocol* – although it still represented a substantial limitation on claims. Further, the limit applied with only three substantial exceptions:

Firstly, under Article 22(1) the carrier and the passenger could agree by “special contract” to allow a higher limit of liability.

Secondly, under Article 3(2) the limit would not apply if the passenger was not given notice in their ticket that the *Warsaw Convention* applied, although the Convention would apply to the carriage in relation to other matters (i.e., which elements needed to be satisfied to found a claim as set down in the Convention).

And thirdly, under Article 25(1) the limit would not apply if it was established that the death or injury was caused by the “wilful misconduct” of the carrier. Although not greatly affecting the meaning, the *Hague Protocol* subsequently replaced this terminology with the more familiar formulation “done with intent to cause damage or recklessly and with knowledge that damage would probably result.”¹⁵

For the passengers who were having the amounts of compensation they might claim limited, the key benefit of this scheme – the balancing factor in their favour – was the creation of a regime based on a presumption of liability against the carrier for that compensation. This presumption arose where the claim could be established under the terms of Article 17, which stated:

The carrier is liable for the damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.¹⁶

13. *Warsaw Convention*, *supra* note 3, Art. 23.

14. One franc was further defined to equal 65.5 milligrams of gold of millesimal fineness 900 under Article 22 of the *Warsaw Convention*. This extra information allows for the value of a gold franc to be determined even when the franc has ceased to be the national currency of France, replaced by the Euro. However, the reference to the franc does provide yet another illustration of how the language of the *Warsaw Convention* is firmly planted in a bygone age.

15. Discussed in: *Newell v. Canadian Pacific Airlines* (1976), 74 D.L.R. (3d) 574 (Ont. Co. Ct.); *SS Pharmaceutical v. Qantas Airways* (1988) 22 N.S.W.L.R. 734 (Com. Div.).

16. *Warsaw Convention*, *supra* note 3, Art. 17.

Once such a claim was established, then the only basis upon which the carrier could defend itself was either under Article 20(1) by positively establishing that it had taken "all necessary measures" (which has been held to mean that the carrier was not negligent),¹⁷ or under Article 21 by establishing that the damage was caused or contributed to by the negligence of the injured person.

Although *prima facie*, it might be considered that the "trade-off" greatly favours the carriers, it should be recalled that there is a wide spectrum covered from the minor injury which is incurred while boarding the aircraft, to the fatal experience. Arguably it is the former class of injury which occurs with greater frequency. Therefore, the balance of the compromise is not quite so clearly defined. Nevertheless, the seventy years which have passed since the *Warsaw Convention* was adopted have clearly allowed substantial scope for reform. With the development of modern aircraft over that time, and the growth of carriers from fledgling infant industries into multinational corporations which record annual profits amounting to billions of dollars,¹⁸ the balance agreed in 1929 is clearly outdated.

II. *The Montreal Convention reforms*

1. *Generally*

The *Montreal Convention* introduces a number of changes. Some will have a minimal effect on the position of claimants seeking compensation for death or injuries incurred during international carriage. For example, in a departure from the *Warsaw Convention* the French text is no longer given prominence over other versions of the treaty.¹⁹ Other provisions reflect the innovations of the communications revolution. For example, presumably as a concession to the electronic ticket purchased over the Internet, no longer will a failure to comply with the ticketing requirements (i.e., the issuing of a ticket with a Warsaw notice) lead to the liability limits of the

17. For example, see *Grein v Imperial Airways* [1937] 1 K.B. 50 at 59 where Greer L.J. said that the carrier would not be liable if:

he proves that by his agents or servants he exercised all reasonable skill and care in taking all necessary measures to avoid causing damages by accident to the passenger, or proves it was impossible to take such measures. This seems to me to amount to a promise not to injure the passenger by avoidable accident, the onus being on the carrier to prove that the accident could not have been avoided by the exercise of reasonable care.

18. For example, it was recently reported that the Australian carrier Qantas recorded a half year profit of AUD 530.3 million. Geoff Easdown, *Herald Sun* (20 February 2004) 35.

19. The signature clause at conclusion of convention notes that the treaty is in English, Arabic, Chinese, French, Russian and Spanish "all texts being equally authentic."

Convention not applying.²⁰ Indeed, Article 3(5) specifically states that the limits will apply in such circumstances.

Of more direct assistance to claimants will be Article 28 which requires the carrier to make advance payments to claimants in cases of air travel accidents which result in death or injury of passengers. Importantly, the article notes that such payments do not constitute an admission of liability. However, the provision clearly has a positive intention. In addition, Article 50 requires states who are parties to the Convention to require their carriers to maintain adequate insurance so as to cover these costs, as well as any liabilities which might arise under the Convention.

Of further practical importance, the *Montreal Convention* potentially increases the choice of fora for a claimant in a death or injuries action. Specifically, under Article 28 of the *Warsaw Convention*, the claimant was limited to four potential jurisdictions in which to bring a claim: before the court where (1) the carrier is ordinarily resident, or (2) has its principal place of business, or (3) where it has an establishment where the contract was made, or (4) at the place of destination. These courts are set out in Article 33(1) of the *Montreal Convention*, but Article 33(2) adds to this quartet the court where the passenger "has his or her principal and permanent residence" provided it is in a state which is party to the Convention.

These sorts of innovation will be of some assistance to many claimants. However, it was the alteration to the monetary limits of compensation which was given most prominence in the I.C.A.O. Press Release quoted above. Does it represent a real advance?

2. *Monetary compensation*

As noted above, under the *Warsaw Convention* the monetary limit of liability was set at 125,000 francs (around US\$8,300), and was only amended once in the 1955 *Hague Protocol*. However, under Article 21 of the *Montreal Convention*, this limit is now abolished and is replaced with a new two-tier scheme, based not on the franc but rather on the International Monetary Fund's Special Drawing Right ("SDR").

Under the first tier, which is set out in Article 21(1), the carrier cannot exclude or limit its liability for damages not exceeding 100,000 SDRs. This is a strict liability regime which applies irrespective of the carrier's fault or lack thereof once the claim is established under Article 17.

20. This problem under the *Warsaw Convention* is discussed in Andres Rueda, "The Warsaw Convention and Electronic Ticketing" (2002) 67 J. Air L. & Com. 401. While noting a conflicting history of case law, Rueda argues that the notice requirement should be satisfied by the carrier evidencing their consent to contractual terms including the Warsaw notice online by ticking a dialogue box on their computer screen. However, he notes more convincingly the effect of the *Montreal Convention* in addressing this situation.

The second tier goes further in removing the protection previously accorded the once fledgling industry in that it finally removes the monetary limit. However, it differs from the first tier in so far as the carrier is permitted to defend itself. Specifically, in Article 21(2), it provides that for damages exceeding 100,000 SDRs (approximately US\$140,000), the carrier shall not be liable if it proves either that the damage was not due to the negligence or other wrongful act or omission of the carrier, or that the damage was solely due to the negligence or wrongful act of a third party. Clearly, there is a presumption of fault of the carrier, which it is incumbent on the carrier to disprove. But subject to this onus of proof being discharged, there is no limit to a carrier's potential liability.

Article 21 represents a great advance on the provisions of the *Warsaw Convention*. However, whether it represents such a great advance on the substance of passengers' rights in practice is perhaps another matter. Arguably, the reality is not quite as impressive as the appearance. This is because since at least 1966 the limits set down in *Warsaw Convention* have been rolled back by a series of private agreements and legislative reforms.

The first of the private agreements was the *Montreal Inter-carrier Agreement 1966* which set a no-fault liability limit of US\$75,000 to apply to those flights which begin, end or stop in the United States. This agreement came about when the United States threatened to abandon the Warsaw system through its dissatisfaction with the limited damages plaintiffs could claim and the failure to increase them substantially in the *Hague Protocol*. To dissuade the United States from such a course, the International Air Transport Association (IATA) and its member carriers agreed to utilize the option set out in Article 22, and by "special agreement" in its contracts with passengers set a higher liability limit.²¹

Subsequent agreements included the agreement made at Malta in 1974 by which some western European countries decided to follow the American example and encourage their carriers to make "special agreements." The result was an increased limit of US\$58,000, excluding legal costs, being therefore roughly similar in limit to the *Montreal Inter-carrier Agreement*, and differing only in that the carriers under this agreement did not agree to

21. Committee on Aeronautics, "The Warsaw Convention Revisited: An Update on Liability Limitations for the Twenty-First Century" (May/June 1999) 54 *The Record: of the Association of the Bar of the City of New York* 318.

waive the "all necessary measures" defence.²² Then, commencing in 1992, ten Japanese carriers gave notice that they would not plead any defence for damages up to 100,000 SDRs, thereby lifting the liability limit by a substantial amount.²³ Finally, in the late 1990s, a series of agreements known collectively as the "IATA Inter-carrier Agreements" matched this sum, and also allowed for damages above that sum but subject to the carrier's right to argue its defences.²⁴ These anticipated provisions were later adopted in the *Montreal Convention*.

The other method which has been used to increase liability limits is legislative. In 1997, the European Union Council Regulation No 2027/97 came into force which also provided that carriers of its member states should have unlimited liability, with absolute liability for the first 100,000 SDRs,²⁵ once again predating Montreal. Similarly, Australia is another country which by legislation has increased the liability limit, although in that case the limit is set at comparatively low 260,000 SDRs.²⁶

The point being illustrated here is that in many cases, the much vaunted increase of liability limits in the *Montreal Convention* is merely a case of mirroring a reality which already exists. Indeed, noting that in 1998 over one hundred carriers had signed the IATA Inter-carrier Agreements of the 1990s,²⁷ it is fair to say that they have had more to do with increasing liability limits than the *Montreal Convention*. Accordingly, perhaps Dr. Kotaite should have been a little more muted in trumpeting this particular advance in international air law consumer protection.

3. *The unreformed criteria*

The *Montreal Convention* was not altered in any significant way with regard to the criteria by which a claim can be made for death or injury. The new formula found in Article 17(1) reads as follows:

22. Austl., Department of Transport and Regional Services, "Consideration of the Ratification by Australia of the *Convention for the Unification of Certain Rules for International Carriage by Air* done at Montreal on 28 May 1999 (The Montreal Convention) and Related Aviation Matters: Discussion Paper" (January 2001), online: Department of Transportation and Regional Services <http://www.dotars.gov.au/avnapt/ipb/mc_discussion_paper.aspx> [DOTARS].

23. Committee on Aeronautics, *supra* note 21 at 322.

24. *Ibid.* at 325.

25. EU, "Council Regulation (EC) No 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents", Official Journal NO. L 285, 17/10/1997 P. 0001 – 0003, Article 3, online: Europe: Gateway to the European Union <<http://europa.eu/int/comm/transport/themes/air/english/library/council-regulation-202797.pdf>> (date accessed 9 March 2004).

26. *Civil Aviation (Carriers' Liability) Act 1959* (Cth.), ss. 11A, 21A.

27. Committee on Aeronautics, *supra* note 21 at 328.

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.²⁸

A comparison with Article 17 of the *Warsaw Convention* quoted above reveals only minor and apparently insignificant changes. Thus, it would appear that the 1929 conception of claims will remain for some time to come. It means that how these terms are understood under the *Warsaw Convention* will probably continue to be the case. Indeed, the refusal of the signatories to alter those terms despite suggestions to use broader terms mooted by national delegations during negotiations, would tend to confirm this.²⁹ Thus, the damage must be caused by an "accident," and the injury must be "bodily" and nothing else. The irony is that while the use of these terms was being confirmed, almost contemporaneously a degree of uniformity in their interpretation in common law jurisdictions was also being confirmed, an interpretation which would exclude certain claims. In very clear terms, and led very persuasively by the United States Supreme Court and the British House of Lords and Court of Appeal, the limitations of "accident" and "bodily injury" have now been made clearly apparent.

III. "Bodily Injury"

1. *The rule in Eastern Airlines v. Floyd.*

Most personal injuries suffered during a flight pose no difficulty under Article 17. The broken leg caused by slipping while boarding an aircraft, or the head wound sustained when an aircraft dips in an air pocket and the passenger collides with the upper bulkheads are unambiguously "bodily injuries." However, even those who are unfamiliar with Newton's universal law of gravity are conscious that engaging in the activity of flying carries with it the risk of falling back to earth, and this realization can induce in some cases emotional responses of fear. In the age of flight, the incidence of aircraft crashes, terrorism and hijackings has also given rise to many instances of emotional responses of some magnitude, sometimes described as "mental injuries" in passengers. The difficulty under the *Warsaw Convention* is that it has been determined as a general rule that the expression "bodily injury" does not include a mental injury.

This was the result which has flowed from the leading case of *Eastern Airlines v. Floyd*,³⁰ a decision of the United States Supreme Court. In that

28. *Montreal Convention*, *supra* note 1, Art. 17.

29. See discussion of negotiating history as explained in *Morris v. KLM Royal Dutch Airlines* [2002] 2 All E.R. 565 at 580 (C.A.).

30. 499 U.S. 530 (U.S. Sup. Ct. 1991).

case, shortly after take-off from Miami, Florida on a flight to the Bahamas, one of the aircraft's engines lost oil pressure and was shut down. However, soon after, the remaining two engines also failed. The crew notified the passengers that the aircraft was losing height and that a crash landing into the sea was imminent. A collision was averted when at the last moment one of the engines re-started and the aircraft returned to Miami. However, after the event a number of passengers brought claims alleging damages for the obvious emotional distress they experienced. The court, noting that this damage was unaccompanied by any physical injuries, had to determine whether such a claim, described as "only a mental or psychic injury,"³¹ fell within the terms of a "bodily injury." The court decided that it did not, stating:

Our review of the documentary record for the Warsaw Conference confirms – and the courts and commentators appear universally to agree – that there is no evidence that the drafters or signatories of the *Warsaw Convention* specifically considered liability for psychic injury or the meaning of "lesion corporelle".... Indeed the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the *Warsaw Convention* persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.³²

This view was subsequently confirmed in other jurisdictions. For example, in the House of Lords in Britain in *Sidhu v. British Airways*³³ it was accepted that psychological injuries did not fall within the meaning of "bodily injury," although the appeals in that case were rejected on other grounds.

In Australia, the New South Wales Court of Appeal in the case of *Kotsambasis v. Singapore Airlines*,³⁴ also endorsed the *Floyd* judgment. In that case the claim for purely psychological injury arose out of a passenger's mid-flight distress at seeing smoke billowing from the aircraft's starboard engines which had caught fire.

Similarly, *Floyd* has also been endorsed in Canada. In *Chau v. Delta Airlines*,³⁵ the Ontario Superior Court of Justice refused a claim for

31. *Ibid* at 536.

32. *Ibid* at 544-545.

33. [1997] 1 All E.R. 193 (H.L.) [*Sidhu*].

34. (1997) 42 N.S.W.L.R. 110 (C.A.).

35. 67 O.R. (3d) 108 (Ont. Sup. Ct. Jus.), online: <<http://canlii.org/ont/cas/onsc/2003/2003onsc11579.html>> (date accessed: 22 January 2004).

"embarrassment and emotional distress" experienced by the plaintiffs when they were asked to leave the aircraft prior to take-off after a dispute involving seating arrangements. Sitting at the more trivial end of the spectrum, this was held not to be an example of a "bodily injury."

2. Mental injuries accompanied by physical injuries?

There was a significant issue which the court in *Floyd* left unanswered. Although a purely mental injury might not fall within Article 17, what would be the fate of a psychological injury which was accompanied by a physical injury? In *Kotsambasis*, it was noted that this possibility was not resolved in *Floyd*. However, it has been addressed in a number of recent cases in the United States.³⁶ Firstly, in the 1998 case of *Terrafranca v. Virgin Atlantic Airways*,³⁷ the plaintiff's claim arose from her response to events aboard a flight to London, when mid-flight the crew announced to the passengers that they had received a warning indicating that there might be a bomb onboard. This warning was subsequently discovered to be a hoax. However, the Third Circuit Court of Appeals had to determine whether the physical manifestations of a passenger's extreme emotional distress, which comprised anorexia and weight loss of some seventeen pounds, constituted a bodily injury. Ruling that this was not the case, the court said that what was required was a "direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety."³⁸

A similar decision was reached in the 2001 case of *Carey v. United Airlines*.³⁹ In that case, during a flight from Costa Rica to Los Angeles, the plaintiff who was seated in first class was visited mid-flight by his two children who were seated in coach class. The children had earaches. The plaintiff was warned by cabin staff that the children were not permitted in that section of the aircraft. With one of his daughters in tears, the plaintiff then explained that they were ill, and was threatened with arrest under air regulations. A heated exchange then followed and the flight attendant proceeded to "humiliate Carey in front of the other first-class passengers."⁴⁰ The plaintiff's claim against the carrier was for "physical manifestations including nausea, cramps, perspiration, nervousness,

36. The issue was addressed with a degree of confusion, as discussed in J. Brent Alldredge, "Continuing Questions in Aviation Liability Law: Should Article 17 of the Warsaw Convention be Construed to Encompass Physical Manifestations of Emotional and Mental Distress?" (2002) 67 J. Air L. & Com. 1345.

37. 151 F.3d 108 (3rd Cir. 1998) (C.A.).

38. *Ibid.* at 112.

39. 255 F.3d 1044 (9th Cir. 2001) (C.A.).

40. *Ibid.* at 1047.

tension and sleeplessness.”⁴¹ Once again the court held that mere physical manifestations of emotional distress could not constitute bodily injuries.

These cases therefore tend to suggest that any “bodily injuries” which result from mental or “emotional” injuries which in themselves could not be identified physically could not fall within Article 17. And yet, against this trend the decision of the U.S. District Court in *Weaver v. Delta Airlines*⁴² suggested another approach by which damages arising from mental injuries could be recovered. In that case mechanical problems to the aircraft necessitated an emergency landing. This event caused the plaintiff to experience emotional distress and she was diagnosed as suffering post-traumatic stress disorder. However, her claim included expert medical evidence which said that the “impact on Kathy Weaver of the events which occurred on that flight was extreme and included biochemical reactions which had physical impacts upon her brain and neurologic system.”⁴³ Faced with such evidence of mental injury, Chief Judge Shanstrom noted that the plaintiff’s

action here is distinguishable from previous cases, because her claim is presented as a physical injury and she relies on recent scientific research explaining that post-traumatic stress disorder evidences actual trauma to brain cell structures. Weaver’s post-traumatic stress disorder evidences an injury to her brain, and the only reasonable conclusion is that it is, in fact, a bodily injury.... The legal question in this case is simply whether the Warsaw Convention allows recovery for this particular kind of bodily injury, i.e., a brain injury (even with slight physical effects). The answer must be yes.⁴⁴

3. *Morris v. KLM*

The *Weaver* decision might best stand up to the passage of time because it was the judgment which was picked up by the House of Lords in its recent decision in *Morris v. KLM Royal Dutch Airlines*.⁴⁵ *Morris* is a significant case for two reasons. Firstly, in endorsing the rule in *Floyd*, it illustrates the international consistency applied to the interpretation of Article 17. However, by adopting the reasoning in *Weaver*, the House of Lords also appears to have provided a senior court judgment which sheds light on the ambiguity which remained from the *Floyd* judgment.

Morris actually concerned two appeals. However, only the first involved “international carriage.” In that case, the sixteen-year-old female

41. *Ibid.* at 1045.

42. 56 F. Supp. 2d 1190 (U.S. Dist. Ct. Mont. 1999).

43. *Ibid.* at 1191.

44. *Ibid.* at 1192.

45. [2002] U.K.H.L. 7 (H.L.) [*Morris*, HL].

plaintiff, was travelling from Malaysia to Amsterdam. She was seated next to two men. After eating a meal she fell asleep. She awoke later to discover the hand of the man next to her touching her thigh, caressing her between her hip and knee. She got up and reported this to one of the cabin crew. However, after the flight she became depressed and went to see a doctor who diagnosed that she was suffering from clinical depression. Anti-depressive treatment was started. When the plaintiff sued the carrier, although she did not seek to establish any physical injury, she was successful. However, this finding was overturned by the Court of Appeal which considered that physical injury and mental illness are distinguishable, with the former involving damage to the structure of the body, while the latter affects the well-being of the mind without organic change to the body. As the plaintiff did not contend that she suffered a physical injury, the carrier's appeal was successful. And yet, although this decision was confirmed by the House of Lords, the reasoning with regard to mental illness was not so clearly delineated.

The House of Lords endorsed the reasoning in *Weaver*. Lord Hope (with whom Lords Nicholls and Steyn agreed) considered that *Weaver* broke new ground,⁴⁶ and said that if physical changes to the brain could be established, it would not be right to refuse compensation for an Article 17 claim.⁴⁷

Lord Hobhouse (with whom Lord Nicholls agreed), when explaining the burden on the plaintiff, said "bodily injury" means:

a change in some part or parts of the body of the passenger which is sufficiently serious to be described as an injury. It does not include mere emotional upset such as fear, distress, grief or mental anguish.... A psychiatric illness may often be evidence of a *bodily injury* or the description of a condition which includes *bodily injury*. But the passenger must be prepared to prove this, not just prove a psychiatric illness without evidence of its significance for the existence of a *bodily injury*.⁴⁸

He expressed dissatisfaction with the distinction drawn between a "bodily injury" and a "mental injury." He noted that the latter expression formed the "cornerstone of the reasoning of the Court of Appeal" but that it was "devoid of actual meaning" because it related to the mind which is a metaphysical concept. Thus, the expression "created a false antithesis" with "bodily injury."⁴⁹ Summing up the changes which have occurred in dealing with such injuries since 1929, His Lordship said:

46. *Ibid.* at 118.

47. *Ibid.* at 125.

48. *Ibid.* at 143.

49. *Ibid.* at 158.

There now exist techniques for investigating the functioning of the living brain and the central nervous system together with the roles played by neurotransmitters, hormones and electrical impulses. Physical changes can be scanned and observed using sophisticated instruments and the alterations in the normal chemistry of the brain can now be detected by sophisticated sampling techniques. What was previously invisible can now be made visible. These developments have two relevant results. It can now be shown by valid scientific techniques that certain psychiatric symptoms correspond to physical changes in the brain.⁵⁰

Thus, such "mental injuries" could be "bodily injuries." Unfortunately for the plaintiff, her claim failed on a more basic point. Although she pleaded a *prima facie* case of bodily injury in relation to her psychiatric injury, she also pleaded that the assault did not cause her any physical injury and (to use Lord Hobhouse's words) "she has implicitly stated that she will not be able to prove any bodily injury."⁵¹

Of course, although the decision in *Morris* provides evidence that illnesses of the brain can fall within the terms of Article 17, it is also clear that there are limits to what scientific observation can disclose. No doubt in years to come, many more "mental injuries" will be physically identifiable and the "bodily injury" restriction will not appear so obnoxious. However, in the meantime, the continued use of this language in the *Montreal Convention* represents a clear and intended limitation on passengers' rights against carriers. It is a limitation which stands despite early efforts in the negotiating of the Convention to establish a separate basis for claims for mental injury, efforts which were abandoned when it was discovered broad support would not be obtained.⁵² Thus, until such time as science can identify the effects on the brain of such incidents as have occurred during air travel, be it hijackings, engine failure and even non-physical

50. *Ibid.* at 152.

51. *Ibid.* at 184.

52. When the matter was raised in the House of Commons, the British Secretary of State for the Environment, Transport and Regions said:

In preparation for the Diplomatic Conference held in Montreal in May 1999, at which the Convention was signed, the UK supported a proposal by Sweden for a separate head of claim for mental injury. Prior to the Conference, however, that proposal was withdrawn from the draft text of the Convention. Our position was that a separate claim for mental injury could be advocated only if there was sufficient support to gain global agreement. There was not sufficient support so, in the interest of securing the best deal for the UK, it was decided to support the text of the Convention without a separate reference to mental injury.

UK, H.C., *Parliamentary Debates*, Session 1999-2000, vol. 353, col. 87 W-88W (3 July 2000) (Mr. Keith Hill, Parliamentary Under Secretary of State for the Environment, Transport and the Regions), online, United Kingdom Parliament <<http://www.publications.parliament.uk>>. Also reproduced in *Morris*, HL, *supra* note 45 at 31.

assault, those passengers who suffer such personal injuries will be without a remedy.⁵³

IV. The "Accident" threshold and DVT

The second major difficulty in establishing a claim under Article 17 is proving that the death or injury was caused by an accident on board the aircraft or during the operations of embarking or disembarking. The limits of embarking and disembarking have been fairly well established, and are determined on the basis of the passenger's activity at the time of the accident, their location at that time, and the extent to which the carrier was exercising control over the passenger.⁵⁴ However, the requirement that the death or injury be caused by an "accident" has proved more troublesome, particularly in common law jurisdictions where the law of negligence has predominated in personal injuries cases for much of the last century. This is because the claim based on negligence is predicated on the rule that a defendant is required to pre-empt reasonably foreseeable dangers to people to whom they owe a duty of care,⁵⁵ including those who are in their care. In contrast, the requirement of an "accident" to cause an injury, and the way that term has been understood, has had the effect of greatly narrowing the number of claims to which a carrier might otherwise have been subject.

1. *Air France v. Saks*

The distinction between a claim in negligence and a claim arising under Article 17 was clearly established in 1985 in the leading decision of the U.S. Supreme Court in *Air France v. Saks (Saks)*.⁵⁶ In that case, a passenger's claim for injury was based on pain and hearing loss in her left ear, caused by the pressurization of the aircraft cabin during the aircraft's descent. Initially, the plaintiff had attempted to argue that her injury was caused by the negligent maintenance of the pressurization system.

53. Nevertheless, it has been written by John F. Easton, Jennifer E. Trock & Kent A. Radford, "Post Traumatic 'Lesion Corporelle': A Continuum of Bodily Injury Under the Warsaw Convention" (2003) 68 J. Air L. & Com. 665 at 698 that "plaintiffs will continue to push the envelope with the backing of experts and application of advances in science and medicine for more rulings to the effect that PTSD [ie "post-traumatic stress disorder"] is itself a physical injury...." This view is almost certainly correct. However, the authors also note that the analysis of such claims involving emotional injury is unlikely to change under the present Convention formulation.

54. See *Day v. Trans World Airlines*, 393 F.Supp. 217 (S.D.N.Y., 1975) (injuries and deaths incurred in airport terminal during terrorist attack after passengers checked in, proceeded through passport control and were situated in the departure lounge occurred during "embarkation"); *Evangelinos v. Trans World Airlines*, 550 F.2d 152 (3rd Cir. P.A., 1977) (same facts); *McCarthy v. Northern Airlines, Inc.*, 56 F.3d 313 (1st Cir. Mass., 1995) (injury incurred on airport escalator after passenger had checked in but prior to passenger reaching departure gate held not to have occurred during embarkation).

55. This is, of course, the most fundamental of principles derived from *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) [*Donoghue*].

56. 470 U.S. 392, 105 S. Ct. 1338 (1985) [*Saks*].

However, this argument was abandoned when it was conceded that the system had operated in the usual manner. At this stage, the plaintiff also acknowledged that the sole issue was whether her injury had been caused by an accident. On this basis her claim was struck out by the District Court because it was held not to have been caused by an "accident." When the question of what constituted an accident came before the Supreme Court, O'Connor J, who delivered the judgment of the court, said:

We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to a passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries.⁵⁷

In addressing the plaintiff's specific claim Her Honour observed that:

But when the injury indisputably results from the passenger's own 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.⁵⁸

Immediately apparent in this definition is the very different basis of liability from that in negligence. Where under the law of negligence reasonable foreseeability forms the basis of a claim, the essential element of an accident is that it is not foreseeable but unexpected. Indeed, if the danger is foreseeable – indeed (in a brutal juxtaposition) *if the danger is certain – then there can be no accident because it is not unexpected.*

Despite the apparent clarity of the *Saks* definition of accident, subsequent courts in the United States have grappled with how broadly this notion of an "accident" needs to be construed. Generally, accidents arising out of such "risks [as] are characteristic of air travel"⁵⁹ will be covered without difficulty and included within Article 17. However, tortious acts of third parties have proved problematic. Hijackings and terrorist attacks, for example, have been stated to clearly fall within Article 17.⁶⁰ Similarly, in *Olympic Airways v. Husain*⁶¹ when a flight attendant repeatedly refused requests to move an asthmatic passenger away from the smokers' section of cabin, the carrier was held liable when the passenger subsequently died from a severe asthma attack. In contrast, in *Price v. British Airways*,⁶² when the injury to one passenger occurred when he was punched without

57. *Ibid.* at 405.

58. *Ibid.* at 406.

59. *Curley v. American Airlines* 846 F. Supp. 280 (S.D.N.Y., 1994) at 283.

60. *Ibid.*

61. 540 U.S. 644 (2004), 2004 U.S. LEXIS 1620 (S. Ct., 2004) [*Olympic Airways*].

62. 1992 U.S. Dist. LEXIS 9581 (S.D.N.Y., 1992).

provocation by another passenger, it was determined that this was not an accident under Article 17 because the “fracas was not a characteristic risk of air travel.”⁶³ Despite these extremes, a reconciliation of these readings appears to have been found in the judgment in *Wallace v. Korean Air*.⁶⁴ In that case, a sleeping passenger was sexually molested by the passenger seated beside her. However, despite this attack being made by a third party unconnected with the carrier, the United States Court of Appeal was able to point to certain characteristics of air travel which contributed to making this unexpected or unusual event an Article 17 “accident.” These included the passenger’s confined position in a cramped seat between two men she did not know, in a cabin with the lights turned down, and her inability to escape immediately when she woke up. Added to this was the total failure of even a single flight attendant to notice a problem – something which was clearly unexpected. The claim was allowed to proceed.

A further problem identified has been that that which is “unusual or unexpected” does not always constitute an accident, because it is not an “event or happening” as required in *Saks*. Such an argument was advanced in *Olympic Airways v. Husain* when (as noted above) the flight attendant refused requests that an asthmatic passenger be moved from the smoking section of an aircraft. The focus of this argument was on the failure of the attendant to move the passenger. However, the argument was swiftly rejected by the U.S. Supreme Court, which considered that the flight attendant’s “rejection of an explicit request for assistance would be an ‘event’ or ‘happening’.”⁶⁵ This was clearly something more than mere inaction.

The force of the “non-event or happening” argument is more accurately appreciated in a case like *Potter v. Delta Air Lines*.⁶⁶ In that case, the United States Court of Appeal refused a claim for injuries caused by the failure of the plaintiff to ask an obnoxious passenger to awake and return his reclined chair to its upright position, the result of which was that the plaintiff tripped and fell when she attempted to return to her seat. This claim was refused because although a rude and hostile passenger is unusual or unexpected, “neither a fully reclined seat nor the act or sleeping in it is an unusual or unexpected event or happening on an airplane.”⁶⁷ Once again, the difference between a claim in negligence and an Article 17 claim is apparent. Whereas inaction might give rise to a claim in the

63. *Ibid.*

64. 214 F.3d 293 (2nd Cir. N.Y., 2000).

65. *Olympic Airlines*, *supra* note 61 at 21.

66. 98 F.3d 881 (5th Cir. Tex., 1996).

67. *Ibid.* at 884.

former, it is an irrelevant issue to the determination of whether an accident has occurred.

And yet, despite the limitations in these readings of what is meant by "accident," the rule in *Saks* has continued to be endorsed not only by courts in the United States but also in many other jurisdictions, including Great Britain,⁶⁸ Canada⁶⁹ and Australia,⁷⁰ and it is clearly the rule applicable to Article 17.

2. *Deep Vein Thrombosis*

The limiting effect of the "accident" requirement in Article 17 has recently received very widespread prominence due to the greater awareness in the travelling community of deep vein thrombosis ("DVT"). This is particularly the case in Great Britain and Australia due to the recent and substantial class actions which were commenced in those countries, *The Deep Vein Thrombosis and Air Travel Group Litigation* (the "DVT Group Litigation")⁷¹ and *Povey v. Qantas Airways Limited Ltd* ("Povey"),⁷² and the atmosphere of broad media coverage in which they were conducted.⁷³ DVT was described in the pleadings in the *DVT Group Litigation* in the following terms:

Deep Vein Thrombosis ("DVT") is a condition in which a small blood clot or thrombus forms mainly in the deep veins of the legs. Such clots can be present without symptom or signs, but may give rise to swelling of the affected leg, sometimes accompanied by pain and local tenderness. Complications arising from DVT may be life-threatening. Complications occur when a thrombus breaks away from the wall of the vein to which it is attached and is carried along with the flow of the blood as an embolus. If the embolus reaches a blood vessel through which it cannot pass, it blocks the vessel, thereby producing an embolism. The most serious of

68. *Morris*, HL, *supra* note 45 at 71 per Lord Hope, 134 per Lord Hobhouse.

69. *Quinn v. Canadian Airlines International*, [1997] O.J. No. 1832, 1997 Carswell Ont. 1583 (C.A.).

70. In *Agtrack (NT) (t/as Spring Air) v. Hatfield*, [2003] V.S.C.A. 6 at para. 15, the Victoria Court of Appeal endorsed the rule in its determination of the meaning of "accident" in relation to a claim arising under legislation dealing with a domestic air carriage but which was drafted in the same terms. The High Court of Australia also endorsed *Saks* in *Povey*, H.C.A., *supra* note 10.

71. *DVT*, *supra* note 8.

72. See *Povey*, H.C.A., *supra* note 10; *Povey* V.C.A., *supra* note 9.

73. No doubt further prominence in the community was given to these cases because although the same law was being applied, on the same day in 2002, an English judge struck out the claim in that country while an Australian judge allowed the Australian claim to survive. Ultimately, on appeal, the results would conform. However, in the short term world of newspaper sales, this was just the sort of rift between Australia and the "mother country" which can have the effect of selling more newspapers. See Fergus Shiel, "Airlines face claims after clot ruling" *The Age* (21 December 2002); David Droad, "British blood clot ruling could prompt appeal in local case" *The Sunday Age* (22 December 2002). Both judgments, *Povey v. Civil Aviation Authority & Ors*, [2002] V.S.C. 580 and *The Deep Vein Thrombosis and Air Travel Litigation*, [2002] E.W.H.C. 2825 (Q.B.), were delivered on 20 December 2002.

these occurs in the lungs (a pulmonary embolism), which gives rise to chest pain and breathing difficulties and, in the worst cases, death from respiratory failure.⁷⁴

The concern is that as illustrated in the pleadings (quoted below), a DVT injury is very clearly the sort of injury which could be described as arising in circumstances “characteristic of air travel.” Further, as the numbers of claimants involved in the class actions indicate, it is widespread. The failure to allow the claims has left these existing plaintiffs and untold future claimants without a remedy against the carriers.

The decisions in these two cases were not without precedent. For example, back in 1976 in one of the earliest DVT cases, the Supreme Court of New York decided in *Scherer v. Pan American World Airways*⁷⁵ that there was no “accident” as required under Article 17 because the plaintiff’s “thrombophlebitis” resulted from the plaintiff “merely ‘sitting’” during a flight from Tokyo to California. More recently, in *Rodriguez v. Ansett Australia*⁷⁶ the United States Court of Appeal rejected a claim on the basis of the plaintiff’s failure to establish that an “accident” caused the DVT, a decision echoed in Canada by the Ontario Superior Court of Justice in *McDonald v. Korean Air*⁷⁷ and in Germany by the Regional Court of Frankfurt am Main in *Reinder Volander v. Deutsche Lufthansa*.⁷⁸ The English and Australian cases have now affirmed these decisions and did so in remarkably similar ways.

3. *The DVT Group Litigation*

In the English *DVT Group Litigation*, fifty-five claims were made against twenty-seven carriers.⁷⁹ In this respect it was similar to *Povey*. Other similarities between the two cases included that in both sets of litigation, as in those other cases noted above, the key issue was whether the DVT was caused by an “accident.” In both cases, the carrier sought to have the claims struck out because there was no accident. Finally, both cases also seemed to devolve into a discussion on two contentions by the

74. *D.V.T.*, *supra* note 8 at 6.

75. 54 A.D. 2d 636 (S.C.N.Y., 1976).

76. 383 F.3d 914 (9th Cir. Cal., 2004).

77. 2002 Can LII 3901, Court file no: 01-B30373 (O.N.S.C.), online: <www.canlii.org> (date accessed: 22 January 2004).

78. Frankfurt am Main Regional Court, File No 2-21 O 54/01, 29 October 2001, A. 231 in Condon & Forsyth LLP (February 2002) *The Liability Reporter* 38, online: <http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/legal/file/2003_Liability_Reporter.pdf> (date accessed: 8 March 2004).

79. This is the figure given in the judgment of Nelson J. at first instance; see *Deep Vein Thrombosis and Air Travel Group Litigation*, [2002] E.W.H.C. 2825 (Q.B.) at para. 1 [*D.V.T.*, QB]. However, before the Court of Appeal the numbers of parties were expressed as 24 passengers with claims against 18 carriers, see *D.V.T.*, *supra* note 8 at para. 2.

plaintiffs. The first contention was, could the failure to warn passengers of the dangers of DVT in itself constitute an accident? Secondly, and in the alternative, could a series of incidents of commercial air travel constitute a single accident?

In the *DVT Group Litigation*, the specimen pleading said the DVT was the fault of the defendant who :

- (1) required the Claimant to sit in a seat which due to its insufficient width, the insufficient distance between it and seats on either side of it and the insufficient distance between it and seats in front and behind it discouraged and/or prevented the Claimant from moving out of his seat throughout the flight or most of the flight and/or restricted his movement and/or caused him to sit in a cramped position while seated in it when it knew or ought to have known that discouraging and/or preventing the Claimant from doing these things or any of them and/or causing him to sit in a cramped position could cause and/or would increase the risk of the flight causing a DVT to the Claimant;
- (2) provided or caused there to be
 - (i) insufficient space between seats
 - (ii) insufficient air pressure within the cabin and/or
 - (iii) insufficient levels of oxygen within the cabin and/or
 - (iv) insufficient amounts of fresh air and movement of that air within the cabin and/or
 - (v) insufficiently humid air within the cabin and/or
 - (vi) a temperature within the cabin that was high or excessively high.⁸⁰

Could this constitute an accident?

At first instance the judge ruled that this could not be an "accident" thereby bringing the plaintiff's claim to an end.⁸¹ This decision was affirmed by the Court of Appeal. In the latter court, Lord Phillips MR (with whom Judge and Kay LJ agreed) adopted the *Saks* rule and swiftly determined that there were two elements to be satisfied to constitute an accident: first, there must be an event, and second, it must be "unusual, unexpected or untoward."⁸² Lord Phillips conceded that such matters as the act of the pressurization, supply of oxygen or temperature of the aircraft cabin could all constitute an "event." However, he also considered that they are "like cramped seats... integral features of carriage."⁸³ He denied "that the existence of these permanent features of the aircraft, or the subjecting

80. *DVT*, *supra* note 8 at para. 6-7.

81. [2003] 1 All E.R. 935; [2002] E.W.H.C. 2825 (Q.B.).

82. *DVT*, *supra* note 8 at para. 23.

83. *Ibid* at para. 22.

of passengers to the carriage in aircraft with these features, is capable of amounting to an event.”⁸⁴ As to whether the failure to warn passengers of the dangers of DVT could on its own constitute an accident, His Lordship plainly stated, “I cannot see how this failure can be categorised as an accident. It was simply something that did not happen – a non event.”⁸⁵ Accordingly, the plaintiffs’ appeal was dismissed.

4. *Povey v. Qantas*

In the Australian case of *Povey v. Qantas* the same result was reached although by a slightly more tortuous route. The plaintiff was running a case to test the claim before the determination of over three hundred other claims which had been issued out of the Supreme Court of Victoria.⁸⁶ The facts of this test case concerned a sixty-one-year-old plaintiff who claimed to have suffered a deep vein thrombosis which led to a pulmonary embolism and a stroke which left him with significant permanent disabilities. The plaintiff argued that his DVT comprised the formation of a blood clot in the deep vein of his right leg and that he first experienced symptoms whilst flying on a British Airways flight between Kuala Lumpur and Sydney. Once again, he claimed his DVT was caused by an “accident,” the content of his pleading being essentially the same as that in the *DVT Group Litigation* quoted above.⁸⁷ At first instance, an application by the carriers to have the claim struck out was refused – subject to amendments being made to his inadequate pleading.⁸⁸ However, before the Victorian Court of Appeal, the claim was struck out, only one of the three judges being concerned that

84. *Ibid* at para. 28.

85. *Ibid* at para. 31.

86. Before the Supreme Court of New South Wales in *Rosenboom v. Qantas Airways*, [2002] N.S.W.S.C. 792 in which case eight plaintiffs were granted their applications to have their D.V.T. claims transferred to the Supreme Court of Victoria, affidavit evidence noted that proceedings had been instituted on behalf of 326 claimants in the latter court, all plaintiffs claiming damages for D.V.T., *ibid* at para. 9.

87. In *Povey*, V.C.A., *supra* note 9 at para. 52, the plaintiff said the D.V.T. was caused by “the conditions of and procedures relating to passenger travel upon the flights.” These “flight conditions” included:

- (a) a confined and restricted physical environment in which the plaintiff was immobilised for long periods of time in a seated position;
- (b) impediments to the plaintiff getting out of his seat during the flights;
- (c) the offer and supply of alcoholic beverages, tea and coffee to the plaintiff during the flights;
- (d) discouraging the plaintiff from moving around the cabin of the aircraft and encouraging the plaintiff to remain seated during the flights;
- (e) the plaintiff not being provided with any information or warning about the risk of D.V.T. or information about the measures which the plaintiff could take to reduce such risk.

The most apparent difference between the pleadings in the two cases appears to be that principles of plain English have penetrated the legal profession in Australia more effectively than in England.

88. *Povey v. Civil Aviation Safety Authority* [2002] V.S.C. 580.

such a substantial piece of litigation should not be disposed of summarily.⁸⁹ However, despite this similarity in the decision with that in the *DVT Group Litigation*, the judgments – or at least the extensive judgment of Ormiston J.A. – deserves some further examination as in dealing with the arguments of the plaintiff, it not only once again sets out the parameters of an accident but clearly addresses the relationship between the tort of negligence and Article 17 – an issue to which lawyers in common law jurisdictions seem to be constantly drawn.

With respect to the issue of whether a failure to warn the plaintiff of the dangers of DVT could constitute an “accident,” the three members of the court were in agreement. It could not. Ormiston J.A. remarked that

I would venture to suggest that it is not the failure to take the step which is properly to be characterised as an accident but rather its immediate and disastrous consequence...It is a slide in reasoning to say that every failure to do that which a carrier ought to do necessarily amounts to an accident, although it may frequently lead to such an event.⁹⁰

For example, His Honour noted that a failure by a pilot to let down the landing wheels may lead to an accident but is not itself an accident. Thus, echoing Lord Phillips M.R., His Honour stated that “[i]t is hard to see how a failure to warn or advise passengers, a ‘non-event’ as it were, can ever constitute an accident within the meaning of the article, not withstanding the presence of surrounding circumstances which would make the failure unusual.”⁹¹

As to whether the “flight conditions” could constitute an accident, Ormiston J.A. (who with Chernov J.A. formed a majority) identified a series of contentions argued by the plaintiff, none of which he considered was correct. The plaintiff first argued that a broad reading should be given to the word “accident” which could “encompass a set of circumstances in which one or more activities could be described as fortuitous” as was set out in the pleadings. However, His Honour found that although the plaintiff’s injury itself might be described as fortuitous or unexpected, the incidents alleged in the pleading which caused the injury could only be described as “undesirable” or “unfortunate” which was insufficient.⁹²

The plaintiff’s second argument was again based on a “chain of circumstances” and suggested that it was sufficient that merely one element in this chain be unusual or unexpected to convert the entire chain into an

89. *Povey, V.C.A.*, *supra* note 9 at para 218, per Ashley J.A.

90. *Ibid* at para. 17.

91. *Ibid* at para. 18.

92. *Ibid* at para. 14

unexpected or unusual event. Ormiston J.A. swiftly rejected this as an incorrect reading of O'Connor's words in *Saks*.⁹³

The plaintiff's third argument focused on the statement by O'Connor J. in *Saks* that Article 17 will not allow a claim which results from "the passenger's own internal reaction to the *usual, normal and expected* operation of the aircraft" [author's italics]. From that proposition, the plaintiff sought to argue that if the injury resulted from "an *unusual or abnormal or unexpected* operation of an aircraft's flight" then that would be sufficient to constitute an accident [author's italics]. The implication was that if the carrier was aware of the dangers of DVT, then it would be usual to issue warnings about these risks. However, as noted above, although this omission or inaction however negligent might lead to an accident, it was not in itself an "accident." Further, Ormiston J.A. pointed out that having the issue of negligence introduced into the discussion of Article 17 claims was misconceived.⁹⁴

The plaintiff's fourth argument relied on what Ormiston J.A. referred to as "textual indications" in other articles of the *Warsaw Convention* to argue that an omission could constitute an "accident." Specifically, reliance was placed on Article 25 where it provides that "the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act of omission of the carrier, his servants or agents, done with intent to cause damage or recklessly."

However, as His Honour pointed out, although a reckless omission may lead to an accident, this does not mean that the accident itself may be constituted by an omission.⁹⁵ Presumably, if Article 25 is being relied upon to remove the Convention's liability limits, this is because an accident – and therefore a claim – has already been established under Article 17. By that stage, the existence of an accident has already been proven and is a matter of history. This is the limited relevance of "omissions" by the carrier to bodily injuries claims; it only applies to the questions of the extent of a proven Article 17 liability. Thus, Ormiston J.A. allowed the carriers' appeals and struck out the plaintiff's claim, a decision with which Chernov J.A. agreed.

This decision was subsequently affirmed by six of the seven judges of the High Court of Australia.⁹⁶ As stated in the joint judgment delivered by four members of the court,⁹⁷ the plaintiff's argument before them was based on three stages. Firstly, it was argued that no distinction should be

93. *Ibid.* at para. 15.

94. *Ibid.* at para. 16-20.

95. *Ibid.* at para. 21.

96. *Povey, H.C.A., supra* note 10.

97. *Ibid.*, per Gleeson C.J., Gummow, Hayne and Heydon JJ.

drawn between “events” or “happenings” on one hand, and “non-events” or “inaction” on the other. Secondly, that what was unexpected or unusual was to be determined from the perspective of the passenger as distinct from the carrier. And thirdly, that an “accident” as a temporal concept might occur during the whole of a flight.⁹⁸ However, beyond this formulation there was little in the plaintiff’s case to differ from the way it was put before the lower courts. In the decision, the *Saks* formulation of “accident” was once again affirmed, and the claim was refused, their Honours observing that “it is central to the appellant’s case that nothing happened on board the aircraft which is in any respect out of the ordinary or unusual”.⁹⁹ Indeed, in taking the discussion a step further, the reasoning in the joint judgment raised one further temporal difficulty concerning the plaintiff’s argument that a failure to warn could be an accident. Where was there a prescription as to *when* such a warning should be given? Article 17 requires the accident to occur if not on board the aircraft, then at least during the operations of embarking or disembarking. However, if the failure to warn – by itself and separately from the other ordinary and usual “flight conditions” – was considered to be an “event” or “happening” and therefore possibly an “accident”, why should the required warning not have been given at a much earlier stage, such as when making arrangements to travel by air, rather than on board the aircraft? Certainly, the Convention gives no instruction on this point. In this context, therefore, their Honours said that the focusing on a failure to warn was a “distraction” and “unhelpful,” because it diverted attention from what actually happened on the aircraft, to “what *might* have, *could* have or perhaps *should* have happened there and why that should be so.”¹⁰⁰ The latter of these two was not the relevant question to be asked.

On this latter point the majority clearly identified a serious flaw with the plaintiff’s case. Indeed, had they found for the plaintiff, the difficulties which could arise in future cases are an easy subject for speculation. For example, had the failure to warn been accepted as an accident under Article 17, then the further possibility arises whereby a carrier could actually give such a warning when a ticket is first issued, but be subsequently liable for a DVT injury incurred because the carrier failed to give a further warning during the flight or during embarkation or disembarkation. Thus is clearly evident at least one of the certainties inherent in the *Saks* definition of “accident,” that an “event” or “happening” is not the same as an “omission.”

⁹⁸ *Ibid.* at para. 29.

⁹⁹ *Ibid.* at para. 40.

¹⁰⁰ *Ibid.* at paras. 41-42.

In summary, the difficulty in the *DVT Group Litigation* and *Povey* was apparent from the start in the pleading quoted above. Probably those pleadings did correctly set out the causes of DVT, but they did not disclose an "accident." Recalling the basic *Saks* definition as being an unexpected or unusual event or happening, any person who has had experience of long-haul air travel would find the basic difficulty in the pleadings was that they read like a very neat summary of the usual incidents of such flights: there was nothing unexpected and there was nothing unusual.¹⁰¹ Indeed, this is the irony of the situation. Because the circumstances which lead to the injury are expected, as is the injury itself, this is precisely the reason why such an injury is not covered by Article 17.¹⁰²

Conclusion

In conclusion, it is clear that there are certain claims for personal injuries experienced during international air travel which neither the *Warsaw Convention* nor the *Montreal Convention* cover. However, that some claims which are so well associated with air travel such as DVT are not covered is perplexing – but nevertheless explicable. As Ormiston J.A. remarked in the final words of his judgment in *Povey*:

If the result seems harsh, and we have no means of testing how the allegations would stand up at common law, then that is the result of this nation's choosing to enter into specific treaty arrangements as are embodied in the Convention, inevitably designed to benefit some and deny rights to other.¹⁰³

If Article 17 does not recognize a claim which occurs during international carriage to which the *Warsaw Convention* applies, then the claimant is left without a claim. This is the clear opinion of courts around the world. The Conventions "cover the field" relating to a passenger's

101. In fact, this is exactly what Chernov J.A. said in his brief judgment in *Povey*, saying that the causes of the plaintiff's D.V.T. did not constitute an "event of happening", and it they did, then his injuries were "his own reaction to standard flight conditions", see *Povey*, V.C.A., *supra* note 9 at para. 47.

102. Indeed, as Ruwantissa Abeyratne has recently noted:

It is an incontrovertible fact that air travel at high altitudes and long durations may involve stagnant recycled air, fluctuations in cabin pressure and jet lag. The passenger may end up at his destination dehydrated and disoriented. Additionally, smaller seat pitch, particularly in economy class, may seriously affect the circulatory process, causing thromboembolism. It is reported that the Aerospace Medical Association Journal in 1988 concluded that the risk of fatal pulmonary embolism was at least 10 times greater after travel than before, linking the risk to long periods of sitting and cramped seating.

This short passage illustrates once again, the reason why the claim for a D.V.T. injury incurred during international air carriage is elusive under Article 17. See Ruwantissa Abeyratne, "The Economy Class Syndrome and Air Carrier Liability", (2001) 28 Transp. L. J. 251, 252-253.

103. *Povey*, V.C.A., *supra* note 9 at para. 41

claims against a carrier for loss incurred during international carriage. Indeed, despite some earlier suggestions that perhaps a claim might exist where the Warsaw Convention fails to provide one, in the last decade both the House of Lords and the Supreme Court of the United States have confirmed that the Convention provides the exclusive cause of action. As Lord Hope of Craighead said in *Sidhu v. British Airways*, when dismissing a claim in negligence for mental injuries brought by a plaintiff outside of the terms of the Convention:

The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law....

...It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available.¹⁰⁴

More recently, this view was endorsed by the Supreme Court of the United States in *El Al Israel Airlines v. Tseng*,¹⁰⁵ when it also disallowed a claim for mental injuries which was being brought outside of Article 17. In addition, the Supreme Court was able to cite during the course of its judgment authorities from a number of other common law jurisdictions, including Canada,¹⁰⁶ New Zealand,¹⁰⁷ and Singapore.¹⁰⁸

However, it is also incongruous that a compromise agreed upon over seventy years ago, should still determine what are the rights and liabilities of carriers and their passengers in the twenty-first century. This appearance of incongruity is highlighted when it is recalled that many of the claims excluded today were barely understood or even recognized in the early days of flight. If only for this reason, Article 17 of the *Warsaw* and *Montreal Conventions* should be reconsidered.

Indeed, if that symbol of an ancient legal system which exists in the English-speaking world today, the common law, can manage to move forward as it has over the last seventy years, then surely so too should a legal regime of more recent descent which stands as a hallmark of

104. *Sidhu*, *supra* note 33 at 453.

105. 525 U.S. 155 (S. Ct., 1999).

106. *Gal v. Northern Mountain Helicopters*, Doc. No. 3491834918, 1998 B.C.T.C. Lexis 1351 (B.C. S.C.). This decision of the Supreme Court of British Columbia was confirmed on appeal, see *Gal v. Northern Mountain Helicopters*, [1999] 11 W.W.R. (B.C.C.A.); see also *Navel Torres v. Northwest Airlines* (1998), 159 D.L.R. (4th) 67 (Ont. Gen. Div.).

107. *Emery Air Freight Corp v. Nerine Nurseries*, [1997] 3 N.Z.L.R. 723 (H.C.).

108. *Seagate Technology International v. Changi International Airport Services*, [1997] 3 Sing. L.R. 1 (C.A.).

globalization.¹⁰⁹ In fact, in matters regulating so obvious a symbol of the modern age as air travel, a similar level of modernity should also be sought. The aircraft which fly the skies of today are a far cry from their predecessors of the 1920s. Arguably, the same should be said of the laws which govern the incidents which occur on those aircraft. It is high time that the states who are parties to the Warsaw system and the *Montreal Convention* reconsider whether the balance of the rights between carriers and their passengers should be revisited.¹¹⁰

109. Coincidentally, it is over such a time frame - which is contemporaneous with the existence of the Warsaw System - that the law of negligence has developed from that basic case dealing with the lady who became ill after taking a drink from a bottle which also contained a snail, see *Donoghue, supra* note 55.

110. It is perhaps worth noting that even prior to the D.V.T. decisions discussed in this article, some states were slow to embrace the *Montreal Convention* for other reasons. For example, the Department of Transport and Regional Services in Australia released a discussion paper in January 2001 to canvass whether the convention should be adopted, see DOTARS, *supra* note 22. However, in the wake of the terrorist hijackings of 11 September of that year, the Department put such matters to one side. As the Department's *Annual Report 2001-02* stated: "The events of 11 September 2001 forced a re-allocation of resources...which meant that there was limited progress on dealing with the responses to the January 2001 departmental discussion paper...", Austl., Department of Transport and Regional Services, *Annual Report 2001-02* (Canberra: Department of Transport and Regional Services, 2002), online: <<http://www.dotars.gov.au/dept/annrpt/0102/3-2-2-18.htm>> (date accessed: 27 March 2004). How convincing a reason for delay this is will vary from commentator to commentator. However, in 2004 the matter was still under consideration.

