

By Brian Bradley

# Aircraft 'ACCIDENT' under WARSAW – Is there clarity?

This article examines some of the leading international and Australian cases to discern whether there is a commonly accepted and definitive view as to what constitutes an 'accident' within the meaning of the Warsaw System.

**B**efore the Warsaw Convention of 1929 (formally entitled Convention for the Unification of Certain Rules Relating to International Carriage by Air),<sup>1</sup> the rights and liabilities of a passenger or of the owner of goods in international air transport and the corresponding liability of the carrier depended upon the laws of the countries between and over which the carriage went and upon the terms of the contract made in particular cases.<sup>2</sup> The Comité International Technique d'Experts Juridiques Aériens (CITEJA) was created to draft the Warsaw Convention in order to 'put an end to the "conflict of laws" problems inherent in international carriage by air'.<sup>3</sup> The original Convention, together with several amending supplementary instruments, rules and regulations, make up the 'Warsaw System'.<sup>4</sup>

### INTERPRETATION OF THE WARSAW SYSTEM CONVENTIONS

The need for international courts to apply a consistent and uniform approach to the interpretation of the conventions is well recognised. In *Povey v Qantas Airways Limited*, it was stated:

'Importantly, international treaties should be interpreted uniformly by contracting states. But, of course, the ultimate questions are, and must remain; what does the relevant treaty provide, and how is that international obligation carried into effect in Australian municipal law?'<sup>5</sup>

In *Deep Vein Thrombosis and Air Travel Group Litigation*, Lord Scott stated:

'Judicial formulation of the characteristics of an Article 17 accident should not, in my opinion, ever be treated as a substitute for the language used in the Convention.

I... express my respectful disagreement with an approach to an interpretation of the Convention that interprets not the language of the Convention but instead the language of the leading judgment interpreting the Convention. This approach tends, I believe, to distort the essential purpose of the judicial interpretation, namely, to consider what "accident" in Article 17 means and whether the facts of the case in hand can constitute an Article 17 accident.'<sup>6</sup>

### THE WARSAW SYSTEM AND THE CIVIL AVIATION (CARRIERS' LIABILITY) ACT 1959 (CTH)

The Montreal Convention 1999 (formally entitled Convention for the Unification of Certain Rules for International Carriage by Air)<sup>7</sup> establishes an alternative carriage by air regime for determining the liability of air carriers.<sup>8</sup> It has 'sought to address the problems that developed in the Warsaw System by substantially raising carriers' liability limits, presenting the liability framework in a single consistent convention and updating the language and terminology used'.<sup>9</sup>

Article 17 of the Montreal No. 4 Convention provides:

'The carrier is liable for damage sustained in the event of the death or wounding of a passenger or other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place onboard the aircraft or in the course of any of the operations of embarking or disembarking.'<sup>10</sup>

Article 17 is slightly different in its wording from its counterpart in the earlier Warsaw System Conventions<sup>11</sup> and Article 17 of the 1999 Montreal Convention. According to decided cases, the changes have not altered the interpretation of 'accident'.

International air carriage by Australian carriers is primarily governed by international conventions which have been ratified and given effect in Australia through legislation. The *Civil Aviation (Carriers' Liability) Act 1959 (Cth)*<sup>12</sup> (the *CACL Act*) provides that the 1999 Montreal Convention,<sup>13</sup> the Warsaw Convention and the Hague Protocol,<sup>14</sup> the Warsaw Convention without the Hague Protocol,<sup>15</sup> the Guadalajara Convention<sup>16</sup> and the Montreal No. 4 Convention<sup>17</sup> all have the force of law in Australia.<sup>18</sup>

The *CACL Act*, combined with its state counterparts, governs the liability of airlines and charter operators for death and bodily injury in domestic carriage to which the conventions do not apply.<sup>19</sup>

Section 28 of the *CACL Act* was amended with effect from 31 March 2013 to substitute the term 'bodily injury' for 'personal injury' (bringing the section into conformity with the Warsaw System Conventions).<sup>20</sup> As amended, s28 provides:

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'... the carrier is liable for damage sustained by reason of the death of the passenger or any bodily injury suffered by the passenger resulting from an accident which took place onboard the aircraft or in the course of any of the operations of embarking or disembarking'.

For accidents occurring on or after 31 March 2013, passengers will be unable to recover damages for mental harm unaccompanied by bodily injury (under s28).<sup>21</sup>

### ACCIDENTS UNDER ARTICLE 17

The decision in 1985 of the US Supreme Court in *Air France v Saks*<sup>22</sup> is often described as the seminal decision on 'accident' within Article 17.

The notion that *Saks* is or should be the basis for further development of the interpretation of accident within the meaning of Article 17 is contrary to Lord Scott's statement in *Deep Vein Thrombosis and Air Travel Group Litigation*.<sup>23</sup>

*Saks* was a passenger on an Air France flight from Paris to Los Angeles. During the descent of the aircraft to land at Los Angeles, *Saks* suffered a left ear injury as a result of a normal change of air pressure in the aircraft. The Supreme Court held that the injury was not caused by an Article 17 accident.

Justice O'Connor, who delivered the judgment of the Court, concluded that:

- Liability under Article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger;
- An injury which results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft is not an Article 17 accident;
- Distinguishing causes that are 'accidents' from causes that are 'occurrences' requires drawing a line when 'reasonable people may differ widely as to the place where the line should fall' (referring to *Schlesinger v Wisconsin*<sup>24</sup>);
- 'Any injury is the product of a chain of causes and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger';
- The Court's definition of accident 'should be flexibly applied after assessment of all of the circumstances surrounding a passenger's injuries'.<sup>25</sup>

In the course of the judgment, the Court referred to decisions of lower US courts<sup>26</sup> which had found torts committed by terrorists, hijackers and fellow passengers to be Article 17 accidents as examples of the broad and flexible interpretation of Article 17.

In *Saks*, the US Supreme Court did not prescribe 'the abnormal operation of the aircraft or its equipment' as a necessary prerequisite for an Article 17 accident to have occurred. Justice O'Connor's words were '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...'<sup>27</sup>

Nor did the judgment in *Saks* suggest that an Article 17 accident must be 'characteristic of air travel' or involve 'risks inherent in air travel'. Nevertheless, such criteria have frequently been brought into the determination of what constitutes an Article 17 accident by lower US courts since *Saks*.

In *Tsevas v Delta Airlines*,<sup>28</sup> a US district court held the defendant carrier liable for injuries suffered by the plaintiff resulting from a sexual assault by an intoxicated male passenger. The plaintiff succeeded on the grounds that the air crew had acted abnormally and unexpectedly by continuing to serve alcohol to a drunken passenger and failing to assist after her complaints regarding his behaviour prior to the assault. In an *obiter*, the court commented that where a passenger failed to show that the aircraft or its crew operated in an abnormal or unusual manner, there would be no accident under Article 17.<sup>29</sup>

In *Wallace v Korean Air*,<sup>30</sup> the plaintiff passenger awoke to find that the male passenger seated next to her was fondling her genitals. The plaintiff had been seated between two men in economy class with the cabin lights dimmed. The assailant's assault on the plaintiff involved significant preparation, which had gone unnoticed by the flight attendants. The majority of the 2<sup>nd</sup> Circuit Court held that an 'accident' had occurred because the characteristics of air travel increased the plaintiff's vulnerability to the assault which was an unexpected or unusual event happening external to the passenger. In the same case, Pooler J found for the plaintiff but on different grounds. He held that the finding of the lower court (that the assault was not an accident under Article 17) was contrary to *Saks* and that an assault by a fellow passenger is an unexpected and unusual event and thereby satisfies the definition of an accident. He added that *Saks* did not 'authorise courts to add more hurdles for a plaintiff to overcome'.<sup>31</sup>

In the English Court of Appeal case of *KLM Royal Dutch Airlines v Morris*,<sup>32</sup> the plaintiff (aged 15 years) was an unaccompanied passenger on a KLM flight. She awoke to find she was being indecently assaulted by the male passenger seated next to her. She developed a depressive illness as a result of the assault. In the judgment, Lord Phillips MR stated:

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

Liability under Article 17 only arises in relation to an accident that occurs onboard the aircraft or in the course of embarking or disembarking. Thus the accident will occur at a time when the passenger is in the charge of the carrier. In those circumstances, it seems to us to be a logical and reasonable scheme of liability that, whatever the nature of the accident, a passenger should be entitled to be compensated for its consequences where the carrier is not able to discharge the burden imposed by Article 20.<sup>33</sup> In the end, the plaintiff failed to establish liability against KLM because her depressive illness was not a 'bodily injury' within the meaning of Article 17. An appeal by the plaintiff to the House of Lords from that finding failed.<sup>34</sup>

In *Olympic Airways v Husain*,<sup>35</sup> a passenger was allergic to cigarette smoke. He had been seated with his wife (the plaintiff) in seats close to the smokers' section of the aircraft. The plaintiff's requests to a flight attendant for her husband to be moved to seats away from the smoke were denied, even though alternative seating was available. The passenger

died onboard the aircraft. The plaintiff brought an action under Article 17 of the Warsaw Convention against Olympic Airways, which admitted that the deceased's death was caused by the cigarette smoke but denied that an 'accident' had occurred on board the aircraft. The US Supreme Court held by majority that a flight attendant's refusal to reseat the passenger was a link in the causal chain which resulted in his death and it was 'an unusual or unexpected event or happening external to the passenger'. Olympic Airways was held liable under Article 17 to pay damages to the plaintiff.

In *Barclay v British Airways*,<sup>36</sup> the plaintiff was a passenger on a British Airways flight from Arizona to London. In attempting to get into her seat, she trod on a plastic strip which covered the seat tracking causing her to slip and suffer injury. The plastic strip was standard to the aircraft. In delivering the judgment of the English Court of Appeal, Laws LJ stated that 'Article 17.1 contemplates, by the term "accident", a distinct event, not being any part of the unusual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger'. The Court of Appeal found that an accident within Article 17 had not occurred because there had been no event independent of anything done or omitted by the passenger.

**AUSTRALIAN CASES**

In *Povey v Qantas Airways Limited*,<sup>37</sup> the plaintiff alleged that he had suffered deep vein thrombosis (DVT) as a passenger

on flights with Qantas and British Airways. The Victorian Court of Appeal had made orders striking out the plaintiff's statement of claim on the grounds that the pleaded facts did not establish a cause of action. The argument in the High Court centred on the meaning of 'accident' under Article 17.

The High Court held that the DVT was not an 'accident' within the meaning of Article 17. In regard to Article 17, the Court stated:

'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. What that reveals is that the "accident" in the sense of an "unfortunate event, a disaster, a mishap" is not to be read as being sufficiently described as an adverse physiological consequence which the passenger has suffered.'<sup>38</sup>

The Court accepted that an 'accident' may happen because of some act or series of acts, or because of some omission or series of omissions, or because of some combination of acts and omissions. A mere failure to warn of the risks of DVT was, however, a non-event which did not fall within the meaning of 'accident'.

In *Povey*, the High Court neither extended nor restricted the *Saks* definition of accident. Criteria such as 'risks characteristic of aviation' and 'abnormal operation of the aircraft or its equipment' were not adopted. In *Povey*, the parties accepted the correctness of the decision in *Husain*, >>

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which the High Court distinguished on its facts from *Povey* where 'nothing happened on board the aircraft which was in any respect out of the ordinary or unusual'.<sup>39</sup>

In *Air Link Pty Ltd v Paterson*,<sup>40</sup> the New South Wales Court of Appeal held that an accident had occurred within the meaning of s28 of the CACL Act, when a portable step which had been placed at the foot of a staircase leading down from an aircraft moved as the plaintiff stepped on to it, causing him to fall and suffer injury. In the judgment, Allsop and Ipp JA cast doubt upon the correctness of:

'a number of United States cases which restrict the meaning of "accident" in Article 17 to events not only that are external to the passenger and unusual or unexpected but also involve a malfunction or abnormality in the aircraft's operation... There must be at least some doubt that these cases involve judicial glosses on the words of the article that do not find their source in the words of Article 17 itself, or indeed in the words of O'Connor J in *Saks*.'<sup>41</sup>

In the same case, Sackville J was critical of the statement by Laws LJ in *Barclay* that Article 17 'contemplates a distinct event not being part of the usual, normal and expected operation of the aircraft'.<sup>42</sup> Sackville J stated that it was not necessary for the passenger to show that 'the event causing the injury occurred independently of anything done or omitted by the passenger... What is required is proof that the injury was caused by an unexpected or unusual event that is external to the passenger'.<sup>43</sup>

In *Brannock v Jetstar Airways*,<sup>44</sup> the plaintiff pleaded that he was on a stairway within the terminal in the course of embarking when he turned, lost his footing, fell and was injured. The Queensland Court of Appeal held by majority that the plaintiff's claim should be struck out because the:

'accumulation of circumstances as pleaded by the plaintiff did not create "an event external to the passenger".

The stairs were an ordinary object of embarkation.

Mr Brannock's approach to embarking and using the stairs was peculiar to him. Mr Brannock's pleaded case is no different from the tripping and slipping cases where recovery has been denied.<sup>45</sup>

In *Kannagara v Qantas Airways Ltd*,<sup>46</sup> the plaintiff, while boarding a Qantas aircraft, attempted to put his leg over

the arm rest of the aisle seat in order to get to his window seat. While doing so, other passengers came into physical contact with him, causing him to lose balance, fall and suffer injury. The District Court found that the plaintiff had failed to establish that the physical contact with other passengers was unusual, untoward or unexpected, as required by s28 of the CACL Act. His action failed.

In the recent case of *Nguyen v Qantas Airways Limited*,<sup>47</sup> the plaintiff, who was a passenger on an international flight, alleged that he had suffered back injury as a result of a defective seat. The plaintiff's evidence that the seat was defective was rejected. The Queensland Supreme Court held that there had been 'no unusual and/or unexpected event that was external to the passenger' and that the back injury was not suffered 'by reason of an accident'.

### CONCLUSION

It was held in *Saks* and *Povey* that for a happening to be an 'accident' within Article 17 it must be unexpected or unusual. The question as to 'unexpected by whom?' was answered by Lord Scott in *Deep Vein Thrombosis and Air Travel Group Litigation*, where he stated:

'It cannot be to the point that the happening was not unintended or unexpected by the perpetrator of it or by the person sought to be made responsible for its consequences. It is the injured passenger who must suffer the "accident" and it is from his perspective that the quality of the happening must be considered.'<sup>48</sup>

The death and bodily injuries suffered by the passengers in the hijacking, terrorist and passenger assault cases referred to in *Saks* could not have been caused by an 'accident' if it were otherwise.

Criteria such as 'risk characteristic of aviation' and 'the abnormal operation of the aircraft and its equipment' have not been adopted by Australian courts either to expand or restrict the meaning of 'accident'. Such criteria are not sanctioned by *Saks* or *Povey*. While in both *Saks* and *Povey* it was stated that the 'accident' must be something 'external to the passenger', the statement must be read in the context in which it was made. In *Povey*, it was in the context of explaining that 'suffering DVT is not an accident'.<sup>49</sup> In *Saks*, it was in the



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context of a case where the injury 'results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft'.<sup>50</sup> In *Saks*, the court went on to say 'we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger'.<sup>51</sup> What is meant by 'an event external to the passenger' is far from clear, except that an injury that is an internal physiological change suffered by the passenger, which is not caused by an unusual or unexpected event, is excluded.

Many accidents – for example, slip-and-fall accidents in supermarkets – are the result of a chain of events. Is it correct to focus attention only on the triggering event (such as the passenger missing his footing or treading on a plastic bag) and to ignore events which followed, such as a severe fall and/or an impact with a hard object, which were also links in the chain of the causation of the injuries and damage? To such a passenger, a collision with a hard object or a hard landing following a tripping incident would no doubt be an unusual or unexpected event, but does that supply the necessary link in the chain to satisfy the *Saks* definition of 'accident'?

We can only await clarification from one of the superior courts. ■


**Notes:** **1** Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention) (Warsaw, 12 October 1929; AustTS 1963 No 18; 137 LNTS 11). The Convention was signed on 12 October 1929. Australia deposited its instrument of ratification on 1 August 1935, with the Convention coming into force between Australia and other parties to the Convention on 30 October 1935. **2** *Shawcross and Beaumont, Air Law*, Butterworths Lexis Nexis, I-7. **3** *Ibid.* **4** The Warsaw system consists of The Warsaw Convention of 1929 and a series of subsequent amendments, instruments and protocols, the latest being the Montreal Convention 1999. **5** *Povey v Qantas Airways Limited* (2005) 216 ALR 427; (2005) HCA 33 at [25]. **6** *Deep Vein Thrombosis and Air Travel Group Litigation* (2006) 1 AC 495 (2005); (2005) UKHL 72 at 22. **7** Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) (Montreal, 28 May 1999; [2009] ATS 3; 2242 UNTS 309). **8** *Halsbury Laws of Australia, 'Aviation'*, Lexis Nexis, accessed on 8 January 2014, at [35-102]. **9** *Ibid.* **10** Montreal Protocol No. 4 to Amend Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol signed at The Hague on 28 September 1955. **11** See, for example, above note 1, Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier. **12** *Civil Aviation (Carriers' Liability) Act 1959* (Cth). **13** See above, note 7. **14** The Protocol amending the International Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention) 1929 (The Hague, 28 September 1955; AustTS 1963 No 18; 478 UNTS 371) (Hague Protocol). **15** See above, note 1. **16** Convention Supplementary to the Warsaw Convention 1929 for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (Guadalajara Convention) (Guadalajara, 14 September 1961; AustTS 1964 No 4; 500 UNTS 31). **17** See above, note 10. **18** See above, note 12, ss9B, 11, 21, 25A, 25K. **19** See above, note 12, s27(1). **20** *The Aviation Legislation Amendment (Liability and Insurance) Act 2012* (Cth). **21** International cases have interpreted 'bodily injury' to exclude cases of pure mental harm (*Eastern Airlines v Floyd* 499 US530, 2010 US Dist.Lexis 10516; *KLM Royal Dutch Airlines v Morris* [2001] EWCA Civ 790, [2001] 3 All ER 126. **22** *Air France v Saks* 470 US 392 (1985). **23** See above, note 6, at 22. **24** *Schlesinger v Wisconsin* 270 US 230 (1926). **25** See above, note 22, at 405. **26** *Evangelinos v Trans World Airlines* [1977] USCA3 143; 550 F.2d 152 (4 February); *Krystal v British Overseas Airway Corporation* 403 F.Supp.1322

(DC CAL 1975); *Oliver v Scandinavian Airlines System* 17 CCH Av.Cas.18,283 (Md.1983). **27** See above, note 22, at 24. **28** *Tsevas v Delta Airlines* No. 97 C 0320, 1997 WL 767278. **29** An example of the introduction of a prerequisite not suggested by *Saks*. **30** *Wallace v Korean Air* 214 F.3d 293 (2000). **31** *Ibid.*, 36. **32** *KLM Royal Dutch Airlines v Morris* (2001) EWCA Civ 790, [2001] 3 WLR 351, [2001] 3 All ER 126, [2002] QB 100, [2001] CLC 1460, [2001] 2 All ER (Comm) 153. **33** *Ibid.*, at [25]-[26]. **34** The appeal was joined with *King v Bristow Helicopters Ltd* (2002) [2001] ILLR 95; [2000] ScotCS 195. The decision was subsequently handed down in *King v Bristow Helicopters Ltd; In re M* [2002] UKHL 7. **35** *Olympic Airways v Husain* 540 US 644 (2004); 316 F.3d 829. **36** *Barclay v British Airways* [2008] EWCA Civ 1419; [2009] 1 Lloyd's Rep 297. **37** *Povey v Qantas Airways Limited* (2005) HCA 33; (2005) 216 ALR 427. **38** *Ibid.*, at [34]. **39** *Ibid.*, at [40]. **40** *Air Link Pty Ltd v Paterson* (2009) NSWCA 251 (*Air Link v Paterson* had been the subject of an appeal to the High Court on preliminary pleading and limitation questions: (2005) 223 CLR 283; [2005] HCA 39). **41** *Ibid.*, at [45]. **42** *Ibid.*, at 118. **43** *Ibid.*, at 121. **44** *Brannock v Jetstar Airways* [2010] QCA 218. **45** *Ibid.*, at 52. **46** *Kannangara v Qantas Airways Ltd*, County Court of Victoria at Melbourne Case No. CI-09-04920. **47** *Nguyen v Qantas Airways Limited* [2013] QSC 286. **48** See above, note 6, at 14. **49** See above, note 37, at 34. **50** See above, note 22, 27. **51** *Ibid.*, 28.

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