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Attention All International Airlines and Flight Crews: Choosing Inaction Over Action No Longer Flies

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For years, international airlines and their flight crews have been blessed with a judicial interpretation of the term *accident* as it is used in the Warsaw Convention.¹ At times, this interpretation of *accident* has enabled them to escape liability by choosing inaction over action when faced with a passenger in distress. This conduct will no longer fly. The U.S. Supreme Court recently clarified the definition of an *accident* in *Olympic Airways v. Rubina Husain*² to include inaction on the part of an airline or flight crew and, by doing so, hopefully will minimize debate over what constitutes an *accident*.

In *Husain*, the Court held, "the 'accident' condition precedent to air carrier liability under Article 17 [of the Warsaw Convention] is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin."³ Its holding re-emphasizes that now, more than ever, courts must flexibly apply the definition of *accident* after assessment of all of the circumstances surrounding a passenger's injuries. In addition, the Court did not criticize the Ninth Circuit's holding that "[t]he failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that

would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane."⁴ Arguably, the application of a "reasonable person" standard will further increase the realm of what constitutes an *accident* for purposes of Article 17 liability.

An "Accident"

The Warsaw Convention of 1929 is a treaty governing international air carrier liability. Article 17 of the Convention deals with a carrier's liability for injuries to passengers. It creates a presumption of liability on the part of the air carrier if an *accident* caused the injuries. Article 17 reads as follows:

The carrier shall be liable for 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.⁵

In 1985, in *Air France v. Saks*,⁶ the U.S. Supreme Court, for the first time, defined *accident* for purposes of Article 17. In *Saks*, a passenger on an international flight lost the hearing in one of her ears as a result of normal changes in the cabin air pressure during the flight. The passenger pursued a Warsaw Convention claim. The Supreme Court held the plaintiff's injury was not an *accident*.⁷

The *Saks* Court ruled that an Article 17 *accident* "arises only if a passenger's injury or death is caused by an unexpected or unusual event or happening that is external to the passenger."⁸ Clarifying its ruling, the Court explained, "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."⁹ On the other hand, "[a]ny 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."¹⁰ The Court directed that this definition must "be flexibly applied after assessment of all of the circumstances surrounding a passenger's injuries."¹¹

The Supreme Court again discussed the Warsaw Convention *accident* requirement in *El Al Israel Airlines v. Tseng*.¹² Resolving a split in the lower courts, the Supreme Court held in *Tseng* that the Warsaw Convention provides the exclusive remedy for injuries on international flights. In *Tseng*, the plaintiff passenger was subjected to an intrusive security search before departing New York on an El Al flight bound for Tel Aviv. By the time the dispute reached

the Supreme Court, both parties had agreed that the security search did not qualify as an *accident* within the meaning of the Warsaw Convention. The Supreme Court questioned this stipulation, but found it unnecessary to resolve the question presented. It explained:

The District Court, 'using the flexible application prescribed by the Supreme Court,' concluded that El Al's search of Tseng was an 'accident': '[A] routine search, applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately characterized as an accident.' 919 F. Supp. 155, 158 (SDNY 1996).

The Court of Appeals disagreed. That court described security searches as 'routine' in international air travel, part of a terrorism-prevention effort that is 'widely recognized and encouraged in the law,' and 'the price passengers pay for the degree of airline safety so far afforded them.' 122 F.3d at 103. The court observed that passengers reasonably should be aware of 'routine operating procedures' of the kind El Al conducts daily. *Ibid.* The risk of mistakes, *i.e.*, that innocent persons will be erroneously searched, is 'inherent in any effort to detect malefactors,' the court explained. *Ibid.* Tseng thus encountered 'ordinary events and procedures of air transportation,' the court concluded, and not 'an unexpected or unusual event.' *Id.* at 104.

It is questionable whether the Court of Appeals 'flexibly applied' the definition of 'accident' we set forth in *Saks*. Both parties, however, now accept the Court of Appeals' disposition of that issue. In any event, even if El Al's search of Tseng was an 'accident,' the core question of the Convention's exclusivity would remain.¹³

The Court next addressed the accident issue in *Olympic Airways v. Husain*.¹⁴

Olympic Airways v. Husain

The events that gave rise to the lawsuit occurred when Rubina Husain and her husband, Dr. Hanson, were returning from a family vacation aboard an Olympic Airways flight from Athens, Greece, to New York City.¹⁵ Knowing that her husband suffered from asthma for more than two decades and was sensitive to secondhand smoke, Ms. Husain secured seats for the two of them in the non-smoking section of the aircraft.¹⁶

Upon boarding the aircraft, the couple located their assigned seats in the non-smoking section. They immediately realized that their seats, while in the non-smoking section, were only three rows from the smoking section.¹⁷ Upon learning this fact, Ms. Husain promptly called to the attention of a flight attendant that her husband could not sit near smoke and requested that they be provided seats away from the smoking section.¹⁸ What happened next is as follows:

The flight attendant told her to 'have a seat.' After all the passengers had boarded but prior to takeoff, respondent again asked Ms. Leptourgou to move Dr. Hanson, explaining that he was 'allergic to smoke.' Ms. Leptourgou replied that she could not reseat Dr. Hanson because the plane was 'totally full' and she was 'too busy' to help.

Shortly after takeoff, passengers in the smoking section began to smoke, and Dr. Hanson was soon surrounded by ambient cigarette smoke. Respondent spoke with Ms. Leptourgou a third time, stating, 'You have to move my husband from here.' Ms. Leptourgou again refused, stating that the plane was full. Ms. Leptourgou told respondent that Dr. Hanson could switch seats with another passenger, but that respondent would have to ask other passengers herself, without the flight crew's assistance. Respondent told Ms. Leptourgou that Dr. Hanson had to move even if the only available seat was in the cockpit or in business class, but Ms. Leptourgou refused to provide any assistance.¹⁹

Dr. Hanson, in an attempt to escape the smoke, walked toward the front of the aircraft, away from the smoking section. He reached the galley area. Shortly thereafter, he suffered respiratory distress. Dr. Sabharwal, an allergist traveling with Dr. Hanson, and Ms. Husain attempted to restore his breathing, but Dr. Hanson died aboard the flight.²⁰

Ms. Husain, on behalf of herself and as personal representative of her husband's estate, brought a wrongful death lawsuit against Olympic Airways in the state court of California. Olympic Airways removed it to federal court. The district court held that the flight attendant's refusal to assist was an *accident*, and the Ninth Circuit affirmed.²¹

The parties did not contest the *Saks* definition of "accident."²² The struggle was over what event was the *accident* and whether inaction by the flight attendant under the law constituted an

accident.²³ The airline argued the "accident" inquiry should focus on the "injury producing event." In its opinion, this event "was the presence of ambient cigarette smoke in the aircraft's cabin." Since the airline's policies permitted smoking on international flights, its contention was that "Dr. Hanson's death resulted from his own internal reaction—namely, an asthma attack—to the normal operation of the aircraft."²⁴ Further, it argued that "the flight attendant's failure to move Dr. Hanson was inaction, whereas Article 17 requires an action that causes the injury."²⁵

The Court found the airline's narrow focus on cigarette smoke as the injury producing event misplaced. It explained that such an approach

... which looks to 'the precise factual 'event' that caused the injury—neglects the reality that there are often multiple interrelated factual events that combine to cause any given injury. . . . In *Saks*, the Court recognized that any one of these factual events or happenings may be a link in the chain of causes and—so long as it is unusual or unexpected—could constitute an 'accident' under Article 17. 470 U.S., at 406. Indeed, the very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event as the 'injury producing event.'²⁶

However, since the airline deemed the conduct of its flight attendant irrelevant and did not dispute that her conduct was "unusual or unexpected," in light of the industry standards or its own procedures, the Court concluded it did not have to "dispositively determine whether the flight attendant's conduct qualified as "unusual or unexpected" under *Saks*, but may assume that it was for purposes of this opinion."²⁷

In addressing the airline's argument that inaction cannot qualify as an *accident* the court explained:

... the fallacy of petitioner's position that an 'accident' cannot take the form of inaction is illustrated by the following example. Suppose that a passenger on a flight inexplicably collapses and stops breathing and that a medical doctor informs the flight crew that the passenger's life could be saved only if the plane lands within one hour. Suppose further that it is industry standard and airline policy to divert a flight to the nearest airport when a passenger otherwise faces imminent death. If the plane

is within 30 minutes of a suitable airport, but the crew chooses to continue its cross-country flight, 'the notion that this is not an unusual event is staggering.' *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (SD Tex. 2001).¹⁰

¹⁰We do not suggest—as the dissent erroneously contends—that liability must lie because otherwise 'harsh results,' *post*, at 5 (SCALIA, J., dissenting), would ensue. This hypothetical merely illustrates that the failure of an airline crew to take certain necessary vital steps could quite naturally and, in routine usage of the language, be an 'event or happening.'²⁸

The Court found additional support for its contention that there is often no distinction between action and inaction on the issue of ultimate liability in other provisions of the Convention.²⁹

In closing, the Court summarily addressed the airline's contention that the Ninth Circuit "created a negligence based standard under Article 17 "when it stated, "[t]he failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane."³⁰ The *Husain* Court simply responds, "Admittedly, this language does seem to approve of a negligence-based approach. However, no party disputes the Ninth Circuit's holding that the flight attendant's conduct was "unexpected and unusual," which is the operative language under *Saks* and the correct Article 17 analysis."³¹

An Accident after *Olympic Airways v. Husain*

In light of *Husain*, both the conduct of flight crews and airlines will come under greater scrutiny. The definition of *accident* has been broadened significantly, thus having an impact on potential liability of international airlines. The importance of the this decision is evident. For example, the U.S. Court of Appeals for the Fifth Circuit delayed its ruling in *Blansett v. Continental Airlines, Inc.*, Case No. 03-40545, until after the Court ruled in *Husain*, and the parties in that matter preserved their right to file supplemental pleadings following the issuance of the *Husain* opinion.

The issue in *Blansett* involves deep vein thrombosis and whether an airline can be held liable to a passenger under a failure to warn theory of liability. The plaintiffs' contention is that the airline had a duty to warn passengers of the risk of developing deep vein thrombosis during long international flights and failed to do so.

The airline contends inaction does not qualify. It is the authors' opinion that *Husain* offers considerable support to the *Blansett* plaintiff and others similarly situated. In addition, it will be interesting to observe how the foreign tribunals respond to *Husain* in their future holdings. Specifically, there are cases currently pending before the highest courts of both England and Australia involving the same issue that is presented in *Blansett*.³² In both of these countries the lower courts ruled that inaction cannot constitute an *accident*.³³

Cases like *Husain* and *Blansett* are of concern to the international airline industry because it operates under a presumptive unlimited strict liability regime.³⁴ If an airline now can be held liable for inaction, including the failure to warn passengers of the risk of developing deep vein thrombosis during long international flights, its exposure to liability is much greater than it anticipated.

For certain, *Husain* promises that future cases will more often than not be found to have involved an *accident*. For example, in *Krys v. Lufthansa German Airlines*,³⁵ the plaintiff and his wife boarded defendant's airplane in Miami for a flight to Frankfurt, Germany. Early in the flight the plaintiff became ill. He claimed that the flight crew should have landed the aircraft while it was still near the western shores of the Atlantic ocean, so that he could obtain medical care. Instead, the flight continued on to Germany. In Germany, it was determined that Mr. Krys had suffered a heart attack.

Mr. and Mrs. Krys filed state tort law claims against the airline, arguing that the crew had negligently responded to his illness, thereby aggravating the damage to his heart. At no time did the plaintiff claim that the heart attack itself was an *accident*. Before trial, the defendants moved for summary judgment, arguing that plaintiffs' negligence claims were pre-empted by the Warsaw Convention, arguing its crew's conduct constituted an *accident*. After this motion was denied, the case proceeded to trial and the magistrate awarded substantial damages to the plaintiffs.³⁶ On appeal, the airline argued that the district court had erred in denying the airline's motion for summary judgment. In an effort to limit its liability, the airline argued that its crew's negligent failure to divert the plane before crossing the Atlantic aggravated the plaintiff's heart attack and was an *accident*. The court ruled that the issue was not whether the aggravation came from crew negligence, but whether the injuries were a result of an event or happening which was unusual or unexpected and external to the plaintiff, using a "purely factual description" of what occurred.³⁷ Under a purely factual description, the court ruled that mere continuation

of the flight was not an event or happening that was unusual or unexpected. Today, the result should be different, and rightfully so.

Husain represents a step forward for passenger rights. Earlier arguments that inaction could not result in an accident made little sense and often resulted in long, drawn out debates that now can be avoided. *Husain* demands the burden of the "unusual or unexpected" be placed on the airline, not the passenger.

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Endnotes

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876 (1934), note following 49 U.S.C. § 40105. On November 4, 2003, the Montreal Convention entered into force, modernizing the Warsaw Convention. Article 17 of the Montreal Convention, like Warsaw, addresses death and injury of passengers and clearly retains the *accident* requirement. It reads as follows: "The carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or bodily injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Article 17, The Convention For the Unification of Certain Rules Relating to the International Carriage By Air Signed at Montreal on 28 May 1999.

² *Olympic Airways v. Rubina Husain*, ____ U.S. ____ 124 S. Ct. 1221, 157 L. Ed. 2d 1146 (2004).

³ *Id.*, at 1152.

⁴ *Id.*, at 1159, quoting, *Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir. 2002).

⁵ The Warsaw Convention's governing text is in French. This quote is the official English translation of the Convention, which was before the Senate when it consented to ratification of the Convention in 1934. See 49 Stat. 3014; *Air France v. Saks*, 470 U.S. 392, 397 (1985).

⁶ *Air France v. Saks*, 470 U.S. 392 (1985).

⁷ *Id.*, at 396.

⁸ *Id.*, at 405.

⁹ *Id.*, at 406.

¹⁰ *Id.*

¹¹ *Id.*, at 405.

¹² *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999). Resolving a split in the lower courts, the Supreme Court held in *Tseng* that the Warsaw Convention provides the exclusive remedy for injuries on international flights.

¹³ *Id.* at 165, fn. 9.

¹⁴ *Olympic Airways v. Rubina Husain*, ____ U.S. ____ 124 S. Ct. 1221, 157 L. Ed. 2d 1146 (2004).

¹⁵ The facts of the case were not disputed and the Court accepted them as true. *Husain*, 157 L. Ed. 2d at 1152.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*, at 1153.

¹⁹ *Id.* Ms. Leptourgou's representations, that the flight was full were false. There were available seats further away from the smoking section. *Id.*, at 1153 n.2.

²⁰ *Id.*, at 1153.

²¹ *Id.* See *Husain*, 116 F. Supp.2d 1121 (ND Cal. 2000); *Husain*, 316 F.3d 829 (9th Cir. 2002).

²² *Id.*, at 1154.

²³ *Id.*

²⁴ *Id.*, at 1156.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, at 1157-1158.

²⁹ "For example Article 25 provides that Article 22's liability cap does not apply in the event of 'wilful misconduct or . . . such *default* on [the carrier's] part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.'" 49 Stat. 3020 (emphasis added). n11 Because liability can be imposed for death or bodily injury only in the case of an Article 17 'accident' and Article 25 only lifts the caps once liability has been found, these provisions read together tend to show that inaction can give rise to liability. Moreover, Article 20(1) makes clear that the 'due care' defense is unavailable when a carrier has *failed* to take 'all necessary measures to avoid the damage.' *Id.*, at 3019. These provisions suggest that an air carrier's inaction can be the basis for liability. *Id.* ("FN" omitted).

³⁰ *Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir. 2002).

³¹ *Olympic Airways v. Rubina Husain*, _____ U.S. _____ 124 S. Ct. 1221, 157 L. Ed. n2d 1152, 1159 (2004).

³² *Id.*, at 1158.

³³ *Deep Vein Thrombosis and Air Travel Group Litigation*, [2003] EWCA Civ. 1005, 2003 WL 21353471, *650 (July 3, 2003), and *Qantas Ltd. v. Povey*, [2003] VSCA 227, P17, 2003 WL 23000692, P17 (Dec. 23, 2003)(Ormiston, J.A.).

³⁴ The Montreal Convention, Article 17, The Convention For the Unification of Certain Rules Relating to the International Carriage By Air Signed at Montreal on 28 May 1999.

³⁵ *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997).

³⁶ In *Krys*, the plaintiff passenger argued against the applicability of the Warsaw Convention, having obtained a large judgment in the district court under state tort law, something which would no longer be possible in light of *EI Al v. Tseng*, *supra*.

³⁷ *Krys*, *supra* note 35, at 1519-1522.

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