The Future of International Air Carrier DVT Claims: Is the End Near?

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In the past few years, the issue that has uniformly garnered the most attention by international air carriers and the high courts in the United States, Australia, Canada and Great Britain has been alleged liability for Deep Vein Thrombosis ("DVT") injuries incurred while one is a passenger traveling on an international flight. With the December 2005 decision of the British House of Lords, the trend has clearly emerged that passengers cannot hold air carriers liable as a result of DVT incidents occurring on international routes governed by the Warsaw Convention. This article will briefly outline the unanimous ruling of the House of Lords. *Deep Vein Thrombosis and Air Travel Group Litigation*, UKHL 72 (2005).

With respect to the procedural history of the case, the original claims were instituted by twenty-four plaintiffs suing eighteen airlines around the world in 2002. In July 2003, the British Court of Appeals had ruled that the air carriers could not be liable for the DVT injuries. With eight plaintiffs remaining, the case proceeded to the House of Lords on a stipulated set of facts and was heard by the court last fall. The sole issue for consideration was whether the onset of DVT during international carriage was an "accident" as defined by Article 17 of the Warsaw Contention on International Carriage by Air of 1929.

The stipulated scenario included that the flight was normal and operated in accordance with the air carrier's standard procedures. The crew complied with all applicable regulations, and the air carrier took no special steps to minimize the risk of incurring DVT or to warn the passengers accordingly. The aircraft seating layout was in accordance with the usual standard for the route of international flight and nothing happened in the flight that adversely impacted the aircraft's performance. The air carrier knew or should have known that there was an increased risk associated with air travel. Finally, the claimants suffered DVT caused by the flight. Id. at 5.

Based on these stipulated facts, in December 2005, the House of Lords ruled in a lengthy forty three page opinion in favor of the air carriers upholding the rulings of its lower courts. In reaching its conclusion, the House of Lords noted the importance of international uniformity in interpreting the Warsaw Convention. In introductory comments and as a good hint as to which way the court was going to rule, the opinion noted that one of the goals of the Convention was to "bring some order" to the internal laws governing international air travel. Id. at 1. (quoting *Morris v. KLM Royal Dutch Airlines*, AC 628, 635 (2002)). Lord Foscote stated: "It is common ground, that it is important that the courts of the respective signatory states should try to adopt a uniform interpretation of the Convention." *Id.* at 1. The opinion relied heavily on the decisions rendered in the United States, Canada, Germany and Australia. The Law Lords noted that the "bulk of the authority is firmly against the acceptance of article 17 DVT claims." *Id.* at 10.

With respect to American jurisprudence, the House of Lords relied on several recent Warsaw cases of the U.S. Supreme Court including *Olympic Airways v. Husain*, 124 S. Ct. 1222 (2004). Although acknowledging that *Husain* was not a DVT case, Lord Foscote quoted Justice Scalia's dissent in *Husain* in which Scalia stated "it was a mistake" to assume that there must be relief for a plaintiff pursuant to the Warsaw Convention when there is relief available under the traditional tort system. He acknowledged that Warsaw's purpose was in fact to promote growth of the airline industry by limiting liability.

There was also significant analysis and embracing by the House of Lords of the test for an Article 17 accident included in *Air France v. Saks*, 470 U.S. 392 (1985). Adopting Justice O'Connor's two-prong test for an Ar-

ticle 17 accident, the House of Lords stated that "both the requirement that the causative event be unusual and that it be external to the passenger were prompted by the facts of *Saks*. Lord Foscote noted that the *Saks* rationale had been adopted widely in the US and by other signatory states. He concluded by stating:

> [A]n event or happening which is no more than the normal operation of the aircraft in the normal conditions cannot constitute an article 17 accident and, second, that the event or happening that has caused the damage of which complaint is made must be something external to the passenger.
>
> These two requirements appear to me to rule out an article 17 recovery in DVT cases where no more can be said than the cramped seating arrangements in the aircraft were a causative link in the onset of the DVT.

Id. at 12.

While the reliance on Saks was notable, Lord Foscote called the 2005 Australian High Court DVT ruling in *Povey v. Qantas Airways Ltd.,* HCA33 (2005) the "most important DVT authority." *Id.* at 10. Foscote noted that in that case the Australian High Court had ruled that there was no external event alleged by the plaintiff that caused the DVT. As such, the onset of DVT could not have been the accident itself. *Id.*

In also rejecting the DVT claims, Lord Steyn rejected the public policy reasons argued by the appellants. The appellants had argued that the air carriers were the most capable of assessing the risk of DVT and likewise insuring against it. As such, the air carriers were the ones who should be best able to spread the remedial cost over the passenger who get DVT. Rejecting soundly that argument, Steyn stated: "This is a variant of a 'deep pocket' tort law theory which has no place in a trade law treaty such as the Warsaw Convention." *Id.* at 14.

Lord Richmond stated: "Once it is clear that the accident which causes the injury must be something other than the injury itself, it becomes equally clear that the suffering of an internal reaction to an ordinarily uncomfortable journey by air, during which nothing untoward other than that reaction took place, cannot fall within article 17 of the Warsaw Convention." *Id.* at 20.

In addressing whether the air carrier's failure to warn had any impact in the Warsaw analysis or liability, the House of Lords considered the US federal circuit court decisions of *Blansett v. Continental Airlines, Inc.,* 370 F.3d 177 (5th Cir. 2004) and *Rodriquez v. Ansett Australia Ltd.,* 383 F.3d 914 (9th Cir. 2004). Noting that in both cases, there did not appear to be an industry standard to warn passengers about DVT, Lord Mance stated that such an alleged failure could not survive in the absence of any evidence of a "clear industry standard" of care to make such warnings. In other words, no legal duty could exist to make warnings, if there was no industry standard to do so. Mance recognized that the duty to warn rationale was also soundly rejected by the Australian High Court in *Povey*. *Id.* at 42.

Several facts are clear with respect to the current status of international DVT claims. First, the majority rule — adopted in the US, Canada, Germany, Great Britain and Australia — now appears to be that passengers cannot assert DVT as an Article 17 accident injury on an otherwise "normal" international flight. There is likewise a significant trend for the courts of the nations considering the issue to rely on and adopt the analysis of the other courts who have previously considered the matter and to strive for uniformity in the international law interpreting the Warsaw Convention. Most courts will continue to require the two part test for an Article 17 injury that (1) the accident must be an unexpected or unusual incident, and (2) the accident is external to the passenger. Although the treaty is dated, the original goals of Warsaw of limiting air carrier liability will trump the public policy arguments of today's traditional tort law. Finally, in the absence of any clear evidence of an industry standard of air carriers' undertaking affirmative actions to warn passengers about DVT risks on long international flights, there can be no duty and therefore no breach for the failure to do so.

With the outcome and analysis of British House of Lords decision, international air travel DVT claims covered by Warsaw have been dealt a significant set back. Although in some new reports, plaintiffs have indicated that they will pursue relief in other European countries and strive to get changes to the Warsaw Convention, either one of those routes will likely be difficult and take years to pursue.