

Trade & Transport Alert

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In Brief

The House of Lords has approved the reasoning of the High Court of Australia and confirmed that carriers are not liable to passengers who sustain DVT in circumstances where the aircraft was operated in accordance with usual practices and procedures.

House of Lords approves High Court ruling on DVT

In our June 2005 *Trade & Transport Alert* we reported that the High Court of Australia in *Povey v Qantas Airways Limited and British Airways Plc (Povey's case)* rejected Povey's argument that he could claim damages for deep vein thrombosis (DVT) suffered by him during an international flight. The High Court considered the meaning of "accident" in Article 17 of the Warsaw Convention and found that no such accident had occurred.

The same issue was recently considered by the House of Lords in the *Deep Vein Thrombosis and Air Travel Group Litigation* which referred to, and approved of, the reasoning in Povey's case.

The issue came before the House of Lords on the basis of agreed facts, which included:

- the claimant was carried by air by the defendant for reward on an international flight to which the Warsaw Convention applied;
- the flight was operated in accordance with the defendant's usual practices and procedures;
- nothing happened during the flight which adversely affected the performance or flight characteristics of the aircraft; and

- the defendant took no other steps to minimise or eliminate the risks of DVT.

Similar arguments to those made in Povey's case were raised by the claimants in this case. These included that the failure to warn of the risk of sustaining DVT was the "accident" which gives rise to liability of the carrier under Article 17 of the Warsaw Convention, which in the UK, as in Australia, provides the exclusive cause of action to passengers for bodily injury sustained during international carriage. As in Povey's case, the claimants did not contend that the House of Lords should not apply the reasoning in the US Supreme Court decision of *Air France v Saks* in which that Court concluded that the bodily injury itself cannot be the accident. They argued that accident meant an unexpected

or unusual event or happening external to the passenger. The House of Lords, like the majority in the High Court, decided the case on the basis that, on the agreed facts, there was no event which was unusual or unexpected. As Lord Scott pointed out the failure to provide a warning does not assist the plaintiffs where there was no established practice by airlines to provide such a warning.

The decision of the House of Lords provides an interpretation of Article 17 which is consistent with Australian law, and consistent with the way it has been interpreted by US courts in DVT cases. It would seem unlikely that the courts of other jurisdictions will interpret in the future Article 17 in a manner inconsistent with these two decisions of the High Court of Australia and the House of Lords.





Progress of ratification of the Montreal Convention

Although the Montreal Convention has been in force since November 2003, Australia has still to ratify it.

It is intended that Australia will do so. The delay results from a review of the provisions of the *Civil Aviation (Carriers' Liability) Act 1959* which will make the provisions of the Convention part of the domestic law of Australia. That review includes a review of the provisions of the *Civil Aviation Act 1988* in relation to compulsory insurance requirements for carriers and holders of Air Operator's Certificates. It is expected that the review will be completed shortly and that Australia will ratify the Montreal Convention later this year.

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