

Trade & Transport Alert

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The High Court of Australia confirms that failure to warn of the risk of DVT is not an “accident” for the purposes of the Warsaw Convention regime

In our [December 2003 Alert](#) we reported on the outcome of the Supreme Court of Victoria, Court of Appeal decision of *Qantas Airways Limited & British Airways plc v Brian William Povey*. The Court of Appeal confirmed that the failure by the airlines to warn of the risk of deep vein thrombosis (DVT) allegedly contracted by Povey during a return air journey between Sydney and London was not an “accident” for the purposes of Article 17 of the relevant Warsaw Convention regime (the Convention) and therefore the airlines could not be held liable for the injury. Accordingly, Povey’s claim was struck out.

Povey was granted special leave to appeal to the High Court of Australia. That Court by majority (6-1) has upheld the decision of the Court of Appeal.

Article 17

This Article states:

“The carrier is 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.”

Prior judicial consideration of “accident”

In the US Supreme Court decision of *Air France v Saks (Saks)* it was held that an “accident”, for the purposes of Article 17 of the Convention, arises only if a passenger’s injury is “caused by an unexpected or unusual event or happening that is external to the passenger”. This interpretation has been followed in Australia, Canada, the UK and the US.

In Brief

This decision of the High Court of Australia is consistent with current international jurisprudence on this issue, namely the failure by airlines to warn passengers of the risk of contracting DVT is not an “accident” for the purposes of the Warsaw Convention regime.

Submissions of Povey

Povey sought to argue that the interpretation of "accident" in Saks should be applied broadly and that the "event or happening", which must be "unexpected or unusual", should include non-events or inaction. Povey argued that the failure by the airlines to warn of the risk of DVT, given the flight conditions he experienced, was an "event or happening" and further that such failure to warn was "unexpected or unusual" because a reasonable air passenger would expect that airlines would warn of such risk.

Submissions of the airlines

The airlines submitted that the phrase "event or happening" required there to be some identifiable event or happening which has occurred on board the aircraft. Further, there must have been some unintended and unexpected occurrence which caused the injury. They argued that a failure to warn was not an "event or happening" and that such failure was something that did not happen. Accordingly, the interpretation of "accident" in Saks was not met and Povey's claim could not succeed.

The majority view

The majority judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ states that the concept of "accident" should not be overrefined and that two questions should be asked:

1. What happened on board (or during embarking or disembarking) that caused the injury of which complaint is made?
2. Was what happened unusual or unexpected?

Showing that a passenger sustained some adverse physiological change whilst on board an aircraft or in the course of embarking or disembarking does not identify the occurrence of an accident. Povey did not suggest that anything actually happened on board the aircraft nor that there was an occurrence that was "unusual or unexpected". Rather Povey, by describing the absence of warning as a "failure" to warn, suggested that that absence was unusual or unexpected.

The majority considered that references to "failure" are unhelpful as they divert attention from what it is that happened on board to what could or should have happened there. Accordingly, even if Povey could prove his allegations at trial, he would not be able to establish a cause of action against the airlines.

Kirby and Callinan JJ, whilst agreeing with the reasons in the joint judgment, each delivered their own reasons.

Kirby J considered that, as a matter of ordinary experience, the word "accident" can mean an unintended event or happening, that is, something accidental and not deliberate. It can also mean something that has occurred by

chance as distinct from by design or prior planning. However, while the absence of a happening or event may be an "occurrence", it will not usually be an "accident".

Kirby J was of the view that the word "accident" must be used flexibly.

The minority view

McHugh J considered that certain circumstances alleged by Povey, if proved, did amount to an "accident" for the purposes of the Convention. In his Honour's view the circumstances alleged by Povey described as "non-events," including the failure to warn of the risk of DVT, could not be construed as an "accident" and therefore should be struck out. However the alleged acts of the flight attendants during the flight, namely the offering of alcoholic beverages, tea and coffee and the discouragement of movement by passengers around the cabin, could constitute an "accident". Therefore those allegations should not be struck out.

Peter McQueen, Partner, Sydney
peter.mcqueen@bdw.com

Dimity Maybury, Lawyer, Sydney
dimity.maybury@bdw.com

BDW Contact Details:

24 hour contact: +61 2 9258 5987

Sydney	Peter McQueen	+61 2 9258 5887	Brisbane	Ernest Van Buuren	+61 7 3259 7119
	Alex Baykitch	+61 2 9258 6752	Canberra	Matthew Roser	+61 2 6234 4094
Melbourne	Jacinta Ellis	+61 3 9679 3608	Perth	Anthony Willinge	+61 8 9366 8165

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