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Airline Liability - The Warsaw Convention - Ninth Circuit Rules Passenger's Development of Deep-Vein Thrombosis Is Not an Accident under the Warsaw Convention: *Rodriguez v. Ansett Australia, Ltd.*

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**AIRLINE LIABILITY — THE WARSAW CONVENTION —
NINTH CIRCUIT RULES PASSENGER’S DEVELOPMENT
OF DEEP-VEIN THROMBOSIS IS NOT AN
“ACCIDENT” UNDER THE WARSAW CONVENTION:
RODRIGUEZ V. ANSETT AUSTRALIA, LTD.**

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INTERNATIONAL AIR transportation is subject to the rules of the Warsaw Convention (“Convention”),¹ a uniform body of legal rules governing the liability and rights of air carriers and their passengers.² Article 17 of the Convention holds an international air carrier liable for the death or bodily injury of a passenger if the accident causing the damage occurred on board the aircraft or in the course of any operations of embarking or disembarking.³ The meaning of the term “accident” is of central importance to the invocation of liability. Because the Convention provides no definition for the term and French continental jurists drafted its contents against the background of French law, the Supreme Court, in *Air France v. Saks*, deferred to French law in determining its meaning.⁴ The Court defined “accident” as “an unexpected or unusual event or happening that is external to the passenger.”⁵ Recently, in *Rodriguez v. Ansett Australia Ltd.*, the Ninth Circuit, relying on the *Saks* definition, held that an international air passenger’s development of Deep-Vein Thrombosis (“DVT”) did not constitute an “acci-

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2004) [hereinafter Warsaw Convention].

² *Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914, 916 (9th Cir. 2004).

³ Warsaw Convention, *supra* note 1, art. 17.

⁴ *Air Fr. v. Saks*, 470 U.S. 392, 399 (1985).

⁵ *Id.* at 405. The Court noted that “[t]he definition should be flexibly applied after an assessment of all the circumstances surrounding a passenger’s injuries.” *Id.*

dent” under the Warsaw Convention.⁶ In doing so, the court effectively limited airline liability for failing to warn passengers of the risks of DVT and for failing to make recommendations for its prevention.

On September 30, 2000, while traveling from Los Angeles, California to Melbourne, Australia, Adriene Rodriguez (“Rodriguez”) developed DVT aboard an Air New Zealand aircraft.⁷ While Rodriguez slept during the twelve-hour flight from Los Angeles to Auckland, New Zealand, a blood clot formed and broke into smaller clots that became lodged in her lungs.⁸ She neither ate nor left her seat for that period.⁹ As Rodriguez exited the aircraft in New Zealand she collapsed in the jetway, and upon regaining consciousness, discovered that she had no control over her right arm and could not speak.¹⁰

Rodriguez filed suit against Air New Zealand in the United States District Court for the Central District of California, alleging that the airline’s conduct caused her DVT and thus constituted an “accident” under the Convention.¹¹ Specifically, she claimed that Air New Zealand negligently operated the aircraft, thereby proximately causing her injuries.¹² In addition, she alleged that the airline acted with willful misconduct by intentionally violating safety procedures, failing to properly design the aircraft, and failing to inform passengers of the risks of DVT during long flights.¹³ Air New Zealand filed a motion for summary judgment in which it argued that Rodriguez’s DVT was not an “accident” under the Convention.¹⁴ The district court held that Rodriguez failed to demonstrate that an “accident” had caused her injury, as there was no admissible evidence that she developed DVT from an unexpected or unusual event external

⁶ *Rodriguez*, 383 F.3d at 919. DVT is often developed on international flights. *Id.* It is initiated by the formation of a blood clot in one of the deep veins of the body, starting in areas where blood moves more slowly, especially when exercise is limited. *Id.* DVT is a serious condition because it may block the blood flow or result in a pulmonary embolism or fatal stroke. Brief of Amicus Curiae Consumer Attorneys of California in Support of Appellant Adriene Rodriguez, *Rodriguez*, 383 F.3d 914 [hereinafter Brief of Amicus Curiae].

⁷ *Rodriguez*, 383 F.3d at 915.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 915-16.

¹² *Id.* at 916.

¹³ *Id.*

¹⁴ *Id.*

to her.¹⁵ The court granted summary judgment in favor of Air New Zealand.¹⁶ Rodriguez appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit.¹⁷

The Ninth Circuit affirmed the district court's grant of summary judgment.¹⁸ Its holding relied on two conclusions: (1) Rodriguez's development of DVT did not constitute an "accident" under the Convention, and (2) Rodriguez failed to raise a genuine issue of material fact as to whether Air New Zealand followed industry custom.¹⁹

Article 17 of the Convention provides that a "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."²⁰

Consequently, in order for the Ninth Circuit to hold Air New Zealand liable, Rodriguez had to establish that an Article 17 "accident" caused her injuries.²¹ The court applied the Supreme Court's definition of "accident" first espoused in *Air France v. Saks*, that "an accident is an unexpected or unusual event or happening that is external to the passenger."²²

More recently, the Supreme Court reiterated this definition in *Olympic Airways v. Husain*. Applying the Supreme Court's definition, the Ninth Circuit concluded that Rodriguez failed to allege such an event external to herself that prompted her development of DVT.²³ The Court noted that whether the aircraft was operating under normal conditions was not even a question.²⁴ In support of her claim, Rodriguez relied on two

¹⁵ *Rodriguez v. Ansett Austl., Ltd.*, No. CV01-7882JFW(SHX), 2002 WL 32153953, at *2 (C.D. Cal. Aug. 8, 2002), *aff'd*, 383 F.3d 914 (9th Cir. 2004).

¹⁶ *Id.*

¹⁷ *Rodriguez*, 383 F.3d at 916.

¹⁸ *Id.* at 919.

¹⁹ *Id.*

²⁰ Warsaw Convention, *supra* note 1, art. 17.

²¹ *Rodriguez*, 383 F.3d at 916.

²² 470 U.S. at 405. *Saks* held that a passenger's hearing loss from an aircraft with no pressurization problems was not an accident, as it resulted from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.* at 406.

²³ *Rodriguez*, 383 F.3d at 918 (citing *Olympic Airways v. Husain*, 540 U.S. 644, 653 (2004)).

²⁴ *Rodriguez*, 383 F.3d at 917-18 (citing *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 (9th Cir. 1993)).

cases.²⁵ First, in *Fulop v. Malev Hungarian Airlines*, the United States District Court for the Southern District of New York held that a flight crew's decision not to divert an aircraft following a passenger's heart attack is an "accident" if the flight crew's actions fail to comply with the airline's operational standards.²⁶ Second, Rodriguez referred to the district court's decision in *Olympic Airways v. Husain*, which held an airline liable for a flight attendant's refusal of a passenger's requests for removal from a smoking section that resulted in the passenger's death following an asthma attack.²⁷ According to the Ninth Circuit, situations involving a response by a flight crew to a passenger's medical condition should be distinguished from those regarding the development of DVT.²⁸ Because there was no response by the flight crew in this case and thus no event external to Rodriguez, the court found this case factually distinct from *Fulop* and *Husain*.²⁹

The Ninth Circuit declined to decide whether an airline's failure to warn of DVT can constitute an Article 17 "accident."³⁰ The evidence Rodriguez submitted consisted of scientific articles, newspaper articles, and in-flight magazines. Although Rodriguez offered this evidence to prove what the airlines knew or should have known about the dangers of DVT, the court found these exhibits lacking because they provided no information regarding the existence of either an industry standard or an Air New Zealand policy to warn of DVT.³¹ Upon examination of the evidence, the court took specific note of an in-flight magazine which recommended passengers drink water and exercise during long flights. The panel found it compelling that Rodriguez had, indeed, read that particular magazine.³²

In reviewing Rodriguez's failure to warn contention, the Ninth Circuit relied on the Fifth Circuit's holding in *Blansett v. Continental Airlines, Inc.*³³ Similar to the instant case, *Blansett* concerned an international passenger's development of DVT

²⁵ *Id.*

²⁶ *Id.* (citing *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 664-66 (S.D.N.Y. 2001)).

²⁷ *Id.* (citing *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121 (N.D. Cal. 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004)).

²⁸ *Id.* at 918.

²⁹ *Id.*

³⁰ *Id.* at 919.

³¹ *Id.* at 918-19.

³² *Id.*

³³ *Id.* (citing *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004)).

and his failure to warn allegation.³⁴ In contrast to the airline in *Rodriguez*, however, the airline in *Blansett* did provide some warnings regarding the development of DVT, which were in accordance with Federal Aviation Administration policies.³⁵ Because of those warnings, the Fifth Circuit held that the airline's failure to warn of DVT was not an "accident" because it was not an unusual or unexpected event.³⁶ Reasoning that Rodriguez failed to provide evidence that raised a genuine issue of material fact as to "whether there was either a clear industry standard or an airline policy at the time regarding DVT warnings," the court upheld the district court's grant of summary judgment.³⁷

The Ninth Circuit erroneously affirmed the district court's order granting summary judgment to Air New Zealand. In reviewing a grant of summary judgment de novo, the Court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the law, and it must do so in the light most favorable to the nonmoving party.³⁸ Furthermore, Federal Rule of Civil Procedure 56(c) provides that summary judgment should only be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."³⁹ Not only did the court ignore a genuine issue of material fact, it failed to conduct its inquiry in the light most favorable to Rodriguez.

The Ninth Circuit concluded that no question existed as to whether the aircraft was operating under normal conditions.⁴⁰ However, such an assertion necessitates an analysis of what "normal conditions" and "an unexpected or unusual event" entails. Whether it is the usual, normal, and expected operation for the

³⁴ *Id.* (citing *Blansett v. Cont'l Airlines, Inc.*, 246 F. Supp. 2d 596, 602 (S.D. Tex. 2002)). In the initial suit before the district court, the passenger provided evidence of an airline industry association's recommendation to warn passengers of the dangers of DVT. *Blansett*, 246 F. Supp. 2d at 602. In denying the airline's motion for summary judgment, the court concluded that a jury could find the airline's failure to warn to be an unexpected departure from industry practice constituting an "accident" under the Convention. *Id.*

³⁵ *Rodriguez*, 383 F.3d at 919 (citing *Blansett*, 246 F. Supp. 2d 596).

³⁶ *Id.* (citing *Blansett*, 379 F.3d at 180-81).

³⁷ *Id.* at 918.

³⁸ *Id.* at 916 (citing *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1191 (9th Cir. 2000)).

³⁹ FED. R. CIV. P. 56(c).

⁴⁰ *Rodriguez*, 383 F.3d at 917.

airline not to inform its passengers of the dangers of DVT and of the necessity of moving about the cabin and drinking or eating was a question of material fact in this case. The Supreme Court in *Air France v. Saks*, an opinion on which the Ninth Circuit heavily relied, devoted considerable analysis to the question of what is an "unusual or unexpected event."⁴¹ At the conclusion of the *Saks* decision, the Court stated that "[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."⁴² Arguably, "normal conditions" not only include such things as cabin pressurization and mechanical fitness, but also the environmental condition for the passenger. In this case, Rodriguez neither ate nor left her seat.⁴³ It is unclear whether "unexpected or unusual" applies to the passenger or the airline. Surely passengers expect to be informed of the dangers of flying and the necessary precautions that need to be taken. After all, it is uniform throughout the airline industry that passengers are informed of seat belt safety, exiting strategies, and operation of breathing apparatus. Arguably, passengers expect that all the necessary information has been provided.

The Ninth Circuit side-stepped the legal question of whether the airline's failure to warn passengers of DVT constituted an accident under the Convention by finding no factual question as to whether there was an actual failure to warn.⁴⁴ Both issues could have been addressed had the court viewed Rodriguez's contentions differently. In its brief discussion of the in-flight magazine that Rodriguez admitted to reading, the court focused on the magazine's recommendations regarding water and exercise. The court failed to mention whether Rodriguez had read that particular portion of the magazine or, more importantly, whether the text mentioned DVT at all. The impact of these "recommendations" is much less significant if there is no mention of the importance of following such recommendations in order to avoid DVT. Thus, the magazine alone presented a question of fact; did the magazine's contents provide a warning?

Whether there was a failure to warn by the airline is a fact-rooted question. Assuming that Rodriguez proved a failure to

⁴¹ *Air Fr.*, 470 U.S. at 392.

⁴² *Id.* at 406.

⁴³ *Rodriguez*, 383 F.3d at 915.

⁴⁴ *Id.* at 919.

warn, the case would have resulted favorably for Rodriguez. In fact, the Ninth Circuit has previously stated 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 aircraft.”⁴⁵

The Convention ranks passenger protection high among its objectives.⁴⁶ Airline passengers need to be cognizant of DVT, a potentially fatal condition, when flying long distances. The airlines themselves are, no doubt, cognizant of its implications and thus need to be proactive in their care of airline passengers. Court decisions suggesting that the placement of magazines recommending eating, drinking, and exercising on aircraft provide a sufficient warning merely serve to ease the burden on the airline industry. Flight attendants, without exception, inform passengers to buckle their safety belts before flights. They should also be required to inform passengers about ways to maintain the proper functioning of their bodies on long flights. However, such a requirement should not be so stringent as to compel flight crews to force passengers to walk around or eat—they need only inform the public and warn them of the dangers of DVT.

The Ninth Circuit erroneously affirmed the district court’s grant of summary judgment. In accordance with its interpretation of *Saks*, the Ninth Circuit concluded that Rodriguez’s DVT “was caused by her ‘own internal reaction to the usual, normal and expected operation of the aircraft.’”⁴⁷ However, Rodriguez did not have DVT when she boarded the plane. Rather, she unknowingly developed DVT during the flight. Further, following the lead of *Saks*, the court refused to give weight—or to even consider—the fact that Rodriguez did not have a preexisting medical condition. Nor did the court define the boundaries of the causal relationship required between the unexpected or unusual event and the operation of the aircraft, claiming that it did not need to do so because Rodriguez failed to show her injury was caused by such an event.⁴⁸

⁴⁵ *Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir. 2002), *aff’d*, 540 U.S. 644 (2004).

⁴⁶ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37 (2d Cir. 1975).

⁴⁷ *Rodriguez*, 383 F.3d at 917 (citing *Saks*, 470 U.S. at 406).

⁴⁸ *Id.* at 918.

Furthermore, as pointed out in an Amicus Curiae Brief in Support of Rodriguez, with the exception of the Second Circuit, the jurisdictional boundaries of the Ninth Circuit make it the key player in defining passenger redress rights for international flights.⁴⁹ The Ninth Circuit essentially sets the law for the Western seaboard, as well as Alaska, Hawaii, and Pacific Territories, all major gateways for long international flights. This decision limits airline liability exposure by its interpretation of the Convention. Though the Ninth Circuit did not go so far as to hold that an airline's failure to warn of DVT does not constitute an "accident" under the Convention,⁵⁰ the nature of the ruling made it seemingly difficult for future plaintiffs to successfully bring such a claim against an airline under the Convention.

⁴⁹ Brief of Amicus Curiae, *supra* note 6.

⁵⁰ *Rodriguez*, 383 F.3d at 919.