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Treaties-Accident under the Warsaw Convention - Ninth Circuit Holds That a Pre-existing Medical Condition, along with a Flight Attendant's Failure to Act, Characterizes an Accident under the Warsaw Convention: *Husain v. Olympic Airways*

Melinda Scissors Conley

TREATIES — "ACCIDENT" UNDER THE WARSAW CONVENTION—NINTH CIRCUIT HOLDS THAT A PRE-EXISTING MEDICAL CONDITION, ALONG WITH A FLIGHT ATTENDANT'S FAILURE TO ACT, CHARACTERIZES AN "ACCIDENT" UNDER THE WARSAW CONVENTION: *HUSAIN V. OLYMPIC AIRWAYS*

MELINDA SCISSORS CONLEY*

THE WARSAW CONVENTION[1] affords a passenger the sole compensatory remedy for injuries caused by an "accident" on an international flight.[2] *Air France v. Saks* held that an "accident," under the Warsaw Convention, is an "unexpected or unusual event or happening that is external to the passenger."[3] In the recent case of *Husain v. Olympic Airways*,[4] the Ninth Circuit broadly applied the "accident" definition. The court held that a passenger's pre-existing medical condition, which may have been aggravated by a flight attendant's failure to move the passenger, constituted an "accident."[5] The court expanded the Supreme Court's definition to include the aggravation of a pre-existing condition, and made tenuous assumptions regarding the proximate cause of the passenger's injury. Had the Ninth Circuit followed the Supreme Court's definition of "accident," which excludes the passenger's own internal reactions to nor-

* J.D. Candidate, SMU Dedman School of Law, 2005; B.A., University of Illinois at Urbana-Champaign; Master of Arts—University of Illinois at Urbana-Champaign.

[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 2003) [hereinafter Warsaw Convention]. For purposes of this case note, references will primarily be made to Article 17.

[2] *Id.* at art. 17.

[3] Air France v. Saks, 470 U.S. 392, 405 (1985).

[4] Husain v. Olympic Airways, 116 F. Supp. 2d 1121, 1123 (N.D. Cal. 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002), *aff'd* 124 S. Ct. 1221 (2004).

[5] *Husain*, 316 F.3d at 838-39.

mal operations, and reasonably applied proximate cause, it would have reversed the Northern District of California's decision.

Dr. Abid M. Hanson had asthma, for which he used an inhaler, and food allergies.[6] Dr. Hanson had previously suffered other serious attacks, related to both of his pre-existing conditions.[7] For example, Dr. Hanson suffered a near-fatal breathing attack. Experts at trial determined that the likely cause of the attack was Dr. Hanson's food allergy, even though he was in a smoky restaurant and ate minimal food.[8] In the instant case, Dr. Hanson and his family traveled between San Francisco and Cairo, connecting through both New York and Athens. Though the family had not initially realized that smoking was allowed on the flight, the family requested non-smoking seats, which were accommodated on both the outbound and inbound trips.[9]

After securing non-smoking boarding passes for the family's return trip, Ms. Husain[10] presented the ticket agent with medical documentation of Dr. Hanson's asthma. Dr. Hanson first experienced breathing difficulties in a smoky waiting area during a layover in Athens. As a result, Dr. Hanson repeatedly used his inhaler in the Athens airport.[11] The family boarded the Olympic Airways flight and noticed they were seated in row 48; the smoking section began at row 51.[12] Ms. Husain asked the flight attendant to reseat Dr. Hanson, but the flight attendant told Ms. Husain to return to her seat. After everyone had boarded the plane, Ms. Husain again asked the flight attendant to move Dr. Hanson, due to his allergy. Ms. Husain was told the flight was "totally full."[13] Immediately after takeoff, the smoke began to filter through the cabin. Ms. Husain immediately urged the flight attendant to reseat Dr. Hanson. The flight attendant refused two different times, but told Ms. Husain she could ask other passengers to switch seats. Ms. Husain chose

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[6] Husain v. Olympic Airways, 316 F.2d 829 (9th Cir. 2002), *aff'g* 116 F. Supp. 2d 1121, 1123 (N.D. Cal. 2000), *aff'd* 124 S. Ct. 1221 (2004).

[7] *Husain*, 116 F. Supp. 2d at 1124.

[8] *Id.* A second food-related attack occurred less than six months prior to this flight. *Id.*

[9] *Id.* at 1124-25.

[10] Ms. Husain is Dr. Hanson's wife. *Id.* at 1123.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1125. A review determined that the flight was not completely full. There were eleven empty seats, including two business class seats. *Id.* at 1126.

not to seek this self-help remedy and returned to her seat.[14] Roughly two hours later, the meal service arrived and Dr. Hanson consumed some portion of the food. Following the meal, he asked for another inhaler and went to the front of the aircraft for some fresh air. Upon reaching the front of the aircraft, he motioned for his epinephrine and shortly went into distress. After two injections of epinephrine, he was unable to breathe on his own and resuscitation efforts were ineffective.[15] Dr. Hanson died on the aircraft, and no autopsy was performed for religious reasons.[16]

Husain filed the initial wrongful death action against Olympic Airways in the California Superior Court for Alameda County on December 24, 1998, alleging that Dr. Hanson's death resulted from an "accident" under the Warsaw Convention.[17] Olympic Airways removed the case to the Northern District of California and unsuccessfully moved for summary judgment, claiming that Dr. Hanson's death was the result of a pre-existing medical condition, not an "accident." After a bench trial, the plaintiffs were awarded $1,400,000, which was reduced by fifty percent due to comparative negligence. Final judgment and additional court findings were entered on November 28, 2000. These conclusions provided an additional $700,000 in non-pecuniary damages, based on California state law. Appeal to the Ninth Circuit Court of Appeals followed.[18]

The Ninth Circuit relied on *Air France*[19] in determining whether an "accident" occurred in the Olympic Airways incident. The court noted that when a passenger reacts to the normal operations of an aircraft, there is no "accident."[20] However, the court determined that this situation was factually distinct, holding that the negligence of the crew was the unusual and

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[14] *Id.*

[15] *Id.* at 1126-27.

[16] *Id.* at 1128.

[17] *Husain*, 316 F.3d at 832.

[18] *Id.* The initial damage award of $1,400,000 exceeded the $75,000 statutory limit imposed by the Warsaw Convention because the court found willful misconduct, which excluded the liability limit under Article 25. *Id.* at 839, 841; Warsaw Convention, *supra* note 1, at art. 25(1).

[19] This case "conclude[d] that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." *Air France*, 470 U.S. at 405.

[20] *Husain*, 316 F.3d at 835-36 (quoting *Air France*, 470 U.S. at 406).

unexpected occurrence, and this "accident" proximately caused Dr. Hanson's death.[21]

The Ninth Circuit discussed the argument that crew negligence characterizes an "accident" since it is both external to the passenger and an unexpected occurrence in the course of travel. The court distinguished two cases, holding that pre-existing conditions, potentially aggravated by flight attendant omissions, were not "accidents" under the Warsaw Convention.[22] In *Abramson v. Japan Airlines Co.*,[23] the flight attendant refused to offer a place for the plaintiff to lie down to alleviate pains associated with a pre-existing hiatal hernia. The flight attendant said there were no available seats, yet it was later determined that there were nine empty seats in first-class. The plaintiff alleged that the denial of a place to exercise his self-help remedy aggravated his condition and caused him to be hospitalized.[24] The court concluded "that the alleged acts and omissions of JAL and its employees during the routine flight . . . do not constitute an 'accident'. . . ."[25] In addition, the court distinguished *Krys v. Lufthansa German Airlines*.[26] In *Krys*, the plaintiff did not feel well (later confirmed to be a heart attack) and, after seeking advice from a passenger doctor, the airplane continued to its destination without making an unscheduled landing. The plaintiff alleged that the crew was negligent for not landing the plane early, which aggravated his injuries.[27] The Eleventh Circuit held that the failure to make an unscheduled landing in this situation was not unusual or unexpected, and thus, not an "accident."[28]

The Ninth Circuit found that the above-cited cases were factually distinct from the present case. The court noted that in *Krys*, the Lufthansa employees relied on an erroneous determination from a medical doctor. Therefore, the employees did not believe that an immediate unscheduled landing was necessary.[29]

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[21] *Id.* at 837-39.

[22] *Id.* at 836.

[23] Abramson v. Japan Airlines Co., 739 F.2d 130 (3d Cir. 1984), *overruled on other grounds by* El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 176 (1999) (holding that the Warsaw Convention is the only personal injury remedy available to a plaintiff that was in the process of embarking, disembarking, or on an aircraft).

[24] *Id.* at 131.

[25] *Id.* at 133.

[26] Krys v. Lufthansa German Airlines, 119 F.3d 1515 (11th Cir. 1997).

[27] *Id.* at 1517.

[28] *Id.* at 1522.

[29] *Husain*, 316 F.3d at 837.

The court distinguished *Abramson* by noting that the passenger never told JAL of the medical condition and, therefore, JAL did not know that immediate action was required.[30] The district court also distinguished two non-"accident" cases[31] because the passengers did not seek flight attendant assistance.[32] The district court contrasted these cases with the instant case and noted that Ms. Husain repeatedly informed the flight attendant of the seriousness of the situation and, despite this information, the flight attendant still failed to act.[33]

The Ninth Circuit relied on the district court's findings that the flight attendant's failure to act with knowledge of the medical necessity was a "blatant disregard of industry standards and airline policies."[34] The district court had relied on other courts' opinions[35] to support the conclusion that negligence of the crew may be characterized as an "accident."[36] The Ninth Circuit found no clear error in the district court's conclusion that "[t]he failure to act in the face of a known serious risk satisfies the meaning of 'accident'. . . so long as reasonable alternatives exist that would substantially minimize the risk and these alternatives would not unreasonably interfere with the normal, expected operation of the airplane."[37]

Further, the Ninth Circuit held that the injury/death was proximately caused by the "accident,"[38] which is another requirement imposed by *Air France*.[39] The Ninth Circuit determined that there was no clear error in the district court's conclusion that it was more likely that Dr. Hanson's death re-

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[30] *Id.*

[31] Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 412-13 (E.D. Pa. 1977) (holding that the normal pressurization of the aircraft, which resulted in deafness in the passenger's ear, was not an "accident"); Gotz v. Delta Air Lines, Inc., 12 F. Supp. 2d 199, 204-05 (D. Mass. 1998) (holding that placing luggage in the overhead bin, which fell and injured that passenger under the watchful eye of a flight attendant, was not an "accident").

[32] *Husain*, 116 F. Supp. 2d at 1132.

[33] *Id.*

[34] *Husain*, 316 F.3d at 837 (citing *Husain*, 116 F. Supp. 2d at 1134).

[35] Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 142 (2d Cir. 1998) (holding that applying a scalding compress to a child's ear, which caused injury, was an "accident"); Carey v. United Airlines, Inc., 77 F. Supp. 2d 1165, 1171 (D. Ore. 1999) (holding that a heated exchange with a passenger, advising him of his rights, and preventing seat changes constituted an "accident").

[36] *Husain*, 116 F. Supp. 2d at 1131.

[37] *Husain*, 316 F.3d at 837.

[38] *Id.* at 839.

[39] *Air France*, 470 U.S. at 405-06.

sulted from smoke inhalation rather than from his food allergies. The court reasoned, based on *Air France*, that the "accident" only needs to be a "link in the chain,"[40] and found that the flight attendant's failure to reseat Dr. Hanson constituted that link.[41]

The *Husain* court incorrectly applied the "accident" definition found in *Air France*. A pre-existing injury or illness has not been held to constitute an "accident" by the Supreme Court. The Supreme Court, in *Air France*, commented that American decisions have "refuse[d] to extend the term ["accident"] to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger."[42] To circumvent this requirement, the Ninth Circuit focused on the alleged negligence of the flight attendant. The court determined that the flight attendant's failure to reseat was the unexpected occurrence and, thus, an "accident." However, it is not clear that the flight attendant was ever aware of the medical emergency, much like in the *Abramson* case. Rather, the flight attendant was faced with a potentially irate passenger sitting near the smoking section who wanted to be moved because of allergies. It is likely that a flight attendant is constantly faced with those requests from the unlucky passengers sitting near the smoking section. If the flight attendant were to reseat each of those passengers on every flight, reseating would turn into a full-time flight attendant job. It is true that Ms. Husain presented some notice of asthma to the Olympic Airways' check-in agent.[43] There is no evidence, however, that the check-in agent made the flight attendant or other crew members aware of any medical issue or whether the note referenced a critical medical issue rather than simply mentioning the passenger's asthma. Regardless, Olympic Airways complied with the request for a non-smoking seat, which was the initial concern. This failure to reseat should not be considered an "accident" under the Warsaw Convention. Further, the "new" negligence standard broadens the "accident" definition and will subject airlines to additional litigation.

This broadened "accident" definition incorporates "reasonable alternatives"[44] to support the negligence standard. This expanded definition would likely bring the *Abramson* case into

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[40] *Id.* at 406.
[41] *Husain*, 316 F.3d at 838.
[42] *Air France*, 470 U.S. at 405.
[43] *Husain*, 316 F.3d at 833.
[44] *Id.* at 837.

question, as it is likely that there were reasonable alternatives available to the flight attendant (first-class seats) to help manage the pain of the passenger's hernia. The Supreme Court, though, referenced *Abramson* as being consistent with other American and international courts in defining "accident."[45] The addition of "reasonable alternatives" leads to further unintended results under the Warsaw Convention. For example, if someone is overweight and cannot comfortably fit into a regular economy-class seat, he may request reseating. In fact, it is conceivable he would explain that the seat would pinch his nerves and cause a problem. If there were an available first-class seat, it may be considered a reasonable alternative to place him in that seat. If the flight attendant fails to reseat the passenger in the available first-class seat and the smaller economy seat pinches a nerve and causes major injury to his leg, this injury could be considered an "accident" under the Warsaw Convention. The flight attendant knew that there was a risk of injury and the failure to act caused the injury because it would not, or might not, have occurred in the first-class seat (the reasonable alternative). Though this example is extreme, it illustrates the absurd result that could occur under this standard and the potentially costly economic effects on the airlines if economy passengers could find a way to sit in first-class at an economy rate.

Finally, the Ninth Circuit erroneously concluded that the failure to act was the proximate cause of Dr. Hanson's injury/death. There was no definitive finding whether the cause of Dr. Hanson's death was an allergic reaction to eating food, or the second-hand smoke. In fact, the Ninth Circuit determined it was simply plausible that Dr. Hanson died from second-hand smoke.[46] This is mere speculation. In fact, it is more likely that the food allergy caused the death, given that the circumstances appeared similar to both of Dr. Hanson's prior documented food-allergy attacks. In this case, he ate the food and shortly thereafter, he had an attack. He had been sitting in the smoking section for well over two hours when he had the attack. Contrary to the district court's finding, there is no indication that moving Dr. Hanson would have changed his fate. Dr. Hanson already had a problem that day before ever boarding the aircraft. He had repeatedly used his inhaler while waiting in the Athens airport. It is certainly possible that the cause of his death

[45] *Air France*, 470 U.S. at 404-05.

[46] *Husain*, 316 F.3d at 839.

was the result of his body's reaction to that smoke and the food he ate. It is mere speculation whether the failure to reseat (the "accident") was a "link in the chain" causing Dr. Hanson's death. These assumptions broaden the proximate cause element. This reasoning would allow an individual plaintiff to speculate as to why an injury occurred, thus satisfying the proximate cause element. This would also subject the airlines to more litigation.

Aggravation of a pre-existing injury, based on a negligence standard, should not be considered an "accident" within the definition articulated by the Supreme Court.[47] This articulated definition has been greatly expanded by this case. Not only has the "accident" definition been extended to a failure to act situation, but also, the proximate cause requirement has been tenuously applied. Other passengers will merely have to show some possible causation of an act, or failure to act, to be able to recover from the airlines. Although comparative negligence reduced the award by fifty percent,[48] the court's holding allows for more findings of "accidents" under the Warsaw Convention. This definition extension would dramatically increase litigation costs and contribute to an already crippled airline industry.[49]

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[47] *Air France*, 470 U.S. at 405.

[48] *Husain*, 316 F.3d at 832.

[49] Just before publication of this journal, the Supreme Court issued a ruling in *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004). The Supreme Court affirmed the Ninth Circuit's opinion. Because Olympic Airways failed to challenge the finding that the flight attendant's conduct was "unusual or unexpected" based on the industry and company standards, the Supreme Court simply assumed it was an "unusual or unexpected" happening in affirming the Ninth Circuit's opinion. The Court acknowledged that it appeared the Ninth Circuit developed a negligence-based approach by focusing on the flight attendant's failure to follow industry and company practice or failure to reseat. However, the Court stated that neither party disagreed with the fact that the flight attendant's actions were both "unexpected and unusual," which was the standard developed in *Air France*. Therefore, the appropriate standard was applied in the case and the conduct of the flight attendant fell within the meaning of "accident" in Article 17 of the Warsaw Convention.

Though the Court discounts the negligence standard developed in the Ninth Circuit, the Court has broadened the "accident" definition in this opinion. The Court has now allowed "inaction" on the part of a flight crew to be an "accident" under the Warsaw Convention. As Justice Scalia commented in dissent, the other signatories to the Convention have rejected this argument and have specifically referenced it as a non-event. In fact, one court even relied on the *Abramson* opinion in reaching its conclusion. The Court's decision has distinguished the United States from other signatories to the Convention. Additionally, the Court failed to discuss whether the flight attendant's failure to seat actually was a cause

of the injury. In dissent, Justice Scalia commented on this very issue and it is mentioned in the case note above.

This opinion continues to open the door wider to lawsuits. An individual only has to show a slight link to an injury (possibly not even a causal link) when someone in the flight crew fails to provide something. Based on the Supreme Court's opinion, if the flight crew failed to reseat someone, who they knew had a medical issue and the industry or company practice was to reseat in an available seat (or it was a "reasonable alternative"), this would be considered an "accident." That means that someone who may have a pinched nerve condition in an economy seat who isn't reseated in an available first-class seat would likely prevail, as is mentioned in the above case note. In the future, the international airlines may be flying passengers just to pay for all the litigation costs, rather than to keep the airline in business.


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS