

2003

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Recommended Citation

Ann Cornett, *Air Carrier Liability under Warsaw: The Ninth Circuit Holds That Aircraft Personnel's Failure to Act in the Face of Known Risk Is an Accident When Determining Warsaw Liability - Husain v. Olympic Airways*, 68 J. Air L. & Com. 163 (2003)
<https://scholar.smu.edu/jalc/vol68/iss1/6>

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**AIR CARRIER LIABILITY UNDER WARSAW: THE NINTH
CIRCUIT HOLDS THAT AIRCRAFT PERSONNEL'S
FAILURE TO ACT IN THE FACE OF KNOWN RISK IS AN
"ACCIDENT" WHEN DETERMINING WARSAW LIABILITY
– HUSAIN v. OLYMPIC AIRWAYS**

ANN CORNETT¹

COURTS HAVE HAD to grapple with the scope of the definition of "accident" under Article 17 of the Warsaw Convention² after the seminal case of *Air France v. Saks*.³ In *Saks*, the Supreme Court rejected a broad interpretation by the Ninth Circuit to characterize an "accident" under the Warsaw Convention as an "occurrence associated with the operation of aircraft which takes place between the time any person boards . . . and all such persons have disembarked"⁴ and instead defined it as an "unexpected or unusual event or happening that is external to the passenger."⁵ While the Court excluded injuries resulting "from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft,"⁶ questions remained as to whether Warsaw liability exists where the air carrier aggravated or caused injury to a passenger through its own action or inaction.⁷

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² 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 [hereinafter Warsaw Convention].

³ *Air France v. Saks*, 470 U.S. 392 (1985); *see also* Harakas, Andrew J. & John Maggio, *Sacking Saks: Transformation of the "Accident" Requirement, Warsaw Convention Article 17*, 15 AIR & SPACE LAW. 8 (2001) (hereinafter *Sacking Saks*) (discussing evolution of Article 17 accident interpretation).

⁴ *Saks v. Air France*, 724 F.2d 1383, 1385 (9th Cir. 1984).

⁵ *Saks*, 470 U.S. at 405.

⁶ *Id.* at 406.

⁷ *See* McDowell v. Continental Airlines, Inc., 54 F. Supp. 2d 1313, 1320 (S.D. Fla. 1999) (finding a dissolution of the airline's duty of care to render or obtain

In *Husain v. Olympic Airways*⁸, the Ninth Circuit answers this question. *Husain* departs from previous caselaw⁹ by finding that the crew's inaction in responding to a known risk to a passenger constitutes an "accident" under Article 17 of the Warsaw Convention where the crew could act to minimize the risk without unreasonably interfering with the normal operation of the aircraft.¹⁰ In light of previous Supreme Court interpretation of Warsaw, this interpretation is necessary so as not to completely eliminate any duty of care of the airline to passengers with pre-existing conditions. However, *Husain* also imposes strict elements for such recovery.

During an Olympic Airways flight from Athens to the New York, Dr. Abid Hanson, his wife Rubina Husain, and their children ("Plaintiffs") discovered that they were seated in the non-smoking section of the airplane only three rows in front of the non-partitioned smoking section.¹¹ Dr. Hanson was an asthmatic who had been suffering from breathing problems prior to boarding the plane. Upon locating their seats, Plaintiffs asked the flight crew to move Dr. Hanson for the duration of the flight to a seat farther away from the smoking section due to his asthma and were refused.

As soon as the flight began, ambient smoke from the smoking section surrounded the Plaintiffs.¹² Ms. Husain sought out the flight attendant and requested to move Dr. Hanson to a seat

medical aid if the cause of the passenger's initial injury is internal to the passenger).

⁸ *Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir. 2002).

⁹ See *Saks*, 470 U.S. at 406; *Abramson v. Japan Air Lines Co.*, 739 F.2d 130, 133 (3d Cir. 1984) (holding that "aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an "accident" within the meaning of Article 17"); *Krys*, 119 F.3d 1515 (11th Cir. 1999) (refusing to extend accident to aggravation of a preexisting condition due to crew negligence in failing to divert plane); *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 2d 1313 (S.D. Fla. 1999) (following *Krys*); *Tandon v. United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996) (finding failure to provide adequate medical care to passengers not an accident under Warsaw). But see *Patel v. Air Canada*, No. 00-02168 (N.D. Cal. Sept. 22, 2000) (refusing to dismiss action where crew refused to provide medical services); *Seguritan v. Northwest Airlines, Inc.*, 446 N.Y.S.2d 397 (N.Y. App. Div. 1982) (pre-*Saks* decision finding failure to provide adequate medical care is an accident).

¹⁰ *Husain*, 316 F.3d at 837.

¹¹ *Id.* at 833. Plaintiffs had presented to the check-in agent a letter from Dr. Hanson's brother, also a doctor, alerting the airline to his condition. They also arrived at the airport early to ensure they would obtain seats in the non-smoking section. *Id.*

¹² *Id.*

farther away from the smoking section. The flight attendant told Plaintiffs that Dr. Hanson could switch seats with another passenger, but to do so, Dr. Hanson or Ms. Husain would have to ask other passengers themselves and without the aid of the flight crew.¹³ Dr. Hanson's breathing problems worsened, and after the meal service, Dr. Hanson walked towards the front of the cabin in an attempt to get away from the smoke.¹⁴ Dr. Hanson then suffered an asthma attack, and despite the assistance by other passengers and the crew, he died.

Plaintiffs filed a wrongful death suit under the liability provisions of the Warsaw Convention in state court on December 24, 1998, and Olympic removed the case to the United States District Court for the Northern District of California on March 23, 1999.¹⁵ Plaintiffs argued that three different scenarios of their trip constituted an "accident" under the Warsaw Convention: (1) the refusals of the flight crew to move Dr. Hanson; (2) the flight crew's inability to provide oxygen in time; and (3) the failure of the captain to turn on the non-smoking signs during Dr. Hanson's attack.¹⁶ Defendants argued that none of these events constituted an "unexpected or unusual event" during the flight to trigger Article 17 liability under *Saks*.¹⁷ Judge Breyer concluded that the "unexpected or unusual" event was the attendant's violation of the recognized standard of care for flight attendants on international flights and the violation of Olympic's policy to move sick passengers if helpful and to alert the chief cabin attendant of the medical requests.¹⁸ Accordingly, the trial judge, in a non-jury trial, awarded \$1,400,000 in damages to Plaintiffs, reduced that award by 50% due to Dr. Hanson's comparative negligence, and awarded an additional \$700,000 in non-pecuniary damages.¹⁹

Olympic appealed the findings of the district court, arguing that Dr. Hanson's death resulted from his own internal reactions and as such, was precluded by the standard set by the Su-

¹³ Unknown to Plaintiffs, the flight contained eleven empty passenger seats and carried 28 non-revenue passengers *Id.* A "non-revenue passenger" is an employee or relative of an employee of the airline and typically pays nothing or a discounted fare to fly. See *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1126 (N.D. Cal. 2000).

¹⁴ *Husain*, 316 F.3d at 834.

¹⁵ *Husain*, 116 F. Supp. 2d at 1123.

¹⁶ *Id.* at 1131.

¹⁷ *Id.*

¹⁸ *Id.* at 1133.

¹⁹ *Husain*, 316 F.3d at 832.

preme Court in *Saks*.²⁰ In reviewing the district court's findings of fact and law for clear error, the Ninth Circuit first looked to *Saks* in determining whether an accident had occurred under Article 17.²¹

The Court in *Saks* looked to the original French text of the Convention and to French legal meaning for the original intent of the drafters of the Convention.²² The Court found two provisions of both the French and English versions of the Convention important: first, that Article 17 assigns carrier liability for death or personal injury when there is an *accident*, while Article 18 finds liability for checked baggage when there is an *incident*; second, that implicit in Article 17 is the necessary requirement that the accident have caused the injury.²³ The court noted that the Warsaw drafters' requirement of a showing of an accident for personal injuries as opposed to an occurrence for baggage must have meant to distinguish the two.²⁴ Secondly, the Court noted that there is an element of causation involved, and that this cause of the injury must satisfy the definition of accident and

²⁰ *Id.* at 836.

²¹ *Id.* at 835. In its entirety, Article 17 states:

The 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.

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

²² *Air France v. Saks*, 470 U.S. 392, 396-400 (1985). The original French text of Article 17 states:

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

Id. at 398 n.2.

²³ *Id.* at 398.

²⁴ *Id.* The court looked to the text of Article 17 and the historical interpretation of the term and determined that the term "accident" could include several different meanings:

The word "accident" is not a technical legal term with a clearly defined meaning. . . [A]n accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also used to denote both the cause and the effect, no attempt being made to discriminate between them.

Id. (quoting *Fenton v. J. Thorley & Co.*, A.C. 443, 453 (1903)).

not the occurrence of an injury by itself.²⁵ Thus, the *Saks* Court held that Warsaw liability under Article 17 could only arise where there is an unusual or unexpected event or happening external to the passenger which caused the injury.²⁶

Despite the causal requirement that the *Saks* court imposed on the term “accident”, determining whether an “accident” occurred under Article 17 is a fact-specific inquiry requiring a flexible assessment of all the circumstances surrounding the injury.²⁷ In *Husain*, the court found that the flight personnel “(1) violated the recognized standard of care for flight attendants on international flights by refusing to assist; (2) violated Olympic’s policy; and (3) failed to alert the chief cabin attendant or another flight attendant to help Dr. Hanson find another seat.”²⁸ The court determined that the flight crew’s actions went beyond a mere negligence standard, as the personnel in charge knew of the potential danger to Dr. Hanson. Thus, the court has assigned an important duty to the carrier under Article 17: where a crew can assist a passenger suffering from a pre-existing condition, it must or such omission renders the carrier liable where it could have taken reasonable steps to prevent aggravation of the condition.²⁹

Notice of such pre-existing injury by the carrier is implicit in this threshold. The court distinguished its holding from those in two similar aggravating injury flight cases, *Abramson v. Japan Airlines Co.*³⁰ and *Krys v. Lufthansa German Airlines*.³¹ In *Abram-*

²⁵ *Id.* In distinguishing between the many different interpretations of “accident”, the *Saks* Court concluded that the drafters of Article 17 meant to require a causal element to the term and not simply allow recovery where accidental damages occurred.

The text of the Convention thus implies that, however we define “accident,” it is the *cause* of the injury that must satisfy the definition rather than the occurrence of the injury alone. American jurisprudence has long recognized this distinction between an accident that is the *cause* of an injury and an injury that is itself an accident.

Id.

²⁶ *Id.* at 405.

²⁷ *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

²⁸ *Id.*

²⁹ This interpretation is consistent with the original intent of the Warsaw Convention, which was to impose liability for accidents only when the carrier had not taken reasonable measures to prevent the injury. *Saks*, 470 U.S. at 401 (citing Report of the Second Session, International Technical Committee of Legal Experts on Air Questions (1927); Report of the Third Session, International Technical Committee of Legal Experts on Air Questions (1928)).

³⁰ *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984).

son, the complainant suffered from a pre-existing condition which had begun to bother him while on board a Japan Airlines flight.³² Abramson's wife asked the flight crew to clear several seats so he could lie down to apply a self-help remedy. The flight crew claimed that there were no empty seats.³³ In actuality, seats were open in first class. In *Krys*, the complainant felt ill early into a flight.³⁴ A doctor on board tended to *Krys* and informed the crew that there was no urgent medical need. The doctor determined that *Krys* had most likely suffered a heart attack, and *Krys* filed suit arguing that the airline was negligent in aggravating his condition.³⁵ The *Husain* court distinguished these cases by noting that in both cases, the crew was unaware of either a pre-existing medical condition or a need for immediate action.³⁶ Besides the issue of notice of the injury, the *Husain* court further required that "reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane."³⁷

This analysis is particularly important after *El Al Israel Airlines, Inc. v. Tseng*,³⁸ where the Supreme Court held that personal injuries suffered when embarking, disembarking, or on board an aircraft are solely recoverable under Article 17.³⁹ Relying on *Tseng*, courts have found negligence, civil rights violations, defamation, assault, and battery preempted under federal statutory law.⁴⁰ To find in *Husain* that the airline was not liable at all for an intentional act knowingly committed by its crew which resulted a passenger's death would completely rid the airline of any duty of care to its passengers.⁴¹ Such a result could not have been the intention of the drafters of the Warsaw Convention.

³¹ *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997).

³² *Abramson*, 739 F.2d at 131.

³³ *Id.*

³⁴ *Krys*, 119 F.3d at 1517.

³⁵ *Id.*

³⁶ *Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir. 2002).

³⁷ *Id.*

³⁸ *El Al Israel Airlines, Inc. v. Tseng*, 525 U.S. 155 (1999).

³⁹ *Id.* at 161.

⁴⁰ See Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention*, 16 AM. U. INT'L L. REV. 891, 932 (2001).

⁴¹ See *id.* at 953-55. The court reasoned that with the preemption of state law causes of action, the carrier's standard of care to its passengers would be unreasonably minimal in allowing a carrier the defense of nonaction:

The result of the union of *Krys* and *Tseng* is a dissolution of an airline's duty of care to its passengers so long as the cause of a pas-

Commentators concerned with the *Husain* court's broadening of the scope of the term "accident" cite the apparent litigation floodgates that would open with respect to issues such as deep-vein thrombosis ("economy class syndrome").⁴² These commentators fail to distinguish between injuries that arise completely independent to any action or inaction of the crew or unusual operation of the plane and those that arise from complete disregard of the passengers by the airline. These commentators fail to realize that *Husain* is specifically limited to a small class of potential plaintiffs as it imposes strict limitations on recovery. It is solely limited to cases where the aircraft personnel 1) are on notice of the pre-existing condition; 2) can reasonably do something to aid in the situation that will not interfere with the normal operations of the flight; and 3) do nothing. By meeting these elements, the carrier has become the "unexpected or unusual happening that is external to the passenger" that *Saks* contemplated. Application of the holding in *Husain* will not result in a torrential flood of prospective litigants, rather it will encourage carriers to take an active role in preventing and assisting passengers who it can help.

senger's initial injury is internal to the passenger himself. This holds true so long as the airline takes no affirmative action which aggravates the injury. Complete inaction is acceptable, even if in doing nothing the airline aggravates the passenger's injury.

Id. (quoting *McDowell v. Continental Airlines*, 54 F. Supp. 2d 1313, 1320 (S.D. Fla. 1999)).

⁴² See *Sacking Saks*, *supra* note 3, at 10 ("It has been consistently recognized that an injury or death caused by an internal reaction or an aggravation of a preexisting condition during a normal and routine flight is not actionable. However, this may no longer be the case under the new judicial attitude toward the definition of 'accident.'").

