particular case fit within the narrow reading of *Husain*, itself an unlikely possibility in the context of DVT claims.[1]

While the law has set its face against recovery for DVT claims the problems associated with the occurrence of DVT arguably require a broader response. Given that nearly 1 billion passengers are carried on international flights annually with projections of 2.75 billion passengers on all flights by 2011, the occurrence of DVT represents a substantial problem for civil society and the aviation industry. Multiple sources suggest that there are around 100,000 DVT related deaths in the US each year. While the heat may have gone out of the issue in a jurisprudential sense it is not utopian to seek another response, one governed by a humanitarian concern for people's welfare. It is doubtful whether the provision of in-flight videos warning of the dangers of DVT and urging passengers to engage in a range of stretching activities represents a sufficient industry response to this pernicious and ongoing problem. Equally, the practice of wearing compression socks or compression tights, which also reduce the risks, is arguably not widely followed among passengers. This is further compounded by the rise of low cost carriers on longer haul routes, airlines which are unlikely to provide complimentary compression socks.

Is it possible or desirable for air carriers to collectively engage in action, under the leadership of IATA, to further reduce the risks or is it the case, particularly in view of the increased incidence of obesity and diabetes, that passengers should take responsibility for their personal reaction to matters which may be neither unusual or unexpected and external to the operation of the aircraft? The jurisprudential act may be over but the curtain has not entirely been drawn on the problem in a broader sense.

Eds.

The Civil Aviation Safety Authority in the Courts

In *Trans Air Ltd and Civil Aviation Safety Authority* [2010] AATA 42 (22 January 2010), is a private company which was incorporated in Papua New Guinea, had its application for a foreign aircraft Air Operator's Certificate (FAAOC) refused by the CASA. Trans Air operates predominately medivac flights between PNG and Australia. When the Applicant applied for the FAAOC, CASA requested that it provide various documents "including but not limited to lease agreements and payments, maintenance releases (or equivalent documents), trip records, pilot records, invoices, passenger or cargo manifests and flight and duty records".

[1] The *Husain* criteria apply narrowly to the following circumstances (i) where airline personnel are given notice of a pre-existing condition, (ii) where they are capable of taking reasonable alleviating steps that will not interfere with the normal operations of the aircraft and (iii) where, in those circumstances, they elect to do nothing.

CASA gave the following reasons for refusing the application on the following basis that "*it appears [Trans Air] have conducted flights to and from Australia that were not authorized. This is a matter CASA is investigating. Therefore, I cannot be satisfied that aviation safety would not be compromised before that investigation is complete and the documents referred to above, received*." Subsequently, Trans Air applied to the AAT for a review of that decision presided over by Deputy President P E Hack SC ("Hack DP").

Hack DP observed that the documentation filed by both parties in the hearing were not satisfactory or helpful. Curious he observed that:

> "*… many of the matters ultimately relied upon by CASA were not identified in its Statement of Facts and Contentions. That document runs to some 49 pages of text of which approximately 46 pages are devoted to matters concerning the operations (and faults) of Lessbrook, the Australian company formerly operated by Mr Wright. That prompted Trans Air to lodge an equally diffuse document that added, as well, irrelevant assertions about the motives of CASA relating to the operations of Lessbrook. The pattern continued in Trans Air's written submissions and their irrelevant attacks upon CASA's decision-making processes and in CASA's somewhat truculent written submissions in reply.*"

The conduct of the proceedings as outlined by Hack DP appeared to be peculiar to say the very least.

Without getting into the detail, Hack DP found that, notwithstanding the submissions made by CASA, Hack DP "*was satisfied of the matters in s 28(1)(a) and (b) of the [Civil Aviation] Act and, there being no suggestion that paragraphs (c), (d) and (e) of the sub-section have application in the present case, a FAAOC must be issued to Trans Air.*"

Less than seven days later, Hack DP was called upon again to consider a refusal by CASA to issue a FAAOC in *Transglobal Airways Corporation and Civil Aviation Safety Authority* [2010] AATA 68 (29 January 2010). In this matter, the Applicant, the holder of an Air Carrier Operating Certificate issued by the Civil Aviation Authority of the Philippines, applied to the AAT for an order to stay the decision by CASA to refuse the FAAOC pending the determination of the application for review pursuant to section 41(2) of the *AAT Act 1975*. Counsel for CASA, Ian Harvey, submitted that the AAT did not have such a power, despite the decision of Siopis J in *Civil Aviation Safety Authority v Hotop* [2005] FCA 1023 (the Polar Aviation case).

However, Hack DP found that the facts in the Polar Aviation case had close factual similarities to this case and rejected Harvey's submission that the relevant part of the decision was in obiter. CASA also submitted that if an order under s 41(2) is made in positive terms it will have the effect that an AOC is being issued without CASA having the state of satisfaction required by s 28(1) of the CAA and

without the Tribunal having had any opportunity to consider that question and that the power in s 41(2) could not be intended by the Parliament to be used in such a way as to potentially expose an AOC holder to being in breach of a statutory condition. Hack DP rejected these submissions stating in string terms that "*It seems absurd to suggest that the Parliament could not have contemplated that the power might not be used where CASA had refused to renew an AOC*". Hack DP rejected further submission advanced by CASA as "*puzzling*". Moreover, Hack DP was satisfied that the AAT to make the interim order sought.

Curiously, Polar Aviation has recently featured in the following matters before the Federal Court of Australia:

- *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2010] FCA 367 (16 April 2010); and
- Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 2) [2010] FCA 404 (29 April 2010).

These decisions relate to an application by Polar Aviation and its director for leave to file proceedings out of time against CASA and some of its officers alleging that the respondents had wrongfully and in breached the rights given to the applicants by and pursuant to the civil aviation legislation, misfeasance in office and negligence in purported exercise of the respondents' powers under the civil aviation legislation. For varying reasons, the application was denied.

Eds.

Neck injury not caused by an Article 17 accident

The plight of economy class travellers has long been recognised by the travelling public, and in recent years have come to the attention of the Courts. Whilst there is a broadly sympathetic tone to the discourse, in a judgment at the end of 2009, the District Court of NSW dismissed a passenger's claim against an airline for personal injury, having been satisfied that an economy seat's inability to fully recline due to the positioning of a bulkhead behind was not an "accident" for the purposes of Article 17 of the Amended Warsaw Convention.

The passenger in this case was travelling by air from London to Shanghai in economy class. The passenger claimed that during that flight he suffered an injury to his neck and cervical spine which led to acute pain and ongoing disability. He received a mixture of medical treatment, including some vigorous Chinese massage and underwent further medical treatment upon his return to Australia.

The passenger sued for damages under Article 17 of the Warsaw Convention as amended at the Hague of 1955 and Montreal Additional Protocol No. 4, and under the relevant parts of the Civil Aviation (Carrier's Liability) Act 1959.