

**DEFINING “ACCIDENTS” IN THE AIR:  
WHY TORT LAW PRINCIPLES  
ARE ESSENTIAL TO INTERPRET  
THE MONTREAL CONVENTION’S  
“ACCIDENT” REQUIREMENT**

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*Exceptions do not exist in a vacuum; in fact, exceptions to a principle are usually formed and understood using those principles to which they are an exception. Even so, U.S. courts interpreting the accident requirement of the Montreal Convention—an exception to traditional tort law regarding injuries sustained during international air travel—fail to use tort law in evaluating whether certain situations meet the accident criteria. Consequentially, many decisions render airlines responsible for a passenger’s injuries where in the same circumstances any other premises owner would not be implicated. This directly contradicts the intent of the Montreal Convention’s creators, who wanted to limit carrier liability to foster the airline industry’s viability. Instead of interpreting “accident” to make carriers liable in a narrower set of circumstances and thereby protect airlines, courts are interpreting “accident” in a way that broadens the airlines’ responsibilities.*

*This Note examines the history of, and the reasons for, the Montreal Convention, which in part forces airlines to indemnify passengers for injuries resulting from “accidents”—a term undefined in the treaty. The Montreal Convention and the subsequent case law interpreting it demonstrate how, to qualify as an “accident,” the injury-producing incident must be causally connected to the plane’s operation. Importantly, the causal connection’s adequacy should be evaluated according to American tort jurisprudence even though the accident requirement itself is an exception to general tort law. This Note focuses on a particular type of injury-producing event, a copassenger tort, because of its interesting causal nature that exemplifies the contrast between decisions using tort law and those rendered under the Convention.*

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#### INTRODUCTION

Brandi Wallace expected her flight from Seoul, South Korea, to Los Angeles, California, to be routine. After consuming a meal, having a drink, and reading her book, Wallace fell asleep in her window seat.<sup>1</sup> According to the standard procedure for long flights, the lights in the cabin were dimmed to help passengers adjust to time changes and ensure their comfort.<sup>2</sup> Some time later, Wallace awoke to find that Kwang-Yong Park, the passenger seated beside her, had undone her belt while she was asleep, unzipped her pants, and put his hand inside her underwear to fondle her

1. See Petition for Writ of Certiorari at 3, *Korean Air Lines Co. v. Wallace*, 531 U.S. 1144 (2001) (No. 00-560).

2. See Andrei Ciobanu, *Saving the Airlines: A Narrower Interpretation of the Term “Accident” in Article 17 of the Montreal Convention*, 31 *ANNALS AIR & SPACE L.* 1, 17 (2006) (“Darkening the cabin on long flights is necessary for the passengers’ comfort.”).

private parts.<sup>3</sup> Wallace reported the incident to a Korean Airlines crewmember, and the crewmember assigned Wallace a new seat immediately.<sup>4</sup> Park was arrested upon arrival in Los Angeles.<sup>5</sup>

This sexual assault is an example of a copassenger tort,<sup>6</sup> when one passenger on a flight injures another passenger or causes another passenger to be injured. The Convention for the Unification of Certain Rules for International Carriage by Air ("the Montreal Convention" or "the Convention") is an international treaty that governs the existence and amount of an air carrier's liability for passenger injuries sustained on international flights, including those resulting from copassenger torts.<sup>7</sup> The Convention premises injuries for which the airline can be liable on whether that injury was caused by an "accident" within the meaning of the treaty.<sup>8</sup> Yet "accident" is not explicitly defined in the document, and this ambiguity forces U.S. courts to apply a heavily fact-based inquiry as to whether certain occurrences are "accidents" under the Convention. This creates a body of U.S. law regarding international air carrier liability that leaves both plaintiffs and airlines uncertain as to what claims will succeed in court.<sup>9</sup>

Prior to the incident described above, Park did not act suspiciously, the crew did not notice any unusual behavior, and Wallace did not alert or complain to the attendants about Park.<sup>10</sup> Korean Air could not have prevented the sexual assault, because it could not possibly have foreseen its occurrence. Even so, and even though Wallace herself conceded that the assault was not caused "by a lack of due care on the part of" Korean Air,<sup>11</sup> the Second Circuit found the airline liable for Wallace's assault.<sup>12</sup> Using

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3. See Petition for Writ of Certiorari, *supra* note 1, at 3.

4. See *id.*

5. See *id.*

6. Recently, there has been growing concern about sexual assaults on airplanes. See Karen Schwartz, *Recent Incidents Put a New Focus on Sexual Assault on Airplanes*, N.Y. TIMES (Oct. 20, 2016), [http://www.nytimes.com/2016/10/20/travel/recent-incidents-put-a-new-focus-on-sexual-assault-on-airplanes.html?smprod=nytcare-iphone&smid=nytcare-iphone-share&\\_r=0](http://www.nytimes.com/2016/10/20/travel/recent-incidents-put-a-new-focus-on-sexual-assault-on-airplanes.html?smprod=nytcare-iphone&smid=nytcare-iphone-share&_r=0) [<https://perma.cc/347J-WV3R>].

7. See Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. TREATY DOC. NO. 106-45 (2000) [hereinafter Montreal Convention].

8. See *id.* art. 17; see also *Air Fr. v. Saks*, 470 U.S. 392, 398-99 (1985) ("[The treaty] specified that air carriers would be liable if an accident caused the passenger's injury." (emphasis omitted)); *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 382 (2d Cir. 2004) ("[The Convention] held carriers liable in the event of an accident.").

9. As one scholar put it, contemplating the meaning of an article 17 accident has become "a metaphysical exercise roughly equivalent to contemplating the number of angels that may dance on the head of a pin." Louise Cobbs, *The Shifting Meaning of 'Accident' Under Article 17 of the Warsaw Convention: What Did the Airline Know and What Did It Do About It?*, 24 AIR & SPACE L. 121, 121 (1999).

10. See *Wallace v. Korean Air*, No. 98 Civ. 1039 (RPP), 1999 U.S. Dist. LEXIS 4312, at \*3 (S.D.N.Y. Apr. 6, 1999).

11. Petition for Writ of Certiorari, *supra* note 1, at 4.

12. See *Wallace v. Korean Air*, 214 F.3d 293, 300 (2d Cir. 2000). This precedent, holding airlines liable for injuries caused by incidents wholly out of their control, essentially imposes strict liability on the airlines for any injuries resulting on international flights, which is neither the intention of the Warsaw Convention's creators nor consistent with other American law. See SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW: OCTOBER 4-12, 1929, WARSAW 49 (Robert C. Horner & Didier Legrez trans., 1975)

particularized and inconsistent precedent, the Second Circuit found that Wallace's sexual assault was an "accident" as defined by the Montreal Convention.<sup>13</sup> In analogous cases, however, courts have not found premises owners liable where the same conduct occurred in a bus, bar, boat, or other on-ground premises.<sup>14</sup>

This challenges one's traditional sense of justice, as it contradicts American jurisprudence's embodiment of the ethical assumption that one should be liable only for injuries one has caused or has a duty to prevent.<sup>15</sup> In conjunction with this tenet is that one has a duty only to prevent harms one can reasonably foresee.<sup>16</sup> The Second Circuit's decision circumvented these foundational principles of American tort law by neglecting to use them in its inquiry of the sufficiency of the causal connection of the assault to the operation of the aircraft.

This Note argues that, although the accident threshold in the Montreal Convention for air carrier liability was included to be an exception to tort law principles,<sup>17</sup> tort principles still are necessary to interpret the accident requirement. Accidents must be causally connected to the operation of the aircraft,<sup>18</sup> and the sufficiency of this causal connection must be interpreted in light of American tort principles to fulfill the intent of the Montreal Convention's drafters and to align Montreal Convention decisions with American jurisprudence's inherent sense of justice regarding who should be liable for negligence and injuries.

[hereinafter WARSAW MINUTES] (noting British representative to the Warsaw Convention Sir Alfred Dennis's statement that "it is therefore not just to impose absolute liability upon the carrier").

13. See *Wallace*, 214 F.3d at 300.

14. See, e.g., *Jaffess v. Home Lines, Inc.*, No. 85 Civ. 7365 (MJL), 1988 U.S. Dist. LEXIS 3481 (S.D.N.Y. Apr. 18, 1988) (finding cruise ship owners not liable for a passenger's sexual assault while on the ship). In *Jaffess*, the court was following Supreme Court precedent laid out in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959), in which the Court held "the owner of a ship in navigable waters owes . . . the duty of exercising reasonable care under the circumstances." The Second Circuit had reaffirmed this precedent specifically regarding passengers on ships. See *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988); *Rainey v. Pacquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir. 1983). Under the particular circumstances in *Jaffess*—a sexual assault on a cruise ship's passenger—the court found that "[i]f anything, sexual assault seems less likely to occur on ships than on land" because assailants on land have the opportunity to "flee the vicinity, while persons on ships cannot." *Jaffess*, 1988 U.S. Dist. LEXIS 3481, at \*11. Therefore, the court found the premises owner had exercised "reasonable care" and refused to hold it liable for the sexual assault. See *id.* at \*10.

15. See, e.g., RESTATEMENT (FIRST) OF TORTS § 901 (AM. LAW INST. 1939) (noting that the purpose of tort law is to "punish wrongdoers"); see also William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 861–62 (1981) ("[I]f asked what tort law is based upon, most tort lawyers would answer that it is based upon notions of justice, equity, fairness, or morality.").

16. See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (noting that if people were liable "without suspicion of the danger," then "[i]f life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as . . . the customary standard to which behavior must conform").

17. See Ciobanu, *supra* note 2, at 13 ("[T]he Warsaw Convention was meant to distinguish between traditional tort injuries and aircraft-related injuries.").

18. See *infra* Part III.A.

Part I of this Note examines the history of the Montreal Convention and focuses on the reasons for its implementation. It explains how the Warsaw Convention was passed in 1929 to protect the young airline industry from liability levels that could threaten its viability.<sup>19</sup> Ultimately, these goals went unmet as numerous amendments stripped the Convention of its uniformity and easy applicability. To fix this confusion, the signatories to the Warsaw Convention met in 1999 and created the Montreal Convention, which superseded the original convention and sought to fix these issues.

Part II then explains current American jurisprudence under the Montreal Convention and courts’ reasoning in labeling certain happenings as “accidents.” Part II also considers the current state of copassenger torts under American precedent.<sup>20</sup>

Part III reexamines the Convention’s legislative history and the operative U.S. cases interpreting the word “accident” to prove that a causal connection to the aircraft is necessary for an incident to be an “accident.” Part III also advocates for the use of American tort principles to analyze the validity of an alleged accident’s causal connection to the aircraft’s operation. Using tort principles to decide whether the causal connection is sufficient to render airlines liable facilitates the intent of the creators of the Convention, the purpose of U.S. tort law, and the foundational sense of morality that underpins the American legal system. Finally, Part III attempts to draw the line at what kinds of copassenger torts are accidents by focusing on what connections these torts must have to the aircraft’s operation and the sufficiency of these connections under traditional tort law.

#### I. A HISTORY OF AIR CARRIER LIABILITY FOR INJURIES ON INTERNATIONAL FLIGHTS

Commercial air travel is how our increasingly globalized society shares persons and resources. In less than one hundred years, air travel has gone from nonexistence to transporting 3.5 billion people in 2015.<sup>21</sup> That is almost half of the world’s population.<sup>22</sup> Commercial air travel is integral to the world’s economy: consumers spend 1 percent of world GDP on air transport, and airlines and their customers generate around \$116 billion in

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19. See *infra* Part I.A.

20. Thus far, American courts have been reluctant to contribute to the “Talmudic debate” of whether all copassenger torts are accidents under the Warsaw Convention. See *Wallace v. Korean Air*, 214 F.3d 293, 299 (2d Cir. 2000) (“Happily, this Talmudic debate is academic in the unique circumstances of this case. Indeed, we have no occasion to decide whether all co-passenger torts are necessarily accidents for purposes of the Convention.”). In addition, examining what is and is not an “accident” under the Warsaw Convention through the lens of copassenger torts will help clarify the scope of the Warsaw Convention’s liability and better align current Montreal Convention jurisprudence with previous precedent and the intent of the treaty’s drafters. *Id.*; see also *infra* Part II.C.

21. IATA, ANNUAL REVIEW 2016, at 55 (2016), <http://www.iata.org/publications/Documents/iata-annual-review-2016.pdf> [https://perma.cc/8FEF-R7WF].

22. See *Current World Population*, WORLDOMETERS, <http://www.worldometers.info/world-population/> (last visited Nov. 19, 2016) [https://perma.cc/BPF4-DS7C].

tax revenue for governments around the globe.<sup>23</sup> Despite this, the commercial airline industry is economically fragile<sup>24</sup> and needs insulation from crippling financial loss through certain limitations on liability.<sup>25</sup> One such protective device is the Montreal Convention, an international treaty governing the liability of air carriers for injuries that occur onboard aircrafts.<sup>26</sup>

The Montreal Convention's predecessor, the Warsaw Convention,<sup>27</sup> prioritized protecting the then-nascent airline industry.<sup>28</sup> Understanding the creators' objectives and concerns are essential to properly interpret Montreal Convention "accidents."<sup>29</sup> Accordingly, Part I traces the history of the Montreal Convention, its structure, and its main goals of unifying liability standards and limiting liability for air carriers. Part I.A reviews the intentions of the Warsaw Convention's creators and the purposes for its creation. Part I.B examines the Montreal Convention, the purposes for rewriting international air carrier liability standards, and what—if anything—changed between the two Conventions.

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23. See IATA, ECONOMIC PERFORMANCE OF THE AIRLINE INDUSTRY 2 (2015), <https://www.iata.org/whatwedo/Documents/economics/IATA-Economic-Performance-of-the-Industry-mid-year-2015-report.pdf> [<https://perma.cc/VBR6-K63Z>].

24. See, e.g., Karen Walker, *The IATA Forecasts Record 2015, 2016 Airline Profits, but Cautions on Regional Disparity*, AIR TRANSPORT WORLD (Dec. 10, 2015), <http://atonline.com/airlines/iata-forecasts-record-2015-2016-airline-profits-cautions-regional-disparity> (noting "backwards steps" in airline profitability, "drop[s] in year-over-year profitability," and the head of the International Air Transport Association's observation that "large parts of the [airline] industry are still struggling") [<https://perma.cc/7MWJ-SYK8>]. As recently as 2015, the "fragility of the [commercial airline] industry's profitability might come as a surprise." Tony Tyler, Dir. Gen., IATA, Remarks at 71st Annual General Meeting of International Air Transportation Association Curtain Raiser Press Conference (June 4, 2015), <http://iata.org/pressroom/speeches/Pages/2015-06-04-01.aspx> [<https://perma.cc/RZD8-7U67>]; see also Nisha Ramchandani, *Global Carriers Cruise Towards Record Year but Profits Remain Fragile*, BUS. TIMES (Dec. 11, 2015), <http://www.businesstimes.com.sg/transport/global-carriers-cruise-towards-record-year-but-profits-remain-fragile-iata> (observing Director General Tyler's remarks that "[t]he industry's results . . . are not outstanding when compared to the profits that are generated in other parts of the global economy") [<https://perma.cc/V9BY-HNKX>].

25. The head of the International Air Transport Association (IATA) has made a plea to government leaders asking them to be "keen to support aviation's financial health" with strategies including liability-limiting regulations. Tony Tyler, Dir. Gen., IATA, Report on the Air Transport Industry (June 8, 2015), <http://www.iata.org/pressroom/speeches/Pages/2015-06-08-01.aspx> [<https://perma.cc/7YHJ-HS9T>].

26. See generally Montreal Convention, *supra* note 7.

27. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (1929) [hereinafter Warsaw Convention].

28. See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499 (1967) ("The second goal—clearly recognized to be the more important one—was to limit the potential liability of the carrier in case of accidents.").

29. These concerns still exist today, almost one hundred years after the Warsaw Convention originally attempted to address them.

A. *The Warsaw Convention: Objectives and Liabilities*

Thirty nations met in Warsaw, Poland, on October 4, 1929, to create uniform international air carrier liability standards.<sup>30</sup> As one scholar put it, for the first time, an industry was going to “link many lands with different languages, customs, and legal systems,” so lawmakers desired “at the outset, a certain degree of uniformity.”<sup>31</sup> A uniform system would make it easier for all parties involved in civil airline litigation—claimants, carriers, and governments—to know their rights and responsibilities and the origins of those rights and obligations.<sup>32</sup>

A second paramount objective of the conference was to foster industry growth by limiting international air carrier liability for personal injury, death, and property damage.<sup>33</sup> In the late 1920s, commercial air travel was still an emerging industry.<sup>34</sup> Limited liability would ensure the young industry’s development, create predictable guidelines for airlines to secure insurance, and stabilize the industry’s operating costs.<sup>35</sup> Air carriers—

30. See PAUL B. LARSEN ET AL., *AVIATION LAW: CASES, LAWS AND RELATED SOURCES* 267–73 (2006).

31. Lowenfeld & Mendelsohn, *supra* note 28, at 498. The resulting treaty’s preamble echoes this sentiment, stating the signatories “recognized the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier.” Warsaw Convention, *supra* note 27, at 3014; see also *Zicherman v. Korean Airlines*, 516 U.S. 217, 230 (1996) (“Undoubtedly it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel.”); *Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996) (“A primary function of the Warsaw Convention is to foster uniformity in the laws governing international air carrier liability.”); see also *Pittman v. Grayson*, 869 F. Supp. 1065, 1069 (S.D.N.Y. 1994) (“The Warsaw Convention was designed to effectuate two central public policy goals: (1) to establish uniformity . . . as to documentation, and (2) to limit air carriers’ potential liability in the event of accidents.”).

32. See *Potter*, 98 F.3d at 885 (“Uniformity with respect to liability is required in order to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which their insurance rates can be calculated.”); M. Veronica Pastor, *Absolute Liability Under Article 17 of the Warsaw Convention: Where Does It Stop?*, 26 GEO. WASH. J. INT’L L. & ECON. 575, 576 (1993) (noting absent an international treaty, conflict of law rules would apply to disputes arising from injuries on flights, and this system “would be complicated, often confusing, and . . . would result in wide discrepancies in recovery and liabilities for parties involved in a single incident”).

33. See *Saks v. Air Fr.*, 724 F.2d 1383, 1386 (1984) (“It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will also prove to be an aid in the development of international air transportation” (quoting *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Hearing Before the S. Comm. on Foreign Relations*, 73rd Cong. 3–4 (1934) (statement of Secretary of State Cordell Hull))), *rev’d*, 470 U.S. 392; see also 7 GEORGE N. TOMPKINS, JR., *LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES: FROM WARSAW 1929 TO MONTREAL 1999*, at 3 (2006).

34. The total airline operations between 1925 and 1929, in both domestic and international travel, were only 400 million passenger miles. Lowenfeld & Mendelsohn, *supra* note 28, at 498.

35. See *Oliver v. Scandinavian Airlines Sys.*, No. M-82-3057, 1983 U.S. Dist. LEXIS 17951, at \*2–3 (D. Md. Apr. 5, 1983) (“[T]he Convention sought to limit the potential liability of the air carrier so as to aid in the development of international air transportation, to provide a definite basis for insurance rates for airlines, and thereby to reduce operating expenses with subsequent savings to the airline industry and its passengers.”).

which, before the conference, attempted to require passengers to contractually accept a reduced or nonexistent level of carrier liability as a condition of air travel<sup>36</sup>—were worried about compensating accident victims who could threaten to bankrupt their business.<sup>37</sup>

The resulting treaty, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, known as “the Warsaw Convention,” became law in 1933.<sup>38</sup> It governed “the international carriage of passengers, baggage, and cargo by air, and regulat[ed] the liability of international air carriers in over 120 nations.”<sup>39</sup> Article 17 of the Warsaw Convention addressed international air carrier liability for personal injury or death. It stated:

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.<sup>40</sup>

An airline’s liability was premised upon an accident causing the claimant’s injury.<sup>41</sup> Read alone, article 17 confers strict liability upon airlines when an *accident* happens. However, as one scholar notes, “Article 17 is written in a way that clearly indicates that the clauses and parts of the article are to be read as an inter-connecting part to a larger more intricate whole.”<sup>42</sup> Therefore, this strict liability must be read in line with the Warsaw Convention’s other liability qualifying articles.

Article 17 created a presumption of liability on the air carriers unless they could prove they had taken all “necessary measures to avoid the damage,”<sup>43</sup>

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36. See WARSAW MINUTES, *supra* note 12, at 47. Purchasing a ticket secured this arrangement.

37. See *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971) (“The most important purpose of the Warsaw Conference was the protection of air carriers from the crushing consequences of a catastrophic accident, a protection thought necessary for the economic health of the then emerging industry.”); see also Ciobanu, *supra* note 2, at 3; Lowenfeld & Mendelsohn, *supra* note 28, at 499 (“It was expected that [the Convention’s limitation of liability] . . . would enable airlines to attract capital that might otherwise be scared away by the fear of a single catastrophic accident.”). This threat still exists today because of the airline industry’s vulnerable state: as recently as July 2015, the rate of expected rise in the airline industry’s profitability has fallen; in addition, profit expectations have dipped dramatically. See IATA, AIRLINE BUSINESS CONFIDENCE INDEX: JULY 2015 SURVEY (2015) <https://www.iata.org/whatwedo/Documents/economics/bcs-jul-15.pdf> [<https://perma.cc/K3AC-9V37>].

38. See Warsaw Convention, *supra* note 27.

39. Loryn B. Zerner, *Tseng v. El Al Israel Airlines and Article 25 of the Warsaw Convention: A Cloud Left Unchartered*, 14 AM. U. INT’L L. REV. 1245, 1249 (1999).

40. Warsaw Convention, *supra* note 27, art. 17 (emphasis added).

41. See *id.*; see also Howard Sokol, *Final Boarding Call—The Warsaw Convention’s Exclusivity and Preemption of State Law Claims in International Air Travel: El Al Israel Airlines v. Tseng*, 74 ST. JOHN’S L. REV. 227, 237 (2000) (“Deciding whether an accident has occurred conclusively determines whether Article 17 applies.”); *supra* note 8 and accompanying text.

42. Sokol, *supra* note 41, at 236 n.75.

43. See Warsaw Convention, *supra* note 27, art. 20.



whereby article 20 allowed them to avoid liability entirely.<sup>44</sup> When an article 17 accident was found to have occurred, article 22 created a monetary recovery limit of \$8,300.<sup>45</sup> The carrier also could limit damages with a contributory negligence defense, embodied in article 21.<sup>46</sup> The only time a claimant could recover more than the Warsaw Convention's monetary limit was upon a showing of "willful misconduct" on the part of the carrier.<sup>47</sup>

Essentially, the Warsaw Convention drew a fault-based line on personal injury liability: if the airline negligently caused the accident, the claimant could recover only up to the monetary limit; if the airline willfully caused the accident, the claimant had unlimited recovery. However, the Warsaw Convention did not make the airline liable for accidents wholly outside the carrier's control;<sup>48</sup> as stated at the Warsaw gathering, "[The objective is] just not to impose absolute liability upon the carrier but to relieve him of all liability when he has taken reasonable and normal measures to avoid damage: This is the diligence which one can demand of the reasonable man."<sup>49</sup>

After the Warsaw Convention's implementation, many signatories found the \$8,300 liability limit too low to justly compensate accident victims.<sup>50</sup> Air safety improvements made it easier for carriers to obtain low-cost insurance (lessening their need for legislative protections), lawsuits for accidents on airlines were consistently asking for damages exceeding the Warsaw limit, and a political and academic contention that international air carriers were no longer entitled to special protection began gaining attention.<sup>51</sup> The 1955 Hague Protocol, attempting to address these issues, doubled the monetary limit on recoverable damages for article 17 accidents.<sup>52</sup> It was the first of numerous amendments to the Warsaw Convention over the next forty years, ultimately rendering the Warsaw Convention unwieldy.<sup>53</sup>

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44. *Id.*

45. *See id.* art. 22.

46. *See id.* art. 21.

47. *See id.* art. 25.

48. *See id.* art. 20.

49. WARSAW MINUTES, *supra* note 12, at 49 (statement of Sir Alfred Dennis, British representative to the Warsaw Convention).

50. *See, e.g.*, 111 CONG. REC. 20,164 (1965) (statement of Sen. Robert Kennedy) ("No one questions the fact that the protection now afforded international travelers is woefully inadequate."); *see also* Maignie v. Compagnie Nationale Air Fr., 549 F.2d 1256, 1258 n.4 (9th Cir. 1977) (noting how the United States denounced the Warsaw Convention because of the low damages limit).

51. *See* Lowenfeld & Mendelsohn, *supra* note 28, at 504; *see also, e.g.*, Aleksander Tobolewski, *Against Limitation of Liability, A Radical Proposal*, 3 ANNALS AIR & SPACE L. 261, 264–67 (1978) (arguing for strict liability for torts occurring on an aircraft).

52. *See* TOMPKINS, *supra* note 33, at 5.

53. The Warsaw Convention was next amended by the 1961 Guadalajara Supplementary Convention. Its purpose was to make the liability rules of the Warsaw Convention and Hague Protocol applicable to both the actual carrier and the contracting carrier when the actual carrier was not a "successive carrier" under the Warsaw Convention's definition. *See id.* at 8. The 1966 Montreal Agreement and the 1971 Guatemala Protocol were further efforts to achieve uniform liability systems and created a higher carrier liability damages

*B. The Montreal Convention:  
Broadening Carrier Liability Standards  
and Shifting Their Bases*

The Warsaw Convention and its supplemental amendments became convoluted and far from uniform.<sup>54</sup> In order to unify the previous forty years' piecemeal amendments, representatives from 118 countries and eleven international organizations met in Montreal in May 1999.<sup>55</sup> The International Civil Aviation Organization's then-president stated at the opening of the Montreal conference:

[The Warsaw Convention's] complexity has been further extended by adding additional rules . . . . The result of these uncoordinated efforts is an increasingly opaque legal framework whose usefulness . . . has become a matter of growing concern, and it is the shared desire of the parties involved that legal certainty and uniformity be restored, while implementing, in a globally-coordinated fashion, the long overdue modernization and consolidation of the [Warsaw] system.<sup>56</sup>

This testimony echoes the Montreal Convention's creators' prioritization of uniform and easy to follow international air liability standards.

A second goal of the Montreal Convention's creators was to reflect the amending provisions in their expansion of air carrier liability.<sup>57</sup> The Montreal Convention's article 17 addressed air carrier liabilities for personal death or injuries on flights, just as it did in the Warsaw

threshold. *See* LARSEN ET AL., *supra* note 30, at 272–73. The Montreal Protocol of 1975 updated the existing liability limits for death or injury by translating the damage limit provision from the gold standard to another currency measure, “Special Drawing Rights” (SDRs). The International Monetary Fund had created the SDR in the wake of abandoning the gold standard. *See id.* Finally, in 1998, IATA created a contractual arrangement of airlines to withdraw from the 1966 Montreal agreement and to create a new language on tickets; carrier signatories agreed not to invoke the monetary limit of damages arising under article 17 and the nonfault defense of article 20(1) for claims under 100,000 SDRs. *See id.* at 274.

54. *See* Runwantissa Abeyratne, *The Economy Class Syndrome and Air Carrier Liability*, 28 *TRANSP. L.J.* 251, 271 (2001) (noting that the Warsaw Convention “did not succeed in presenting to the world unequivocally objective and quantified rules of liability,” thus precluding “a plaintiff from knowing that he would be, as a rule, compensated if he is injured in an air accident”).

55. *See* TOMPKINS, *supra* note 33, at 27.

56. 1 INT'L CIVIL AVIATION ORG., INTERNATIONAL CONFERENCE ON AIR LAW: MONTREAL, 10–28, MAY 1999, at 37 (1999); *see also* *Milestones in International Civil Aviation*, ICAO, <http://www.icao.int/about-icao/History/Pages/Milestones-in-International-Civil-Aviation.aspx> (noting that when the Montreal Convention came into effect on November 4, 2003, ICAO Council President Assad Kotaite remarked, “Victims of international air accidents and their families will be better protected and compensated under the new Montreal Convention, which modernizes and consolidates a seventy-five year old system of international instruments of private international law into one legal instrument”) (last visited Nov. 19, 2016) [<https://perma.cc/G579-NVKE>].

57. *See* *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006) (noting that the Montreal Convention “represents a significant shift away from a treaty that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers” by broadening carrier liability).

Convention.<sup>58</sup> The Warsaw Convention's presumption of air carrier liability remained in Montreal's article 17, but the damages cap was significantly increased (from \$8,300 to 100,000 "Special Drawing Rights" (SDRs), an international reserve asset the International Monetary Fund created, equivalent to approximately \$135,000).<sup>59</sup> It also stripped air carriers of any defense in actions under 100,000 SDRs.<sup>60</sup> The carrier could escape claims over 100,000 SDRs only if it could prove that factors other than its negligence, like a third party's act, caused the damages.<sup>61</sup> Whereas the Warsaw Convention had divided its two tiers of recovery based on fault, the Montreal Convention did so monetarily.<sup>62</sup>

Significantly, for the first time in aviation law, plaintiffs could recover unlimited damages for negligence claims.<sup>63</sup> The Department of Transportation's under secretary for policy found this elimination of "all artificial monetary limits on recoveries from the airline for proven damages with respect to the death or injury of a passenger during an international airline mishap" a cornerstone of the new treaty, and he made sure to point it out when urging the Senate to include the United States as a Montreal Convention signatory.<sup>64</sup>

Yet, despite its newly aligned purposes and liability parameters, there were no substantive changes in the liability-inducing provision of the Montreal Convention (still article 17).<sup>65</sup> Because of the lack of substantive

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58. See Montreal Convention, *supra* note 7, art. 17 ("The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."). Although there were slight changes in language—the Montreal Convention's "in case of death or bodily injury" replaced the Warsaw Convention's "in the event of the death or wounding of a passenger or any other bodily injury"—no substantive liability changes were made. Compare Montreal Convention, *supra* note 7, art. 17, with Warsaw Convention, *supra* note 27, art. 17; *infra* note 65 and accompanying text.

59. See Larry Moore, *The New Montreal Liability Convention, Major Changes in International Air Law: An End to the Warsaw Convention*, 9 TUL. J. INT'L & COMP. L. 223, 227 (2001).

60. See Montreal Convention, *supra* note 7, art. 21. By contrast, the Warsaw Convention allowed a carrier to escape liability at any monetary damage level if it could prove it had taken all necessary measures to prevent the damage or that those measures were impossible. See LARSEN ET AL., *supra* note 30, at 275.

61. See Ciobanu, *supra* note 2, at 5.

62. See *id.* ("[U]nder the Montreal Convention, there is no longer any distinction between limited and unlimited liability based on the plaintiff's cause of action. Instead, the distinction arises from the amount of damages that the plaintiff can prove.").

63. See Allan I. Mendelsohn & Renée Lieux, *The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff*, 68 J. AIR L. & COM. 75, 110 (2003). In other words, there is a limit to the finding of liability, but in some circumstances, there is no limit to the amount of recovery once the airline is found liable.

64. S. EXEC. REP. NO. 108-8 (2003) (statement of Hon. Jeffrey N. Shane).

65. See *Doe v. Etihad Airways*, No. 13-14358, 2015 WL 5936326, at \*1 (E.D. Mich. Oct. 13, 2015) ("The Montreal Convention superseded the Warsaw Convention, but retained many of the Warsaw Convention's substantive provisions."); see also Andrew Field, *Air Travel, Accidents and Injuries: Why the New Montreal Convention Is Already Outdated*, 28 DALHOUSIE L.J. 69, 78-79 (2005) ("The Montreal Convention was not altered in any significant way with regard to the criteria by which a claim can be made for death or

changes between the two treaties, most U.S. courts continued to interpret article 17 in the same way they had under the Warsaw Convention; as the Ninth Circuit observed, “in interpreting the Montreal Convention, courts have routinely relied upon Warsaw Convention precedent where the equivalent provision in the Montreal Convention is substantively the same.”<sup>66</sup>

In the Montreal Convention, international air carrier liability continued to be premised upon an accident occurring, and “accident” continued to be undefined in the treaty.<sup>67</sup> Due to this remaining definitional uncertainty, U.S. courts defining the term “accident” have had to interpret the Convention’s plain language and legislative history, creating inconsistent and heavily fact-based precedent.

## II. HOW THE UNITED STATES INTERPRETS “ACCIDENT”:

### *AIR FRANCE V. SAKS*

The U.S. Supreme Court acknowledged that, alone, article 17’s language was “stark and undefined” and thus granted certiorari in 1985 in *Air France v. Saks*<sup>68</sup> to resolve the conflict “as to the proper definition of the word ‘accident’ as used in [the Warsaw] treaty.”<sup>69</sup> The Court examined the Warsaw Convention’s article 17 because the Montreal Convention had not yet been written or ratified.<sup>70</sup> After examining the treaty’s plain language (in its original French), legislative history, and subsequent interpretations in both U.S. and foreign courts, the Court defined “accident” as an “unexpected or unusual event or happening that is external to the passenger.”<sup>71</sup>

Part II.A looks at the Supreme Court’s rationale in defining “accident,” and Part II.B explains the confusion surrounding the definition. *Saks* has proven to be inadequate in instructing U.S. courts as to whether certain

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injury. . . . [I]t would appear that the 1929 conception of claims will remain for some time to come.”).

66. *Narayanan v. British Airways*, 747 F.3d 1125, 1127 n.2 (9th Cir. 2014); *see also Doe*, 2015 WL 5936326, at \*1 (“Courts routinely look to legal precedent interpreting the Warsaw Convention for substantively equivalent provisions of the Montreal Convention.”); PAUL S. DEMPSEY & MICHAEL MILDE, INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999, at 7 (2005) (noting that the Montreal Convention’s drafters “tried, wherever possible, to embrace the language of the original Warsaw Convention and its various Protocols, with the purpose of not disrupting the existing jurisprudence . . . . Thus, the ‘common law’ of the Warsaw jurisprudence is vitally important to understanding the meaning of the Montreal Convention.”). *But see* Sven Brise, *Economic Implications of Changing Passenger Limits in the Warsaw Liability System*, 22 ANNALS AIR & SPACE L. 121, 129 (1992) (arguing that the Montreal Convention’s changes are enough to mandate replacement of Warsaw Convention case law).

67. *See* Montreal Convention, *supra* note 7, art. 17.

68. 470 U.S. 392 (1985).

69. *Id.* at 394; *accord* Janice Cousins, Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 FORDHAM L. REV. 369, 388 (1976).

70. Since the two conventions’ “accident” articles are essentially the same, *see supra* note 58, the court’s interpretation can be used for both liability limiting treaties, *see supra* note 66 and accompanying text.

71. *Saks*, 470 U.S. at 405.

situations—in particular, whether certain copassenger torts—are “accidents” under the Montreal Convention. The resulting confusion and the inconsistent rulings it creates undermine the U.S. legal system’s pride in predictability,<sup>72</sup> making it difficult for airlines to predict the outcome of particular cases to adequately insure themselves. Further, it makes injured consumers unsure as to whether they will be able to recover damages. In addition, the *Saks* definition leaves air carriers virtually unprotected from liability, a result in stark contrast with the entire Montreal Convention’s intent.<sup>73</sup> Finally, Part II.C looks at the current state of copassenger torts under this uncertain interpretation regime.

#### A. *Saks and the “Unusual or Unexpected” Measure*

After a flight from Paris to Los Angeles, Valerie Saks brought suit against Air France, alleging the plane’s depressurization during the flight caused her hearing loss.<sup>74</sup> Saks’s claim rested on asserting the plane’s depressurization was a Warsaw Convention article 17 accident.<sup>75</sup> Air France moved for summary judgment on the basis that the pressurization system’s normal operation was not an “accident” under the Warsaw Convention.<sup>76</sup> While Saks urged the Court to define an article 17 accident as a “hazard of air travel,” the airline contended an article 17 accident should be defined as “an unusual or unexpected occurrence.”<sup>77</sup>

The Supreme Court began by examining the article’s plain language.<sup>78</sup> The Court acknowledged, “the word ‘accident’ is not a technical legal term with a clearly defined meaning” and therefore turned to its context within the Warsaw Convention.<sup>79</sup> The Court noted that, whether written in French or English, the Warsaw Convention imposed article 17 liability for personal injuries on “accidents” whereas article 18 (defining the scope of air carrier liability for damage to cargo) imposed liability for damage to any checked

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72. See, e.g., Maimon Schwarzschild, *Keeping It Private*, 25 U. QUEENSL. L.J. 215, 221 (2006) (“[P]redictability ranks fairly high among [U.S.] legal virtues: it is part of what people mean by the Rule of Law.”); Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm 1* (Mar. 26, 2010) (unpublished manuscript), <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> (noting that predictability “has a moral valence insofar as it assures that like cases will be treated equally” and that absent predictability, “citizens have difficulty managing their affairs effectively”) [<https://perma.cc/3LRJ-Z7JC>].

73. See *supra* note 37 and accompanying text.

74. *Saks*, 470 U.S. at 394.

75. *Id.* at 394–95.

76. *Id.* at 395.

77. *Id.*

78. See *id.* at 396–97. See generally Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975) (“It seems elementary to us that the language employed in Article 17 must be the logical starting point.”).

79. See *Saks*, 470 U.S. at 398 (quoting *Fenton v. J. Thorley & Co.* [1903] AC 443 (HL) 453 (appeal taken from Eng.)).

baggage or goods for “occurrences.”<sup>80</sup> This differentiation in language indicated that the drafters understood accidents to be different than occurrences.<sup>81</sup> The drafters must have considered some factor present in accidents and not present in occurrences significant enough to induce liability for injury to persons rather than to baggage.<sup>82</sup> The Court identified this differentiating factor as the unusual or unexpected nature of accidents, as opposed to the typicality of occurrences.<sup>83</sup>

In support of this finding, the Court looked to the Warsaw Convention’s legislative history, noting that “[t]he records of the negotiation of the Convention accordingly support what is evident from its text: A passenger’s injury must be caused by an accident, and an accident must mean something different than an ‘occurrence’ on the plane.”<sup>84</sup> The Court enumerated U.S. cases that, although employing a broad definition of “accident,” still refused to consider routine travel procedures that produced injuries as “accidents.”<sup>85</sup> Finally, the Court considered sister signatories’ and U.S. courts’ interpretations of article 17 since the Warsaw Convention’s ratification.<sup>86</sup> For example, the Court discussed a French legal opinion that held article 17 accidents embrace “causes of injuries that are fortuitous or unpredictable.”<sup>87</sup>

Ultimately, the Court agreed with Air France that an accident is “an unexpected or unusual event or happening that is external to the passenger” and noted, “This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.”<sup>88</sup> The Court emphasized that it is the Court’s duty to “enforce the . . . treaties of the United States, whatever they might be, and . . . the Warsaw Convention remains the supreme law of the land.”<sup>89</sup> Although the Supreme Court defined “accident,” the definition requires more clarification, as inconsistent “accident” interpretations continue in lower courts.

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80. *See id.* at 397–98.

81. *See id.*; accord M. MILDE, THE PROBLEMS OF LIABILITIES IN INTERNATIONAL CARRIAGE BY AIR 62 (1963).

82. *See Saks*, 470 U.S. at 397–98.

83. *See id.* at 399–400 (“The text of the Convention consequently suggests that the passenger’s injury must be caused by an unexpected or unusual event.”).

84. *Id.* at 403. For a more detailed analysis of the Warsaw Convention’s legislative history, *see infra* Part III.A.2.

85. *See Saks*, 470 U.S. at 405.

86. *See id.* at 404 (“[T]he opinions of our sister signatories [are] entitled to considerable weight.” (quoting *Benjamins v. British European Airways*, 57 F.2d 913, 919 (2d Cir. 1978))); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975) (“The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty’s various provisions.”).

87. *See Saks*, 470 U.S. at 404 (observing additionally that Swiss and German law construe “accidents” as a sudden event independent of the will of the carrier).

88. *Id.* at 405. The Court also noted that this could expand air carrier liability to terrorist or hijacking activity as well as some copassenger torts. *Id.*

89. *Id.* at 406 (alterations in original) (quoting *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir. 1977)).

*B. Post-Saks Areas of Controversy  
Regarding Article 17 Accidents*

*Saks's* unusual or unexpected measure does not work as a complete indication of whether incidents are article 17 accidents. Alone, the *Saks* inquiry is perspective based, focusing on the parties' state of mind, which is not a clear, consistent, or even fair way to assess the air carrier's fault.<sup>90</sup> For example, in *Gotz v. Delta Air Lines, Inc.*,<sup>91</sup> a passenger was injured when placing a heavy bag in an overhead bin because another passenger stood up, causing the plaintiff to move and hyperextend his arm.<sup>92</sup> In this case, the man standing up was unexpected from the perspective of the passenger, but from the airline's perspective, it was a normal and routine occurrence in airline operation.<sup>93</sup> In addition, there was no possible way in which the airline could have prevented a man from standing up when he was allowed to move around the cabin.<sup>94</sup> Implicating the carrier in this circumstance extends the carrier's liability far past what the Warsaw Convention's drafters intended.<sup>95</sup>

Because of the uncertainty in *Saks's* perspective-based inquiry, forums have since considered a number of criteria in addition to the unusualness or unexpectedness of an incident to determine what is and what is not an accident. Some of these factors include (1) whether the incident was related to the normal aircraft or airline operations; (2) if the crew members were knowledgeable or complicit in the events surrounding the alleged accident; (3) fellow passengers' acts; (4) the acts of third parties who are not crew or passengers (e.g., terrorists or hijackers); (5) the incident's location; (6) the complainant's role, reaction, or condition in connection with the occurrence at issue; and (7) the risks inherent in air travel.<sup>96</sup> The two most frequently considered factors are whether the incident must be a "risk inherent in air

90. See Ciobanu, *supra* note 2, at 12 ("The answer to such a question is whatever courts desire it to be. Further, judges are more likely to view these cases through the eyes of a consumer."); see also Cobbs, *supra* note 9, at 123 (finding that after *Saks*, "the trend appears to be towards an even fuzzier definition more or less dependent on perspective").

91. 12 F. Supp. 2d 199 (D. Mass. 1998).

92. See *id.* at 200.

93. See *id.*; accord *Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1010 (N.D. Cal. 2007) (ruling that a passenger swinging a bag and unintentionally hitting another passenger was an article 17 accident); Ciobanu, *supra* note 2, at 12.

94. See *Gotz*, 12 F. Supp. 2d at 200–01.

95. See WARSAW MINUTES, *supra* note 12, at 47.

What can one demand of the air carrier? A normal organization of his operation, a judicious choice of his personnel, a constant surveillance of his agents and servants, a rigorous control of his aircraft, spare parts and raw material.

One must indeed admit that those who use aircraft are not ignorant of the risks inherent in a mode of transportation which has not yet attained the point of perfection that one hundred years has given to railroads.

*Id.* at 49; *supra* note 49 and accompanying text.

96. See *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 657 (S.D.N.Y. 2001); see also *Domenica DiGiacomo, The End of an Evolution: From Air France v. Saks to Olympic Airways v. Husain—the Term "Accident" Under Article 17 of the Warsaw Convention Has Come Full Circle*, 16 PACE INT'L L. REV. 409, 415 n.56 (2004); *Judith R. Karp, Mile High Assaults: Air Carrier Liability Under the Warsaw Convention*, 66 J. AIR L. & COM. 1551, 1560 (2001).

travel”<sup>97</sup> and if the incident was causally related to the operation of the aircraft.<sup>98</sup>

Because *Saks* only addressed the “narrow issue [of] whether the respondent can meet [the article 17] burden by showing that her injury was caused by the normal operation of the aircraft’s pressurization system,”<sup>99</sup> judges are uncertain about which factors are relevant in the “accident” definition.<sup>100</sup> For example, the Eastern District of New York held that a woman falling off of her shuttle bus to pick up her luggage in a separate area of the airport was an “accident” within the meaning of the Warsaw Convention.<sup>101</sup> The court rejected the notion that an article 17 accident must be a “risk inherent in air travel” (which falling off of a bus certainly is not; in fact, it is more a risk inherent in ground travel) because that kind of inquiry would “necessarily involve courts in the ‘complicated, always fact laden, and irrelevant question of what constitutes a risk characteristic of air travel.’”<sup>102</sup> However, the Southern District of New York held that a man being accused of smoking marijuana in an airplane restroom was not an “accident” solely because the situation was not an inherent air travel risk, noting, “[o]n the theory that hijackings and terrorist attacks are risks

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97. Some courts have treated the accident’s relation to the risks inherent in air travel as paramount. *See* *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 133 (3d Cir. 1984) (finding no accident when a passenger’s hernia was aggravated due to the airline staff’s refusal to allow him to lay across seats because the denial was not a risk inherent in air travel); *Pittman v. Grayson*, 869 F. Supp. 1065, 1070–71 (S.D.N.Y. 1994) (observing, after examining the legal precedent under article 17, that courts have focused on whether the alleged conduct constitutes a risk inherent in air travel, a criterion explaining why instances such as aircraft collisions and terrorist activities qualify as “accidents”); *Curley v. Am. Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994) (asserting that an international flight’s passenger being falsely accused of smoking marijuana in the restroom was not a characteristic air travel risk and was therefore not an article 17 accident). Some court decisions have asserted that “accident” under article 17 need not be a risk inherent in air travel. *See* *Girard v. Am. Airlines, Inc.*, No. 00-CV-4559 (ERK), 2003 WL 21989978, at \*5–6 (E.D.N.Y. 2003) (holding that it is unnecessary for an injury to relate to risks characteristic of air travel); *Morris v. KLM Royal Dutch Airlines* [2001] EWCA (Civ) 790, [2002] QB 100 (Eng.) (asserting that the Supreme Court’s “accident” definition under *Saks* does not justify requiring an accident to have some relationship with an inherent air travel risk).

98. *See* *Sethy v. Malev-Hungarian Airlines, Inc.*, No. 98 Civ. 8722, 2000 U.S. Dist. LEXIS 12606, at \*13 (S.D.N.Y. Aug. 31, 2000) (holding that a trip and fall over another passenger’s bag on the plane’s floor was not an accident under article 17 because the incident did not relate to the operation of the aircraft or acts of the crew members); *Gotz*, 12 F. Supp. 2d at 204 (stating expressly that the unusual event *Saks* requires must be an abnormal aircraft operation). *But see* *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 n.4 (9th Cir. 1993) (stating that *Saks* did not indicate whether an accident must relate to aircraft operations); *Barratt v. Trin. & Tobago (BWIA Int’l) Airways Corp.*, No. CV 88-3945 (RR), 1990 WL 127590, at \*2 (E.D.N.Y. Aug. 28, 1990) (finding that a passenger tripping and injuring herself on a staircase while on her way to board the plane was an article 17 accident, and stating that the definition of “accident” is “in no way limited to those injuries resulting from dangers exclusive to aviation”).

99. *Air Fr. v. Saks*, 470 U.S. 392, 396 (1985); *see also infra* Part III.A.1.

100. *See* *Cobbs*, *supra* note 9, at 123 (“Because the *Saks* definition has left so much to the factual situation, cases since *Saks* have not arrived at any bright line rule . . .”).

101. *See* *Girard*, 2003 WL 21989978.

102. *See id.* at \*5 (quoting *Wallace v. Korean Air*, 214 F.3d 293, 301 (2d Cir. 2000) (Pooler, J., concurring)).



characteristic of air travel, liability . . . has been expanded to include[] injuries resulting from such attacks" and should not be expanded further.<sup>103</sup>

Whether the "risk inherent in air travel"<sup>104</sup> and "causal connection to aircraft operation" factors are considered essential creates two versions of the "accident" definition: a narrow one, in which accidents must be (1) unusual or unexpected, (2) external to the passenger, (3) causally connected to an aircraft's operation, and (4) a risk inherent in air travel,<sup>105</sup> and a broader one, where an accident is (1) unexpected or unusual and (2) external to the passenger, regardless of causal relation to the plane's operation or of the occurrence being an inherent air travel risk.<sup>106</sup> The broader definition, adopted by courts like the Ninth Circuit, essentially imposes strict liability on international air carriers for injuries on planes or while embarking or disembarking onto planes.<sup>107</sup> Even courts using the narrower scopes of article 17 accidents stretch the scope of liability to a degree harmful to international air carriers and beyond the capacity to which the drafters of these conventions wanted to subject airlines.<sup>108</sup> This is especially true regarding copassenger torts, where fact patterns are intricate and the airline's involvement in the injury or its prevention requires more investigation than solely whether the tort was unusual or unexpected.

### C. *The Current State of Copassenger Torts Under Article 17*

Courts currently acknowledge that not all copassenger torts are article 17 accidents, although some scholars insist they should be.<sup>109</sup> Generally, courts have been disinclined to broaden article 17's accident definition to

103. *Curley v. Am. Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994); *accord Maxwell v. Aer Lingus Ltd.*, 122 F. Supp. 2d 210, 213 (D. Mass. 2000) ("Liability for injuries resulting from [the risk of terrorism] is allocated to the carrier for the simple reason that the carrier is in a far superior position than are passengers to institute protective safeguards.").

104. Whether an article 17 accident must be a "risk inherent in air travel" is outside the scope of this Note. The focus of this Note is on tort principles being used to interpret the causal connection requirement. Yet, tort principles also should be used for the risk inherent requirement in the sense that whether a risk is inherent in air travel is causally connected to the air travel and that causal connection should be read in light of tort law. However, the *Saks* Court seemingly rejected arguments that "accidents" "refer[] to any of the possible hazards of air travel." Pastor, *supra* note 32, at 583; *see also Saks*, 470 U.S. at 396 (disagreeing with the finding that "the Montreal [Convention] impose[s] absolute liability on airlines for injuries proximately caused by the risks inherent in air travel").

105. *See, e.g., Curley*, 846 F. Supp. at 283.

106. *See, e.g., Gezzi v. British Airways PLC*, 991 F.2d 603, 605 n.4 (9th Cir. 1993).

107. *See infra* notes 117, 122 and accompanying text; *see also infra* Part II.C.

108. *See infra* Part III.A. This is due to courts' reluctance to use American tort principles in their interpretation of the narrowing requirements. *See infra* Part III.B.

109. *See, e.g., Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 70 (1st Cir. 2000) ("Of course, not every tort committed by a fellow passenger is a Warsaw Convention accident."). *But see* Blair J. Berkley, *Warsaw Convention Claims Arising from Airline-Passenger Violence*, 6 UCLA J. INT'L L. & FOREIGN AFF. 499, 511 (2002) ("Characterizing passenger-on-passenger assaults as Article 17 accidents, and imposing liability for injuries on airlines, is good policy."); Karp, *supra* note 96, at 1559 (arguing "Article 17 'accident' encompasses tortious actions of co-passengers").

include all copassenger torts.<sup>110</sup> For example, the Eastern District of Pennsylvania stated that the “premise that an accident under the Warsaw Convention includes, as a matter of law, an assault committed upon a seated Plaintiff by a fellow airline passenger is inaccurate.”<sup>111</sup>

However, courts using the broad “accident” definition, finding it irrelevant whether an accident is a risk inherent in air travel or causally related to the plane’s operation, implicitly allow for air carrier liability in all copassenger torts.<sup>112</sup> Under this broad definition, any injury that occurs on an airplane implicates carriers solely because it occurred during air travel.<sup>113</sup> For instance, the Northern District of California held Singapore Airlines liable for a passenger’s foot injury caused by another passenger stepping on his foot.<sup>114</sup> The carrier was held liable even though it could not possibly have prevented the incident, because it occurred before takeoff when passengers were allowed to walk around the plane.<sup>115</sup>

Some courts, while adhering to a narrower “accident” definition, do so in a way that makes air carriers liable for basically all copassenger torts.<sup>116</sup> Interpreting the narrowing requirement without considering American tort law causation principles essentially swallows the narrowing factor itself.<sup>117</sup> This liability extent is far beyond the *Saks* definition or what the Warsaw and Montreal Conventions’ makers intended, considering they created the conventions to limit airline liability.<sup>118</sup> In addition, these far-reaching decisions contradict a fundamental tort liability principle—that people should be responsible only for injuries they should have and could have prevented.<sup>119</sup>

Part III reexamines the logic in *Saks*, cases interpreting *Saks*, and the conventions’ legislative histories. This reconsideration indicates that article 17 accidents must stem from incidents causally connected to aircraft

110. See Karp, *supra* note 96, at 1560.

111. O’Grady v. British Airways, 134 F. Supp. 2d 407, 412 (E.D. Pa. 2001).

112. See, e.g., Barratt v. Trin. & Tobago (BWIA Int’l) Airways Corp., No. CV 88-3945 (RR), 1990 WL 127590, at \*4 (E.D.N.Y. Aug. 28, 1990) (holding that a plaintiff’s injury sustained on an airport staircase constituted an article 17 accident even though the stairs were not causally tied to the air craft’s operation).

113. See, e.g., Gezzi v. British Airways PLC, 991 F.2d 603, 605 (9th Cir. 1993).

114. See Kwon v. Sing. Airlines, 356 F. Supp. 2d 1041, 1047 (N.D. Cal. 2003).

115. The court called the narrowing factors “glosses . . . not contained in Article 17 or in *Saks*.” *Id.* at 1045.

116. See Wallace v. Korean Air, 214 F.3d 293, 300 (2d Cir. 2000) (Pooler, J., concurring).

117. See Ciobanu, *supra* note 2, at 17 (“By [the court’s] rationale [in Wallace], the airline is at fault for co-passenger torts simply because it transports passengers.”). In fact, one scholar asserts that, because the Wallace Court could not find any event in the chain of causation that fit the *Saks* definition, it “strained . . . taking the term ‘accident’ far beyond its original purpose or intention.” Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AM. U. INT’L L. REV. 891, 966 (2001); see also *supra* note 108 and accompanying text.

118. See *supra* notes 33–37 and accompanying text; see also Air Fr. v. Saks, 470 U.S. 392, 407 (1985) (“[S]ome commentators have characterized the [Montreal] Agreement as imposing ‘absolute’ liability on air carriers. . . . [This] characterization is not entirely accurate.”); Pastor, *supra* note 32, at 582.

119. See *supra* note 16.

operation and therefore do not encompass all copassenger torts. The legislative history and relevant cases all point to using American tort principles in interpreting article 17 accidents—a strategy many courts avoid because of the conventions’ roles as exceptions to American tort jurisprudence.<sup>120</sup>

### III. ARTICLE 17 ACCIDENTS REINTERPRETED

An analysis of the *Saks* holding and a closer reading of the Montreal and Warsaw Conventions indicate that in order to be an article 17 accident, there must be a clear causal connection between the injury and the operation of the aircraft. This conflates the two most frequently considered narrowing factors (causal connection to aircraft operation and inherent air travel risks) because, to be a risk inherent in air travel, such a risk must logically have a causal connection to the travel.<sup>121</sup> To hold these narrowing requirements as unnecessary “would be effectively to construe the Convention as a statute imposing absolute liability for any harmful occurrence on an international flight,” and, as one district court noted, “there is neither a reason nor authority for such a construction.”<sup>122</sup> In addition, reexamining these sources indicates that, although the conventions were created as a deviation from tort liability, it is appropriate and in line with precedent to use these tort principles in interpreting the conventions.<sup>123</sup>

Part III.A reexamines the *Saks* decision and the conventions’ legislative histories to demonstrate that a causal connection to aircraft operation is necessary for an incident to be an article 17 accident. Then, it discusses why the causal limit on air carrier liability is good policy. Part III.B analyzes the *Saks* decision, its progeny, and the conventions’ legislative history to highlight the creators’ intent to analyze causation in light of tort precedent. Finally, Part III.C delineates what kinds of copassenger torts should be considered “accidents” under the Montreal Convention.

#### A. *No Indemnification Without Causation: The Necessity for an Accident to Be Causally Connected to the Aircraft*

The *Saks* decision unequivocally rejects the idea that the conventions impose absolute liability on international air carriers for passengers’ injuries.<sup>124</sup> Instead, the Court found that the accident must be unusual or

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120. See *infra* Part III.B.1.

121. See *supra* note 104.

122. *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 204 (D. Mass. 1998). In order to come up with an equitable delineation of an article 17 accident, it is important to move away from the passengers’ point of view and instead focus on delineating what injuries are risks inherent in air travel or are actually caused by the operation of the aircraft. See *supra* notes 90–95 and accompanying text.

123. See *infra* Part III.B.

124. See *supra* note 118.

unexpected to make the carrier liable.<sup>125</sup> Part III.A.1 demonstrates that, albeit not explicitly, the *Saks* decision requires a happening to be causally connected to aircraft operation. Part III.A.2 explains that the conventions' legislative histories echo that requirement. Finally, Part III.A.3 advocates for this causal necessity in light of policy considerations and the current state of the airline industry.

### 1. *Saks*'s Context and Treatment of Intention Point to the Necessity for Causal Connections

*Saks* must be understood within its limited context to be correctly interpreted.<sup>126</sup> The Court's restrictive rather than expansive definition of "accident" is, as the First Circuit put it, "entirely understandable as Article 17 provides for strict liability [for accidents], and there are sound policy reasons to confine that liability to the letter of the text, narrowly construed."<sup>127</sup> *Saks* never addressed whether an article 17 accident must be causally connected to the aircraft operation because it was never at issue; causation was "assumed or implicit in the decision" because the fact pattern was solely concerned with ear damage resulting from cabin depressurization—an injury clearly resulting from the operation of an aircraft.<sup>128</sup> By deciding *Saks* based on the context before it, the Court did not intend to "expand 'accident' beyond the intent of the drafters, eliminate the need for there to be a connection between the injury producing event and an aspect of aviation or air craft operation, or render all passenger upon passenger torts actionable."<sup>129</sup>

In addition, the *Saks* Court explicitly decided against adding "unintended" or "unintentional" to the accident definition.<sup>130</sup> This contrasts with the article 17 accident definitions adopted by some sister signatories to the conventions, like France, which require an incident be unintended to be an "accident."<sup>131</sup> It also contrasts with the normal English language

125. See *Saks v. Air Fr.*, 470 U.S. 392, 405 (1985) ("We conclude that liability under 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.").

126. See *id.* at 396 ("The narrow issue presented is whether respondent can meet this burden by showing that her injury was caused by the normal operation of the aircraft's pressurization system."). But see *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 n.4 (9th Cir. 1993) ("It is not clear whether an event's relationship to the operation of an aircraft is relevant to whether the event is an 'accident.'").

127. *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 316 (1st Cir. 1995) (asserting the Supreme Court generally interprets article 17 "parsimoniously"); see also *infra* Part III.B.

128. Weigand, *supra* note 117, at 938–39 ("Lost by many decisions since *Saks* is the undisputed fact that the abnormal operation of the aircraft was not at issue.").

129. *Id.* at 938. Weigand also mentions that, "[w]hile the exact origins of this [qualification] are not particularly clear[,] . . . it is derivative of the drafters' intent to have the Convention pertain to aviation accidents." *Id.* at 949.

130. Compare *Saks*, 470 U.S. at 399–400 ("[T]he word 'accident' is often used to . . . describe a cause of injury, and when the word is used in this . . . sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event."), with *id.* at 405 ("We conclude 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.").

131. See *id.* at 400 (defining the word "accident" in French).

accident definition, which is defined referring to intent; for example, *Webster’s* defines “accident” as a “happening that is not . . . intended.”<sup>132</sup> The element of intention, if included, should focus on the carrier’s perspective.<sup>133</sup> Instead, the *Saks* Court chose to focus on a certain occurrence’s expectedness based on a reasonable passenger’s perspective and therefore did not assess the carrier’s fault. This is seemingly contrary to the whole point of assigning liability—to make the person at fault pay for damages.<sup>134</sup>

Leaving intention out of the accident inquiry does not fit within the Warsaw Convention because the line between limited and unlimited liability was explicitly drawn at willfulness.<sup>135</sup> However, the Court continued to refine this fault analysis by noting that an article 17 accident does not occur if the injury results from a passenger’s internal reaction to the “normal operation of the plane.”<sup>136</sup> This exception to the *Saks* definition’s language demonstrates that the Court viewed the fault element as causally connected to the plane’s operation.<sup>137</sup>

The International Court of Justice’s (ICJ) interpretation provides additional guidance. The U.S. Supreme Court has recognized that ICJ interpretations deserve “respectful consideration” by U.S. courts.<sup>138</sup> The ICJ interpretation scheme, a model many courts around the world emulate,<sup>139</sup> gives more priority (than the Supreme Court’s interpretation) to two principles: the principle of the natural meaning and the principle of integration.<sup>140</sup> The principle of the natural meaning provides that words and phrases are interpreted in their normal context, and the principle of integration advocates for interpreting treaties with continual reference to their purposes.<sup>141</sup> As the entire Montreal Convention concerns air travel, it follows that all the articles and their words (such as “accident”) be interpreted within the airplane’s context. Using this framework, a causal connection to the aircraft is necessary. This causal connection can be

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132. *Accident*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed. 1999); *see also Accident*, OXFORD ENGLISH DICTIONARY (3d ed. 2015) (defining “accident” as “[a]n unfortunate incident that happens unexpectedly and unintentionally”).

133. The Warsaw Convention’s fault-based line drawing at willful misconduct versus negligence is indicative of the airline’s perspective, if perspective is relevant at all. *See Ciobanu, supra* note 2, at 12.

134. *See id.*

135. *See* Warsaw Convention, *supra* note 27, art. 25.

136. *See Saks*, 470 U.S. at 404.

137. *See Ciobanu, supra* note 2, at 13.

138. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 376 (2006).

139. *See* Melissa A. Waters, *The U.S. Supreme Court and the International Court of Justice: What Does “Respectful Consideration” Mean?*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 112, 113 (Cesare P.R. Romano ed., 2009) (discussing Justice Breyer’s conception that “U.S. courts should recognize the ICJ as an international tribunal with special expertise in matters of treaty interpretation”).

140. *See* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Certain Other Treaty Points*, 33 BRIT. Y.B. INT’L L. 203 (1957).

141. *See id.* at 211, 223.

anything from an equipment malfunction to the actions of the airline employees; yet if an injury results from activity that has nothing whatsoever to do with the plane's operation, it should not be classified an "accident" and expose carriers to liability.<sup>142</sup> This causal necessity is echoed in the Warsaw Convention's and Montreal Convention's legislative histories.

## 2. The Conventions' Legislative Histories Support a Mandated Causal Connection

Treaty interpretation endeavors to give meaning to the drafters' intentions.<sup>143</sup> As such, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to more precisely understand the treaty's purposes.<sup>144</sup> Because article 17 lacks substantive change from the Warsaw to the Montreal Convention, it is appropriate to look at both conferences' legislative histories to gauge the intended air carrier liability limits.<sup>145</sup>

These legislative histories indicate that the treaty creators presupposed an incident's causal connection with the aircraft in qualifying it as an article 17 accident and did not advocate for a strict liability standard. The Warsaw Convention's drafters were presented with two options for personal injury liability language: a preliminary plan for their consideration created by a team of experts, the Comité International Technique d'Experts Juridique Aériens (CITEJA),<sup>146</sup> and a draft developed at a previous conference, the Paris Protocol.<sup>147</sup> Ultimately, the drafters chose the CITEJA proposal's "narrower language" for liability, a choice from which the Supreme Court found it "reasonable to infer that the Conference adopted the narrower

142. This is in line with American tort jurisprudence. *See infra* Part III.B.

143. *See Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963) (noting that courts strive to give "the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties").

144. *See Air Fr. v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943)); *accord Maignie v. Compagnie Nationale Air Fr.*, 549 F.2d 1256, 1258 (9th Cir. 1977) ("[I]t is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties."); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35–36 (2d Cir. 1975); *Block v. Compagnie Nationale Air Fr.*, 386 F.2d 323, 336–38 (5th Cir. 1967).

145. *See* 149 CONG. REC. S10,870 (daily ed. July 31, 2003) (statement of Sen. Biden) ("[A] large body of judicial precedents has developed during the[] seven decades [since the United States became a party to the Warsaw Convention]. The negotiators intended . . . to the extent applicable, to preserve these precedents."); *see also* LARSEN ET AL., *supra* note 30, at 349 ("[E]fforts were made in the negotiations and drafting [of the Montreal Convention] to retain existing language and substance of other provisions to preserve judicial precedent relating to other aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by courts under the Warsaw Convention." (quoting S. EXEC. REP. NO. 108-8 (2003) (statement of Hon. Jeffrey N. Shane))); *see also supra* note 67 and accompanying text.

146. *See Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 382 (2d Cir. 2004); *see also* WARSAW MINUTES, *supra* note 12, at 257–68 (reprinting the preliminary draft); *see also* Pastor, *supra* note 32, at 578 (explaining CITEJA's spatial, rather than fault-induced, liability impositions).

147. *See Saks*, 470 U.S. at 401 ("The treaty that became the Warsaw Convention was first drafted at an international conference in Paris in 1925.").

language [of the CITEJA proposal] to limit the types of recoverable injuries."<sup>148</sup>

Finally, the writings of Dieter Goedhuis, the Warsaw Convention's official reporter, insisted the drafters' clear intention was that air carriers be freed from strict liability for passenger injuries, writing that "the carrier does not *guarantee* safety; he is only obliged to take all the measures which a good carrier would take for the safety of his passengers."<sup>149</sup> Goedhuis necessitated causal connection to the aircraft even in the specific case of copassenger torts: "In [a case] . . . in which a passenger is injured in a fight with another passenger, it would be unjustifiable to declare the carrier liable by virtue of Article 17, because the accident which caused the damage had no relation with the operation of the aircraft."<sup>150</sup> A second look at the Warsaw Convention's legislative history and the *Saks* interpretation of that history and language indicate that causal connections are necessary between an incident and injury to qualify as an article 17 accident.

### 3. Necessitating an Accident's Causal Connection Is Good Policy

Airlines need protection, and mandating a causal connection with the aircraft to classify injuries as article 17 accidents is an incredibly protective measure. Commercial air carriage is a fragile industry<sup>151</sup> in need of governmental safeguards for multiple reasons: small airlines need protections to grow in a competitive market dominated by large international airlines and large airlines need financial safeguards to continue providing services because of the insecure status of the airline industry.

Unfortunately, today's Montreal Convention scheme does not provide this protection. As one author put it, "[T]he combination between the Montreal Convention's expansion of liability and the precedents developed under Article 17 has the potential to harm the viability of commercial air travel."<sup>152</sup> Requiring a causal connection limits air carrier liability to certain situations<sup>153</sup> instead of inundating them with responsibility for any injury that occurs on a plane. Courts arguing otherwise "fail[] to take account of the fact that the same risk occurs in every other walk of life" and

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148. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 543 (1991); *accord* Sokol, *supra* note 41, at 249 (noting that the Warsaw Convention's article 24(2) limiting language, which reviews damage limits, refers only to cases where an "accident" causes an injury, and therefore "logically implies that there are cases *not* covered by Article 17").

149. DIETER GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 200 (1937).

150. *Id.*; *see also* *Price v. British Airways*, No. 91 Civ. 4947 (JFK), 1992 U.S. Dist. LEXIS 9581, at \*7 (S.D.N.Y. July 6, 1992).

151. *See supra* note 24 and accompanying text.

152. Ciobanu, *supra* note 2, at 25. This is especially true under the Montreal Convention's monetary two-tier scheme, where airlines are extremely vulnerable in the lower tier. *Id.*

153. These situations end up being ones in which the airline is in the best position to mitigate risks, in line with American tort jurisprudence. *See infra* Part III.C.

unreasonably extend air carrier liability past notions of premises liability for torts occurring on land.<sup>154</sup>

The Montreal Convention applies to small airlines as well as large international ones.<sup>155</sup> Many assume the Convention only applies to large international air carriers, but in fact, the Convention applies to any carrier on a passenger's itinerary if the itinerary includes at least two stopping points in different sovereigns' territories.<sup>156</sup> This means the Montreal Convention can cover any airline, even a domestic one.<sup>157</sup> For example, a passenger goes from London to New York, then changes planes and goes on a different airline's flight from New York to Washington. The Montreal Convention would apply if that passenger were injured on the second, purely domestic flight, even if that airline had never sent a plane outside U.S. borders.<sup>158</sup> Notably, "the Montreal Convention has a broader reach than a first glance would reveal."<sup>159</sup> Small domestic airlines need protection to compete in the oligarchic commercial air travel industry.<sup>160</sup>

In addition, even bigger airlines—who some assume "are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become 'accident' victims"<sup>161</sup>—need protection due to the commercial air industry's fragile economic state and "weak profitability."<sup>162</sup> Even though today's international air travel contributes significantly to the world economy, there is a "mismatch between the value that the industry contributes to economies and the rewards that it generates" for investors and the airlines themselves.<sup>163</sup> Even the International Air Transport Association's president concedes that all

154. MONTREAL CONVENTION, ch. III, art. 17, para. 20 (Elmar Giumulla & Ronald Schmid eds., 2011); *supra* note 14 and accompanying text.

155. The Montreal Convention applies to all "international carriage of persons, baggage or cargo performed by aircraft." Montreal Convention, *supra* note 7, art. 1.1.

156. *See id.* art. 1.2. Any carrier on the itinerary is covered regardless of whether there is a break in the travel, different airlines are involved, or the sovereigns on the itinerary have signed the Convention. *See Ciobanu, supra* note 2, at 5.

157. *See Ciobanu, supra* note 2, at 6 ("[A]n airline that is domestic in the sense of deriving most of its profits from flights within the same country may easily enter into the international carriage arena, by virtue of the contracts into which it enters.").

158. *See id.*

159. *Id.*

160. *See Evelyn D. Sahr & Drew M. Derco, Airlines Need Protection Too*, 26 AIR & SPACE L. 1, 4 (2013) ("Airlines (particularly smaller airlines) do not have the capability to prevent all such errors [and] . . . [t]he financial cost of such an error could be devastating, particularly for smaller airlines."); *see also Brise, supra* note 66, at 128 (noting that indemnification under the Montreal Convention has the potential to bankrupt sovereign states if brought against small state-owned carriers).

161. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34 (2d. Cir. 1975). Recently, US Airways and American Airlines merged and created the world's largest airline to compete with other airlines that had benefitted from "megamerger[s]." *See American Airlines Bulks Up*, N.Y. TIMES (Feb. 14, 2013), <http://www.nytimes.com/2013/02/15/opinion/american-airlines-bulks-up.html> [<https://perma.cc/BG84-XK6R>].

162. *See The State of Airline Industry, 100 Years In*, SKIFT (June 2, 2014, 9:00 AM), <http://skift.com/2014/06/02/the-state-of-airline-industry-100-years-in/> ("With a net profit margin of just 2.4%, airlines will retain only \$5.42 per passenger carried.") [<https://perma.cc/FP8U-RHLC>]; *see also supra* note 23 and accompanying text.

163. *See The State of Airline Industry, 100 Years In, supra* note 162.



airlines need governments to enact “regulatory structure[s] that facilitate[] [their] success” and curb liability.<sup>164</sup>

Also, the United States’s continued signatory status to the Montreal Convention echoes the legislature’s insistence that airlines are persistently in need of liability protection. It is not for the judicial but rather the legislative and executive branches to evaluate whether air carriers should be strictly liable for injuries that occur on planes or whether air carriers are in a state to do so.<sup>165</sup> The concerns of the Warsaw Convention’s creators are still just as paramount today, one hundred years after the creation of air travel, as they were at the dawn of the industry. For example, after the September 11 terrorist attacks, Congress enacted the Air Transportation Safety and System Stabilization Act, which capped liability claims against airlines that arose from the attacks.<sup>166</sup> Although a domestic action, the legislation limiting liability was enacted to prevent the airline industry’s collapse.<sup>167</sup> As one scholar put it, “These [more recent] measures demonstrate that the limits on recovery for claims against the airlines are not relics of the past.”<sup>168</sup>

Because causal connections between incidents and injuries are necessary in article 17 accident inquiries, courts must uniformly interpret these connections’ sufficiency. They can do so while remaining consistent with the intent of the conventions’ creators by using tort law notions of negligence, proximate causation, and foreseeability.

#### *B. General Tort Principles Are Necessary to Analyze Causal Connections*

The causal connections between injuries and aircraft operation should be analyzed with general tort principles. Part III.B.1 illustrates how the conventions, their legislative history, and their subsequent interpretation do not exclude using tort law. In fact, the sources seem to advocate using it. Part III.B.2 then applies tort principles to a particular Supreme Court case, *Olympic Airways v. Husain*,<sup>169</sup> and demonstrates how using tort law to interpret causal connections removes some of the subjective fact-based inquiry and ambiguity as to what is and what is not an article 17 accident throughout U.S. courts, while maintaining the purpose of the Montreal Convention.

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164. *See id.* (“Governments should understand that the real value of aviation is the global connectivity it provides and the growth and development it stimulates, not [wealth] . . . that can be extracted from it.”).

165. *See In re Aircrash in Bali* on Apr. 22, 1974, 684 F.2d 1301, 1308–09 (9th Cir. 1982) (noting that the airline industry is no longer in its infancy, but insisting that a court interpreting a treaty like the Warsaw Convention must “studiously avoid imposing its own view of foreign policy objectives and must accept [those] . . . of the executive and legislative branches”).

166. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

167. *See* Ciobanu, *supra* note 2, at 8.

168. *Id.*

169. 540 U.S. 644 (2004).

### 1. Tort Law Is Not Precluded from Accident Analysis

Simply because the Montreal Convention is an exception to tort principles does not mean courts cannot use these principles to interpret the extent of this exception. Although the accident requirement is a departure from the foundational tort principle of full compensation for injury victims because it limits a claimant's ability to recover if the injury does not fit within the requirement (therefore leaving some people without a valid claim under the Convention),<sup>170</sup> this does not preclude tort law's use to figure out what constitutes an "accident." Doing so is consistent with the conventions' creators' intentions, subsequent U.S. cases interpreting *Saks*, and domestic flight liability standards.

In fact, the Warsaw Convention "based its approach toward air carrier liability on the fault theory of tort."<sup>171</sup> Its creators uniformly spoke of rendering air carriers responsible only for injuries they could have reasonably prevented.<sup>172</sup> For instance, the original Warsaw Convention provided as a valid defense that air carriers took all necessary measures to avoid the damage.<sup>173</sup> Courts hold the "all necessary measures" defense should be interpreted as "all reasonable measures,"<sup>174</sup> based on the reasonableness idea embodied in tort law. This is in line with tort negligence principles implicating only those who have committed a wrong or have failed to protect people for whom they are responsible from injury sources relatively under their control.<sup>175</sup> It is also consistent with American airline liability legislation outside the Montreal Convention, which states,

170. *In re Inflight Explosion on Trans World Airlines, Inc.*, 778 F. Supp. 625, 631 (E.D.N.Y. 1991) (noting that the Warsaw Convention's limit is a "statutory departure" from the idea of full compensation for tort victims, a "conceptual underpinning[] of modern American tort law"); see also JOHN G. FLEMING, *THE LAW OF TORTS* 3-5 (9th ed. 1983); Abeyratne, *supra* note 54, at 256 ("It is an incontrovertible principle of tort law that tortious liability exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage he has done."); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1135 (2007) (observing that tort law "is a law that empowers victims to respond to wrongdoers whose wrongs have injured them").

171. Abeyratne, *supra* note 54, at 256. See generally Ruwantissa I.R. Abeyratne, *Liability for Personal Injury and Death Under the Warsaw Convention and Its Relevance to Fault Liability in Tort Law*, 21 ANNALS AIR & SPACE L. 1 (1996). It is interesting how industrial growth fuels legislation: the Montreal Convention and Warsaw Convention created the "accident" requirement to protect the young airline industry, while the fundamental fault and negligence principles upon which the conventions were created themselves came from the eighteenth century need to protect new industries from previous tort law's strict liability scheme. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972) (observing that the underpinning of American tort jurisprudence developed itself to subsidize "the expanding industries of the nineteenth century").

172. See *supra* note 95; see also Lowenfeld & Mendehlon, *supra* note 28, at 500; *supra* note 49 and accompanying text.

173. See Warsaw Convention, *supra* note 27, art. 20.

174. See, e.g., *Obuzor v. Sabena Belgian World Airlines*, No. 98 Civ. 0224 (JSM), 1999 U.S. Dist. LEXIS 5317, at \*2 (S.D.N.Y. Apr. 16, 1999).

175. See Goldberg & Zipursky, *supra* note 170, at 1123-24 ("On its face, tort law is a law of wrongs. The word 'tort' means wrong. . . . Substantive tort doctrine is filled with rules and concepts that express the idea of one person wronging another."); see also *supra* note 16 and accompanying text.

“A carrier of passengers by airplane is not an insurer of the passengers’ safety, and its liability for injury to or the death of a passenger must be based upon some negligence or fault for which the carrier is responsible.”<sup>176</sup>

Additionally, to bolster their holdings’ validity, U.S. courts point out their decisions’ consistency with American tort jurisprudence.<sup>177</sup> One can view *Saks*’s “unusual or unexpected” measure as embracing tort law’s integral accident inquiry role because it brings in an element of foreseeability.<sup>178</sup> Courts also have explicitly held that whether claimants are “entitled to assert the Warsaw Convention [causes of action]” and what their respective rights are should “be determined by reference to other federal statutes”—the majority of which are based on foundational tort jurisprudence.<sup>179</sup> In fact, the Second Circuit has explicitly “adopt[ed] the federal common law of torts to construe the [Montreal] Convention.”<sup>180</sup>

As such, liability limitations in tort law—including ideas of contributory negligence, reasonableness, and foreseeability—should apply to whether incidents are considered within the definition of an article 17 accident. The *Saks* holding, the legislative histories of the conventions, and subsequent interpretation of the conventions all support a requirement that an “accident” be (1) an unusual or unexpected happening, (2) external to the passenger, (3) causally connected to the operation of an aircraft, and (4) consistent with common law tort jurisprudence evaluating the causal connection. This definition, albeit abstract, removes some of the subjective fact-based inquiry and ambiguity as to what is and is not a Montreal Convention article 17 accident throughout U.S. courts. This is illustrated in

176. 8A AM. JUR. 2D *Aviation* § 116 (2015); *see also* *Magan v. Lufthansa German Airlines*, 339 F.3d 158, 162 n.3 (2d Cir. 2003) (“Courts have theorized that one of the guiding principles that pervades, and arguably explains, the original Convention, the subsequent modifications, and even the Court’s decision in *Saks*, is an apportionment of risk to the party best able to control it . . .”).

177. *See, e.g., Day v. Trans World Airlines Inc.*, 528 F.2d 31, 34 (2d Cir. 1975) (noting that its decision indemnifying Trans World Air is consistent with “modern [tort] theories of accident cost allocation”); *In re Inflight Explosion on Trans World Airlines, Inc.*, 778 F. Supp. 625, 638 (E.D.N.Y. 1991) (noting that the Court’s decision in *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), is “consistent with American tort law”).

178. *See Pastor, supra* note 32, at 580–81 (“[The *Saks*] result is fully consistent with U.S. tort law. . . . [A]llowing such claims in the absence of a federal tort law would run counter to the primary purpose of the Warsaw Convention—providing uniformity in the law governing international air transportation.”).

179. *See In re Inflight Explosion*, 778 F. Supp. at 632 (quoting *In re Mex. City Air crash of October 31, 1979*, 708 F.2d 400, 415 (9th Cir. 1983)); *see also* Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2012) (premising the ability of a victim to sue government on tort principles, including negligence and foreseeability); Federal Employers’ Liability Act of 1908, 45 U.S.C. §§ 51–60 (rendering employers liable for tortious activity and using tort tenets such as negligence and proximate cause).

180. *In re Air Disaster at Lockerbie on Dec. 21, 1988*, 928 F.2d 1267, 1270 (2d Cir. 1991) (“[B]ecause air carrier liability is a uniquely international problem requiring uniform interpretation, the Convention must be interpreted according to federal common law.”); *see id.* at 1279 (“[W]e look to the common law of tort in order to determine the elements of the cause of action under the Convention.”). *But see* *Wallace v. Korean Air*, 214 F.3d 293, 301 (2d Cir. 2000) (holding an airline liable for a sexual assault even though the assault was not proximately caused by the operation of the aircraft).

the Supreme Court decision *Olympic Airways v. Husain*,<sup>181</sup> described further below.

2. Applying Tort Principles to Article 17 Analyses:  
A Reexamination of *Olympic Airways v. Husain*

In *Husain*, the Supreme Court held Olympic Airways liable for a passenger's death from smoke exposure after a flight attendant refused to move him away from the smoking section.<sup>182</sup> The Court, petitioner, and respondent all focused on the flight attendant's refusal to move the passenger's seat and viewed the relevant question of law as whether a failure to act could constitute an "accident."<sup>183</sup> Both parties denounced using a negligence inquiry into whether the incident was an article 17 accident and instead focused on the *Saks* unusual or unexpected measure.<sup>184</sup> This ignores the *Saks*'s implication that a causal connection to aircraft operation is necessary and that using tort law to interpret that causal requirement was not only permitted but also advocated by *Saks*, its progeny, and the conventions' legislative histories.<sup>185</sup>

*Husain* did not hold that omission could be considered an action in general, because the airline attendant's refusal to move the decedent can be seen as an affirmative action, not an omission.<sup>186</sup> However, the majority's dicta noted that "the failure of an airline crew to take certain necessary vital steps could quite naturally and, in routine usage of the language, be an 'event or happening.'"<sup>187</sup> In his dissent, Justice Antonin Scalia focused on the dangers of considering omissions as "accidents" for article 17 analyses<sup>188</sup>: it made carriers liable for anything that may occur on the plane whether or not the air carrier could have prevented it, which is far past what

181. 540 U.S. 644 (2004).

182. See *id.* at 647; accord Thomas Adam Peters, *Olympic Airways v. Husain: The United States Supreme Court Expands the Scope of an "Accident" for Purposes of Article 17 of the Warsaw Convention and Consequently Contradicts Its Application of Multilateral International Treaty Interpretation*, 31 OKLA. CITY U. L. REV. 193, 201 (2006) ("The flight attendant told them they could switch seats if they were able to find another passenger willing to do the same. The flight attendant refused to offer or provide any type of assistance. As the smoke increased, [the decedent] walked to the front of the plane, visibly having difficulty breathing.").

183. See DiGiacomo, *supra* note 96, at 439 & nn.251 & 260–61 (citing both petitioner's and respondent's briefs in *Husain*); see also *Husain*, 540 U.S. at 655–57 (discussing why a failure to act can be considered an "accident" under the Warsaw Convention).

184. See *Husain*, 540 U.S. at 654 ("The distinction between action and inaction, as petitioner uses these terms, would perhaps be relevant were this a tort law negligence case. But respondents do not advocate, and petitioner vigorously rejects, that a negligence regime applies under Article 17 of the Convention.").

185. See Peters, *supra* note 182, at 202 ("The Court dismissed the action versus inaction distinction reasoning that Article 17 does not support the rules of an ordinary tort law negligence regime."); see also *supra* Part III.B.1.

186. See Field, *supra* note 65, at 87 (noting the flight attendant's rejection of an explicit request for assistance "was clearly something more than mere inaction").

187. *Husain*, 540 U.S. at 656 n.10.

188. See Peters, *supra* note 182, at 205 (noting the dangers of the *Husain* decision, including that international air carriers are now "easy targets for passengers with a knack for creative legal schemes").

legislators originally intended and which could potentially “transform the airline into an insurer for any harmful event.”<sup>189</sup>

The focus in *Husain* should have been whether the causal connection to the aircraft operation—the flight attendant’s refusal to move the decedent—was, within American tort jurisprudence, a legitimate proximate cause of the passenger’s injury. If found a sufficient causal connection, the refusal would be an article 17 accident and make the carrier responsible for injuries resulting from that refusal; if not, Olympic Airways would not be liable for the passenger’s death.

An accident analysis anchored in tort law would still find Olympic Airways liable while simultaneously solving the issue with which Scalia was so concerned—putting strict liability on airlines.<sup>190</sup> In common law torts, a common carrier (like the owner of an airplane, a cruise ship, or a bus) is liable for injuries that are foreseeable and within the carrier’s ability to prevent.<sup>191</sup> In *Husain*, the decedent asked multiple times to be moved away from the smoking section and explained to the stewardess why he was particularly sensitive to smoke.<sup>192</sup> His injury was clearly foreseeable, and therefore the air carrier’s refusal to move him—the causal connection with his injury to the aircraft—was negligent and a legitimate proximate cause within tort jurisprudence.<sup>193</sup> Because the airline attendant’s refusal to move him was (1) an unexpected and unusual occurrence, (2) external to the passenger,<sup>194</sup> (3) causally connected to the passenger’s injury, and (4) the causal connection was sufficient according to common law tort jurisprudence, it falls within the “accident” definition of article 17.

Using tort law to analyze Montreal Convention accident causal connections is a consistent and equitable strategy to impose liability on air carriers in line with the Convention’s creators’ intent. It is a strategy that

189. Ciobanu, *supra* note 2, at 17; *see also infra* Part III.C. Scalia noted that the *Saks* Court did not intend for omissions to be considered “accidents” by pointing out the two ways to define “accident.” The first refers to something unintentional or not purposeful—in Scalia’s words, “as in, ‘the hundred typing monkeys’ verbatim reproduction of War and Peace was an accident.” *See Husain*, 540 U.S. at 659 (Scalia, J., dissenting). The second refers to an unusual or unexpected event, whether intentional or not. *See id.* The Supreme Court in *Saks* disregarded intention and chose the latter definition, and, as Scalia explained, “while there is no doubt that inaction can be an accident in the former sense . . . whether it can be so in the latter sense is questionable.” *Id.*

190. *See Peters, supra* note 182, at 193 (“Justice Scalia’s dissent in [*Husain*] is on point and more congruent not only with previous Supreme Court decisions, but also with the ultimate goal of the Warsaw Convention.”).

191. *See* 8A AM. JUR. 2D *Aviation* § 117 (2015) (“A common carrier owes a duty of utmost care and vigilance of a very cautious person towards its passengers.”); *see also* Wilbur J. Russ, Comment, *Tort Liability of Air Carriers to Their Passengers*, 39 CALIF. L. REV. 541, 542 (1951).

192. *See Husain*, 540 U.S. at 647–49.

193. *See Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 663 (S.D.N.Y. 2001) (“The air carrier . . . could not be reasonably expected to anticipate and protect against every cause of injury which results solely from a traveler’s internal reaction to normal flight operations or other like conditions peculiar to or uniquely known only by a particular passenger.”).

194. *See DiGiacomo, supra* note 96, at 441.

avoids sweeping fact-based holdings that further complicate accident cases and go against the American sense of integrity.<sup>195</sup>

*C. What Copassenger Torts Are Article 17 Accidents?*

Understanding that a causal connection with aircraft operation is necessary for incidents to be Montreal Convention accidents and that the causal connection must be in line with tort jurisprudence simplifies analyzing whether airlines should be responsible for a copassenger tort. In addition to this simplification, it allows copassenger tort cases a measure of predictability important to carriers, claimants, and governments. This understanding also will keep copassenger tort decisions in line with the original Montreal Convention goal of protecting air carriers, while also incentivizing airlines to maintain diligent observation and security measures.<sup>196</sup>

In tort jurisprudence, premises owners do not have a duty to protect people from others unless the owners see foreseeable indicators that another patron or a third party will inflict harm on one of its patrons; only then does a duty to act develop.<sup>197</sup> Indicators of foreseeability include previous incidents by that patron or third party on the property.<sup>198</sup> When an airplane is the tort's premises, there is a minimal chance that a particular group of flight attendants will encounter a passenger they have previously seen commit a copassenger tort. However, there remains a foreseeability requirement to implicate an airline for injuries sustained by passengers.

For example, a fistfight between two sober passengers has nothing to do with aircraft operation, was not foreseeable, "nor may carriers easily guard against such a risk through the employment of protective security measures"; therefore air carriers should not be responsible for resulting injuries.<sup>199</sup> This is in line with tort law common carrier liabilities and the duty to protect others from the conduct of third parties: without an

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195. See Goldberg & Zipursky, *supra* note 170, at 1135–36 (explaining American law's coupling of liability with a proximately caused wrongdoing in that "[t]ort law identifies domains of conduct that constitute a mistreatment of one person by another, such that the person who suffers the mistreatment is entitled to some sort of recourse against the wrongdoer").

196. See *Fulop*, 175 F. Supp. 2d at 663 ("[L]iability for accidents whose proximate ties to causation may be traced to some deviation from normal aircraft or airline operation or procedure would place the burden on the party best situated to know what went wrong, and most able to control, prevent and insure against the eventuality.").

197. And therefore, by not acting, the premises owner will be held liable for the patron's injuries. See, e.g., *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1168–69 (Cal. 2005) (noting that "only when 'heightened' foreseeability of third party criminal activity on the premises exists—shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—does the scope of a business proprietor's special-relationship-based duty include an obligation").

198. See *id.*

199. *Price v. British Airways*, No. 91 Civ. 4947 (JFK), 1992 WL 170679, at \*4 (S.D.N.Y. July 6, 1992); see also *Stone v. Cont'l Airlines, Inc.*, 905 F. Supp. 823, 826–27 (D. Haw. 1995) (holding that an airline was not liable for injuries sustained by a first-class passenger when punched by another passenger because the injury was not an "accident derived from air travel").

incident's foreseeability, there is no duty.<sup>200</sup> However, when an airline's attendant negligently violates the carrier's policy by overserving alcoholic beverages to a passenger who then injures another passenger, the injury is causally connected enough to the aircraft to render the carrier responsible (because it is foreseeable that getting a passenger drunk will result in misbehavior).<sup>201</sup>

Canonizing this "accident" definition would relieve airlines of liability for sexual assaults that occur on planes when alcohol was not served to the perpetrator and when there was no other foreseeability indicator for the assault. In these situations, the air carrier is not involved in the chain of causation: a sexual assault is not causally related to the operation of an aircraft.<sup>202</sup> Courts would not have to use the shaky logic of *Wallace v. Korean Air*,<sup>203</sup> which attributes usual and expected aspects of flights (e.g., close quarters, having lights off) to inherent air travel risks and therefore implicates the air carrier.<sup>204</sup> The *Wallace* Court did not find the carrier liable for the sexual assault (which could be seen as "internal" to the pair of passengers) but rather for the "characteristics of air travel [that] increased [Wallace's] vulnerability to assault."<sup>205</sup> If courts were to continue using the *Wallace* logic, it would force airlines to, in order to escape liability, keep the lights illuminated on long flights and require passengers to stay awake—both conditions that would likely increase air rage and create more copassenger torts—bad for airlines, passengers, safety, and policy.<sup>206</sup>

#### CONCLUSION

Protecting airlines, and the legislative histories corroborating this goal, should not be shunted aside in favor of a broader interpretation of the conventions forcing air carriers to compensate victims for any injury occurring on a plane. Airlines should not be strictly liable for injuries that occur onboard: nothing in the Warsaw and Montreal Conventions' histories nor in the tort jurisprudence surrounding them indicates otherwise. The

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200. See, e.g., RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965).

201. See, e.g., *Oliver v. Scandinavian Airlines Sys.*, No. M-82-3057, 1983 U.S. Dist. LEXIS 17951, at \*6 (D. Md. Apr. 5, 1983) (finding that, when a passenger was overserved alcohol, fell on another passenger, and injured the second passenger, it was an article 17 accident). *But see* *Lahey v. Sing. Airlines, Ltd.*, 115 F. Supp. 2d 464, 467 (S.D.N.Y. 2000) (noting that "the actions of the crew are not relevant to the determination of whether [an] assault was an 'accident'").

202. See *Wallace v. Korean Air*, No. 98 Civ. 1039 (RPP), 1999 U.S. Dist. LEXIS 4312, at \*16 (S.D.N.Y. Apr. 6, 1999) (finding that a sexual assault by a copassenger was not an article 17 accident because "[a]n event cannot fall within the operation of the aircraft if that event is not within the airline's purview or control"); see also *Ciobanu*, *supra* note 2, at 17. *But see* *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 72 (1st Cir. 2000) (allowing a sexual assault claim to survive solely because the perpetrator was overserved alcohol, noting that "[w]ithout the allegation of over-serving, . . . American could not bear any causal responsibility for Langadino's injuries and there would be no Warsaw Convention accident").

203. No. 98 Civ. 1039 (RPP), 1999 U.S. Dist. LEXIS 4312 (S.D.N.Y. Apr. 6, 1999).

204. See *Wallace v. Korean Air*, 214 F.3d 293, 299 (2d Cir. 2000).

205. See *id.* at 294.

206. See *Ciobanu*, *supra* note 2, at 17–18.

subsequent interpretation of the Warsaw and Montreal Conventions, both created to protect airlines, has distorted the accident requirement to hold air carriers responsible beyond the limits to which they would be held accountable by tort jurisprudence.

In order to be an article 17 accident, an incident must be (1) unusual or unexpected, (2) external to the passenger, (3) causally connected to the operation of the aircraft, and (4) the causal connection must be sufficient under a traditional tort law evaluation. Using this definition makes sure that courts are ruling in a manner consistent with *Saks*, the conventions' legislative histories, and notions of responsibility and morality. This definition is especially helpful in analyzing copassenger torts, where the causal connections are intricate and where American tort jurisprudence has a rich history of assigning liability to the premises owner or other actors. Ultimately, this narrower definition of article 17 accidents gives courts, airlines, and claimants their deserved predictability, protection, and justice.