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Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention

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ACCIDENT, EXCLUSIVITY, AND PASSENGER DISTURBANCES UNDER THE WARSAW CONVENTION

TORY A. WEIGAND*

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INTRODUCTION

Since 1929, an international air carrier's liability for personal and cargo injury and damage has been governed by the Warsaw Convention ("Convention"), officially referred to as the *Convention for the Unification of Certain Rules Relating to International Transportation by Air*.¹ The Convention is a comprehensive international treaty governing the liability of carriers in "all international transportation of persons, baggage and goods."² The Convention emerged due to differences among the world's countries as to liability rules governing air transportation accidents.³ The parties to the Convention desired to limit a carrier's liability in the event of any catastrophic aircraft disasters which might otherwise threaten the financial security of the infant industry.⁴ Other objectives were to achieve uniformity in an air carrier's liability and documentation for transportation, to avoid involved conflicts of law problems, protect the fledgling international transportation business, and to facilitate transactions between countries around the world.⁵

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in 449 U.S.C. § 1502 (1998) (adherence of United States proclaimed Oct. 29, 1934) [hereinafter Warsaw Convention]. The various instruments comprising the Warsaw Convention are reprinted and collected in the International Air Transport Association's *ESSENTIAL DOCUMENTS ON INTERNATIONAL AIR CARRIER LIABILITY* (1999) [hereinafter IATA, AVIATION DOCUMENTS].

2. Warsaw Convention, *supra* note 1, art. 1(1).

3. See *id.* pmbl.; see also Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497-99 (1967) (noting the intention of the Warsaw Convention to create, among other things, uniform regulations regarding liability of air carriers).

4. See Lowenfeld & Mendelsohn, *supra* note 3, at 498-99 (discussing the relative youth of the airline industry and the goal of the Warsaw Convention to limit air carrier liability in instances involving accidents).

5. See Warsaw Convention, *supra* note 1, pmble. (relating the aims of the Warsaw Convention); see also Lowenfeld & Mendelsohn, *supra* note 3, at 498-99 (discussing the goals of the Warsaw Convention).

Since the Convention's inception, various issues have emerged regarding the scope and interpretation of the Convention, especially in light of the modernization and expansion of air travel. As a result, the Convention has recently undergone significant changes and reform efforts aimed at modernizing the liability scheme. The traditionally low liability limits have been raised, converted into an international market standard, and tied to inflation. The concept of willful misconduct to break the monetary limits has been eliminated with an essentially no-fault based system in place for damage claims under the new and higher limits, with a pure fault based system for claims over the established limits. The reforms also have introduced notions of up-front payments, arbitration, and mandatory insurance as well as expanded the possible forums to assert claims.

Despite these changes, however, the fundamental standard of liability for death and injury claims under Article 17 remains unchanged. Since the initial elimination of the international carrier's due diligence defense, beginning in 1966, the meaning and intent of "accident" has been under great strain. Moreover, it is now clear that the Convention provides the exclusive remedy for claims arising out of international air travel. This has further intensified the debate over the scope and meaning of Article 17, especially as to altercations by and among passengers and flight crew, and other similar disturbances or incidents arising out of modern air travel.

This Article overviews the history and origin of the Warsaw Convention as it relates to carrier liability for passenger disturbances. This Article examines the evolution of the liability scheme, together with decisional law interpreting and applying Article 17, and the Convention's exclusivity to international air travel claims. This Article suggests that courts have interpreted and applied the "accident" requirement of Article 17 too broadly and contrary to the drafters' intentions, especially as to incidents of passenger misconduct. It is argued that the modern reform efforts have so far failed to include Article 17 within their purview, and that they must do so in order to truly modernize an international air carrier's liability. This Article further asserts that the interpretational problems with "accident," vis-à-vis passenger upon passenger misconduct, raise the more fundamental question of whether there is any need for monetary limits or wholesale elimination of fault based principles for all international aviation claims.

I. THE WARSAW CONVENTION

A. PASSENGER DISTURBANCES

Modern air travel is both convenient and relatively inexpensive, allowing more passengers to travel to more places than ever before.⁶ Moreover, air travel is now a routine and fundamental aspect of modern life. One result of this growth is that in-flight disturbances by and between passengers and/or flight crew have become increasingly common.⁷

In-flight disturbances range in degree and character.⁸ The panoply of altercations encompass physical fights or confrontations, sexual assaults, injurious contact, or verbal harassment by and between passengers, or passengers and flight crew members.⁹ Others include refusals to obey simple commands or instructions of the flight crew. Some of the reported incidents include:

6. See Suzi T. Collins & John Scott Hoff, *In Flight Incivility Today: The Unruly Passenger*, 12 AIR & SPACE L. 23, 23 (1998) (stating that “[m]ost airlines have reconfigured their aircraft to fit as many passengers as possible to increase their seat revenues per flight mile”); see also World Airline Passenger Traffic Growth Pick Up Through to 2001, at <http://www.icao.org/icao/en/nr/pio9909.htm> (last visited Feb. 9, 2001) (noting the International Civil Aviation Organization’s (“ICAO”) statistics and estimates for total international and domestic passenger traffic, including 2,630 billion passenger-kilometers in 1998, 2,739 billion in 1999, 2,875 billion in 2000, and 3,038 billion in 2001).

7. See Collins & Hoff, *supra* note 6, at 23 (noting the rise of disturbances that have taken place on airplanes during the course of air travel).

8. See Jeff MacGregor, *The Way We Live Now: 9-24-00; Fly the Angry Skies*, N.Y. TIMES, Sept. 24, 2000, § 6 (Magazine), at 21 (discussing some of the different disturbances that have occurred during commercial airline flights); see also *Feds Are Getting Tough on Unruly Airline Passenger*, SALT LAKE TRIB., Dec. 10, 1997, at A16, available at 1997 WL 15241024 (discussing a survey by the Air Transport Association (“ATP”) finding that twenty-five percent of air rage incidents were fueled by alcohol, sixteen percent concerned seat assignments, ten percent of incidents related to smoking, nine percent involved carry-on baggage, eight percent of incidents related to attitude problems, and five percent of airline incidents centered around food service).

9. See Donald B. Cotton, *Interference with Crew Members in the Performance of their Duties*, Federal Aviation Administration Advisory Circular No. 120-65 (1996), available at www.faa.gov/avr/afs/cabin.htm; see generally AIR TRANSPORT ASSOCIATION, PASSENGER MISCONDUCT: A GUIDE TO PROSECUTING CRIMES AGAINST AIRLINES PERSONNEL AND PASSENGERS (2000), available at www.airtransport.org/public/publications/74.asp.

- a sleeping passenger wakes up to another passenger unbuttoning her pants and fondling her private parts;¹⁰
- a passenger assaults flight attendant and tries to enter cockpit after becoming enraged when told he was whistling too loudly;¹¹
- a passenger momentarily grabs another passenger's private parts based on mistaken identity;¹²
- a fist fight between two passengers;¹³
- a drunken passenger falls on another passenger;¹⁴
- a passenger injures another passenger by suddenly moving his seat or dropping an item from overhead compartments;¹⁵

10. See *Wallace v. Korean Airlines, Inc.*, 214 F.3d 293, 297 (2d Cir. 2000), cert. denied, 2001 U.S. Lexis 1113 (U.S. Feb. 20, 2001) (holding that a sexual assault while on an airplane was to be considered an "accident" under the rules of the Warsaw Convention, thus subjecting the carrier to potential liability); see also *Tsevas v. Delta Airlines, Inc.*, No. 97 C 0320, 1997 WL 767278, at *2 (N.D. Ill. Dec. 1, 1997) (holding that the unsolicited sexual advances of one intoxicated passenger upon another passenger comprised an accident within the terms of the Warsaw Convention).

11. See *Officials Seek to Prevent Air Rage; Experts on Security Exchange Ideas During DFW Airport Meeting*, FORT WORTH STAR-TELEGRAM, Sept. 20, 2000, at 2, available at LEXIS, News Library, FWSTEL File (discussing incidents of air rage).

12. See *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir. 2000) (reversing a lower court's dismissal of a claim brought by a passenger who asserted that he was momentarily grabbed in the private area by another passenger).

13. See *Price v. British Airways*, No. 91 Civ. 4947 (JFK), 1992 WL 170679, at **1-3 (S.D.N.Y. July 7, 1992) (granting defendant's summary judgment motion where plaintiff, who was intoxicated, was assaulted in the aircraft and sought to hold the defendant liable under Warsaw Convention); see also *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823, 827 (D. Haw. 1995) (holding that an assault that occurred between two passengers did not qualify as an "accident," thereby resulting in airline liability under the terms of the Warsaw Convention because it "was not an accident derived from air travel.").

14. See *Oliver v. Scandinavian Airlines Sys.*, 17 Av. Cas. (CCH) para. 18,283-25 (D. Md. Apr. 5, 1983) (dismissing a plaintiff's claim that he was allegedly injured on an airline flight when an intoxicated passenger fell on him because, although the incident was an accident under the terms of the Warsaw Convention, the claim was barred by the statute of limitations).

15. See *Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 883-84 (5th Cir. 1996) (holding that a passenger who sought to hold an airline liable for injuries she suffered as she attempted to avoid contact with another passenger's seat failed to sup-

- a verbal and/or physical confrontation between crew member and passenger over seat assignment;¹⁶
- a routine but offensive search of a passenger prior to boarding;¹⁷
- a flight attendant pushes a passenger into a seat to clear the aisle;¹⁸
- a flight crew member forcefully removes a passenger from the lavatory due to a smoke alarm sounding;¹⁹
- a passenger assaults and intimidates flight attendant after being denied a request for pillow or blanket;²⁰
- a passenger refuses to turn off boom box;²¹ and

port her claim of an "accident" under the Warsaw Convention because a reclined seat was not considered an unusual event on an airplane); *see also* *Gotz v. Delta Airlines, Inc.*, 12 F. Supp. 2d 199, 204 (D. Mass. 1998) (holding that a passenger who injured himself by placing a bag in an over-head compartment while seeking to avoid injuring another passenger failed to support his claim for airline liability for an "accident" under the Warsaw Convention because the incident was not within the airline's control); *Maxwell v. Aer Lingus*, 122 F. Supp. 2d 210 (D. Mass. 2000) (holding that liquor bottles which dislodge from overhead bin and strike passenger on head is an accident)

16. *See Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165, 1170-71 (D. Or. 1999) (holding that a physical and verbal confrontation between a passenger and a flight attendant over seating assignments was governed by the Warsaw Convention and was considered an accident under the Convention).

17. *See El Al Israel Airlines, LTD v. Tseng Yuan Tsui*, 525 U.S. 155 (1999) (considering the liability of an airline where an "intrusive security search" conducted by airline security before the passenger boarded plane inflicted the passenger with psychological harm).

18. *See Brandt v. American Airlines*, No. C 98-2089 SI, 2000 WL 288393, at *7 (N.D. Cal. Mar. 13, 2000) (dismissing plaintiff's claim that airline personnel's act of pushing plaintiff into his seat constituted grounds for airline liability as an accident under the terms of the Warsaw Convention).

19. *See Laor v. Air France*, 31 F. Supp. 2d 347, 349-51 (S.D.N.Y. 1998) (holding that the plaintiff's claim of being forcibly removed from an airplane lavatory by airline personnel was considered an accident under the Warsaw Convention, but that the plaintiff's claim for punitive damages was barred by the Convention).

20. *See United States v. Flores*, 968 F.2d 1366, 1368 (1st Cir. 1992) (assessing liability when a passenger assaulted a flight attendant during a dispute concerning the passenger's rude behavior).

21. *See United States v. Hicks*, 980 F.2d 963, 972, 974-75 (5th Cir. 1992) (holding that the charge of intimidating an airline's flight crew was not unconstitu-

- a passenger refuses to extinguish cigarette.²²

These incidents, as well as other related modern day events such as in-flight health crises, diversions, passenger removals, security searches and arrests, pose conflicts under the Warsaw scheme. It is not immediately apparent whether the Convention's liability scheme was meant to cover such events, especially passenger upon passenger assaults or torts. Courts are currently conflicted, with a growing number finding such confrontations to invoke carrier liability under the Convention.²³ Upon deeper inquiry, however, substantial questions are raised as to whether the Convention was ever meant to cover such disputes.

B. THE WARSAW INSTRUMENTS AND LIABILITY SCHEME

The Warsaw Convention was the product of international conferences held in 1925 and 1929.²⁴ At the 1929 conference, the Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.), a committee of government selected experts previously appointed to establish a set of rules for international air carriage, presented a draft convention.²⁵ Underlying this draft were the principles upon which the liability provisions of the Warsaw Convention were founded. Ac-

tionally vague and that there was sufficient evidence of intimidation where a passenger refused to discontinue the use of his boombox despite repeated requests to do so).

22. See *Choukroun v. American Airlines, Inc.*, No. 98-12557-NG (D. Mass. Aug. 2, 2000) (order granting defendant's motion for summary judgment).

23. See *El Al Israel Airlines, Ltd. v. Tseng Yuan Tsui*, 525 U.S. 155, 160 (1999) (suggesting that an intrusive routine security search can be interpreted as an accident under the Warsaw Convention); see also *Wallace v. Korean Airlines*, 214 F.3d 293, 297 (2d Cir. 2000) (holding that a sexual assault by one passenger upon another is an accident under the rules of the Warsaw Convention); *Lahey v. Singapore Airlines, Ltd.*, 115 F. Supp. 2d 464, 466-67 (S.D.N.Y. 2000) (holding that an assault on one passenger by another was considered an accident under the Warsaw Convention); *Goodwin v. Air France*, No. C97-1997 FMS, 1998 WL 296356, at *1 (N.D. Cal. June 2, 1998) (holding that an attack by a passenger on another passenger can be deemed an accident under the terms of the Warsaw Convention).

24. See Lowenfeld & Mendelsohn, *supra* note 3, at 498 (providing the background of the Warsaw Convention).

25. See John J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. & COM. 27, 32, 36 (1932) (describing the work of the CITEJA on the Warsaw Convention).

cording to the Rapporteur of the 1925 Conference:

[t]he Commission asked itself which liability regime had to be adopted: risk or fault. The general feeling is that, whilst liability towards third parties must see the application of the risk theory, by contrast, in the matter of the carrier's liability in relation to passengers and goods, one must admit the fault theory.²⁶

Further, the Convention's formation involved the convergence of principles of carrier liability under both the civil and common law systems. Under common law, the carrier is subjected to a heightened duty of care. While not absolute, it requires the carrier "to use the greatest amount of care and foresight which is reasonably necessary"²⁷ under the circumstances. Thus, failure to exercise this care is negligent. Carriers are not liable for the assaults or torts of third parties absent notice and failure to protect the injured passenger.²⁸ In contrast, under the civil law system, a carrier's duty to passengers is a strict contractual duty to safely transport.²⁹ The only exception to this contractual liability is if the damage or loss is due to a cause that is not attributable to the carrier.³⁰ Under the principle of force majeure, a carrier is not liable for loss or damage if the occurrence is unforeseeable, insuperable, and extraneous to the carrier's business and activities,³¹ and includes "fait ou faute d'un tiers" (act or fault of

26. See GEORGETTE MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS* 63 (1977) (quoting *Conference Internationale* (Paris, 1925) Rapport Pittard Annexes, p. 60).

27. *Id.* at 52.

28. See *Milone v. Washington Metro. Area Transit Auth.*, 91 F.3d 229, 231 (D.C. Cir. 1996) (quoting *Washington Metro. Area Transit Auth. v. O'Neill*, 633 A.2d 834, 840 (D.C. 1993)) (holding that a common carrier "has a duty to protect its passengers from foreseeable harm arising from criminal conduct of others."); see also *Kelley v. Metro-N. Commuter R.R.*, 37 F. Supp. 2d 233, 240 (S.D.N.Y. 1999) (holding that a railroad is not liable for assault of a passenger by an employee unless it is proven that the railroad "knew or should have known the assailant was the type of person who might commit an assault.").

29. See MILLER, *supra* note 26, at 54 (describing the presence of a contractual duty to transport goods and passengers safely under French law).

30. See *id.* (describing the exception to contractual liability, "cause étrangère," under the Civil Code).

31. See *id.* at 54-55 (listing instances where a carrier is not liable for failing to deliver passengers and goods safely under the concept of force majeure in French

a third party) so long as all three conditions are met.³² Accordingly, carriers were not absolutely liable for injuries or damage caused to passengers by other passengers under either system of liability.

A primary and fundamental purpose of the Convention was to establish uniform rules governing claims arising out of international air transportation and limit the liability of air carriers.³³ At the time, the air transportation industry was in its infancy,³⁴ and there were substantial differences among the world's countries as to liability rules governing air transportation accidents.³⁵ Many countries' civil laws allowed carriers to contractually (i.e. by ticket) disclaim liability for injury or death.³⁶ Importantly, while uniformity was an essential goal to the Convention, the objectives also included the desire to protect the fledgling air transportation business from disaster.³⁷ The primary concern was air accidents, such as crashes or other large-scale incidents in the plane's operation, which could lead to disastrous finan-

law).

32. See *id.* at 55 n.41 (noting the requirement that all three conditions must be met in order for liability to be excluded in situations involving "fait ou faute d'un tiers").

33. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467 (11th Cir. 1989) (discussing the background of the Warsaw Convention and its aims); Lowenfeld & Mendelsohn, *supra* note 3, at 498-99 (outlining the drafter's goals for the Warsaw Convention).

34. See 1 LEE S. KREINDLER, *AVIATION ACCIDENT LAW* sec. 10.01[2], at 10-6 (Blanca I. Rodriguez ed., 1996) (describing the state of the aviation industry in 1929); Lowenfeld & Mendelsohn, *supra* note 3, at 498 (characterizing the aviation industry as being on the verge of becoming a common mode of transportation).

35. See 1 STUART M. SPEISER & CHARLES F. KRAUSE, *AVIATION TORT LAW* §11.4, at 635-36 (1978 & Supp. 1999) (stating the twin goals of the Convention to be establishing uniformity in law and limiting the liability of air carriers in accidents).

36. See HUIBERT DRION, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 1-11 (1954) (discussing limitations on liability in civil aviation law).

37. See generally Jonathan L. Neville, *The International Air Transportation Association's Attempt to Modify International Air Disaster Liability: An Admirable Effort with an Impossible Goal*, 27 GA. J. INT'L & COMP. L. 571, 573-74 (1999) (citing Francis Lyall, *The Warsaw Convention: Cutting the Gordian Knot and the 1995 Intercarrier Agreement*, 22 SYRACUSE J. INT'L L. & COM. 67, 68-69 (1996)) (noting the problem that liability posed to the relatively young airline industry in the event of an airline disaster).

cial consequences.³⁸ There was also the concern that insurance would otherwise become too expensive for carriers, and tickets too costly for most passengers. At the time, the air carrier industry was financially weak and faced possible, if not inevitable, bankruptcy from a single disaster.³⁹ It was crucial for the Convention to limit air carrier liability and allow the air transportation industry to grow and obtain the necessary capital by placing uniform limits on possible disastrous claims.⁴⁰ This could be done by identifying, at the outset, what liability the carrier could incur.⁴¹

38. See *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971) (discussing the aims of the Warsaw Convention, particularly preventing liability claims from severely harming air carriers in the event of a disastrous accident); see also James N. Fincher, *Watching Liability Limits Under the Warsaw Convention Fly Away, and the IATA Initiative*, 10 TRANSNAT'L LAW 309, 310 (1997) (noting the concerns surrounding the potential financial ramifications that an air disaster could have had on the airline industry); cf. Lowenfeld & Mendelsohn, *supra* note 3, at 499 (observing that the Warsaw Convention's aim of establishing liability ceilings was an effort to attract capital to the airline industry).

39. See generally KREINDLER, *supra* note 34, sec. 10.01[2], at 10-6 (citing *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 410-11 (9th Cir. 1978)) (discussing early issues and problems with the aviation industry).

40. See Lowenfeld & Mendelsohn, *supra* note 3, at 498-500 (maintaining that a central goal of the Convention was to uniformly restrict the potential liability of the airline in the event of passenger injuries or fatalities); see also D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION 136 (Martinus Nijhoff ed., 1937) (stressing that the airliners' motive to enter into the Convention was in limiting their own liability). Moreover, the airliners sought to exclude domestic flights, non-commercial flights, and "carriages performed not for reward by individuals or groups" from the Convention altogether. *Id.* at 142; KRIENDLER, *supra* note 34, sec. 11.01[2] n.4 (citing *Dunn*, 589 F.2d at 410-11) (providing the example of *Dunn*, a federal case in which the defendant airline was forced to pay a substantial penalty to an injured passenger). Airlines were fully aware of the possibility that a major lawsuit could destroy capital investment, and thus sought to limit their potential liability through the Convention. See KRIENDLER, *supra* note 34, sec. 11.01[2] n.4.

41. See *Ide*, *supra* note 25, at 30 (citing Report of 1925 International Conference of Private Air Law) (reporting the establishment of two commissions by the First International Conference of Private Air Law in 1925, created to report on general questions of private air law and the liability of air carriers); see also Andrea Buff, *Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?*, 20 FORDHAM INT'L L.J. 1768, 1774 n.42 (1997) (citing Senate Comm. on Foreign Relations, *Message from the President of the U.S. Transmitting a Convention for the Unification of Certain Rules*, S. EXEC. DOC. NO. G., 73d Cong., at 3-4 (2d Sess. 1934), reprinted in 1934 U.S. Aviation Rep. 239, 242) (contending that lim-

Also underlying the Convention's goal of limiting a carrier's liability was the understanding that liability of the air carrier would be "less rigorous" than that for other carriers⁴² and that the carrier was not assuming responsibility for the safety of the passenger absent fault. It was also understood and intended that the carrier would not assume responsibility for risks associated with travel in general.⁴³ Reduced to its essentials, the Convention's limited liability scheme imposed presumed liability upon the carrier for injury resulting from aviation accidents by setting monetary limits to any damage recovery, and allowing exoneration where the carrier exercised due diligence.⁴⁴ Since the Convention was imposing liability upon the carrier for aircraft accidents, it placed the burden of proof regarding due diligence on the carrier, as it was believed that, in most crashes or major incidents, the carrier would be the most knowledgeable as to cause.⁴⁵ If the cause could not be determined, then the carrier would

ited liability would attract investors and insurance underwriters to the airline industry); GOEDHUIS, *supra* note 40, at 243 (explaining that the purpose of the Warsaw Convention was to give carriers the advantage of knowing when and to what extent their liability would be engaged).

42. See GOEDHUIS, *supra* note 40, at 233, 236 (stating that the "[t]he liability of the air carrier must be submitted to rules less rigorous than those imposed on other carriers.").

43. See *id.* (justifying the "less rigorous" enforcement of airline liability with the belief among representatives at the Convention that airline passengers, unlike passengers traveling on the more traditional modes of transportation, accepted the increased risks accompanied with flying). The argument for decreased airline liability was further strengthened by the contention that an airline could not overcome a presumption of fault where the airplane is involved in an accident, or disappears in the sea. See *id.* at 237; MILLER, *supra* note 26, at 63 (admitting that "anyone using an aircraft does not ignore the risks inherent in a mode of transportation which has not yet reached the point of perfection that one hundred years have given to the railways.").

44. See GOEDHUIS, *supra* note 40, at 38 (explaining that "a system of liability must be arrived to which the injured party is relieved from the burden of proof without this resulting in declaring the carrier liable when it has committed no fault.").

45. See INTERNATIONAL CONFERENCE ON AIR LAW AFFECTING AIR QUESTIONS, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, OCT. 4-12, WARSAW 1929, at 21, 37, 252 (R. Horner ed. & D. Legrez transl., 1975) [hereinafter 1929 WARSAW MINUTES] (noting that a showing of due diligence will lessen the extent to which the air carrier would be liable); GOEDHUIS, *supra* note 40, at 217-18, 230 (discussing the generally accepted rule of placing the burden of proof on the carrier).

be liable.⁴⁶ Indeed, it was the placement of the burden of proof on the carrier that served as the justification for modest liability limits.

Based on these notions, the Warsaw liability scheme that emerged in 1929 allowed a passenger to recover damages for any injury or death if the following were established: "(a) the claimant was a passenger of an international flight;⁴⁷ (b) the claimant suffered an 'accident';⁴⁸ (c) the accident occurred aboard the international flight or in the course of embarking or disembarking the international flight;⁴⁹ and (d) the accident caused the passenger to suffer 'death or wounding . . . or any other bodily injury.'"⁵⁰ The two primary defenses were contributory negligence on the part of the claimant and carrier exoneration where it undertook "all necessary measures" to avoid the accident.⁵¹ Finally, the monetary limit could be broken by showing that the carrier engaged in "willful misconduct,"⁵² or where the carrier failed to deliver the ticket.⁵³ The monetary limit was 125,000 francs (approximately \$8,300 in U. S. currency).⁵⁴ Although the Convention barred carriers from undermining the Convention rules by exculpatory contract language, carriers could agree to a higher limit of liability with the passenger "by special contract."⁵⁵

Since its inception, a number of modifications or supplements to the Convention have attempted to address and raise the liability limits.⁵⁶ These modifications include the 1955 Hague Protocol,⁵⁷ the

46. See LAWRENCE B. GOLDBIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* (Kluwer 2000) (providing a translation and analytical commentary for the Warsaw Convention).

47. See Warsaw Convention, *supra* note 1, arts. 1, 17.

48. See *id.* art. 17.

49. See *id.*

50. *Id.*

51. See *id.* art. 20(1).

52. See Warsaw Convention, *supra* note 1, art. 25.

53. See *id.* art. 22.

54. See *id.*

55. See *id.* art. 22(1).

56. See *infra* notes 57-107 and accompanying text (delineating the several multilateral and unilateral attempts to increase liability limits).

57. Protocol to Amend the Convention for the Unification of Certain Rules

1966 Montreal Interim Agreement,⁵⁸ the 1971 Guatemala City Protocol,⁵⁹ the Supplemental Guadalajara Convention of 1961,⁶⁰ the 1975 Montreal Protocols,⁶¹ and the more recent 1999 Montreal Convention.⁶² Moreover, there have been unilateral efforts to modify the liability scheme. These primarily include the Japanese Initiative of 1992,⁶³ the European Community Regulation,⁶⁴ and the IATA Inter-

Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter *The Hague Protocol*].

58. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (1966), Civil Aeronautics Board Agreement No. 18,900, approved by Exec. Order No. 23,680, 31 Fed. Reg. 7,302 (1966) [hereinafter *Montreal Interim Agreement*], reprinted in IATA, AVIATION DOCUMENTS, *supra* note 1, at 139.

59. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol Done at the Hague on 28 Sept. 1955, Mar. 8, 1971 [hereinafter *Guatemala City Protocol*], reprinted in IATA, PRINCIPAL INSTRUMENTS OF THE WARSAW SYSTEM 3-47 (2d ed. 1981) [hereinafter *PRINCIPAL INSTRUMENTS*].

60. Convention, Supplementary to the Warsaw Convention, For the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, reprinted in *PRINCIPAL INSTRUMENTS*, *supra* note 59, at 58-60.

61. Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929, Sept. 25, 1975, reprinted in *PRINCIPAL INSTRUMENTS*, *supra* note 59, at 48-50; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at the Hague on 28 Sept. 1955, Sept. 25, 1975, reprinted in *PRINCIPAL INSTRUMENTS*, *supra* note 59, at 51-53; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at the Hague on 28 Sept. 1955 and at Guatemala City on 8 Mar. 1971, Sept. 25, 1975, reprinted in *PRINCIPAL INSTRUMENTS*, *supra* note 59, at 54-57; Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at the Hague on 28 Sept. 1955, Sept. 25, 1975 [hereinafter *Montreal Protocol No. 4*], reprinted in *PRINCIPAL INSTRUMENTS*, *supra* note 59, at 2-47.

62. Convention For the Unification of Certain Rules for International Carriage by Air, opened for signature on 28 May 1999, available at <http://www.dot.gov/ot/ogc/Convention.pdf> (last visited Jan. 28, 2001) [hereinafter *Montreal Convention 1999*], reprinted in IATA, AVIATION DOCUMENTS, *supra* note 1, at 17.

63. See Nanaeen K. Baden, *The Japanese Initiative on the Warsaw Convention*,

carrier Agreements.⁶⁵

The Hague Protocol doubled the liability limits to 250,000 francs (approximately \$16,600 in U. S. currency).⁶⁶ It also added a provision allowing recovery of litigation expenses according to local law and defining "willful misconduct" to mean intentional or reckless acts causing injury or death.⁶⁷ Although the Montreal Interim Agreement

61 J. AIR L. & COM. 437, 453-56 (1996) (discussing Japanese airliners' agreement to abandon liability limits imposed by the Warsaw Convention). This initiative preceded the modern IATA Agreements and the Montreal Convention of 1999. *See id.* It constitutes an agreement among ten Japanese carriers to establish a two-tiered liability scheme with absolute liability of up to 100,000 SDRs and presumed liability for damages in excess of this limit. *See id.* A major impetus behind this agreement was the 1985 crash of a Japanese Airline, which killed five-hundred twenty-nine people. *See id.*; Bin Cheng, *Air Carriers' Liability for Passenger Injury and Death: The Japanese Initiative and Response to the Recent EC Consultation Paper*, 18 AIR & SPACE L. 109 (1993) (discussing the importance and circumstances of the Japanese initiative).

64. *See* Council Regulation 2027/97, 40 O.J. (L 285) 1 [hereinafter EC Regulation]; *see also* Berend Crans & Onno Rijdsdijk, *EC Aviation Scene*, 21 AIR & SPACE L. 193 (1996) (reviewing the EC Regulation in the context of the European Community). The EC Regulation resulted from the Commission of the European Union's concern over the voluntary nature of the IATA initiative. *See* Crans & Rijdsdijk, *supra*. The EC Regulation not only set forth a two-tiered liability system like the IATA and Japanese initiative, but also provided that it was mandatory for all European Union countries and required up-front payments to the family of a victim in case of death. *See* EC Regulation, *supra*. In *The Queen v. The Secretary of State For the Environment, Transport and the Regions*, the regulation was challenged before the High Court of Justice in the United Kingdom as constituting an impermissible change to the Warsaw Convention without the consent of the signatory states. The Court held that the Regulation in suspense because it conflicts "with the Warsaw Convention and impedes the performance by member states who are parties to it." 1 Lloyd's Rep. 242 (Apr. 21, 1999).

65. *See* IATA Inter-carrier Agreement on Passenger Liability (IIA), available at http://www.iata.org/legal/list_intercarrier.htm (last visited Jan. 28, 2001) [hereinafter IIA], reprinted in IATA, AVIATION DOCUMENTS, *supra* note 1, at 51; Agreement on Measures to Implement the IATA Inter-carrier Agreement (MIA), available at http://www.iata.org/legal/list_intercarrier.htm (last visited Jan. 28, 2001), reprinted in IATA, AVIATION DOCUMENTS, *supra* note 1, at 55.

66. *See* The Hague Protocol, *supra* note 57, art. XI.

67. *See id.* art. XIII. The United States did not adopt The Hague Protocol due to its continued dissatisfaction with the amount of the Protocol's limits. *See* Matthew R. Pickelman, *Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time*, 64 J. AIR L. & COMM. 274, 284 (1998).

followed in 1966,⁶⁸ the United States expressed dissatisfaction with the amount of the liability limits and threatened to denounce the Convention.⁶⁹ The United States sought limits of \$100,000 per passenger, an amount that other countries felt to be excessive.⁷⁰ The two sides finally reached a "compromise," establishing a limit of \$75,000 per passenger, including litigation expenses.⁷¹ In addition, the compromise waived the "all necessary measures" defense provided by Article 20, and included notice of the new limits on airline tickets.⁷² Thus, the agreement was a contract between carriers and passengers whose tickets have points of departure, destination or an agreed stopping place in the United States.⁷³

In 1971, the liability limits were again at issue when a convention was held in Guatemala City. The resulting Guatemala City Protocol of 1971⁷⁴ proposed amendments to the Warsaw Scheme which included the following: (a) an increase in the liability limits to approximately \$100,000;⁷⁵ (b) absolute liability for injury or death up to the \$100,000 limit which could not be overcome by a showing of willful misconduct;⁷⁶ (c) recovery of litigation costs including attorneys' fees, if allowed for by the national law and if the air carrier re-

68. One intervening convention was held in 1961, and resulted in the Guadalajara Supplementary Convention. See *supra* note 60 and accompanying text. This Convention amended the Warsaw Convention to bring all carriers of an international flight (actual and contracting) within the purview of the Warsaw Convention. See *id.*

69. See Warsaw Convention, *supra* note 1, art. 39 (allowing for any of the High Contracting Parties to denounce the Convention by giving notice to the Polish Government). Denunciation is to take place six months thereafter. See *id.*

70. See Lowenfeld & Mendelsohn, *supra* note 3, at 586-87.

71. See J.C. Batra, *Modernization of the Warsaw System* Montreal 1999, 65 J. AIR L. & COM. 429, 430 (2000) (noting that the compromise is not a convention nor a protocol to the Warsaw Convention, but a bilateral agreement).

72. See Special Notice of Limited Liability For Death or Injury Under the Warsaw Convention, 14 C.F.R. sec. 221.175 (1999).

73. See Waiver of Warsaw Convention Liability Limits and Defenses, 14 C.F.R. sec. 203 (1999).

74. Guatemala City Protocol, *supra* note 59.

75. See *id.* art. 8.

76. See *id.* art. 10.

fused to settle a claim within six months of receiving notice;⁷⁷ (d) jurisdiction where the passenger was domiciled or had a permanent residence, if the carrier had a place of business there;⁷⁸ and (e) authority by any country to create a supplemental compensation plan funded by passenger contributions in amounts exceeding the absolute limit of \$100,000.⁷⁹

Four additional protocols emerged in 1975 (Montreal Protocols No. 1, 2, 3, & 4), primarily due to unstable gold prices in United States dollars.⁸⁰ The French franc was replaced by Special Drawing Rights ("SDR").⁸¹ In addition, The Hague and Guatemala provisions (absolute liability with an unbreakable limit, a settlement inducement clause, and a supplemental compensation plan) were incorporated. Although Protocol No. 4 primarily concerned the simplification of rules pertaining to cargo liability, it changed Article 25's willful misconduct term to an "act or omission" of the carrier or its agents committed "with intent to cause damage or recklessly and with knowledge that damage would result" as the proof needed to escape the liability limit.⁸² Moreover, it amended Article 24 by clarifying how the Convention precluded passengers from bringing actions under local law when they could not establish air carrier liability under

77. *See id.* art. 7.

78. *See id.* art. 12.

79. *See* Guatemala City Protocol, *supra* note 59, art. 14. In order for the Protocol to take effect, it needed ratification from thirty countries, five of which would have to comprise forty percent of international air travel of ICAO member nations. *See id.* art. 20(1); *see also* Frederico Ortino & Gideon R.E. Jurgens, *The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation*, 64 J. AIR L. COM. 377, 384 (1999) (explaining how the U. S. failure to ratify the Protocol effectively defeated the Protocol, given the U. S. share of the market).

80. *See* David I. Sheinfeld, *From Warsaw to Terrific: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COMM. 653, 677-78 (1980).

81. The SDR was created by the International Monetary Fund and is based on the currencies of France, the United States, Germany, England, and Japan. *See* Learning Network, Special Drawing Rights, at <http://www.infoplease.com/Ce6/bus/A0846206.html> (last visited Jan. 28, 2001).

82. *See* Montreal Protocol No. 4, *supra* note 61, art. 25, *reprinted in* GOLDHIRSCH, *supra* note 46, at 358.

the Treaty.⁸³

The most recent reform efforts are the agreements promulgated by the International Aviation Transit Association⁸⁴ and the Montreal Convention of 1999.⁸⁵ Due to continued dissatisfaction with the monetary limits, IATA moved to obtain agreement from its member airlines to raise, by intercarrier agreement, the monetary limits under the Warsaw Convention. These efforts resulted in the 1994 IATA initiative, as the world governments had failed to ratify the prior Guatemala and Montreal Protocols.⁸⁶ The centerpieces of the discussions leading up to the IATA Intercarrier Agreement were: raising the monetary limits, eliminating the willful misconduct provision,⁸⁷ and allowing a claimant passenger to resort to his or her home country as the governing law for damages.⁸⁸

Under the IATA Intercarrier liability scheme,⁸⁹ signatory carriers agreed to a monetary limit of 100,000 SDRs and the elimination of the willful misconduct component. Under this scheme—which is in place today for most major airlines—there is no longer any requirement that the claimant establish willful misconduct in order to recover more than the established limits.⁹⁰ A passenger claimant is en-

83. See Guatemala City Protocol, *supra* note 59, art. 24.

84. The IATA is a private organization whose membership is comprised of international air carriers, and whose purpose is to “ensure . . . that aircraft can operate safely, securely, efficiently, and economically.” IATA’s Mission, at <http://www.iata.org/mission.htm> (last visited Jan. 21, 2001).

85. Montreal Convention 1999, *supra* note 62.

86. For a general discussion of the IATA Agreements, see Ortino & Jurgens, *supra* note 79 (discussing the strengths and weaknesses of the IATA Agreements).

87. See Pickelman, *supra* note 67, at 289 (allowing a claimant to recover for damages without requiring proof of the carrier’s willful misconduct).

88. But see *id.* at 289 (stating that travelers exiting, entering, or going through the United States claim damages under U. S. tort law).

89. The IATA Intercarrier Agreement is composed of three related, but separate agreements: (1) the IATA Intercarrier Agreement on Passenger Liability; (2) the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement; and (3) the Air Transport Association’s Provisions Implementing the IATA Intercarrier Agreement. See *id.* at 289 (describing the collective nature of IATA agreements). The agreements, while separate, are intended to operate in conjunction with one another. See *id.* (noting the effect that IATA agreements have on limiting the Warsaw Convention’s carrier liability).

90. See *id.*

titled to receive damages for injuries up to 100,000 SDRs if he or she meets the standard set forth in Article 17 (i.e., "accident", etc.).⁹¹ The due care or "all reasonable measures" defense is only available for claims of damages over 100,000 SDRs and again, is the burden of the carrier to establish.⁹² The IATA scheme also allows the passenger claimant to look to the law of his domicile or permanent residence in determining recoverable damages.⁹³

Although most major carriers agreed to the IATA Inter-carrier Agreement,⁹⁴ the Agreement remains problematic in several respects. The most fundamental problem is that it is a contractual undertaking which allows carriers to opt out, as opposed to a legally binding international treaty. Consequently, the International Civil Aviation Organization ("ICAO")⁹⁵ made efforts to reform the Warsaw Convention through amendment rather than by inter-carrier agreement.⁹⁶ The primary focuses were, again, increasing the existing limits of liability and ensuring that the changes or updates had the force and effect of an international treaty. As a result, the Montreal Convention of 1999 came into existence as a compilation of the original Warsaw Convention and subsequent protocols, including the Hague Protocol, the Montreal Protocols Nos. 3 and 4, the Guatemala City Protocol, and the Guadalajara Supplementary Convention of 1961.⁹⁷ Accordingly, the liability scheme is similar to the two-tiered IATA agreements. Moreover, the carrier is strictly liable up to 100,000 SDRs for death

91. See Pickelman, *supra* note 67, at 290.

92. See *id.*

93. But see *id.* at 291 (asserting that the IATA Inter-carrier liability scheme provides for damages based on United States tort law).

94. See List of Carriers Signatory to the IATA Inter-carrier Agreement on Passenger Liability (IIA), at http://www.iata.org/legal/passenger_liability.htm (last visited Jan. 26, 2001) (stating that, as of January 2001, the IATA (IIA) Agreement had one-hundred-twenty-two carrier signatories, while the MIA and IPA had ninety and twenty signatories respectively).

95. See About ICAO: Memorandum on ICAO, at <http://www.icao.org> (last visited Jan. 26, 2001) (explaining the ICAO's function as a specialized agency of the United Nations and its responsibility for administering the Warsaw Convention and the related treaties and protocols).

96. See Batra, *supra* note 71, at 429 (discussing the history and drafting of the Montreal Convention of 1999).

97. See Montreal Convention 1999, *supra* note 62.

or injury of a passenger resulting from an "accident."⁹⁸ The injured passenger bears the burden of proof to establish damages, and the carrier can only escape or reduce its liability based on contributory negligence of the passenger.⁹⁹ For provable damages over 100,000 SDRs, the carrier is liable based on fault—i.e., where the carrier establishes that the damage was not the result of its negligence or "wrongful act or omission," or was the result of the "sole" negligence or wrongful act or omission of a third party.¹⁰⁰

Other notable provisions include: automatic review of the SDR limit every five years;¹⁰¹ the passenger's option of filing suit where he or she has a principal place of business and permanent residence;¹⁰² mandatory advance payment obligation upon carrier in a sum to meet the passengers' "immediate economical need";¹⁰³ preemption over claims arising out of international air travel;¹⁰⁴ inflationary adjustment based on the Consumer Price Index ("CPI"); the right of carriers to stipulate to higher limits;¹⁰⁵ and the right of carriers to have recourse against third parties.¹⁰⁶

The advent of the IATA Agreements and the Montreal Convention of 1999 represented landmark developments in the Warsaw scheme. While the IATA agreements are intercarrier agreements made operative only by the voluntary participation of the individual carrier through the filing of appropriate tariffs, the Montreal Convention of 1999 is a proposed international treaty which consolidates the five different legal instruments comprising the Warsaw scheme into one

98. *See id.* art. 21(1) (describing the system of compensation for death and injury under the 1999 Convention).

99. *See id.* art. 20 (allowing defendants to assert affirmative defenses).

100. *See id.* art. 21(2)(a)-(b).

101. *See id.* art. 24(1) (listing term limits of liability review).

102. *See* Montreal Convention 1999, *supra* note 62, art. 33(2) (providing jurisdictional requirements for actions to bring damages).

103. *See id.* art. 28.

104. *See id.* art. 29 (setting forth the Montreal Convention as a basis for air carriage claim).

105. *See id.* art. 25.

106. *See id.* art. 37.

instrument.¹⁰⁷

Both sets of instruments, however, adopt the SDR monetary system, raise the monetary limits, and establish a two-tier liability system. The Montreal Convention of 1999 has been ratified by seven countries thus far,¹⁰⁸ and needs thirty countries in order for it to become operative.¹⁰⁹ If ratified, the Convention would displace the IATA Agreements, as it is an international treaty, instead of a private accord.

The centerpieces of these reform efforts have been the low liability limits, the time consuming and expensive litigation surrounding claimants' attempts to break the liability limits by showing willful misconduct on the part of the carrier, and the belief that the compensatory scheme should allow a passenger to be compensated according to his or her own country's laws. With only one exception—the Guatemala City Protocol of 1971—the accident requirement has not been the topic of *any* of the reform efforts.¹¹⁰ Indeed, the wording of Article 17 remains the same today as it did when the Convention was originally enacted in 1929.

C. ARTICLE 17 AND ACCIDENT: TEXT, CONTEXT, *TRAVAUX PREPARATOIRES*, AND POST-RATIFICATION CONDUCT

While it is fairly universal that the goal in the interpretation of any instrument is to effectuate the intent of the parties,¹¹¹ treaty interpre-

107. See Montreal Convention 1999, *supra* note 62, art. 55 (describing the Montreal Convention's relationship to the Warsaw Convention, The Hague Protocol, the Guatemala City Protocol, and the Montreal Protocol).

108. See Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999 (status as of 20 Nov. 2000), at <http://www.icao.int/icao/en/leb/mtl99.htm> (last visited Mar. 6, 2001) (listing the seven countries ratifying the Convention to date: Belize, the Czech Republic, Mexico, Slovakia, Japan, the United Arab Emirates, and the former Yugoslav Republic of Macedonia).

109. See Montreal Convention 1999, *supra* note 62, art. 53(6) (describing the process of signature, ratification, and entry with the Montreal Convention).

110. See Guatemala City Protocol, *supra* note 59, art. 17(1) (imposing liability on a carrier when a passenger is injured due to a causal "event" that was incident to the carrier's operations).

111. See *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) (describing the court's reliance on facts surrounding the treaty, along with

tation is no different. According to the Vienna Convention,¹¹² “a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”¹¹³ The basic rules include the need to uphold the purposes of the treaty and give meaningful effect to the signature or intent behind the treaty.¹¹⁴ Upon examination of the treaty’s text and the context in which the words are used,¹¹⁵ particularly with respect to uncertain or ambiguous areas, one can resort to the “history of the treaty, the negotiations, and the practical construction adopted by the parties.”¹¹⁶ Notions of liberality and good faith¹¹⁷ are also commonly invoked, as is the interpretation of sister signatories’ courts.¹¹⁸ According to the U. S. Supreme Court, as the “travaux préparatoires” of the Warsaw Convention are published and are generally available to litigants, courts will frequently refer to these materials to resolve ambiguities in the text.¹¹⁹ With Article 17, in particular, the “travaux préparatoires,” context, and post-ratification conduct are crucial, given that the article is “stark and undefined.”¹²⁰

parties’ understanding and intent, as important factors in treaty interpretation).

112. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The United States has never ratified the Vienna Convention. See *Chubb & Sons v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000). It nonetheless is used as a guide to international treaty interpretation as it is a codification of customary international law. *Id.* (citing Maria Fran Kowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 286 (1988)).

113. Vienna Convention, *supra* note 112, art. 32; see *Air France v. Saks*, 470 U.S. 392, 397 (1985) (emphasizing that interpretation of a treaty requires one to commence “with the text of the treaty and the context in which the words are used.”). In *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991), the Court interpreted Article 17’s “bodily injury” requirement and held that it does not encompass mental injuries.

114. See *Floyd*, 499 U.S. at 531 (describing the need to consider signatory conduct in interpreting parties’ intent).

115. See *Saks*, 470 U.S. at 397 (citing *Maximov v. United States*, 373 U.S. 49, 53-54 (1963)).

116. *Choctaw*, 318 U.S. at 432.

117. See Vienna Convention, *supra* note 112, art. 32.

118. See *Saks*, 470 U.S. at 404 (emphasizing the importance of opinions and the conduct of signatories in interpreting treaties).

119. See *id.* at 400.

120. Janice Cousins, Note, *Warsaw Convention—Air Carrier Liability for Pas-*

As originally enacted, Article 17 governing personal injury claims provides as follows:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.¹²¹

Accordingly, the original Convention provides for liability for "death, wounding or bodily injury" resulting from an "accident" which occurred during the "international flight" or in the course of any of the operations of "embarking or disembarking."¹²²

Notably, the draft convention initially presented to the Warsaw delegation by CITEJA made air carriers liable "in the case of death, wounding or any other bodily injury suffered by a traveler," "in the case of loss, damage or destruction of goods or baggage," or "the case of delay suffered by a traveler, goods, or baggage." The liability scheme did not textually include any requirement of causation and made no mention or reference to "accident." Liability was likewise the same for personal injuries and damage to goods or baggage.¹²³ Pursuant to this initial draft, Article 22 permitted the carrier to avoid liability by proving it had taken reasonable measures to avoid the damage.¹²⁴

The minutes to the Convention establish that the term "accident" itself was never discussed, but simply appeared in final form as revised by the drafting committee at the Convention.¹²⁵ While there is no information as to why or when this occurred, the wording remains exactly the same today as it was then. Notably, the term "accident" previously appeared in an early draft convention prepared by

senger Injuries Sustained Within a Terminal, 45 FORDHAM L. REV. 369, 388 (1976).

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

122. *See id.*

123. *See* 1929 WARSAW MINUTES, *supra* note 45, at 264-65 (listing liability of the carrier as adopted by CITEJA in May 1928).

124. *See* Warsaw Convention, *supra* note 1, art. 22.

125. *See* 1929 WARSAW MINUTES, *supra* note 45, at 267 (using the term "accident" in discussing the liability of third party carriers).

CITEJA directed toward liability of carriers for damage or injury caused to "person or objects" on the ground.¹²⁶ Under this draft, liability was imposed where the injury or damage was "caused by aircraft,"¹²⁷ which is referenced in the draft as an "accident".¹²⁸ Further, liability was limited to the value of the aircraft, and the carrier could not be held liable where the damage was caused "by any person on board the aircraft" who acted "intentionally by some act which had nothing to do with the operation of the aircraft and without the operator or his staff being able to prevent the damage."¹²⁹ Finally, the draft allowed the monetary limits to be exceeded if the "damage was caused by his fault."¹³⁰ This history is informative, as the use of "accident" by CITEJA was limited, tied to aircraft operation and modified by concepts of fault.

One can hardly disagree with the U. S. Supreme Court's description of Article 17 as "stark and undefined."¹³¹ The plain or ordinary meaning of "accident" or, "l'accident", is certainly similar under both English and French usage, and references an unexpected, fortuitous, or untoward event or happening. What it includes within its

126. See *Ide*, *supra* note 25, at 46, art. 1. CITEJA was charged with writing a draft convention, which would then be addressed at the international conference. See *id.* at 31. At the First Session of CITEJA on May of 1926, members identified and divided a set of problems to study among four Commissions within the CITEJA group. See *id.* at 32. The problems were identified as follows:

First Commission: (1) Nationality of aircraft; (2) aeronautical register; (3) ownership, co-ownership, construction, and transfer; (4) vested rights, mortgages, privileges and seizure. Second Commission: (1) Category of transport (commercial transport, touring, etc.); (2) bill of lading; (3) liability of carrier towards consignors of goods and towards passengers; (4) jettison of cargo and general damage; and (5) renting of aircraft. Third Commission: (1) Damage and liability toward third parties (landing, collision, and jettison); (2) limits of liability (contractual limitation, abandonment); and (3) insurance. Fourth Commission: (1) Legal status of commanding officer and crew; (2) accidents to the crew and insurance; (3) status of passengers; (4) law governing acts committed aboard aircraft.

Id. at 33.

127. *Id.* at 46, art. 1.

128. *Ide*, *supra* note 25, at 47, arts. 5-6.

129. *Id.* at 46, art. 2(b).

130. *Id.* at 47, art. 8.

131. See Cousins, *supra* note 120, at 388.

ambit, however, remains in question, as the context in which it is used is what gives the term meaning.¹³² The clear context is that "accident" was unequivocally tied to aircraft operation, aircraft crashes, and aviation mishaps. Indeed, the very dictionary definitions of accident are invariably, if not always, provided by the context in which the word is used (i.e., car accident, aviation accident, aircraft accident, etc.).¹³³ Thus, the omission by the Warsaw drafters to expressly and specifically modify "accident" with aircraft operations or aviation does not detract from its limited meaning as that was the unequivocal context in which it was used.¹³⁴

It was obvious to the drafters that they were addressing aircraft operational accidents. Indeed, the very purpose and heart of the 1929 conference was the concern over aircraft accidents and the associated risks associated with aircraft operation and travel. One delegate described accidents to be one of three things: (1) those that arise out of errors in piloting; (2) those that arise out of a defect in the functioning of the aircraft; and (3) those designated as being an act of God.¹³⁵ As such, the intent was to impose liability for accidents endemic to aviation, the aircraft, or its operation. In fact, the Convention placed the burden of proof upon the carrier to establish its due diligence to avoid liability for any "accident," as it was understood that the carrier would have the most knowledge regarding the cause of the account as it would necessarily involve the aircraft or its operation.¹³⁶ It is this fundamental understanding that has been ignored in many modern decisions applying the Convention to modern day disturbances, especially passenger upon passenger misconduct.

Delegates' opposition to identical liability rules for personal injury and property claims at the 1929 Convention resulted in a proposal to make a carrier liable for injuries caused by "accidents" and for dam-

132. See *Maximov*, 373 U.S. at 53-54 (commenting that words used in treaties are to be interpreted based on the context in which they are used).

133. See HARPER ET AL., *FRENCH UNABRIDGED DICTIONARY* (5th ed. 1997).

134. See *supra* notes 127-28 and accompanying text (noting the drafters' intent to impose liability when the injury or damage was "caused by aircraft," which is referenced as "accident").

135. See *1929 Warsaw Minutes*, *supra* note 45, at 52.

136. See *id.* at 44, 52, 69; GOEDHUIS, *supra* note 40, at 200.

age to goods or baggage caused by "occurrences."¹³⁷ Even though many other delegates felt it was unnecessary, delegates made this distinction because "Article 22 establishe[d] a very mitigated system of liability for the carrier, and from the moment that the carrier has taken reasonable measures, he does not answer for the risks, nor for the accidents occur[ring] to people by the fault of third parties, nor for accidents occur[r]ing for any other cause."¹³⁸ According to the Supreme Court, "the records of the negotiations 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."¹³⁹

In post-ratification meetings of the ICAO Legal Committee of the International Civil Aviation Organization ("ICAO"), debate continued over whether to maintain the distinction. Some expressed the concern that "occurrence" for personal injury claims would be too broad. In fact, the specific instance of a passenger "attack" upon another was provided as an example which "occurrence" would cover and "accident" would not.¹⁴⁰ At another meeting of the ICAO Legal Committee in 1951, delegates debated this distinction one again.¹⁴¹ A majority of delegates, including the United States, opposed any change with reference to instances of passenger attacks and air sickness as not being a risk for which the carrier should be responsible.¹⁴² Just prior to the Hague Convention of 1955, the consensus of the

137. *Air France v. Saks*, 470 U.S. 392, 402 (1985).

138. *1929 Warsaw Minutes*, *supra* note 45, at 77-78.

139. *Air France v. Saks*, 470 U.S. 392, 402-03 (1985).

140. *See Report of the Subcomm. on the Revision of the Warsaw Convention*, ICAO Legal Comm. Minutes and Documents of the 4th Sess., at 270, ICAO Doc. 6027-LC/124 (1949) (agreed that "the term 'occurrence' would be too broad . . . as this expression would cover the case of independent action among passengers such as an attack by one passenger upon another with consequent bodily injury to the latter.").

141. *See Report of the Subcomm. on the Revision of the Warsaw Convention*, ICAO Legal Comm. Minutes and Documents of the 8th Sess., at 136-38, ICAO Doc. 7229-LC/133 (1951); *Report of the United States Delegation to the 8th Sess. of the Legal Committee of ICAO* (1951), at §(e)(1) (Emmory T. Nunneley, Jr., Chairman, U.S. Delegation), *reprinted in* 19 J. AIR L & COMM. 70, 79 (1952) (discussing opposing views and indicating opposition to change concerned about passenger upon passenger attacks being carrier liability).

142. *See id.*

Committee, with the strong urging of the U. S. delegation, was again that "accident" was the better standard.¹⁴³ An attack by one passenger upon another was noted as an example of an event not intended to be the carrier's responsibility under the liability scheme.¹⁴⁴ As a result, the Hague Protocol contained no changes to Article 17, demonstrating an intent that liability should not arise for claims unrelated to aircraft operation or an aviation event.

The terms of Article 17 liability were also the subject of the Convention held at Guatemala City in 1971. There, delegates proposed and adopted to change the term "accident" to "event." Article 17 to the Guatemala City Protocol of 1971 read as follows:

The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event 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. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.¹⁴⁵

Accordingly, Article 17 would impose liability for an "event" which caused the death or injury, rather than an "accident" which caused the death or injury. The version continued to exempt the carrier from liability if death or injury resulted "solely from the state of the health of the passenger."¹⁴⁶ The Guatemala Protocol likewise removed the willful misconduct and the "all necessary measures" defense. The delegates understood that the change from "accident" to "event" was a significant expansion of potential liability. Indeed, the Italian delegation proposed that "accident" be retained in order to clarify how carrier liability would be imposed only in the case of a "malfunction of service" or "abnormal event directly connected with

143. See *Report of the Subcomm. on the Revision of the Warsaw Convention*, ICAO Legal Comm. Minutes and Documents of the 9th Sess., at 71, ICAO Doc. 7450-LC/136-1 (1954) (U.S. Delegate, Mr. Calkins).

144. See *id.* (asserting that "an attack by one passenger against another might come within the Warsaw Convention, if the proposed changes were made, and place liability where liability heretofore did not belong.").

145. See Guatemala City Protocol, *supra* note 59, art. 17(1).

146. *Id.*

air transport operations.”¹⁴⁷ A similar alternative proposal from the same delegation sought to add the following clarifying language if “event” was retained: “However, the carrier cannot be liable if the death or injury result from an event unrelated to air transport operations.”¹⁴⁸ The concern was that “the carrier would be held responsible even though it had nothing whatsoever to do with the event from which the injury had resulted, and the dispute could just as easily have arisen somewhere else.”¹⁴⁹

It is noteworthy that at the Fifth International Air Navigation Congress in 1930, Professor Goedhuis, the original reporter to the Convention, suggested a clarification by adding the words “un connexe avec le transport.”¹⁵⁰ The Italian Delegation, however, originally recommended to reject this proposal at the 1929 Convention, as a connection to the carriage was deemed obvious.¹⁵¹ This is entirely consistent with efforts to clarify how, with the Guatemala Protocol, if “event” was used, drafters would need to add language providing that no liability could result if the event was unrelated to air transport operations.¹⁵² Consequently, the use and retention of “accident” assumed, and was limited to, an aircraft aviation accident. Again, the specific example of passenger upon passenger misconduct was referenced as an example of potential liability under “event”, which was not the liability intended.¹⁵³ Indeed, delegates referenced the fact that such incidents did not have “a direct connection with an accident resulting from the operation of the aircraft.”¹⁵⁴

The Guatemala Protocol’s replacement of “accident” with “event” created an absolute liability scheme and diminished, if not elimi-

147. 2 Int’l Civ. Aviation Org., Int’l Conference on Air Law, Guatemala City, IACO Doc. 9040-LC/167-1 p. 32, 44 (1972) [hereinafter Guatemala Protocol Minutes].

148. *Id.* at 44.

149. *Id.* at 32-33, 48.

150. ELMAR MARIA GIEMULLA, WARSAW CONVENTION: COMMENTARY 10 (1992).

151. *See id.* at 10, n.5 (citing Minutes II to Air Navigation Conference at 1168, 1177).

152. *See* Guatemala Protocol Minutes, *supra* note 147, at 44.

153. *See supra* note 140 and accompanying text.

154. Guatemala Protocol Minutes, *supra* note 147, at 144.

nated, any need for the accident to be related to aviation. The Protocol, however, was never ratified by the U. S. Senate, and has never been ratified by the necessary number of countries to make it operative.¹⁵⁵ The failure to ratify the Proposal left the unamended Article 17 intact and the understanding that "accident" required some involvement or complicity of the air carrier or, at least, some relation to the operation of the aircraft.

Based on this history, the use of the term accident did not create absolute liability for passenger upon passenger incidents absent some causal involvement or complicity of the air carrier, because such an event does not necessarily have a relation to aviation or aircraft operation. The intent of the drafters was to cover *aviation accidents*,¹⁵⁶ not the traditional risks undertaken by a common carrier.¹⁵⁷

D. THE MONTREAL INTERIM AGREEMENT OF 1966 AND THE ELIMINATION OF THE ALL NECESSARY MEASURES DEFENSE

The Montreal Interim Agreement¹⁵⁸ resulted in the elimination of Article 20's "all necessary measures" defense¹⁵⁹ for all carriers serv-

155. See Guatemala City Protocol, *supra* note 59 (noting that the United States was one of thirty-three countries to sign the Protocol, but that only seven of those countries ratified it, excluding the United States). The governing Nixon administration never submitted the Protocol to the Senate for ratification due to the fact that the Protocol linked the liability to the gold standard. See Nicolas M. Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANNALS OF AIR & SPACE L. 151, 158 (1983).

156. See, e.g., *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 411 (9th Cir. 1978) (stating that the "drafter of the treaty proposed to limit liability for injuries caused by air accidents."); GOEDHUIS, *supra* note 40, at 218 (interpreting the word "accident" to include those related to carriages).

157. See GOEDHUIS, *supra* note 40, at 218, 233, 236-37 (explaining that airline passengers, unlike passengers flying on more traditional means of transportation, accept the risks associated with flying).

158. Montreal Interim Agreement, *supra* note 58.

159. The "all reasonable measures" defense, sometimes referenced as the "due care" defense, can be found in Article 20 of the original Convention, which provides:

(1) The carrier shall not be liable if he proves that he had his agents take all necessary measures to avoid the damage or that it was impossible for him or them to take such measures; and (2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occa-

icing the United States. This defense obligated the carrier to prove that the accident was caused by something beyond its control. Although awkwardly worded, most authorities equate the "all necessary measures" defense to mean all reasonable measures and represent the fundamental fault based notions underlying the Convention.¹⁶⁰ The Agreement resulted after the United States announced its intention to withdraw from the Warsaw system due to the low liability limits.¹⁶¹ The compromise was the increase in the monetary limits and the elimination of the due diligence defense, resulting in what was perceived as a "virtual strict liability" scheme for injury or death.¹⁶²

Courts have since relied upon the elimination of the "all necessary measures" defense to assert that acts or omissions of the carrier or relationship with aircraft operation play no part in interpreting and applying the term "accident" to injury claims.¹⁶³ In fact, many courts viewed the Montreal Interim Agreement as essentially establishing absolute and expansive liability.¹⁶⁴ One obvious fault with this view

sioned by an error in piloting in the handling of the aircraft or in navigation and that, in all other respects, he and his agents had taken all necessary measures to avoid the damage.

Warsaw Convention, *supra* note 1, art. 20(1).

160. See *Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964, 961 (1977) (noting that "Article 20 requires of a defendant proof, not of a surfeit of preventatives, but rather an understanding embracing all precautions that in sum are appropriate to the risk, i.e., measures reasonably available to defendant and reasonably calculated, in cumulation to prevent the subject loss."); see also *Verdesca v. American Airlines, Inc.*, 2000 WL 1538704, at *10 (N.D.Tex., Oct. 17, 2000) (noting that failure to take any particular precaution that might prevent accident does not prevent carrier from relying on reasonable measures defense).

161. Unhappy with the low limits, the United States gave formal notice renouncing its participation in the Warsaw Convention on November 15, 1965, which became effective on May 15, 1966. See Dep't of State Release No. 268 (Nov. 15, 1965), reprinted in 53 Dep't State Bull. 923-24 (Dec. 6, 1965). The denunciation was pursuant to Article 39 of the original Warsaw Convention, which allows any member country to opt out of the Convention, as long as they provide six months notice. See *id.*

162. See *Air France v. Saks*, 724 F.2d 1383, 1386 (9th Cir. 1984), *rev'd*, 470 U.S. 392 (1985).

163. See, e.g., *Lahey v. Singapore Airlines, Ltd.*, 115 F. Supp. 2d 464, 466-67 (S.D.N.Y. 2000).

164. See *Saks*, 724 F.2d at 1386; *Evangelinos v. Trans World Airlines*, 550 F.2d 152 (3d Cir. 1977); *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975).

is that it fails to recognize that the Montreal Interim Agreement was an accord, not an international treaty.¹⁶⁵ While an accord is simply a private agreement, an international treaty is part of the supreme law of the land.¹⁶⁶ As such, the Montreal Interim Agreement neither amends the Convention nor directly affects its interpretation. More fundamentally, this approach neglects the fact that the Convention set up a very specific liability scheme with "accident" as only one component and which term was to be confined to aviation mishaps.¹⁶⁷ There was also the understanding that concepts of fault, shifts in the burden of proof, and monetary limits would apply to carrier liability.¹⁶⁸ The scheme envisioned those air disasters where information would likely be difficult to obtain or more readily available to the carrier.¹⁶⁹ If the cause of the aviation accident could not be determined (due to destruction or loss of the aircraft), then the carrier would remain liable. This has no applicability, however, to passenger upon passenger misconduct or other related incidents.

Equally significant is that the elimination of the due diligence defense by the Montreal Interim Agreement was hasty and without a real agreement that no-fault was a necessary change to the Convention. The change was made with virtually little analysis or consideration of the fact that the Convention was originally based on fault concepts and set forth *a system* of liability.¹⁷⁰ While it is one thing to

165. See *Husserl v. Swiss Air Transp. Co., Ltd.*, 351 F. Supp. 702, 704 n.1 (S.D.N.Y. 1972) (discussing how the Montreal Interim Agreement imposes upon international aviation a quasi-legal system of liability that is essentially contractual in nature).

166. See U.S. CONST. art. VI; *Butler's Shoe Corp. v. Pan Am World Airways, Inc.*, 514 F.2d 1283, 1285 (5th Cir. 1975) (stating that the interpretation of the Warsaw Convention is within the court's jurisdiction).

167. See *supra* note 134 and accompanying text.

168. See RENÉ H. MANKIEWICZ, *THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER: A COMMENTARY ON THE PRESENT WARSAW SYSTEM* 91 (1981); MILLER, *supra* note 26, at 65 (explaining that in order for Articles 17, 18, and 19 of the Warsaw Convention to cover all liabilities, they must be read in conjunction with other provisions).

169. See 1929 WARSAW MINUTES, *supra* note 45, at 21, 37, 252; GOEDHUIS, *supra* note 40, at 38, 217, 218, 230; see also George W. Orr, *Fault As the Basis of Liability*, 21 J. AIR L. & COMM. 399, 403 (1954) (challenging the assumption that a switch in the burden of proof is necessary in aviation disasters).

170. See *Dunn v. Trans World Airlines*, 589 F.2d 408, 411 (9th Cir. 1978) (cit-

be concerned with monetary limits, it is quite another to eliminate one fundamental and interrelated component of the overall scheme without clarifying, changing or addressing "accident." Noteworthy in this regard is that the "all reasonable measures" term was understood to require the carrier to establish that damage or loss was caused by a "cas de force majeure," by a third party, or by an event unrelated to the operation of the aircraft.¹⁷¹

An in-depth account of the events leading up to the Montreal Agreement demonstrates that the elimination of the fault based defense was only and belatedly introduced in the face of the severe economic and international ramifications carriers and other nations would face if the United States withdrew from the Warsaw system.¹⁷² Many thought that, without the United States' approval, the system would fail.¹⁷³ The proposal of no fault arose late in the conference after it became clear that a majority of delegates would not agree to the United States' demand of a \$100,000 limit.¹⁷⁴ While many airlines felt the \$100,000 limit was excessive, poorer nations felt it was unfair for "the peasant to pay for the comfort of the King."¹⁷⁵ Thus, several countries sought to persuade the United States to agree to a lower limit by proposing absolute liability with a \$75,000 limit.¹⁷⁶ The advantage of the plan was that it would allow the U. S. delega-

ing Dep't of State Press Release No. 268, 50 Dep't of State Bull. 923-24 (1965)). The hastiness with which the Montreal Interim Agreement eliminated the "due care" defense is exemplified by the fact that virtually all of the discussion or debate that led up to its existence focused exclusively on the limits, not the defense itself. *See id.* Indeed, the press release announcing the denunciation expressed dissatisfaction only with the monetary limits, not a fault based system. *See id.* Moreover, the parties entered into the Agreement one day before the United States' withdrawal would have become effective. *See id.*

171. *See* MILLER, *supra* note 26, at 142.

172. *See* Lowenfeld & Mendolsohn, *supra* note 3, at 588.

173. *See id.* at 591-92.

174. *See id.* at 586-87 (observing that the prospect of the United States' withdrawal from the Warsaw system led conference delegates to suggest an absolute liability arrangement in exchange for a retreat of the United States' position in support of a \$100,000 limit).

175. *Id.* at 565 (paraphrasing the statement of a Nigerian delegate).

176. *See* Lowenfeld & Mendolsohn, *supra* note 3, at 570 (observing that the proposal would benefit the United States delegation by guaranteeing passengers some recovery in all cases).

tion to save face by trumpeting a new advantage for passengers. Despite attempts to reconcile differences, however, the proposal was rejected.¹⁷⁷

Only after the conference had concluded, and just before the United States was to formally withdraw from the Convention, did carriers succumb to the pressure and accept the no-fault standard with a liability limit of \$75,000.¹⁷⁸ The no-fault standard was not embraced by other countries, was contrary to the fault principle underlying the convention and common law, was never subjected to any congressional hearings or Senate approval, and resulted only as a political compromise.¹⁷⁹ Therefore, the emergence of the no fault concept was more the result of political expediency than any consensus or doctrinal acceptance.¹⁸⁰

The discussions following the Montreal Interim Agreement,¹⁸¹ and those prior to the Guatemala Protocol, noted that even with the elimination of the due care defense, "the possibility of making the carrier liable independent of the 'risks of the air' (and independent of fault) is small," because under the Convention an "accident" is required and the carrier has the possibility of asserting contributory

177. *See id.* at 573 (stating that while seventeen delegates voted for a limit of 75,000 with absolute liability, twenty-seven delegates voted against the proposal and eight abstained).

178. *See id.* at 587-97 (describing the last minute decisions by various carriers to accept the \$75,000 limit on liability without regard to fault on the part of the carrier). Many countries or carriers did not embrace the inclusion of the no-fault proposal in the interim agreement; they considered it controversial because it signaled a departure from the common law principle of liability for fault only. *See id.* at 588-96.

179. *See id.*

180. *See supra* notes 174-76 and accompanying text; *see also* Lowenfeld & Mendelsohn, *supra* note 3, at 590 (explaining that what prompted the International Association of Carriers, the International Civil Aviation Organization ("ICAO"), and international carriers to accept the no-fault standard was the fear that the United States would withdraw from the Convention and cause the whole treaty to come undone, thereby defeating the uniformity of documentation and legal rules achieved by the Convention).

181. *See* *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 410 (E.D. Pa. 1977) (explaining that the ICAO held meetings to discuss possible liability systems between 1966-1970).

negligence on the part of the passenger.¹⁸² “Murder or infection by a fellow passenger or a heart attack” were cited as the only “exceptional cases” where a carrier could be liable “for damage which is unrelated to the ‘risks of the air and to which the carrier has in no way contributed by negligence.’”¹⁸³ Delegates found this concern to be “unjustified” and resolved the problem by construing “accident,” for which there is no due care defense, as equating to an “aircraft accident.”¹⁸⁴

Accordingly, while the liability scheme was drastically altered with the elimination of the “due diligence” defense, the “accident” requirement was ignored and unchanged.¹⁸⁵ The failure to provide clarity for what constitutes an “accident”, however, continues today and has paved the way for carrier liability to be extended beyond both the Convention’s intention and the prior and present objectives of the Warsaw scheme.¹⁸⁶

II. ARTICLE 24 AND EXCLUSIVITY UNDER THE CONVENTION

The Convention’s preemptive or exclusive effect over other sources of potentially applicable law was unclear until recently.¹⁸⁷ Given that the fundamental purpose of the Convention was to provide a uniform system of rules, the delegates certainly believed the Convention would have a substantial preemptive scope.¹⁸⁸ The issue was to what extent the Convention would have preemptive power, given that the Convention incorporated express reference to local law

182. See *id.* at 411 (citing *Report of Subcomm. on Revision of the Warsaw Convention as Amended by the Hague Protocol*, ICAO Doc. 8839-LC 158-1, Report, para. 7, at 2 (1969) (statement of Reporter, Dr. Swart)).

183. *Id.*

184. See *id.* (concluding that the easiest way to resolve the difficulty of determining under which circumstances absolute liability would attach, independent of the “risks of the air,” is to limit the “absolute liability of the carrier to aircraft accidents.”).

185. See *supra* notes 146-53 and accompanying text.

186. See discussion *supra* Part I (discussing the Warsaw Liability Scheme).

187. See *infra* notes 188-227 and accompanying text.

188. See *supra* notes 33-36 and accompanying text (discussing the Convention’s goal of uniform rules governing claims).

in many of its provisions.¹⁸⁹ Indeed, the Convention expressly provided for resort to local law, based on the forum's choice of law rules, on such issues as recoverable damages,¹⁹⁰ contributory or comparative negligence,¹⁹¹ award of costs,¹⁹² issues of procedure,¹⁹³ calculation of the limitation period,¹⁹⁴ and definition of willful misconduct.¹⁹⁵

The original text of Article 24 of the Convention provides as follows:

1. In the cases covered by articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
2. In cases covered by article 17, the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.¹⁹⁶

Prior to the Montreal Convention of 1999, of the five subsequent instruments to the Convention, only the Guatemala City Protocol of

189. See, e.g., *Zicherman v. Korean Airlines*, 516 U.S. 217, 227 (1996) (holding that Article 17 of the Convention permits compensation only for legally cognizable harm recognized under domestic law).

190. See Warsaw Convention, *supra* note 1, arts. 17-19 (providing carrier liability for damages relating to personal injury, checked baggage, and transportation delay).

191. See *id.* art. 21 (stating that the court to which a claim was submitted may exempt carriers from liability in accordance with their own law where a carrier proves that damage was caused in whole or in part by the injured party).

192. See *id.* art. 22 (setting forth maximum amounts of liability for recoverable damages, and providing that the form of payments be governed by the law of the court to which the claim was submitted).

193. See *id.* art. 28 (establishing that procedural questions be determined by the law of the court to which the claim was submitted).

194. See *id.* art. 29 (providing a two year statute of limitations to be calculated according to the law of the court to which the claim was submitted).

195. See Warsaw Convention, *supra* note 1, art. 25 (stating that provisions which exempt or limit a carrier's liability are not available to carriers who have demonstrated willful misconduct as defined by the law of the court to which a claim was submitted).

196. See *id.* art. 24.

1971 and the Montreal Protocol No. 4 addressed the exclusivity language set forth in Article 24.¹⁹⁷ While the Guatemala Protocol of 1971 was primarily aimed at increasing the limits of liability to approximately \$100,000,¹⁹⁸ it also amended Article 24 to read as follows:

1. In the carriage of cargo, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
2. In the carriage of passengers and baggage, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.¹⁹⁹

By adding “whether under this Convention, or in contract, or in tort, or otherwise,” the drafters made the preemptive scope of the Convention expressly clear.²⁰⁰ The Guatemala Protocol, however, was never ratified by the United States, nor did the necessary number of countries adopt it to give it worldwide effect.²⁰¹

The amended language in Article 24 was subsequently included, in its entirety, in the later Montreal Protocol No. 4 proposed in 1975.²⁰²

197. See *infra* notes 199-206 and accompanying text.

198. See Rene H. Mankiewicz, *Warsaw Convention: The 1971 Protocol of Guatemala City*, 20 AM. J. COMP. L. 335, 335 (1972) (stating that the basis for the Diplomatic Conference in Guatemala was the United States’ agreement to withdraw its denunciation of the Warsaw Convention). The United States threatened to withdraw from the Convention because it considered the liability limit to be too low under The Hague Protocol. See *id.*

199. See Guatemala City Protocol, *supra* note 59, art. IX.

200. Cf. Mankiewicz, *supra* note 198, at 336-37 (pointing out that the additional language of “whether under this Convention or in contract or in tort or otherwise” after “however founded” in paragraph two of Article 24, reflects the compromise made by delegates to provide for an unbreakable limit of liability, and forecloses the possibility of damages exceeding the \$100,000 dollar limitation).

201. See *supra* note 155 and accompanying text.

202. See Montreal Protocol No. 4, *supra* note 61, art. VIII (establishing that the

Montreal Protocol No. 4 made clear that the Convention precludes passengers from bringing actions for bodily injury, delay in cargo or baggage damages under local law.²⁰³ Pursuant to this Protocol, the Convention provided an exclusive remedy even in instances where the international passenger could not establish liability under the Convention.²⁰⁴ Montreal Protocol No. 4 became effective in the United States in March of 1999²⁰⁵ and has been held by some courts to have retroactive effect.²⁰⁶ Separately, the Montreal Convention of 1999, which is open for ratification but has not yet been enforced, has also incorporated the same amended language.²⁰⁷

Prior to the adoption of the Montreal Protocol No. 4, Article 24's instruction that "cases covered by article 17" may "only be brought subject to the conditions and limits set out in this convention"²⁰⁸ created a court split on whether the language and/or purpose of the Convention precluded a claimant from resorting to local law remedies.²⁰⁹ Courts finding the Convention to be nonexclusive interpreted

amended language of Article 24 under the Guatemala Protocol replace the language of Article 24 under the Convention).

203. *See id.*

204. *See id.*

205. *See* 144 CONG. REC. S11059 (Sept. 28, 1998).

206. *See* *Hermano v. United Airlines*, No. C 99-0105, 1999 WL 1269187, at *6 (N.D. Cal. Dec. 21, 1999) (concluding that amendments made to the Convention by the Montreal Protocol were clarifications, rather than substantive legal changes, and as such, application of the amended changes to the case before the court did not raise constitutional issues). Separately, the Montreal Convention of 1999, which is currently open for ratification, incorporated the same amendment language. *See* Montreal Convention 1999, *supra* note 62.

207. *See* Montreal Convention 1999, *supra* note 62.

208. *See* Warsaw Convention, *supra* note 1, art. 24.

209. *See* *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997) (recognizing a circuit split on whether the Warsaw Convention preempts state law). *Compare* *Abramson v. Japan Airlines*, 739 F.2d 130, 134 (3d Cir. 1984) (stating that the Warsaw Convention does not preclude passengers unable to recover under the Warsaw Convention from pursuing state law remedies), *and* *Beaudet v. British Airways, PLC*, 853 F. Supp. 1062, 1072 (N.D. Ill. 1994) (enumerating the number of cases which exemplify the divergence of views over whether a claimant's failure to satisfy terms under the Convention precludes a claimant's recovery under state law), *with* *Fishman v. Delta Airlines, Inc.*, 132 F.3d 138, 142 (2d Cir. 1998) (holding that all state law claims falling within provisions of the Warsaw Convention are preempted by the Convention), *and* *Potter v.*

Article 24's language of "any action for damages, however founded," to establish an intent that state law causes of action would survive the Convention subject to the limitation of liability imposed by the Convention.²¹⁰ Under this view, so long as state law was interpreted to limit liability to the amount available under the Warsaw Convention, it was not preempted.²¹¹ Courts finding the Convention to be nonexclusive, however, interpreted Article 24 to preempt only those cases in which a passenger could actually maintain a claim for relief under Article 17.²¹² Under this approach, Article 24 would permit any passenger whose personal injury suit did not satisfy the liability conditions of Article 17, i.e., "accident" and "bodily injury," to pursue the claim under local law.²¹³ Support for this interpretation was found in the various provisions of the Convention expressly in-

Delta Airlines, Inc., 98 F.3d 881, 885 (5th Cir. 1996) (holding that the Warsaw Convention created an exclusive remedy for claims resulting from personal injury accidents aboard an aircraft, precluding resort to state claims).

210. See *Zinn v. American Jet, S.A.*, No. CV 96-4251, 1996 WL 757191, at *4 (C.D. Cal. Oct. 10, 1996) (holding that Article 24's express language of any action "however founded" indicates the drafters' intention that the Warsaw Convention does not preclude causes of action based on state law). Further, the court reasoned that because the drafters failed to create a set of conditions and limitations applicable to all possible causes of action created by any country's local law, state causes of action were not precluded. See *id.* at *3; see also *Gensplit Fin. Corp. v. Pan American World Airways*, 581 F. Supp. 1241, 1242 (E.D. Wis. 1984) (holding that a cause of action provided to the plaintiff under the Warsaw Convention did not preclude plaintiff from bringing a cause of action under the Federal Bill of Lading Act).

211. See *Zinn*, 1996 WL 757191, at *5 (stating that so long as liability under state law is constrained to limitations set forth under the Warsaw Convention, state law does not conflict with the Convention).

212. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 (11th Cir. 1989) (concluding that the Warsaw Convention only preempts causes of action recognized under state law that are inconsistent with the Convention).

213. See *Beaudet*, 853 F. Supp. at 1073 (holding that when a claim falls outside the Convention's scope, such as when a passenger is not on an aircraft or in the course of embarking or disembarking, the Convention does not pre-empt a state law cause of action for negligence); see also *Floyd*, 872 F.2d at 1482 (declining to decide whether the Warsaw Convention "entirely" preempts state law causes of action" that fall within the definition of "accident" under Article 17); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (stating that it appears the drafters "did not intend that the cause of action created by the Convention to be exclusive.").

corporating local law.²¹⁴ For example, in *Zicherman v. Korean Air Lines*, the Supreme Court held that the Convention left the determination of the availability of compensatory damages to local law.²¹⁵ Indeed, the view was that the Convention intended to allow national laws to provide a passenger with a remedy when the Convention did not.²¹⁶

The debate was resolved in January 1999 by the Supreme Court in *El Al Israel Airlines, Inc. v. Tseng*²¹⁷ and the U. S. Senate's adoption of the Montreal Protocol No. 4 in March of 1999.²¹⁸ Prior to *Tseng*, courts in both the United Kingdom and Canada found the Convention to be exclusive.²¹⁹ In *Tseng*, however, the Court made it clear that recovery for personal injury suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of the Warsaw Convention, is not available at all.²²⁰ The Court's emphasis on the Convention's "comprehen-

214. See Warsaw Convention, *supra* note 1, arts. 21 (contributory negligence), 24 (standing), 25 (misconduct), 28 (questions of procedure), 29 (statute of limitations computation). See generally *supra* notes 189-95 and accompanying text.

215. See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227 (1995) (concluding that statements derived from the drafting history of the Warsaw Convention indicate that questions of who may recover and the extent to which compensatory damages are available were left unresolved by the Warsaw Convention and are to be addressed by "private international law").

216. See *supra* notes 190-95 and accompanying text.

217. See *Tseng*, 525 U.S. at 161 (holding that if recovery for personal injuries is not provided under Article 17 of the Warsaw Convention, recovery is not available at all).

218. See 144 CONG. REC. S11059 (Sept. 28, 1998). The Protocol entered into force in the United States on March 4, 1999. See *id.*

219. See *Sindu v. British Airways, PLC*, [1997] 1 A.C. 193, 207. In *Sindu*, the Court stated that the purpose of Article 17 is "to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air." *Id.* at 207; see also *Naval-Torres v. Northwest Airlines, Inc.*, [1998] 159 D.L.R. 4th 67, 76 (noting that claims under the Convention are exclusive). The court read Article 24's reference to "cases covered under Article 17" to mean those cases within the Convention not covered by Article 18 (baggage) and Article 19 (delay), rather than distinguish between incidents of personal injury that are or are not within the provisions of the Convention. See *id.*

220. See *Tseng*, 525 U.S. at 161.

sive scheme of liability rules” and goals of uniformity²²¹ enabled it to conclude that allowing air carriers to be subject to “distinct, non-uniform liability rules of the individual signatory nations” would be an unreasonable construction of the Convention.²²² The Court also based its opinion on the consideration that a nonexclusive interpretation of liability under the Convention might encourage plaintiffs to attempt to opt out of the Convention’s liability scheme where local laws provided maximum limits of liability above those available under the Convention.²²³

The Supreme Court made clear, however, that the exclusive effect of the Convention was not all-encompassing, by stating that “the Convention’s preemptive effect on local law extends no further than the Convention’s own substantive scope.”²²⁴ As such, a carrier is subject to liability under local law for injuries arising outside of the air transportation or “any of the operations of embarking” or “disembarking.”²²⁵

The Supreme Court’s decision in *Tseng*, the adoption of Montreal Protocol No. 4, and the pending Montreal Convention of 1999 all expressly indicate that the Convention provides an exclusive remedy supplanting resort to local law remedies. The issue that emerges is what effect the exclusivity will play in the Court’s interpretation of the liability rules of the Convention, particularly Article 17.²²⁶ Given

221. *See id.* at 169 (stating that it would be difficult to conclude that delegates to the Convention intended to subject air carriers to non-uniform local laws, given the textual emphasis on uniformity and the vast scope of the Conventions liability rules).

222. *Id.* at 171.

223. *See id.*

224. *See id.* at 172 (citing Brief for the United States as *Amicus Curiae* 16).

225. *Tseng*, 525 U.S. at 172.

226. Noteworthy is the remaining question of whether a state law claim can be asserted where there was no accident, but the injury was caused by the willful or intentional conduct of the carrier. *See* Loryn B. Zerner, *Tseng v. El Al Airlines and Article 25 of the Warsaw Convention*, 14 AM. U. INT’L L. REV. 1245, 1273 (1999) (arguing that “in light of the unequal positions between air carriers and passengers, an injured party denied recovery under Article 17 should be allowed recovery under the willful misconduct exception set forth in Article 25.”). Virtually all lower courts that have addressed this issue have found that Article 25 only comes into play if an Article 17 accident is established. *See El Al Israel Airlines, Ltd. v. Tseng*, 122 F.3d 99, 104 (2d Cir. 1997) (stating that *Tseng* mistakenly asserts that

that claimants will have no remedy for personal injuries suffered during international flights, or in the course of operations of embarking or disembarking, if they cannot establish an "accident" or "bodily injury," courts may be more inclined to broadly apply the Convention's liability prerequisites. Indeed, the Court in *Tseng* could have arguably foreshadowed such a result when it stated, in dicta, that it disagreed with the lower court's conclusion, which was not before the Supreme Court, that the routine security search to which Ms. Tseng was subjected was likely an "accident."²²⁷

El Al's conduct is "willful misconduct" under Article 25 and, therefore, constitutes an "accident" as defined under Article 17); *Brandt v. American Airlines, Inc.*, No. C 98-2089 SI, 2000 WL 288393, at *6 (N.D. Cal. Mar. 13, 2000) (holding that Article 25 does not provide an independent cause of action under local law when willful misconduct is alleged); *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 2d 1313, 1321 (S.D. Fla. 1999) (stating that the Eleventh Circuit previously held that Article 25 does not create a separate cause of action from Article 17); *Carey v. United States*, 77 F. Supp. 2d 1165, 1175 (D. Or. 1999) (concluding that plaintiff must assert a valid Article 17 claim before reaching a claim under Article 25); *Harpalani v. Air India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (stating that "Article 25 is most reasonably interpreted as an exception to the Convention's limitations on the recovery of compensatory damages, not as authority for a form of damages not permitted elsewhere in the Convention."). Further, the concern that, without such a reading of Article 25, carriers cannot be held accountable for intentional torts such as assault, battery, and false imprisonment, is simply ill-founded; accidents cover both negligent and intentional conduct of the carrier. *See Laor v. Air France*, 31 F. Supp. 2d 247, 350 (S.D.N.Y. 1998) (noting that an "accident" can occur from an "inappropriate or unintended happenstance" during aircraft operation). If the carrier's agent commits an intentional tort, then the conduct would clearly be an abnormal aircraft operation and unexpected event rendering the carrier liable. *See id.*

227. *See Tseng*, 119 525 U.S. at 166 n.9 (defining "accident" under Article 17 as an "unexpected or unusual event or happening that is external to the passenger"). Apparently, Ms. Tseng gave "illogical" responses to routine questions during screening and was classified as a "high risk" passenger. *See Tseng*, 122 F.3d at 101. She was thus subjected to a security search pursuant to the carrier's security procedures, taken to a private room, and searched. *See id.* at 163, 164. She was required to remove her jacket and sweater, and lower her blue jeans. *See id.* A female security guard searched her entire body, including her breasts and her groin area. *See id.* The search was pursuant to standard procedures and, thus, was not an abnormal operation necessary for Article 17 liability. *See id.* Of course, if the claimed "illogical" answers that formed the basis for the search were false, then an accident would exist, as it would constitute an abnormal operation and deviation from standard procedures. *See id.* at 158 (stating that a security search of a passenger based solely on "suspicion of circumstances" subjects the carrier to liability under Article 17).

III. JUDICIAL INTERPRETATION AND APPLICATION OF ACCIDENT AND EXCLUSIVITY

Articles 17 and 24 have a symbiotic relationship. That is, whether or not an event is an accident can conclusively determine whether the claimant will have any remedy at all.²²⁸ Moreover, the scope of the Convention's exclusivity turns upon whether the event or injury arose out of the international flight or in the course of embarking or disembarking, notions akin to determining Article 17 liability.²²⁹

A. EXCLUSIVITY

Since *Tseng*, and the adoption of the Montreal Protocol No. 4, only a limited number of courts have addressed the parameters of the Convention's exclusivity.²³⁰ Under the instruction of *Tseng* and the terms of the Convention, the Convention precludes any resort to alternative law, where the injury arose out of the international flight or out of any of the operations of embarking or disembarking, regardless of whether the event constitutes an accident.²³¹ The few courts that have addressed the scope of the Convention's exclusivity since *Tseng* generally have done so in a relatively broad fashion.²³²

228. See *Air France v. Saks*, 470 U.S. 392, 405 (1985) (defining "accident" in Article 17 of the Convention to include willful acts of misconduct); *Asher v. United Airlines*, 70 F. Supp. 2d 614, 617 (D. Md. 1999) (asserting that plaintiffs must establish the incident as an "accident" in order to recover damages under the Convention).

229. See *Asher*, 70 F. Supp. 2d at 617 (stating that the Warsaw Convention governs personal injury claims that occur during a flight or the act of embarking or disembarking).

230. See, e.g., *Cruz v. American Airlines, Inc.*, 193 F.3d 526 (D. Colo. 1999) (holding that fraud and deceit claims related to luggage claim are preempted under the Convention); *Donkor v. British Airways Corp.*, 62 F. Supp. 2d 963, 967-68 (1999) (noting that breach of contract, negligence, wrongful detention, and assault claims resulting from detention and deportation are preempted); *Asher*, 70 F. Supp. 2d at 618 (stating that defamation, false arrest, and assault based claims, grounded on airline carrier claim that passenger was a thief, were preempted).

231. See *Asher*, 70 F. Supp. 2d at 618 (noting that the Supreme Court found that "the cardinal purpose of the Warsaw Convention . . . is to achiev[e] uniformity of rules governing claims arising from international air transportation).

232. See generally *Cruz*, 193 F.3d at 526; *Donkor*, 62 F. Supp. 2d at 963; *Asher*, 70 F. Supp. 2d at 614.

Courts have found a wide range of claims to be preempted, including claims for breach of contract, negligence, false arrest, false imprisonment, civil rights, malicious prosecution, defamation, deceit, assault, and battery.²³³ Even federal statutory claims of discrimination have been found preempted.²³⁴ Contract claims found preempted include those arising out of damages for delays,²³⁵ loss of luggage,²³⁶ or failure to transport due to removal or diversion.²³⁷

The only means of escaping the Convention's preemptive scope is to establish that the claim arises out of an event that did not take place during the transportation or the process of embarking or disembarking.²³⁸ The interesting issue that emerges centers upon claims for injuries that might have arisen after the transportation was com-

233. See *Asher*, 70 F. Supp. 2d at 619 (preempting claims for defamation, false arrest and assault under state law, based on disturbances over seat assignments and detention by airline service employees); *Hermano*, 1999 WL 1269187, at *5-6 (holding that defamation and other willful or reckless acts were preempted under Warsaw).

234. See *Turturro v. Continental Airlines, Inc.*, 128 F. Supp. 2d 170, 181-82 (S.D.N.Y. 2001) (holding that a discrimination claim under Air Carrier Access Act was preempted).

235. See *Perralta v. Continental Airlines, Inc.*, No. C 98-1252, 1999 WL 193393, at *2 (N.D. Cal. Mar. 30, 1999) (stating that a breach of contract claim for delay resulting in the loss of a business deal was governed exclusively by the Warsaw Convention); *Minhas v. Biman Bangladesh Airlines*, 1999 WL 447445, at **2-3 (S.D.N.Y. June 30, 1999) (stating that claims arising from delay due to "bumping" were governed by the Warsaw Convention); *Daniel v. Virgin Atl. Ltd.*, 59 F. Supp. 2d 986, 989 (N.D. Cal. 1998) (concluding that passengers' inconvenience as a resulting delay was a legally cognizable harm under the Convention); *Obuzor v. Sabena Belgian World Airlines*, No. 98 CIV 0224, 1999 WL 223162, at *1 (S.D.N.Y. Apr. 16, 1999) (holding that the Convention imposes liability upon carriers for damages caused by delay in transportation of passengers).

236. See *Spanner v. United Airlines, Inc.*, No. C 97-2972, 1998 WL 196466, at **2-3 (N.D. Cal. Mar. 22, 1998) (holding that the Warsaw Convention is inapplicable to a loss of luggage because of the liability provision, Article 18(1), which requires that a loss of baggage take place during air transport); see also *Cruz*, 193 F.3d at 530 (stating that a common law claim for fraudulent denial of lost luggage was preempted by the Warsaw Convention).

237. See *Donkor*, 62 F. Supp. 2d at 965 (describing a passenger's detainment and deportation during layover).

238. See *id.* at 968 (holding that plaintiff's causes of action are governed by Articles 17, 18, and 19, and must be established to support preemption under the Convention).

pleted, but which relate to an in-flight event. For instance, a state claim was asserted against an airline for breach of "a post-crash duty of care" following an aborted take off, crash, and fire.²³⁹ In another, a party alleged that a passenger sustained injuries following the flight crew's forced opening of a locked lavatory due to a smoke alarm.²⁴⁰ Moreover, in a lost luggage case, a state claim for deceit and/or misrepresentation was made as to claims arising from representations after the transportation was completed.²⁴¹ There likewise have been attempts to assert assorted state based claims for false arrest and malicious prosecution following a passenger's arrest and/or removal from the aircraft.²⁴² In all of these cases, the court found that the Convention preempted the state based claims.

A small number of cases have, however, been more limited in their application of Warsaw's exclusivity. The Southern District of New York recently held that alleged communications between airline personnel and local police pertaining to a passenger's demand to be let off the airplane and which resulted in the passenger's placement in a psychiatric emergency room were actionable under state law.²⁴³ Although the communications pertained to an on-board event, the fact that the communications were made after the passenger disembarked was found determinative.²⁴⁴ Similarly, a Florida Appeals court refused to apply Warsaw's exclusivity to a passenger's claim for damages after she was forced off the plane and searched at the request or instigation of airport personnel.²⁴⁵ The court found disposi-

239. See *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 663 (N.D. Cal. 1994) (asserting a state law claim for a post-crash duty of care).

240. See *Laor v. Air France*, 31 F. Supp. 2d 247, 350 (S.D.N.Y. 1998).

241. See *Cruz*, 193 F.3d at 530 (holding that the Convention preempts state law claims).

242. See *Garcia v. Aerovias De Mexico, S.A.*, 896 F. Supp. 1216, 1218 (S.D. Fla. 1995) (stating that state law claims for intentional torts are preempted by the Warsaw Convention); see also *Singh v. Tarom Romanian Transp.*, 88 F. Supp. 2d 62, 64 (E.D.N.Y. 2000) (holding that "plaintiffs concede perhaps unwisely that the Convention governs their malicious prosecution claims.").

243. See *Turturro*, 128 F. Supp. 2d at 170.

244. See *id.* at 180-82.

245. See *Zuliana de Aviacion v. Herrera*, 763 So. 2d 499 (Fl. App. Ct. 2000).

tive the fact that the injuries occurred after disembarkation.²⁴⁶

Nonetheless, the majority of courts have been mindful of *Tseng*'s admonition that to allow parties to pursue claims covered by the Convention would "encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the [Convention]."²⁴⁷ So long as the underlying event arises out of or occurred during the air transportation or process of embarking or disembarking, the courts were careful not to allow the Convention to be circumvented.²⁴⁸ As two recent decisions held in separate scenarios, "[t]he precipitating cause of 'the accident' cannot be artificially separated from its results in order to avoid the Warsaw Convention."²⁴⁹ In *Choukroun v. American Airlines Inc.*,²⁵⁰ for instance, various state claims such as false arrest, malicious prosecution, false imprisonment, and negligence arose out of the diversion of the flight and the plaintiff's removal as a result of a purported smoking incident.²⁵¹ The event at issue took place during the flight and, regardless of whether it constituted an "accident" or the fact that the arrest and prosecution came later, was not sufficient to elude the Convention's exclusivity.²⁵²

The generally broad preemptive scope of the Convention places great stress upon Article 17 as whether or not an event is an accident will determine whether the claimant has any remedy at all. The resulting pressure upon courts to provide a claimant a remedy could

246. *See id.*

247. *Tseng*, 525 U.S. at 161 n.3 (citing *Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 886 (5th Cir. 1996)).

248. *See Laor*, 31 F. Supp. 2d at 347; *Cruz*, 193 F.3d at 527.

249. *Laor*, 31 F. Supp. 2d at 347; *Cruz*, 193 F.3d at 531 (holding that fraud and deceit claims were preempted, as "[t]he relationship between the occurrence that [caused the] injuries is so closely related to the loss of luggage itself as to be, in a sense, indistinguishable from it."). In *Choukroun*, the issue was whether the incident was an "accident", as plaintiff did not assert a claim under the Convention and any such claim was barred by the two year statute of limitations under the Convention. *See Choukroun v. American Airlines, Inc.*, No. 98-12557-NG (D. Mass. Aug. 2, 2000) (order granting defendant's motion for summary judgment).

250. *See Choukroun*, No. 98-12557-NG.

251. *See id.*

252. *See id.*

well lead to an unsupportable broadening of “accident.” As a result, the need for courts to properly interpret and apply accident as well as the need for the term to be addressed textually becomes paramount.

B. ACCIDENT

1. *Saks v. Air France*

a. The Supreme Court’s Decision

The leading case in the United States as to Article 17’s “accident” requirement is the 1985 decision, *Saks v. Air France*.²⁵³ Ms. Saks was a passenger on an international flight between France and Los Angeles, California.²⁵⁴ As the aircraft descended, Ms. Saks felt extreme pressure and pain in her left ear²⁵⁵ and suffered permanent deafness as a result.²⁵⁶ It is important to note, however, that she did not base her claim on abnormal operation of the aircraft, but conceded that the cabin depressurization was functioning properly at the time.²⁵⁷ Despite this fact, Ms. Saks claimed that the normal pressurization changes during descent caused her deafness and constituted an accident under Article 17.²⁵⁸

The District Court ruled that Ms. Saks could not recover under Article 17, as she could not demonstrate some malfunction or abnormality in the aircraft’s operation.²⁵⁹ On appeal, the Ninth Circuit reversed.²⁶⁰ The Court held that a showing of a malfunction or abnormality in the aircraft’s operation was not a prerequisite to liability

253. 470 U.S. 392 (1985). Other countries have adopted *Saks* with little discussion. See, e.g., *Quinn v. Canadian Airlines Int’l Ltd.*, [1994] 18 O.R.3d 326 (relying on *Saks*’ holding that turbulence was not considered an accident under the Convention).

254. See *Saks*, 470 U.S. at 394.

255. See *id.*

256. See *id.*

257. See *id.* (stating that “all the available evidence, including the post flight report, affidavits, and passenger testimony, indicated that the aircraft’s pressurization system had operated in the usual manner.”).

258. See *id.* at 395.

259. See *Saks*, 470 U.S. at 395.

260. See *Saks*, 724 F.2d at 1384.

under the Convention.²⁶¹ According to the Ninth Circuit, an accident is defined as “an occurrence associated with the operation of aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked”²⁶² Thus, under this definition, a normal cabin depressurization qualifies as an accident.²⁶³ Central to the Ninth Circuit’s analysis was its reliance on the “history and policy” of Annex 13 to the Convention on International Aviation and the Montreal Interim Agreement of 1966, which, according to the Court, allowed “accident” to be equated with “occurrence.”²⁶⁴

The U. S. Supreme Court, however, reversed the Ninth Circuit’s decision.²⁶⁵ The Court held that an “accident” is an “unexpected or unusual event or happening that is external to the passenger.”²⁶⁶ Thus, when “the injury indisputably results from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.”²⁶⁷ The Court admonished that the definition was to be applied “flexibly,” and “after assessment of all the circumstances,” that the inquiry should address “the nature of the event which caused the injury rather than the care taken by the airline to avert the injury,” and that the passenger need only prove “that some link in the chain was an unusual and unexpected event external to the passenger.”²⁶⁸ Further, the Court considered the inquiry to be “an objective one, which does not focus on the perspective of the

261. *See id.* at 1396 (explaining that the Ninth Circuit based its decision on the Montreal Agreement’s view, which imposes absolute liability on airlines for injuries proximately caused by inherent risks in travel).

262. *Id.* at 1385.

263. *See id.*

264. *See id.*

265. *See Saks*, 470 U.S. at 396.

266. *Id.* at 405.

267. *Id.* at 406. In reaching this definition, the Court found the text of Article 17 to be “stark and undefined”. *See id.* at 399. The Court resorted to the Convention’s structure, the meaning that the binding French team might have intended for the negotiators, the subsequent conduct of the parties, and applicable foreign precedent. *See id.* at 399-400.

268. *See Saks*, 470 U.S. at 393.

person experiencing the injury.”²⁶⁹ Not surprisingly, the *Saks* definition has been readily adopted by other countries with virtually no analysis.²⁷⁰

Crucial to *Saks* is that the Court defined the issue before it as a “narrow” one:²⁷¹ “whether [Ms. Saks] can meet [her burden of proof] by showing that her injury was caused by the normal operation of the aircraft’s pressurization system.”²⁷² In rejecting the Ninth Circuit’s reasoning that equated “occurrence” with “accident,”²⁷³ the Court stated: “it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone.”²⁷⁴ The Court also found that the Ninth Circuit’s reliance on both the Annex and the Montreal Agreement to be misplaced.²⁷⁵ According to the Court, the elimination of the “all necessary measures” defense did not constitute a waiver of the other provisions of the Convention such as the “accident” requirement of Article 17, which had a separate and distinct meaning and intention.²⁷⁶

b. The Aftermath of *Saks*

The *Saks* formulation of the standard has not been uniformly applied. Some Courts have not questioned whether the “unusual or unexpected” event requires any causal connection or relationship to aircraft operation or procedures, or constitutes an “inherent risk of air

269. *Id.* at 392.

270. See *Naval-Torres v. Northwest Airlines, Inc.*, [1998] 159 D.L.R.4th 67; *Quinn v. Canadian Airlines*, [1994] 18 O.R.3d 325, *aff’d*, O.J. No. 1832, application for leave to appeal dismissed (1997) S.C.J., No. 354. Interestingly, the court in *Naval-Torres* addressed whether a passenger’s exposure to second-hand smoke was an accident, and found that the carrier’s failure to provide an adequate ventilation system to avoid the circulation of second-hand smoke in the non-smoking section met the definition of accident under *Saks*. See *Naval-Torres*, [1998] 159 D.L.R. 4th 67, para. 22. The court noted that “accident” encompassed inadvertent, negligent and intentional acts. See *id.* at 14-15.

271. *Saks*, 470 U.S. at 396.

272. *Id.*

273. See *id.*

274. *Id.* at 399.

275. See *id.* at 405-07.

276. See *Saks*, 470 U.S. at 407.

travel.”²⁷⁷ An examination of the *Saks*’ holding, in the context of the limited factual dispute before it, discloses that the Supreme 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 aircraft operation, or render all passenger upon passenger torts actionable.²⁷⁸ Indeed, *Saks* adopted a restrictive, rather than an expansive definition of “accident.”²⁷⁹ According to the First Circuit, “[t]his restraint is entirely understandable as Article 17 provides for strict liability and there are sound policy reasons to confine that liability to the letter of the text, narrowly construed.”²⁸⁰

Lost by many decisions since *Saks* is the undisputed fact that the abnormal operation of the aircraft was not at issue.²⁸¹ It was agreed that the pressure within the cabin was not the result of an aviation abnormality or any abnormal operation or malfunction of the aircraft.²⁸² Clearly, if Ms. *Saks*’ injury resulted from a malfunction or abnormality in the pressurization system [whether negligent or not], there would have been an accident under the Warsaw Convention, as the abnormal depressurization would have been considered an unexpected aviation event.²⁸³ Contrary to many subsequent decisions, *Saks* did not eliminate the need for there to be some relationship to aviation or an abnormal or unusual operation of the aircraft, as the op-

277. See *Daniel v. Virgin Atl. Ltd.*, 59 F. Supp. 2d 986, 994 (N.D. Cal. 1998) (holding that damages for inconvenience as a result of a delayed flight cannot be compensated).

278. See *Saks*, 470 U.S. at 399 (defining accident to be the cause of the injury, not the occurrence of the injury in and of itself); *Tseng*, 525 U.S. at 158 (stating that the drafters intended to allow passengers to “skirt [the conditions of air carrier liability in Article 17]” to pursue claims under local law).

279. See *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 316 (1st Cir. 1995) (asserting that the Supreme Court generally interprets Article 17 “parsimoniously”); *McDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971) (holding that the Convention requires an “accident” to occur during disembarkment).

280. *McCarthy*, 56 F.3d at 316.

281. See *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 412-13 (E.D. Pa. 1977) (holding that routine pressurization of the cabin was not an “accident”).

282. See *id.* at 401 (discussing the issue of whether a plaintiff’s loss of hearing during a flight was considered an “accident” under the Convention).

283. See *id.* at 413.

eration of the aircraft was assumed or implicit in the decision.²⁸⁴ The fact that the injury resulted from an aircraft operation—i.e., pressurization—left only the legal issue of whether the pressurization had to be abnormal for there to be a Warsaw accident.²⁸⁵ The Court held that it did.²⁸⁶

To read *Saks* as requiring that “accident” only requires an abnormal or an unusual event—regardless of any connection with the aircraft’s operation or aviation—is to ignore both the context of the decision and the intention of the drafters of the Convention. Air carriers agreed to assume liability for aviation related accidents, not for every injury that occurs on an aircraft or in the course of embarking or disembarking, and certainly not injuries that result from the every day, normal, expected operations of the aircraft and its personnel. As one court has noted, “[t]o hold otherwise would be effectively to construe the Convention as a statute imposing absolute liability for any harmful occurrence on an international flight. There is neither a reason nor authority for such a construction.”²⁸⁷

While the Court in *Saks* did expressly acknowledge that “torts committed by terrorists or fellow passengers”²⁸⁸ have been found to be accidents by lower courts, the reference was unnecessary to the limited facts presented and was not intended as an absolute proposition. *Saks* is simply not determinative as to whether torts or assaults by passengers on fellow passengers are an accident under Article 17.

First, in referencing torts committed by fellow passengers, the Court was not holding that all torts committed by fellow passengers are “accidents,” but only that the definition should be applied flexibly “after assessment of all the circumstances” of the particular incident.²⁸⁹ Depending on the circumstances, and particularly whether the airline played a causal role in the tort or assault, an Article 17 accident could well exist, and whether the action was intentional or not is

284. See *Air France v. Saks*, 470 U.S. 392, 396 (1985).

285. See *id.*

286. See *id.* at 406.

287. *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 204 (D. Mass. 1998).

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

289. *Id.*

not determinative of whether an accident occurred.²⁹⁰ An airline's involvement or causal role in any tort for assault may well be sufficient abnormal operation to incur liability.

Second, the only citation made by the Supreme Court was to *Oliver v. Scandinavian Airlines Systems*,²⁹¹ an unreported Maryland district court decision, which held that an accident occurred when a passenger was injured as a result of another "drunken" passenger falling on him. In *Oliver*, however, there was no discussion or mention of any other circumstances.²⁹² Certainly, if the offending passenger was known to be drunk by airline personnel, over-served, or allowed to walk about the aircraft when he or she should have been seated, then an unusual or abnormal aircraft operation could have occurred, justifying that finding.

Neither the Supreme Court's remark, nor reference to *Oliver*, supports the assertion that all torts committed by passengers upon other passengers, especially intentional assaults, are accidents under Warsaw. Indeed, the First Circuit recently rejected such a notion, adopting flexible assessment and requiring a causal connection between airline personnel and the passenger-on-passenger tort.²⁹³

2. *A Strict Application of Saks*

Despite the negotiating history behind Article 17 and the factual context of *Saks*, a number of Courts have applied a strict interpretation of *Saks*. These courts view *Saks* as establishing a single test of whether or not the injury producing event was unusual or unexpected.²⁹⁴ Consideration of whether the event is an "inherent risk of

290. *Cf. id.* at 406 (requiring only that the passenger prove that the injury was caused by an unusual or unexpected event).

291. No. M-82-3057, 1983 U.S. Dist. LEXIS 17951, at *1 (D. Md. Apr. 5, 1983).

292. *See id.*

293. *See* Langadinos v. American Airlines, Inc., 199 F.3d 68, 71 (1st Cir. 2000) (reversing a lower court's dismissal of a claim brought by a passenger asserting that he was momentarily grabbed in the private area by another passenger where the complaint contained allegations of over-service of alcohol).

294. *See* Gezzi v. British Airways, PLC, 991 F.2d 603, 605 (9th Cir. 1993) (holding that water on stairs passes the unusual and unexpected test under *Saks*); *see also* Barratt v. Trinidad & Tobago (BWIA Int'l) Airways Corp., No. CV 88-

air travel” or has a causal connection to abnormal aircraft operation or service is immaterial. In *Gezzi v. British Airways, PLC*,²⁹⁴ for example, the Ninth Circuit held that a passenger’s fall due to the presence of water on the stairs of an embarking aircraft was an accident even if the water had no relation to the operation of the aircraft. In the court’s view, the water was unexpected, unusual, and external to the passenger.²⁹⁶ Although the court acknowledged that water on the stairs used to enter an aircraft did relate to the airplane’s operation, i.e., the process of embarking on the plane,²⁹⁷ it nonetheless questioned “whether an event’s relationship to the operation of an aircraft is relevant”²⁹⁸

Similarly, in *Barratt v. Trinidad & Tobago Airways, Corp.*,²⁹⁹ the court rejected the assertion that a stumble and fall inside an airplane terminal could never constitute an accident. The court reasoned that the plain language of Article 17 was not limited by any reference to “risks inherent in aviation.”³⁰⁰ This strict liability view is an oversimplistic reading of *Saks* and fails to consider the context and history of Article 17’s adoption. Under this view, any event or happening, so long as unexpected, would result in liability. This would render carriers virtual insurers, which was not the intent of the Convention.³⁰¹

3. *The Causal Connection or Relationship to Aircraft Operations*

A large portion of the decisional law to date is less literal in its ap-

3945, 1990 WL 127590, at *1 (E.D.N.Y. Aug. 28, 1990) (referencing the *Saks* test).

295. 991 F.2d 603 (9th Cir. 1993).

296. *See id.* at 605.

297. *See id.* (stating that “the presence of water on stairs that are used to provide access to an airplane, unlike a fistfight between passengers, relates directly to the process of embarking on the plane.”).

298. *Id.* at 605 n.4 (noting that “[i]t is not clear whether an event’s relationship to the operation of an aircraft is relevant to whether the event is an ‘accident.’”).

299. No. CV 88-3945, 1990 WL 27590, at *1 (E.D.N.Y. Aug. 28, 1990).

300. *Id.* at *2.

301. The fall in *Gezzi* was unusual and unexpected but also related to the operation of the aircraft, as water on the steps of entry is an unusual aspect of the aircraft’s operating procedure of embarking. *See Gezzi*, 991 F.2d at 605.

plication, and more in line with the intent behind the Convention. The decisions have either expressly or implicitly referenced a causal connection or relationship between the unusual event and the aircraft's operation or procedures.³⁰² A Warsaw accident has been found to cover such injuries as those caused by the full recline of a seat when the claimant sought and was denied assistance by airline personnel,³⁰³ a prick by a hypodermic needle missed by air maintenance personnel,³⁰⁴ a stewardess' application of an overly hot compress,³⁰⁵ contact by a piece of galley equipment that had broken loose,³⁰⁶ a spill of hot coffee,³⁰⁷ a fall relating to a boarding ramp,³⁰⁸ poor cabin air,³⁰⁹ exposure to "bio-medical waste,"³¹⁰ failure of a tire on take-off,³¹¹ and a slip and fall on an airplane's steps.³¹²

302. See *Levy v. American Airlines*, 1993 WL 205857, at *1 (S.D.N.Y. June 9, 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994) (holding that some relationship between the accident and the operation of the aircraft is required under Article 17).

303. See *Schneider v. Swiss Air Transp. Co.*, 686 F. Supp. 15, 16 (D. Me. 1988) (discussing the injury plaintiff suffered while attempting to get up from her seat where the passenger in front of her refused to straighten the seat, and the flight attendant would not assist the plaintiff); *cf. Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1135 (N.D. Cal. 2000) (holding that flight attendant's refusal to move asthmatic passenger, and follow company procedure as well as the recognized standard of care, constituted an accident).

304. See *Waxman v. C.I.S. Mexicana De Aviacion S.A. De C.V.*, 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998); *Rothschild v. Tower Air, Inc.*, 1995 U.S. Dist. LEXIS 2078, at *7 (E.D. Pa. Feb. 22, 1995).

305. See *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141-42 (2d Cir. 1998).

306. See *Gilbert v. Pan Am. World Airways, Inc.*, No. 85 Civ. 4157, 1989 U.S. Dist. LEXIS 1715, at *1 (S.D.N.Y. Feb. 22, 1989); *cf. Price v. KLM-Royal Dutch Airlines*, 107 F. Supp. 2d 1365, 1368 (N.D. Ga. 2000) (holding that a sales trolley striking and injuring plaintiff's knee was the result of an accident).

307. See *Lugo v. American Airlines, Inc.*, 686 F. Supp. 373, 375 (D.P.R. 1988).

308. See *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611, 613 (S.D.N.Y. 1955).

309. See *Dias v. Transbrasil Airlines, Inc.*, 26 Av. Cas. (CCH) 16,048 (S.D.N.Y. 1998).

310. See *Croucher v. Worldwide Flight Servs., Inc.*, 111 F. Supp. 2d 501, 506 (D.N.J. 2000).

311. See *Arkin v. Trans Int'l Airlines, Inc.*, 568 F. Supp. 11, 12 (E.D.N.Y. 1982).

312. See *Gezzi v. British Airways, PLC*, 991 F.2d 603, 605 (9th Cir. 1993) (holding that since water was present on the airplane's steps, the fall was an acci-

No "accident" has been found where the passenger claimed an injury as a result of a normal landing,³¹³ a passenger was not served in-flight meal after takeoff,³¹⁴ a prolonged sitting due to delay,³¹⁵ an attempt to avoid a sleeping passenger,³¹⁶ passengers sitting in improper seats,³¹⁷ or the passenger's own excessive consumption of alcohol.³¹⁸ Turbulence cases can have varying outcomes, depending on whether it was unusual or unexpected under the circumstances.³¹⁹

While many of these, and other decisions, do not specifically reference or discuss the need for the unusual event or happening to concern some aspect of the aircraft's operation, such an element is implicit. For instance, where a passenger is injured as a result of abnormal pressurization changes, a sudden dive,³²⁰ unusual turbulence, emergencies, evacuation,³²¹ harsh landings,³²² or unusual en-

dent as it involved the process of embarking).

313. *See Salce v. Aer Lingus Air Lines*, No. 84 Civ. 3444, 1985 U.S. Dist. LEXIS 20215, at *1 (S.D.N.Y. May 1, 1985).

314. *See Farra v. American Airlines, Inc.*, No. 00-67, 2000 U.S. Dist. LEXIS 8824, at *1, 9 (E.D. Pa. June 27, 2000) (concluding that "the service of the plaintiff's meal at the same time the other passengers' meals were served was not, however, an 'unexpected or unusual event.'").

315. *See Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986).

316. *See Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 884 (5th Cir. 1996); *see also* *Craig v. Compagnie Nationale Air France*, No. 93-55263, 1994 U.S. App. LEXIS 37038, at *1 (9th Cir. Sept. 16, 1994) (holding that a passenger falling over shoes is not unexpected or unusual, and, therefore, not an accident).

317. *See Toteja v. British Airlines*, No. JFM-99-815, 1999 U.S. Dist. LEXIS 17374, at *1 (D. Md. Sept. 9, 1999).

318. *See Padilla v. Olympic Airways*, 765 F. Supp. 835, 838 (S.D.N.Y. 1991).

319. *See Quinn v. Canadian Airlines Int'l, Ltd.*, [1994] 48 A.C.W.S.3d 222 (finding that turbulence between Toronto and Florida was not severe enough to be unexpected or unusual and, therefore, not an accident); *see also* *Simmons v. American Airlines, Inc.*, 2001 U.S. Dist. Lexis 571 (S.D. Fla., Jan. 18, 2001) (finding turbulence claim actionable under Warsaw).

320. *See Weintraub v. Capital Int'l Airways, Inc.*, 16 Av. Cas. (CCH) 18,0858 (N.Y. 1980) (holding that an aircraft's sudden steep dive and swerve to the right constituted an accident).

321. *See Tavaréz v. American Airlines, Inc.*, 1997 U.S. Dist. LEXIS 17507, at *1 (S.D.N.Y. Nov. 5, 1997); *Sanna v. Delta Airlines*, 132 F.R.D. 47, 48-49 (N.D. Ohio 1990); *Hinds v. Philippine Airlines, Inc.*, 1979 U.S. Dist. LEXIS 10638, at *1 (S.D.N.Y. Aug. 2, 1979).

322. *See Mathias v. Pan-Am. World Airways, Inc.*, 53 F.R.D. 447, 448-49

gine noise,³²³ the abnormality of the aircraft operation element is obviously present and understandable. Other cases have expressly stated that the unusual event required by *Saks* must be an abnormal operation of the aircraft.³²⁴ The Second Circuit, in turn, has held that an injury resulting from routine airline procedures carried out in any abnormal way can be an accident.³²⁵

Another class of cases directly related to the passenger-upon-passenger misconduct scenario are those involving injuries resulting from airline services or facilities. These cases include such events as the spilling of hot beverages, bones in meals,³²⁶ and excessive service of alcohol.³²⁷ Again, it is either the abnormality in the routine service or the causal connection to carrier activities that forms the basis for a finding of a Warsaw accident.

The more difficult borderline cases in this category involve seemingly minor interactions between passengers, and as well as those between passengers and crew. For instance, where passengers claim injuries as a result of removing or storing baggage, or avoiding other passengers, there may or may not be an accident depending upon the circumstances. In *Gotz v. Delta Airlines, Inc.*,³²⁸ a passenger claimed a Warsaw accident occurred when he attempted to remove an overhead bag and had to move to avoid a passenger who suddenly arose from his seat. The court in *Gotz* employed a precise and appropriately focused analysis by determining whether there was: (a) an un-

(W.D. Pa. 1971); *Weaver v. Delta Airlines, Inc.*, 56 F. Supp. 2d 1190, 1191-92 (D. Mont. 1999).

323. See *Manion v. American Airlines, Inc.*, 17 F. Supp. 2d 1, 5 (D.D.C. 1997) (stating that whether engine noise is unusual for purposes of Article 17 is a question of fact).

324. See *Gotz v. Delta Airlines, Inc.*, 12 F. Supp. 2d 199, 204 (D. Mass. 1998).

325. See *Fishman v. Delta Airlines, Inc.*, 132 F.3d 138, 138 (2d Cir. 1998).

326. See *Bouso v. Iberia Lineas Aereas De Espana*, No. 96-CV-9094, 1998 U.S. Dist. LEXIS 3939, at *1 (S.D.N.Y. Mar. 7, 1998); *Rhodes v. American Airlines, Inc.*, No. 96-CV-3583, 1996 WL 1088897, at *1 (E.D.N.Y. Dec. 26, 1996) (holding that ingestion of fish bone during in-flight meal is an accident); *Halmos v. Pan-Am. World Airways, Inc.*, 727 F. Supp. 122, 122 (S.D.N.Y. 1999) (applying the Warsaw Convention's two year statute of limitations to a passenger's claim that he suffered food poisoning from an in-flight meal).

327. See *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir. 2000).

328. 12 F. Supp. 2d at 244.

usual or unexpected event that was external to claimant and, if so, (b) whether the event was a malfunction or abnormality in the aircraft's operation.³²⁹ The court ultimately found that no accident had occurred because the event was neither unusual nor unexpected,³³⁰ and did not result from an unusual or abnormal aircraft event.³³¹

In *Brandt v. American Airlines, Inc.*,³³² a federal district court in California held that there was no accident where a passenger claimed he was injured after a flight attendant pushed him down into his seat while clearing the aisle in order to evacuate an injured passenger. The court found that, under the circumstances, it was neither unusual nor unexpected that a flight attendant might physically touch a passenger in order to ensure that the passenger is seated and in order to clear the aisle. The court also found that statements by the pilot and flight attendant to the passenger³³³ were not unusual or unexpected under the circumstances and, therefore, did not constitute an accident.³³⁴ Similarly, a passenger's fall over a carry-on bag left in the aisle of a plane was not found to be an accident, as there was nothing unexpected about the bag's presence in or near the aisle during the boarding process.³³⁵ Moreover, an argument over seating was found not to be an accident, nor was a passenger's confrontation with a rude, hostile fellow passenger in a fully reclined seat.³³⁶

329. *See id.* at 201-02.

330. *See id.* at 205 (stating that a passenger's sudden rise from his or her seat while the aircraft was parked at the gate was not unusual).

331. *See id.* at 203 (holding that the actions of the aisle-seated passenger do not fall within the scope of the aircraft's operation).

332. 2000 WL 288393, at *7 (N.D. Cal. Mar. 13, 2000).

333. *See id.* (explaining the airline personnel's statements regarding the passenger's failure to sit down and his possible arrest for not cooperating with the flight attendant).

334. *See id.*

335. *See Sethy v. Maleu-Hungarian Airlines, Inc.*, 2000 WL 1234660 (S.D.N.Y. Aug. 30, 2000) (finding no evidence to support the assertion that a flight attendant had been asked to help, but refused to do so, and awarding summary judgment for the carrier when the plaintiff claimed to have suffered a Warsaw accident by tripping over a bag); *see also Gotz*, 12 F. Supp. 2d at 200 (finding that the mere failure of a flight attendant to intervene—absent notice or a request to do so—is insufficient to render the event an accident).

336. *See Potter v. Delta Airlines, Inc.*, 98 F.3d 881, 883-884 (5th Cir. 1996); *Grimes v. Northwest Airlines, Inc.*, 1999 WL 562244 (E.D. Pa. July 30, 1999)

Where a similar injury results from unexpected or unusual flight crew involvement, however, courts have held that an accident did occur. In *Carey v. United Airlines, Inc.*,³³⁷ a district court found that an accident had occurred due to a series of actions by a flight attendant, including preventing the claimant passenger and his children from changing seats, engaging in a heated argumentative exchange, informing the passenger he would be arrested, and publicly humiliating him on board the aircraft.³³⁸ Where a flight attendant refused to move an asthmatic passenger despite repeated requests, and falsely told the passenger that there were no other seats in which to lay down, a court also found that an "accident" took place.³³⁹ The court admonished that "[w]hen a passenger boards an airplane, he or she should be able to expect that the flight crew comply with accepted procedures and rules. A failure to do so is unexpected."³⁴⁰

It is clear from these cases that service from flight attendants and other air personnel has a direct relation to the operation of an aircraft. Accordingly, where a passenger is injured as a result of conduct or actions of airline personnel, which are outside the scope of normal aircraft expectations, procedures, events, or operations, an aviation accident occurs.³⁴¹ Conversely, actions or failures to act by flight attendants or other air personnel that are normal, expected, and not unusual in the operation of the aircraft are not actionable.³⁴² This approach is in keeping with the understanding that liability under the Warsaw scheme was meant to cover aviation accidents and not ren-

(granting defendant airline's request for summary judgment when two passengers had engaged in a hostile confrontation, since the event was not an accident within the scope of the Warsaw Convention); *see also* *Craig v. Compagnie Nationale Air France*, 45 F.3d 435, 1994 WL 711916 (9th Cir. Dec. 21, 1994) (finding a passenger's fall over shoes not to be an accident, since it was neither unexpected nor unusual).

337. 77 F. Supp. 2d 1165 (D. Or. 1999).

338. *See Carey v. United Airlines, Inc.*, 77 F.Supp. 2d 1165, 1168 (D. Or. 1999).

339. *See Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1121 (N.D. Cal. 2000).

340. *Id.* at 1134.

341. *See supra* note 278 and accompanying text.

342. *See Gotz v. Delta Airlines, Inc.*, 12 F. Supp. 2d 199, 200 (D. Mass. 1998) (finding that no accident occurred where a flight attendant failed to intervene without notice or a request to do so).

der carriers insurers for all injuries that take place in an aircraft.³⁴³ This does not mean, however, that the interpretation or application of an accident engrafts a due care or negligent standard for liability. To the contrary, the element of abnormal operation of the aircraft does not require that the abnormality or unusual event be either negligent or fault based. The injury, however, must result from or have a relation to the abnormal operation of the aircraft to be actionable.

Other hybrid interactions between flight personnel and passengers that pose difficulties include: delays,³⁴⁴ searches, diversions, detentions,³⁴⁵ passenger removals,³⁴⁶ and arrests. In *El Al Israel Airlines, Inc. v. Tseng*, for example, a search was at issue.³⁴⁷ The airline subjected a passenger to an intrusive search pursuant to established pre-boarding security procedures when a guard considered the passenger to be a high security risk. The Second Circuit held that the security search was a "routine" part of international air travel and, thus, not an unexpected or unusual event.³⁴⁸ According to the court, the risk of mistakes—that innocent persons will be erroneously searched—is "inherent to any effort to detect malefactors."³⁴⁹ Security precautions

343. See *Chendrimada v. Air-India*, 802 F. Supp. 1089, 1091 (S.D.N.Y. 1992) (stating that one of the purposes of the Warsaw treaty was to limit potential accident liability for the carrier).

344. See *id.* at 1089 (stating that whether an eleven-hour detainment aboard an aircraft constitutes an accident is a question of fact).

345. See *Singh v. Tarom Romanian Air Transp.*, 88 F. Supp. 2d 62 (E.D.N.Y. 2000) (questioning whether plaintiff's detention in the customs area met the requirements of Article 17); *Shen v. Japan Airlines*, 918 F. Supp. 686 (S.D.N.Y. 1994), *aff'd*, 43 F.3d 1459 (2d Cir. 1994); *Sakaria v. Trans World Airlines*, 8 F.3d 164 (4th Cir. 1993).

346. See *Grimes v. Northwest Airlines, Inc.*, 1999 WL 562244, at *13 (E.D. Pa. July 30, 1999). In *Grimes*, a passenger and the flight crew had a verbal dispute over a seat assignment that resulted in the arrest of the passenger by police for disorderly conduct. See *id.* at *13. The court found that an argument over seating is neither unexpected nor unusual, especially given that the claimant refused to move to another seat. See *id.* Further, removal from an airplane was not an accident, as the passenger refused to do so when ordered by the captain. See *id.* According to the court, "[i]t does not matter if it was the Captain's decision that initiated the chain of events leading to the arrest, the fact remains that it was entirely within Grimes' control whether he was arrested." *Id.*

347. See *Tseng*, 525 U.S. at 155.

348. See *Tseng*, 122 F.3d at 103.

349. *Id.*

such as searches are expected, routine, and a usual aspect of international travel. If conducted pursuant to customs and procedures, a security search is not unexpected or unusual even if the searched passenger claims injury or is not a safety threat.³⁵⁰

Although the sole issue on appeal before the Supreme Court in *Tseng* was the issue of exclusivity, the High Court did state that "[i]t is questionable whether the Court of Appeals 'flexibly applied' the definition of 'accident' as set forth in *Saks*."³⁵¹ What the Court may have had in mind is that while a security search may be routine, if applied erroneously, it is an unexpected event creating liability under Warsaw.³⁵² Such a view, however, is problematic and contrary to limiting a carrier's liability.

Removals, diversions, and arrests may or may not be considered accidents, depending upon the circumstances.³⁵³ While a crew member's relationship to the operation of the aircraft is clear, given his or her involvement, special circumstances must be present to establish that the involvement was abnormal or unusual. Similar to a search, an accident may occur where a crew member undertakes an arrest, removal, or diversion contrary to established procedures. When a passenger acts in such a manner requiring arrest, removal, or diversion, however, the event is not unexpected, unusual, or external to the passenger. In such cases, it is reasonable and consistent with the terms and purposes of the Convention that liability turn on the rea-

350. Cf. *Zuliana de Aviacion v. Herrera*, 763 So. 2d 499 (Fla. App. Ct. 2000) (finding a passenger's claim for damages, after forced off plane and searched, not preempted by Warsaw as injuries occurred after passenger was removed from plane).

351. *Tseng*, 525 U.S. at 158.

352. See *Shen v. Japan Airlines*, 918 F. Supp. 686, 692 (S.D.N.Y. 1994) (stating that detention, search, seizure, delay, and arrest were an accident, but dismissing the claim since the Court lacked jurisdiction). But see *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990) (declining to find the airline liable for the death of a ticket holder from a terrorist attack when the ticket holder was not in an advanced state of boarding the plane and had not gone through security inspection).

353. See *Garcia v. Aerovias de Mexico, S.A.*, 896 F. Supp. 1216, 1217 (S.D. Fl. 1995) (discussing whether an accident occurred when a passenger was falsely accused of being a thief by a flight attendant).

sonableness of the airlines' actions.³⁵⁴

4. *The Inherent Risks of Air Travel*

Another view referenced both before and after *Saks* is that an Article 17 accident must involve a "risk inherent or characteristic to air travel." While the exact origins of this meaning are not particularly clear—including whether it is meant to be synonymous with aircraft operation—it is derivative of the drafters' intent to have the Convention pertain to aviation accidents. It was not the intention of the drafters, however, to have the carrier responsible for all risks associated with air travel or those inherent with any common carrier. Indeed, the Convention eschews a risk based scheme rather than one based on fault.³⁵⁵ The drafters believed that a passenger utilizing air transportation was accepting the accompanying "risks".³⁵⁶ In imposing liability for "accidents," the drafters envisioned injuries arising out of the hazards of flying related to the abnormal operation of the aircraft, rather than the traditional risks undertaken by a common carrier.³⁵⁷

The "risk inherent to air travel" view became especially prominent

354. The Tokyo Convention is also very relevant to these cases. See *The Convention of Offenses and Certain Other Acts Committed on Board Aircraft*, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [hereinafter Tokyo Convention]. The United States ratified the Tokyo Convention in 1969. It was intended to oblige member States to "take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State." *Id.* art. III, sec. 2. The Tokyo Convention also covers "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board." *Id.* art. I, sec. 1, cl. b. The agreement immunizes the aircraft's commander, crew, and even passengers who utilize "reasonable measures" where there are "reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein." *Id.* art. VI, sec. 2.

355. See 1929 WARSAW MINUTES, *supra* note 45, at 21; GOEDHUIS, *supra* note 40, at 197-237 (discussing generally the rejection of a risk based approach to liability for air carriers).

356. See GOEDHUIS, *supra* note 40, at 236; GIEMULLA, *supra* note 150, at 11-12.

357. See *Rullman v. Pan Am. World Airways, Inc.*, 471 N.Y.S.2d 478, 480 (N.Y. Sup. Ct. 1983) (stating that in order for an event to constitute an accident under the Warsaw Convention, it must arise out of a risk that is "peculiar to air travel").

after the Montreal Interim Agreement of 1966³⁵⁸ for personal injuries resulting from hijackings,³⁵⁹ bomb threats,³⁶⁰ or terrorist attacks.³⁶¹ These events are clearly intentional criminal acts and pose a difficult "textual" question as to whether they constitute "accidents" under Article 17. The courts, however, eschewed a textual analysis emphasizing that the drafters of the Convention were concerned with air crashes and similar "hazards of air travel." As such, hijackings and terrorist attacks were deemed "hazards of air travel." These same courts found the Montreal Interim Agreement's waiver of Article 20's "all necessary measures" defense as establishing absolute liability. Therefore, pursuant to "policy considerations," the Convention modified and redistributed the costs involved in air transportation, and placed the carrier in the best position of assessing and insuring against these inherent risks associated with air travel.

Interestingly, the Court in *Saks* made no express reference to any risk allocation and, in fact, rejected the notion that the Montreal Interim Agreement of 1966 affected Article 17's intention of estab-

358. See Montreal Interim Agreement, *supra* note 58.

359. See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975); *Pflug v. Egypt Aircorp*, 961 F.2d 26, 30 (2d Cir. 1992); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1324 (C.D. Cal. 1975); see also *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657, 660 n.4 (S.D.N.Y. 1986) (agreeing that a hijacking constitutes an accident under Warsaw); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 976 (S.D.N.Y. 1977) (acknowledging that the Warsaw Convention covers injuries arising out of terrorist attacks).

360. See *Salerno v. Pan Am. World Airways, Inc.*, 606 F. Supp. 656, 657 (S.D.N.Y. 1985) (holding that a miscarriage caused by a bomb was an unexpected and unusual event that was outside the normal operation of the aircraft); *Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986) (holding that extended sitting on an airplane due to a bomb threat "cannot be characterized as the sort of accident that triggers liability under the Convention.").

361. See *Husserl v. Swiss Air Transp. Co. Ltd.*, 351 F. Supp. 702, 706 (S.D.N.Y. 1972); *Day*, 528 F.2d at 31 (involving a terrorist attack at Hellenikon Airport in Athens, Greece); *Sweis v. Trans World Airlines, Inc.*, 681 F. Supp. 501 (N.D. Ill. 1988); *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 156 (3d Cir. 1977); *Benjamins v. British European Airways*, 572 F.2d 913, 917 (2d Cir. 1978). It is noteworthy that the early 1960s witnessed a rise in the crime of hijackings. See generally Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijackings*, 2 CONN. J. INT'L L. 427, 429 (1987); Jamie L. Rhee, Comment, *Rational and Constitutional Approaches to Airline Safety in the Face of Terrorist Threats*, 49 DEPAUL L. REV. 847, 851 (2000) (noting that there were forty-six hijackings between 1960 and 1967).

lishing absolute liability.³⁶² Moreover, while the Court in *Saks* did not make express reference to any notion of risks characteristic to air travel, it did reverse the Ninth Circuit's decision referencing the normal depressurization on an aircraft as a "hazard of air travel."³⁶³ This, in turn, is consistent with the intention of the Convention's drafters, who had made the conscious effort not to adopt a risk based liability standard, but actually intended that passengers accept typical risks related to air carriage.

As a result, one could argue that the Supreme Court was rejecting "a risk inherent to air travel" view, especially when Ms. Saks had expressed such a view in her Supreme Court brief. On the other hand, by holding that injuries resulting from normal—as opposed to abnormal—aircraft operations are not recoverable, the Court was equating abnormal operations with air risks assumed by the carrier. If the injury did not result from aircraft operations outside the normal and routine, it did not result from the type of risks for which the carrier should be liable. In *Maxwell v. Aer Lingus*,³⁶⁴ for example, a district court held that an injury caused by liquor bottles dislodged from an overhead bin was an accident, notwithstanding the fact that the airline had warned passengers about shifting overhead items. In so holding, the court made it clear that an accident under Warsaw must have a connection to aircraft operation and that the risk posed by stowed items was a risk characteristic of air travel.³⁶⁵

It is worth noting that the "inherent risk of air travel" approach has not been extended to terrorist attacks in airports or other events or happenings. In *Martinez-Hernandez v. Air France*,³⁶⁶ the First Circuit found that Article 17 liability did not apply to a terrorist attack within an airport and rejected the assertion that such an attack was a "char-

362. See *Saks*, 470 U.S. at 393.

363. *Id.* at 395.

364. 122 F. Supp. 2d 210 (D. Mass. 2000).

365. See *id.* at 211 (stating that "[w]hile a reasonable passenger would expect some shifting of the contents of an overhead bin, particularly during a turbulent flight, she would not expect, as an ordinary incident of the operation of the aircraft, to be struck on the head by a falling object when the bin above her seat is opened by a fellow passenger.").

366. 545 F.2d 279 (1st Cir. 1976).

acteristic of air travel.”³⁶⁷ Indeed, the court stated that

[u]nlike the risk of hijacking . . . where the aircraft and the fact of air travel are prerequisites to the crime, we think the risk of a random attack such as that which gave rise to this litigation is not a risk characteristic of travel by aircraft, but rather a risk of living in a world such as ours.³⁶⁸

Similarly, in *Rullman v. Pan American World Airways, Inc.*,³⁶⁹ the fainting of a passenger ten feet from the doorway of an aircraft was deemed to not be an accident, as the injury was not “a risk inherent in modern air travel.”³⁷⁰ This notion, by perforce, applies to passenger assaults and torts.

In *Curley v. American Airlines, Inc.*,³⁷¹ a New York District Court held that “the highly unusual happenstance” of being detained and searched by Mexican authorities after being identified by the plane captain as smoking marijuana in the airplane lavatory was “hardly a characteristic of air travel,”³⁷² and not an accident within the meaning of Article 17. Another New York District Court found that “the risk that airline personnel will smuggle a passenger onto an international flight in violation of a court order, or will otherwise commit intentional torts against a passenger, likewise hardly constitutes a ‘risk inherent to air travel.’”³⁷³

These cases are consistent with the Convention’s intention. Moreover, terrorist hijackings and bombing activities that are “acci-

367. *Id.* at 284.

368. *Id.* at 284. The issue of terrorists attacks and hijackings have received little analysis as to why and how they meet the intention and meaning of an accident. See *supra* note 125 and accompanying text. The rationale in *Martinez* is equally applicable to such terrorist events, as they are not in anyway unique to air travel but are risks present in many aspects of modern life.

369. 471 N.Y.S.2d 478 (N.Y. Sup. Ct. 1983).

370. See also *Warsaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 448 (holding that plaintiff’s injuries did not constitute an accident under Warsaw since they arose out of the “ordinary, anticipated, and required programmed changes in the aircraft’s operation, all of which were performed purposefully under the careful control of the plane’s crew in the normal and prudent course of flight control . . .”).

371. 846 F. Supp. 280 (S.D.N.Y. 1994).

372. *Id.* at 283.

373. *Pittman v. Grayson*, 869 F. Supp. 1065, 1071 (S.D.N.Y. 1994).

dents” are not directly analogous to passenger upon passenger torts. While hijackings have a relationship to the operation of the aircraft, air travel, and global airline security practices,³⁷⁴ passenger upon passenger assaults or torts that have no substantial airline complicity do not involve the aircraft operation or the type of “risk” for which carrier’s were to assume liability. Indeed, such assaults or torts are a “risk of living in a world such as ours”³⁷⁵ and, thus, no different than any other type of risk that could occur in a public place.

5. Medical Aid Claims

Medical aid cases are yet another class of cases causing consternation in the courts. In this scenario, a passenger is stricken with a health problem such as a heart attack, asthma, or a stroke, and it is claimed that the flight crew did not act appropriately in providing aid or in diverting the flight. It is recognized that a health condition is not an accident unless triggered by an unusual or unexpected event such as a passenger suffering a heart attack during a sudden dive or emergency landing. The difficulty occurs, however, when the medical condition occurs during an uneventful flight and the passenger claims that the actions or inactions of flight personnel aggravated the condition.³⁷⁶

Both the Third and Eleventh Circuits have found these instances not to be accidents on the rationale that any failure of the flight crew resulting in the aggravation of the injury is not an “unusual or unexpected happening.” In *Krys v. Lufthansa German Airlines*,³⁷⁷ for ex-

374. See *Seguritan v. Northwest Airlines, Inc.*, 446 N.Y.S.2d 397, 398 (N.Y. App. Div. 1982), *aff’d*, 440 N.E.2d 1339 (N.Y. 1982) (analogizing the failure of the crewmembers to provide medical aid with hijacking cases, stating that it “is not the act of the hijackers but the alleged failure of the carrier to provide adequate security” that was the cause of the injury).

375. *Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) (requiring a close and logical nexus between the injury and air travel per se).

376. See *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1515 (11th Cir. 1997); *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985) (dismissing claims under the Warsaw Convention because the failure of crewmembers to provide the plaintiff with an area to lie down so that he could administer “self-help” for a pre-existing paraesophageal hiatal hernia was not an accident within the meaning of the Convention).

377. 119 F.3d at 1515.

ample, the passenger claimant suffered a heart attack during the flight and alleged that the carrier was negligent in the handling of the attack after it had occurred.³⁷⁸ The court, however, refused to look at the assertion of crew negligence as opposed to the underlying factual event.³⁷⁹ As such, the court found that the continuation of the flight caused the aggravation of the injury and, thus, the incident could not be considered an unexpected or unusual happening or event.³⁸⁰ Only one other reported decision to date has held otherwise in finding that a flights crew's negligent failure to render medical assistance to a passenger who suffered a heart attack was an "accident."³⁸¹

All of the other decisions, including *Krys*, that have found no "accident" under Article 17 for medical aid cases did so before the exclusivity holding in *Tseng*. These cases all held that the claimant could pursue remedies under state law. Indeed, the plaintiffs in *Krys* recovered \$2.4 million in damages. Under *Tseng*, however, such a plaintiff would have no remedy at all. One court decision, decided after both *Krys* and *Tseng*, noted this to be "absurd" stating:

The result of the union of *Krys* and *Tseng* is a dissolution of an airline's

378. See *id.* at 1515 (stating passenger's allegation "that crew negligently failed to make unscheduled landing at available airports on east coast in response to passenger's systems and this aggravated damage to his heart.").

379. See *id.* at 1521-22.

380. See *Tandon v. United Air Lines*, 926 F. Supp. 366, 371 (S.D.N.Y. 1996); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985); *Walker v. Eastern Airlines, Inc.*, 775 F. Supp. 111, 112 (S.D.N.Y. 1991) (conceding that there was not a Warsaw accident in an allegation that inadequate care aggravated the medical condition); *Scherer v. Pan Am. World Airways, Inc.*, 387 N.Y.S.2d 580, 580 (N.Y. App. Div. 1976) (alleging that the prolonged sitting in an airline seat caused thrombophlebitis); *Farra v. American Airlines, Inc.* 2000 U.S. Dist. Lexis 8824 (E.D. Pa., June 28, 2000) (finding that illness allegedly resulting from failure to serve in-flight meal after take-off not recoverable under Warsaw); *Chaudhari v. British Airways, Inc.*, THE TIMES, 7 May 1997 (transcript Smith Bernal) (partially paralyzed passenger fell while going to lavatory).

381. See *Seguritan v. Northwest Airlines, Inc.*, 446 N.Y.S.2d 397, 398 (N.Y. App. Div. 1982); cf. *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121 (N.D. Cal. 2000) (finding that an accident had occurred due to failures by the crew when a passenger inhaled second hand smoke in the nonsmoking part of the airplane, thereby aggravating his asthma and ultimately resulting in death). But see *Rajcooar v. Air India, Ltd.*, 89 F. Supp. 2d 324 (E.D.N.Y. 2000) (finding a heart attack that occurred on board an airplane was not an accident); *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 2d 1313 (S.D. Fla. 1999).

duty of care to its passengers so long as the cause of a passenger's initial injury is internal to the passenger himself. This holds true so long as the airline takes no affirmative action which aggravates the injury. Complete inaction is acceptable, even if in doing nothing the airline aggravates the passenger's injury.³⁸²

It is simply incongruous to hold that a carrier is not liable for failing to take any actions to aid a passenger stricken with a medical condition, but is liable for passenger upon passenger torts. After all, it is certainly consistent with the Warsaw scheme to find, "after assessment of all the circumstances" that an "accident" occurs when a flight crew does not make reasonable efforts to assist stricken passengers. Such action or inaction, if contrary to established airline procedures or standards, could be "unusual and unexpected" in modern air travel, and is certainly an abnormal aircraft operation. Of course, whether it is the proximate cause of the injury would remain undetermined.³⁸³

IV. JUDICIAL TREATMENT OF PASSENGER UPON PASSENGER ASSAULTS

The debate over the application and contours of an "accident" under Article 17 also includes passenger upon passenger assaults. Courts are split over whether such events are accidents absent some causal connection to airline operation. At least one court has applied a rigid application of *Saks* without elaboration, finding that such an event is unexpected or unusual, thereby rendering the airline liable.³⁸⁴ Most courts, however, have been hard pressed to find an intentional assault by one passenger upon another to impose liability on the car-

382. See *McDowell*, 54 F. Supp. 2d at 1320.

383. See *Sakaria v. Trans World Airlines*, 8 F.3d 164 (4th Cir. 1993). In *Sakaria*, the passenger's flight landed shortly after a terrorist attack in the airport. See *id.* Although there was death and carnage, the passenger was not directly exposed to the aftermath of the attack. See *id.* Some time after meeting his party, however, the passenger suffered a heart attack and died. See *id.* The court dismissed the claim due to lack of evidence as to causation between the terrorist attack and the passenger's heart attack and death. See *id.*

384. See *Goodwin v. Air France*, No. C97-1997, 1998 WL 296356, at *1 (N.D. Cal. June 2, 1998) (holding that an attack by a passenger on another passenger can be deemed an accident under the terms of the Warsaw Convention).

rier under Warsaw. These courts have held that such episodes are not inherent risks of air travel, or an incident derived from air travel.

In *Price v. British Airways*,³⁸⁵ a district court agreed with the comments of Professor Goedhuis³⁸⁶ and found that a fistfight between two passengers was not an accident relating to the operation of the aircraft. It further stated: "To suggest that a fistfight between two passengers is a characteristic risk of air travel is absurd. Such a fracas is not a characteristic risk of air travel nor may carriers easily guard against such air risk through the employment of protective security measures."³⁸⁷

In *Stone v. Continental Airlines, Inc.*,³⁸⁸ the plaintiff claimed that another passenger instigated a fight and punched him. The plaintiff also alleged that the airlines "facilitated and/or participated [in]" the incident by allowing the assailant to enter the first class compartment without a proper ticket and failing to warn the plaintiff.³⁸⁹ The court nonetheless agreed to dismiss the complaint holding that "[p]laintiffs' misfortune allegedly occurred on the airplane, but was not an accident derived from air travel."³⁹⁰

Other jurisdictions have held that a carrier can be held liable where it played a causal role in the assault. In *Tsevas v. Delta Airlines, Inc.*,³⁹¹ and *Langadinos v. American Airlines, Inc.*,³⁹² the courts

385. No. 91 Civ. 4947, 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992) (holding that situations in which a passenger is injured in a fight with another passenger would not justify the carrier's liability by virtue of Article 17 because the accident, which caused the damage, had no relation to the operation of the aircraft).

386. *See id.* (discussing Goedhuis' specific example of a passenger upon passenger assault and finding that 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."); GOEDHUIS, *supra* note 40, at 199-200.

387. *Price*, 1992 WL 170679, at *3; *see also* Chumney v. Nixon, 615 F.2d 389 (6th Cir. 1980) (holding that a fight between two passengers is not an "accident" within the meaning of the Warsaw Convention).

388. 905 F. Supp. 823 (D. Haw. 1995).

389. *See id.* at 827.

390. *Id.*

391. 1997 WL 767278, at *4 (N.D. Ill. Dec. 1, 1997) (finding that the assaults and the resulting injuries allegedly sustained by the plaintiff were caused, at least in part, by the carrier's actions in serving another passenger too much alcohol and failing repeatedly to subdue said passenger or change the plaintiff's seat).

found that the respective allegations were sufficient for the cases to go forward where an assault by one passenger upon another passenger was allegedly caused by over service of alcohol. In *Tsevas*, the victimized passenger alleged that, prior to the assault, the assailant was over served alcohol and that the flight attendants refused to change the assaulted passenger's seat.³⁹³ Under these circumstances, the unwanted advances, coupled with the refusal of attendants to intervene, could constitute an unexpected event external to the passenger³⁹⁴ because these events were beyond the usual and normal operations of the aircraft. "While a 'fight' between passengers may not have a 'relation to the operation the aircraft,' service from flight attendants, on the other hand, is characteristic of air travel and does have such a "relation with the operation of the aircraft."³⁹⁵

Similarly, in *Langadinos*, the First Circuit found a passenger's allegations sufficient to survive a motion to dismiss when another passenger had allegedly grabbed the plaintiff's private area and, prior to the assault, was served alcohol despite his "erratic" and "bizarre" behavior.³⁹⁶ The court, however, noted:

Of course, not every tort committed by a fellow passenger is a Warsaw Convention accident. Where the airline personnel play no causal role in the commission of the tort, courts have found no Warsaw accident. On the flip side, courts have found Warsaw accidents where airline personnel play a causal role in passenger-on-passenger torts.³⁹⁷

392. 199 F.3d 68 (1st Cir. 2000) (holding that carrier's act of continuing to serve alcohol to intoxicated passenger supported plaintiff's claim that the carrier played a causal role in the assault).

393. See *Tsevas*, 1997 WL 767278, at *4 (determining that the carrier's continued service of alcohol to a passenger while knowing that he was intoxicated, as well as the numerous opportunities to prevent the assault upon the plaintiff, were sufficient to hold the carrier liable under the Warsaw Convention).

394. See *id.* (concluding that defendant's flight attendants failed to provide service to the plaintiff which would have diffused the situation or allowed the airline's employees an opportunity to prevent the assault from occurring).

395. *Id.*; cf. *Moses v. Air Afrique*, 2000 WL 306853, at *6 (E.D.N.Y. Mar. 21, 2000) (alleging an assault in the baggage claim area by carrier employees to be outside the scope of the Warsaw Convention).

396. See *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 70 (1st Cir. 2000).

397. *Id.* at 71; see *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1134 (N.D. Cal. 2000) (stating that "when a flight attendant's act creates a foreseeable

A. *WALLACE V. KOREAN AIRLINES*

Despite these decisions, the Second Circuit recently held that a passenger's sexual fondling of another passenger while she slept was an accident under Article 17.³⁹⁸ The court recognized the division in the application of *Saks*³⁹⁹ between those cases requiring the "accident" to derive from "a risk characteristic of air travel" and those courts requiring that only an unusual or unexpected event need be shown.⁴⁰⁰ Under the latter approach, the court found that "an airline presumably would be liable for all passenger injuries, including those caused by co-passenger torts, regardless of whether they arose from a characteristic risk of air travel."⁴⁰¹

The *Wallace* court also found that *Saks* did not address whether an event must relate to air travel to be an Article 17 accident but, instead, limited the issue of whether the event was related to a normal, as opposed to abnormal, operation of an aircraft.⁴⁰² The court avoided this "Talmudic debate" as to whether "all co-passenger torts are necessarily accidents for purposes of the Convention" by finding that, under the facts presented, "the characteristics of air travel increased [the claimant's] vulnerability to [the] assault."⁴⁰³ The court found that the plaintiff was "cramped into a confined space beside two men she did not know; the lights were turned down; the "sexual predator" was left unsupervised in the dark, and the fondling "could not have been five second procedures even for the nimblest of fingers," nor could it "have been entirely inconspicuous."⁴⁰⁴

A New York District Court recently followed *Wallace* in another

risk of injury to passenger, an 'accident' has occurred.").

398. See *Wallace v. Korean Airlines, Inc.*, 214 F.3d 293, 297 (2d Cir. 2000), cert. denied, 2001 U.S. Lexis 1113 (U.S. Feb. 20, 2001) (holding that molestation was an "accident" within the meaning of the Warsaw Convention).

399. See *Air France v. Saks*, 470 U.S. 392, 407 (1985) (discussing the division between an inquiry into the nature of the event which caused the injury, and the care taken by the airline to avert the injury).

400. See *Wallace*, 214 F.3d at 298.

401. *Id.* at 299.

402. See *id.* (stating that if the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be considered an accident).

403. *Id.* at 299.

404. *Id.* at 299-300.

passenger upon passenger assault.⁴⁰⁵ In *Lahey v. Singapore Airlines, Ltd.*, the Southern District of New York relied on *Wallace*, without any reference to or analysis of the Convention's history or intention, and found that the assault by one passenger upon another was an accident in that "the actions of the crew [were] not relevant to the determination of whether the assault was an 'accident' because it is clear that nothing in the term 'accident' suggests a requirement of culpable conduct on the part of the airline crew."⁴⁰⁶

These recent decisions are both troubling and ill-reasoned. First, to some extent, the Second Circuit in *Wallace* ignores its own precedent in *Fishman* where it held that an Article 17 accident required a connection between the injury and abnormal operations.⁴⁰⁷ Second, both *Wallace* and *Lahey* conflict with the earlier First Circuit decision of *Langadinos*, which held that a causal connection must exist between the passenger's assault and the airline's involvement to constitute an accident.⁴⁰⁸ Third, the courts fail to reference or consider the negotiating history of Article 17, throughout which the drafters reiterated that the Article was not intended to encompass passenger upon passenger torts, risks common to all carriers, or risks in every day life.

Finally, in *Wallace*, there was no basis for the "factual findings" of the court. The parties agreed that the assault was not caused by any

405. See *Lahey v. Singapore Airlines, Ltd.*, 115 F. Supp. 2d 464, 466-67 (S.D.N.Y. 2000) (following the Second Circuit's holding that an assault committed by another passenger can be an accident under the Warsaw Convention).

406. *Id.* at 467. In *Lahey*, the passenger was sitting reclined in her seat when the passenger behind her kept thrusting his knees or kicking from behind. See *id.* at 465. When the plaintiff complained to the flight attendants, the attendants offered several solutions and provided both passengers the opportunity to change seats, yet both passengers refused. See *id.* The flight supervisor advised the attendants to "monitor the situation." See *id.* at 465. Sometime later, after meal service and while the attendants were serving coffee, the passenger suddenly punched the plaintiff, threw a food tray at her, and struck her on the side of the head with a plastic entree dish. See *id.* at 466. The plaintiff suffered a laceration and the passenger was arrested, at the plaintiff's request, upon arrival in Amsterdam. See *id.* Following a bench trial, the court awarded the plaintiff \$10,000 in compensation and denied any reduction based on contributory negligence. See *id.* at 468.

407. See *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 138 (2d Cir. 1998).

408. See *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 72 (1st Cir. 2000) (stating that plaintiff's claim that flight attendants were rude to him does not affix the carrier with causal responsibility for an assault).

act or omission of the carrier and that the carrier was, or should have been, on notice that the assaulting passenger was a problem or likely to commit an assault.⁴⁰⁹ There was no evidence, however, as to how long it took for the assailant to unbutton the passenger's pants and briefly fondle her.⁴¹⁰ Accordingly, there was no basis for the finding that the assault "could not have been inconspicuous" or that the "sexual predator was left unsupervised."⁴¹¹ Such an assertion assumes notice or knowledge to the carrier when the parties had already agreed otherwise. Indeed, the court in *Wallace* made its findings as a matter of law on summary judgment.⁴¹² Moreover, in *Saks*, the High Court cautioned "that any standard requiring courts to distinguish causes that are 'accidents' from causes that are 'occurrences' requires drawing a line, and we realize that reasonable [people] may differ widely as to the place where the line should fall."⁴¹³ Thus, where there exists "contradictory evidence, it is for the trier of fact to decide whether an accident . . . caused the passenger's injury."⁴¹⁴ It is disturbing, then, that a court could find that a risk of an assault was created by the airline simply because the plaintiff-passenger had two other passengers whom she did not know sitting on either side of her in a dimmed cabin. Neither a sleeping passenger in a dimmed cabin nor three passengers seated next to each other constitute an abnormal aircraft operation or a unique risk to air travel.

Wallace and other decisions not requiring a causal connection to

409. See *Wallace*, 214 F.3d at 300 (noting the undisputed fact that, for the entire duration of the attack, not a single flight attendant noticed a problem).

410. See *id.* (opining that "these could not have been five-second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous.").

411. *Id.* at 299.

412. See *Celutex Corp. v. Catrell*, 477 U.S. 317, 322 (1986) (emphasizing the well-established rule that, on summary judgment requests, the Court is not to weigh, assess credibility, or draw conclusions where reasonable minds might differ); *Matsushita v. Elec. Indust. Co. Ltd.*, 475 U.S. 574, 587 (1986); see also *Gabra v. Egypt Air*, 2000 U.S. Dist. LEXIS 140395 (S.D.N.Y. Oct. 4, 2000) (denying a motion for summary judgment on whether a passenger's fall on a jetway was an accident, leaving the issue to be resolved by a jury).

413. *Air France v. Saks*, 470 U.S. 392, 406 (1985) (citing *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926)).

414. *Id.* at 405.

aircraft operation are imposing a standard of liability far beyond the duty imposed on other common carriers. The intent of the drafters was to subject international carriers to "less rigorous" duties than those placed upon the more established common carriers.⁴¹⁵ Such carriers are not strictly or absolutely liable for assault or torts upon passengers by fellow passengers absent knowledge and inaction by the carrier.⁴¹⁶ This showing is required even though the common law duty of care imposed on domestic carriers is considered to be a "high" or "heightened" one.⁴¹⁷

V. FAULT REVISITED AND OTHER RUMINATIONS

While one objective of the new Convention is to maintain more than sixty years of established precedent,⁴¹⁸ this precedent remains

415. See *GOEDHUIS*, *supra* note 40, at 236.

416. See *Kelley v. Metro N. Commuter R.R.*, 37 F. Supp. 2d 233, 240 (S.D.N.Y. 1999) (holding that a railroad was not liable for employee's assault on a passenger absent a showing that the railroad knew or should have known that the employee was the type of person who might commit assault); *Milone v. Washington Metro. Area Transit Auth.*, 91 F.3d 229, 231 (D.C. Cir. 1996) (finding that, although common carriers are not insurers against assaults, a duty arises when harm to passengers should have been foreseeable); *Toombs v. Manning*, 835 F.2d 453, 466 (3d Cir. 1987) (stating that common carriers are liable if, prior to the injury, the conduct of the offending parties indicated a disposition to engage in violent, harmful behavior, thus giving rise to a reasonable apprehension of injury to others); *Johnston v. National Ry. Pas. Corp.*, 1997 U.S. Dist. Lexis 5624 (N.D.N.Y. Apr. 25, 1997); *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 472 (2d Cir. 1995) (explaining that a duty of reasonable care imposed on a common carrier to protect passengers from other travelers and the existence of an unruly crowd is only one factor to consider); *Curley v. AMR, Corp.*, 153 F.3d 5, 12 (2d Cir. 1998); *Robinson v. Northwest Airlines*, 1996 U.S. App. Lexis 8237 (6th Cir. 1996) (finding common carrier owes high duty of care but is not insurer of safety and negligence must be shown); see also *Lamkin v. Branniff Airlines, Inc.*, 853 F. Supp. 30, 33 (D. Mass. 1994) (affirming that a common carrier "is not an insurer of safety of its passengers nor is it obliged by law to foresee and to guard against unlikely damages and improbable harm."); *O'Leary v. American Airlines, Inc.*, 475 N.Y.S.2d 285, 286-87 (N.Y. App. Div. 1984) (holding that an airline had a common law duty of care to protect others from drunken passengers who get out of control).

417. See *O'Leary*, 475 N.Y.S.2d at 286-87.

418. See *Montreal Convention 1999*, *supra* note 62, pmbl. The Convention's preamble provides as follows:

THE STATES PARTIES TO THIS CONVENTION

conflicted as to the meaning and application of "accident." Moreover, the term is likewise under pressure due to the Convention's exclusivity, and the lack of any fault based defense to claims under 100,000 SDRs.

Arguably, the Montreal Convention of 1999's express adoption of a pure negligence-based liability for claims over 100,000 SDRs, instead of the prior concept of "all necessary measures,"⁴¹⁹ and the express reference to carrier exoneration for injuries caused by the conduct of third parties,⁴²⁰ evidences an intent to view passenger upon

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objective of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests . . .

See id.

419. *See id.* art. 21(1). Article 21(1) of the Montreal Convention provides: "For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability."

420. *See id.* art. 21(2)(a)-(b). Article 21(2)(a)-(b) of the Montreal Convention provides:

The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that :

- a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
- b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

See id.

passenger torts as accidents, regardless of any complicity on the part of the carrier. This is not overly persuasive, however, as the express exoneration of carrier liability for "accident" caused by the "sole" negligence of a third party was understood to be entirely directed at aircraft related entities such as airline manufacturers and air traffic controllers. This language does not diminish the original context and meaning of "accident" at its adoption, nor would it obviate the need that the injury producing event relate to an abnormal operation or airline complicity in order to constitute an accident. A causal connection to abnormal or nonstandard carrier operations does not necessarily equate to fault.

The continuing uncertainty of Article 17's accident requirement is largely due to the failure of modernization efforts to include "accident" in its "updating" of the Warsaw scheme. This raises the continuing question as to whether, in modern air travel, there should be any need for monetary limits or elimination of fault based recovery. Indeed, the monetary limits have long been and continue to be attacked as unnecessary in modern air travel.⁴²¹ This is undoubtedly true as the international aviation industry is no longer in need of special protection and can readily obtain substantial insurance.

Perhaps the new Convention's failure to clarify that an "accident" requires airline complicity or abnormal aircraft operations demonstrates that such a limitation was not intended. This assertion, however, is highly speculative and simply inconsistent with the drafter's intent, especially as to passenger upon passenger torts. By relying on the virtual elimination of fault based exoneration, the reform efforts simply by-pass the "accident" component, fail to appreciate that an "accident" is not intended to extend beyond aircraft operations, and fail to take into account the expansive interpretation of "accident" by the courts.

To be sure, both the IATA and pending Montreal Convention schemes have opted, without discussion, to maintain the no-fault liability scheme first introduced through the Montreal Interim Agreement for claims under 100,000 SDRs. The justification for the con-

421. See Bin Cheng, *A New-Look Warsaw Convention on the Eve of the Twenty-First Century*, 22 ANNALS AIR & SPACE L. 45, 46-47 (1997) (observing that practically all the dissatisfaction with the Warsaw Convention stems from the amount of limits imposed).

tinuation of the no fault regime—aside from representing a trade-off for monetary limits—is that it encourages quick, less expensive settlements; reduces attorneys' fees; and reflects that airlines can best distribute the loss among all passengers.⁴²² The concepts of risk distribution and deep pockets has its genesis in tort concepts that emerged in the mid-20th century when many thought that tortious liability was no longer cost effective.⁴²³ Flowing from these concepts is the view, espoused by some, that the Warsaw system "is to be an instrument of solace, not an opportunity for debate."⁴²⁴

Certainly the notion that Warsaw should be an instrument of solace is appealing. Equally admirable is the desire to focus on compensating victims of major accidents, speeding up the time between a catastrophic airline accident and compensation, and reducing the costs associated with obtaining deserved compensation. Nonetheless, these issues are not as compelling when directed at passenger upon passenger torts. For instance, the rationale of excessive litigation costs is not particularly persuasive when, under the new scheme, the sole issue for resolution will be damages, which does not necessarily translate to lower costs or quicker settlements. Without risk of suffering a no-liability finding, claimants will seek damage trials, have little incentive to settle, and seek compensation beyond their true injuries. Carriers, in turn, will have little bargaining power. The elimination of fault based liability is not necessarily the answer to reducing costs; rather, the solution rests with such mechanisms as expedited time-tables, mediation, arbitration, or other expeditious dispute resolution mechanisms.

Fault based liability, in turn, does serve the practical and meaningful ends of deterring claimants from presenting questionable or meritless claims,⁴²⁵ and protecting the public by improving safety and

422. See Nicolas Mateesco Maltee, *The Warsaw System and the Hesitations of the U.S. Senate*, 8 ANNALS AIR & SPACE L. 151, 164 (1983) (identifying various interests behind the no fault system and the Warsaw Convention).

423. See Lowenfeld & Mendolsohn, *supra* note 3, at 598-99.

424. Ruwantissa I.R. Abeyratne, *The Spread of Tuberculosis in the Aircraft Cabin—Issues of Air Carrier Liability*, 27 TRANS. L.J. 41, 77 (2000).

425. See Orr, *supra* note 169, at 418 (noting that "the fact that fault has to be proven deters the claimant from presenting claims without merit and encourages compromise of claims of questionable liability.").

security.⁴²⁶ In the absence of at least a causal connection to abnormal aircraft operations, ineffective or unresponsive airline service assistance, or other airline complicity or involvement, the resulting absolute liability standard places the carrier at the mercy of claimants and renders it an absolute insurer. It is simply adverse to basic notions of equality, justice, fairness, and moral responsibility to hold a carrier absolutely liable for damages for passenger upon passenger assaults or related torts. The degree of liability imposed is basic "to the preservation or loss of equal justice."⁴²⁷ As one commentator noted:

The philosophy of the law has been progressive, keeping in pace with the best interests of civilization. Let us encourage this sound progress which maintains the balance of justice between all parties holding each accountable for his own fault rather than arbitrarily imposing liability upon one innocent party for the benefit of another who is quite arbitrarily set apart as more deserving.⁴²⁸

Whatever value a no fault system is perceived to retain for major international air disasters, that value is greatly reduced when applied to attrition losses, such as passenger upon passenger torts or intentional conduct. Such a system only encourages frivolous claims, holds the carrier hostage to such claimants, and diminishes moral responsibility. Although carriers are, and should be, held to a high duty of care, they should not be made absolute insurers for torts by and between passengers.

CONCLUSION

The original Convention was intended as a limitation upon carrier liability. As to personal injuries, delegates were concerned with

426. See 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, 4 (1996) (citing L.S. Kriendler, *The IATA Solution*, in 14:21 LLOYD'S AVIATION LAW 4, 5 (1996)) (asserting that "the fault system is extremely important to the public. It is a public protection. It has improved aviation safety and security.").

427. Orr, *supra* note 169, at 418-19 (stating that "in justice, the carrier should assume the burden of using the highest degree of care. But in equal justice, the person who chooses to use those services should assume those risks that are beyond the bounds of due care.").

428. See *id.* at 418.

aviation accidents not everyday torts or injuries, and certainly not passenger upon passenger assaults. The concerns at that time were with major disasters and the potential devastating effect such events could have on the infant international aviation industry. Indeed, various comments by delegates throughout the course of the subsequent protocols and conventions related to the Warsaw scheme specifically indicate that "accident" was not intended to cover such incidents.

It is significant that the term "accident" was utilized with the understanding that the carrier would not be liable where it was not at fault. When the carrier's "due diligence" defense was first, and rather hastily, eliminated by the Montreal Interim Agreement in 1966, however, the term "accident" took on new significance. This significance has only increased with the continued elimination of any fault based defense (other than contributory negligence) for claims under 100,000 SDRs under both the IAA Inter-carrier Agreement and the Montreal Convention of 1999, the Convention's preemptive scope over state or individual national law for any claims arising out of international travel, and the ever growing number of international air passengers. Despite modernization efforts culminating in the pending Montreal Convention, no attention, clarification or "modernization," has been directed to the element of "accident" resulting in a divergent and inconsistent application by the courts, especially as to passenger disturbances, medical aid cases, and passenger torts.

The *Saks* decision fails to fully clarify the scope of "accident," especially as to whether there must be an unexpected or unusual aircraft operation, or risk unique to air travel for carrier liability. Further compounding the problem is the suggestion by the Supreme Court in *Tseng* that an Article 17 accident encompasses a routine security search, even when the search is not unreasonable or contrary to procedures.

The Second Circuit's recent decision in *Wallace v. Korean Airlines* is especially disconcerting, as it holds a carrier absolutely liable for passenger upon passenger torts. In that case, the court strained to find carrier complicity, taking the term "accident" far beyond its original purpose or intention. The decision also places carrier liability under a "risk" analysis, and grounds that liability on circumstances far beyond those which would be imposed upon other common carriers.

It is certainly reasonable that the drafter's intended the Convention, like any legislation, to remain flexible in interpretation in order to keep with changing times.⁴²⁹ It also cannot be ignored that modern aviation is a far cry from what it was in 1929. The Convention's original intention and framework, however, cannot be ignored.⁴³⁰ Neither the new liability limits, the two tier liability scheme, the rationale for the shift in the burden of proof, nor the Convention's exclusivity, change the restricted understanding of "accident." Passenger upon passenger torts, absent carrier involvement or complicity, have no relation to aircraft operation, nor do they justify carrier liability under Warsaw. Thus, injury claims arising out of standard practices and operations of air travel, or those that arise out of risks which are not unique to air travel, are not compensable.

Absent a textual amendment, in keeping with the purpose and objectives of the Convention, a proper analysis requires a determination of: (1) whether the cause of the injury was an unusual or unexpected event external to the passenger; (2) whether the event was an abnormal operation of the aircraft; and (3) whether the event was the proximate cause of the injury. The abnormal operation of the aircraft element can be further evaluated by assessing whether the event constituted a unique risk related to air travel. Until otherwise clarified through express language in the Convention, this approach is consistent with the limited nature of carrier liability, as well as with

429. See *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990) (stating that the "drafters intended a flexible approach which would adapt to the changing conditions of international air travel over the years."); see also *GOEDHUIS*, *supra* note 40, at 36 (opining how "[l]ife always precedes law. Law can thus adapt itself to the necessities of life and express its needs without cramping it into the narrowness of laws too vigorous because premature"); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975) (noting how the delegates at the Warsaw Convention drafted articles with the idea that they could be applied to meet the changing needs of the aviation industry); *Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) (observing that the drafting history does not determine the precise meaning of Article 17, but does illuminate the intention of the Warsaw Convention drafters).

430. *Cf. Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 273 (1984) (documenting the fact that the Warsaw Convention's limitations on liability for damage has not been altered in the past half-century). See generally *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160-61 (1934) (instructing that a treaty is to be construed in light of the conditions and circumstances existing at the time it was drafted).

modern concepts of liability under the Convention. While the tendency of courts to improperly apply “accident” to passenger upon passenger misconduct may be deemed by some as only a minor glitch in the overall scheme of injury compensation for international aviation claimants, it raises the fundamental question of whether monetary limits and elimination of fault based concepts under the Warsaw convention have continued vitality in modern air travel.