Air France v. Saks: An Accidental Interpretation of the Warsaw Convention

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AIR FRANCE V. SAKS: AN ACCIDENTAL INTERPRETATION OF THE WARSAW CONVENTION

INTRODUCTION

Since the United States adhered to the Warsaw Convention1 in 1934, United States courts have struggled to construe the proper interpretation of the Convention's most innovative provision—limited airline liability for passenger injuries occurring from "accidents"2 during international air travel.3 In attempting to carve out the boundaries of the "accident" precept, courts have been at odds in formulating a uniform definition.4 In a recent decision, the Supreme Court attempted to allay this confusion by developing a new standard based on the ordinary meaning of the term.5 The Supreme Court, however, overlooked the unique meaning that the term "accident" engenders in the context of airline liability. In doing so, the Court set a standard that circumvents United States obligations under the Warsaw Convention.

This Comment analyzes the meaning of the term "accident" under article 17 of the Warsaw Convention. Part I discusses the historical background of the Convention as modified in part by the Montreal Agreement. Part II examines judicial attempts to define the term "accident" under article 17. Finally, Part III scrutinizes the courts' analy-

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This Comment uses the terms "convention" and "treaty" interchangeably. The term "treaty" now is accepted as a generic term that embraces all kinds of international arrangements in written form. T. Elias, THE MODERN LAW OF TREATIES 14 (1974).

2. Warsaw Convention, supra note 1, at art. 17. The text of article 17 provides: The carrier shall be liable for damages 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. Id. (emphasis added).

3. Warsaw Convention, supra note 1, at art. 1(2) (defining scope of international air transportation for purposes of the Warsaw Convention). The Warsaw Convention comprehends transportation where the place of departure and the place of destination are within the territories of two parties to the Convention or within the territory of one party if there is a stopping place in another territory. Id.

4. See infra notes 48-89 and accompanying text (discussing judicial interpretations of the term "accident").

ses and proposes a more technically definitive standard for determining when an "accident" occurred for Warsaw Convention purposes.

I. THE WARSAW CONVENTION

The Warsaw Convention is the principal treaty governing air carrier liability in international air transportation.\(^6\) Anticipating the growth of air transportation,\(^7\) and aiming to facilitate the rapid expansion in international commercial operations,\(^8\) many nations united to formulate a uniform body of regulation. The Warsaw Convention was the result of two international air conferences.\(^9\) In concluding the Warsaw Convention in 1929, air strategists achieved two primary objectives: to provide a uniform system of regulation in a manner that would accommodate many countries with different legal systems;\(^10\) and to limit airline liabil-

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8. See A. LOWENFELD, AVIATION LAW § 2.1 (2d ed. 1981) (stating that airline operations in domestic and foreign travel totalled only 400 million passenger-miles between 1925-1929). In contrast, in 1985 alone, scheduled international and domestic air traffic was estimated at 168 billion tonne-kilometres. 1985 Scheduled Air Traffic Growth Continued, but at Lower Annual Rate, 42 INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO) BULL. 10 (Feb. 1986).


10. See Warsaw Convention, supra note 1, at preamble (recognizing specifically the advantage of uniformity in regulating international air transportation). See also
ity in order to protect the newly emerging and vulnerable airline industry from disabling losses. The Warsaw Convention is a body of rules that provide a uniform framework for governing the legal rights and responsibilities of international air carriers, passengers, and shippers. Moreover, the Convention provides a uniform system for documenting passenger tickets, baggage checks, and air-way bills. These items form the contractual relationship between the carrier and passenger or shipper. Fixing the rights and liabilities of the carrier and the passengers, the Convention helps alleviate confusion and conflict of laws uncertainties.


"It is believed that the principle of limitation will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges."

11. See supra note 9, at 499 (noting that the liability limitation was intended to encourage the growth of the infant airline industry by assisting airlines to "attract capital that might otherwise be scared away by the fear of a single catastrophic accident").

12. See Warsaw Convention, supra note 1, at preamble. (discussing the advantage of uniformity); see also Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 396, 314 N.E.2d 848, 854 (1974) (stating "[t]he apparent purpose of the entire Convention is uniformity among its diverse adherent Nations—the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered").

13. See Warsaw Convention, supra note 1, at arts. 3-16 (providing elaborate rules that regulate travel documents).


15. See 1 C. Shawcross & M. Beaumont, supra note 9, at I(89) (relating that the Warsaw Convention eliminated many conflicting law questions that would otherwise arise); Matte, The Warsaw System and the Hesitations of the U.S. Senate, 8 Annals Air & Space L. 151, 153 (1983) (stating that "[t]he most important reason for
The Warsaw Convention, however, receives its notoriety for placing an absolute limit on air carrier liability for passenger injury and death. Article 17 presumes carrier liability for passenger injuries caused by an “accident” occurring during air travel. Accordingly, once a plaintiff passenger shows that an “accident” occurred, the burden of proof shifts from the passenger to the carrier. To avoid liability, the carrier must demonstrate that it acted without negligence. In exchange for this presumption, the Convention limits the carrier’s liability to the passenger. Currently, under the Warsaw Convention, the ceiling for air carrier liability is approximately $8,300.

achieving uniformity was to avoid serious and complicated conflict of law problems which could arise in the absence of a treaty.

16. Warsaw Convention, supra note 1, at arts. 17, 22. Article 17 establishes liability for personal injury and death. Article 22 limits the carrier’s liability.

17. Warsaw Convention, supra note 1, at art. 17. The presumption, however, does not guarantee the injured plaintiff full recovery of the limited amount. A claimant can recover only the amount of damages proven not exceeding the liability ceiling; see Husserl v. Swiss Air Transport Co. (Husserl I), 351 F. Supp. 702, 708 (S.D.N.Y. 1972), aff’d per curiam, 485 F.2d 1240 (2d Cir. 1973) (predicating recovery under the Warsaw Convention on proof not only of an accident, but damages as well). But see Warsaw Convention, supra note 1, at art. 25 (permitting a claimant to pierce the liability ceiling under the Convention by proving that the carrier is guilty of wilful misconduct and recover proven damages in excess of the liability limit).


The carrier shall be liable for damage sustained during carriage:

(a) in the case of death, wounding, or any other bodily injury suffered by a traveler;

(b) in the case of destruction, loss, or damage to goods or baggage;

(c) in the case of delay suffered by a traveler, goods or baggage.


Presumptive liability is particularly helpful for plaintiffs in aviation tort cases because the expense and expertise required to prove negligence is often beyond the grasp of the injured victim. See B. Reukema, No New Deal on Liability Limits for International Flights, 18 INT’L L. & POL’Y 983, 994 (1984) (discussing plaintiff’s difficult burden in proving airline negligence).

20. See Warsaw Convention, supra note 1, at art. 22 (limiting airline liability for personal injury or death in international transportation to 125,000 Poincaré francs per person).

21. Id.; see Block v. Compagnie Nationale Air France, 386 F.2d 323, 325 (5th Cir. 1967) (computing that 125,000 Poincaré francs converts into $8,291.87 U.S. dollars); see also Trans World Airlines, Inc. v. Franklin Mint Corp., 104 S. Ct. 1776, 1780 (1984) (holding that the official price of gold would continue to be used as unit to convert liability limits into U.S. dollars). But see infra notes 33, 38, and accompanying
The Convention also mitigates the harshness of the presumption of liability, allowing air carriers to assert certain defenses. First, the Convention permits airlines to rebut the presumption of liability with a due care defense. An airline thus escapes liability by proving that it took reasonable measures to avoid the damage or that to take such measures was impossible. Second, the Convention permits air carriers to avoid liability when the passenger’s contributory negligence was a cause of the injury. Third, the airline may claim that the suit was not timely filed and that the Convention’s two year limitation therefore bars the claim.

A. United States Participation

The United States, although an observer, was not an official party to the international air conferences that formulated the Convention. Desiring to take advantage of the uniform scheme, however, the United States adhered to the treaty in 1934. Currently, the Warsaw Con-
Convention preempts domestic law because its treaty status makes it the supreme law in the United States. Since its adherence, however, the United States expressed dissatisfaction with the Convention’s low ceiling on air carrier liability. After paragraph of article 2 of the Convention should not apply to international transportation performed directly by the state. 78 CONG. REC. 11,582 (1934).

28. See 78 CONG. REC. 11,577 (1934) (Senate approving resolution of ratification supporting adherence to Warsaw Convention by voice vote without floor debate).

On July 31, 1934 the United States deposited its adherence instrument to the Warsaw Convention in the Poland Ministry of Foreign Affairs archives as directed by article 37 of the treaty. Lowenfeld & Mendelsohn, supra note 9, at 502. The Warsaw Convention was proclaimed effective for the United States on October 29, 1934. Id.

29. Dickens v. United States, 545 F.2d 886, 892 (5th Cir. 1977). Under domestic law, a carrier’s liability for passenger injury or death generally is determined by principles of negligence. Id. Negligence claims brought under domestic aviation law often are aided by the common law doctrine of res ipsa loquitur, permitting an inference of negligence on the part of the carrier. W. Keaton, Prosser and Keaton on the Law of Torts 242-47 (5th ed. 1984). Because American tort law holds the tortfeasor responsible for the costs of accidents for which he is at fault, the Convention’s ceiling on the amount of damages recoverable is a diametric departure from American tort principles. See 129 CONG. REC. S2246 (daily ed. March 7, 1983) (statement of Sen. Hollings) (asserting that limited liability under Warsaw Convention destroys compensation goal of our tort law system).


31. U.S. CONST. art. VI, cl. 2 (supremacy clause); see Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (noting that treaties made under United States authority are binding law that judges in every state must follow); see also Dalton v. Delta Airlines, Inc., 58 F. Supp. 338, 339 (S.D.N.Y. 1944) (stating Warsaw Convention, an international treaty, is supreme law in the United States).

32. The United States began to propose revisions of the air carriers’ liability limitation shortly after it adhered to the Warsaw Convention. See Lowenfeld & Mendelsohn, supra note 9, at 504 (underlying American concern was whether the limit had been set at the right level). Early proponents argued to raise the passenger recovery limit because airlines could obtain low-cost liability insurance. Id. at 502.

several unavailing attempts to adequately increase the liability limit, the United States submitted a notice on November 15, 1965 threatening denunciation of the Convention. The notice made clear, however, that the United States desired to remain a part of the cooperative Warsaw system. Before the United States could carry out its threat, a


The United States has not ratified any of these Protocols. The Senate refused to consent to the Hague Protocol in stalled proceedings, insisting that a $16,000 liability limit was still too low. See Lowenfeld & Mendelsohn, supra note 9, at 504-16 (providing detailed history of Hague Protocol ratification controversy). The modified liability limit under the Guatemala City Protocol also failed to appease the United States. See Comment, Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention, 54 Chi.-Kent L. Rev. 851, 854 (suggesting United States failure to ratify Guatemala Protocol due to inadequacy of $100,000 limitation and successful lobbying by air carriers). Most recently, the Senate rejected the modified liability scheme under the Montreal Protocols. 129 Cong. Rec. S2270 (daily ed. March 8, 1983) (failing to achieve a two-thirds majority vote for Senate treaty consent in a 50-42 vote).

The only other variance of the Warsaw Convention is the Guadalajara Convention. Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air Performed by a Person Other Than the Contracting Carrier, signed Sept. 18, 1961, ICAO Doc. No. 8181, 500 U.N.T.S. 31 (entered into force May 1, 1964). This Convention does not modify the liability limitations, rather it clarifies the position of successive carriers.


35. Department of State Press Release No. 268, 53 Dep't St. Bull. 923 (1965). The notice acknowledges:

To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and the Hague Protocol but without the limits of liability for personal injury or death.

Id.
number of airlines voluntarily agreed to recast the liability scheme pursuant to a provision in the Warsaw Convention that specifically stipulates that airlines may contract to increase the liability limit. The contractual arrangements under this provision developed into the Montreal Agreement.

B. THE MONTREAL AGREEMENT

The Montreal Agreement is a contractual variance of the Warsaw Convention. Undersigned by airlines with departures, arrivals, or connections in the United States, the Agreement neither directly involves the member nations, nor amends the Warsaw Convention. Functionally, however, airlines that participate in the Montreal Agreement accept two major variances in the Warsaw Convention scheme of liability: (1) carriers concede liability up to a $75,000 ceiling, including legal fees and costs; and (2) carriers relinquish the due care defense available under the Convention.

36. Id. The Proviso in the Denunciation Notice envisioned a provisional arrangement among principal international airlines to establish a higher liability limit. Id. Responding to the threat, the International Civil Aviation Organization (ICAO) held a conference in Montreal in 1966 in order to accommodate the Proviso and maintain United States participation in the Warsaw Convention. Lowenfeld & Mendelsohn, supra note 9, at 552.

37. Warsaw Convention, supra note 1, at art. 22(1) (providing that "by special contract, the carrier and the passenger may agree to a higher limit of liability").


39. See id. (describing the Montreal Agreement as including all international transportation which, according to the passenger ticket, includes a point in the United States as a point of origin, point of destination, or agreed stopping place); see also 48 Fed. Reg. 8048 (1983) (adopting rule by Civil Aeronautics Board (CAB) requiring all carriers with direct United States contact to adhere to the Montreal Agreement).


40. See Montreal Agreement, supra note 38 (noting that unlike other modifications of the Warsaw Convention, air carriers signed the Montreal Agreement rather than member nations); see also 2 C. SHAWCROSS & M. BEAUMONT, supra note 6, at (D)45-49 (listing air carriers participating in the Montreal Agreement).

41. See Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1259 n.6 (9th Cir.), cert. denied, 431 U.S. 974 (1977) (stressing Montreal Agreement is not a treaty, but an agreement among airlines).

42. See Montreal Agreement, supra note 38 (noting that when legal fees and costs are awarded separately, the liability limit adjusts to $58,000 under the Montreal Agreement).

43. Id.; see also supra notes 22-23 and accompanying text (discussing due care
Eliminating the due care defense, the Montreal Agreement, in effect imposes an absolute liability system upon participating airlines for injuries occurring from "accidents" in international air travel. The Agreement, however, only modifies the scheme of liability; it does not affect other provisions of the Warsaw Convention. The prerequisite contained in article 17 that an "accident" occur continues to trigger airline liability. Thus, the airline faces absolute liability for all injuries incurred due to "accidents" in connection with a flight unless the passenger is at fault or the claim arises after the two year statute of limitations. The modified liability scheme under the Montreal Agreement consequently prompted court consideration of the "accident" question.

II. INTERNATIONAL AIR ACCIDENTS: ARTICLE 17 AND UNITED STATES COURTS

The Warsaw Convention predicates airline liability to passengers upon the occurrence of an "accident." The Warsaw Convention, however, does not define the term "accident." Courts, therefore, must interpret article 17 to determine the meaning of the term as an element of liability. Since the air carriers' adoption of the Montreal Agreement,
courts experience the particular challenge to interpret the meaning of article 17’s “accident” in conjunction with the Agreement’s liability modification. Courts advanced differing views of the “accident” issue until ultimately, the Supreme Court provided the definition in Air France v. Saks.

A. EARLY VIEW: ABSOLUTE LIABILITY

During the Convention’s formative years, most cases brought under the Warsaw Convention involved airplane crashes or disappearances. Although avoiding a critical analysis of the term, courts listed these occurrences as “accidents.”

After the United States completed the Montreal Agreement, a totally new scheme of liability emerged, and the interpretation of the accident prerequisite increased in importance. Courts quickly expanded the breadth of the term “accident” to include hijackings and terrorist

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Courts have struggled to construe this condition as well; see Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975) (developing a tripartite test based on passenger’s activity, location, and control to determine that article 17 covered terrorist attack at departure gate); Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1262 (9th Cir.), cert. denied, 431 U.S. 974 (1977) (adopter totality of surrounding circumstances test to determine questions of embarking or disembarking).

See infra notes 53-79 and accompanying text (discussing court disparity interpreting “accident” resulting from differing perspectives of the absolute liability standard).


52. See Berguido v. Eastern Airlines, Inc., 369 F.2d 874 (3d Cir. 1966), cert. denied, 390 U.S. 996 (1968); Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 965 (1968); Domangue v. Eastern Airlines, Inc., 722 F.2d 256 (5th Cir. 1984) (finding that airplane crashes were clearly accidents under article 17).

53. See G. MILLER, supra note 6, at 109-10 (noting significance of determining conditions sufficient to hold air carrier liable subsequent to adoption of Montreal Agreement):

[The Montreal Agreement] changes the whole outlook of the liability regime since the carriers that are party to it have agreed to raise the liability limit to $75,000 and more importantly, ... to waive their right to use Article 20(1) of the Convention which allows them to avoid liability if they prove that they have taken all necessary measures to avoid the damage or that it was impossible to take such measures. Thus, the carrier is in effect subject to a regime of strict liability and it is essential to determine the conditions in which damage must occur before the carrier can be made responsible for it.

Id.

attacks, characterizing the airline's liability in these instances as absolute. During this period, however, courts continually failed to carefully consider the meaning and scope of the "accident" limitation.

Courts frequently relied on policy considerations to justify decisions. In the court's perspective, passenger protection was among the primary goals of the Warsaw Convention. Persuaded by the prospects of quicker settlements and unhampered accident investigations, courts were confident that the Warsaw Convention, as modified by the Montreal Agreement, now compelled an absolute liability standard to better effectuate passenger protection.


56. Reed v. Wiser, 555 F.2d 1079, 1081 (2d Cir. 1977). Although the Convention creates a presumption in favor of the plaintiff, the liability scheme remains based on fault. Under the Montreal Agreement, however, the airline, without the due care defense, is strictly liable for "accidents." See Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258-59 (9th Cir. 1977), cert. denied, 431 U.S. 974 (1977) (finding Montreal Agreement imposed absolute liability on air carriers); Day v. Trans World Airlines, Inc., 528 F.2d 31, 37 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976) (acknowledging Montreal Agreement absolute liability effect).

57. See Hussler v. Swiss Air Transport Co. (Hussler I), 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972). The court in Hussler I first addressed the hijacking question. After noting that hijackings were an unanticipated gap in the Warsaw Convention liability scheme, the court focused on the Montreal Agreement absolute liability system to provide guidance on the issue. Id. The Agreement was attentive to the problem of intentional acts of sabotage and addressed it by shielding saboteurs from recovery under the Warsaw system. Id. The court inferred, however, that airlines should be liable for innocent victims of such occurrences. Id. The court did not directly address the "accident" question. Courts extended this reasoning to terrorist attacks, and again skirted the "accident" issue. The emphasis in the terrorist attack cases focused on the embarking/dismounting question, rather than the "accident" issue. See supra notes 49, 55 (discussing terrorist attacks).


59. Id. Courts reasoned that because the Convention functions to redistribute the costs involved in international air transportation, the carrier is in the best position to bear the burden of accident costs. Courts found that the airlines' adoption of absolute liability under the Montreal Agreement justified this result. Id.
B. ENCOUNTERING TURBULENCE

Applying an absolute liability standard, however, presented complications when courts faced unusual factual situations, such as passenger injuries on routine international flights not caused by abnormal occurrences.60 These unusual injuries included hearing losses caused by normal cabin depressurization, and hernia and heart attacks occurring during the proper functioning of the aircraft. Earlier, courts had little trouble construing “accidents” from such events as airplane crashes, 61 severe turbulence, 62 hijackings, 63 terrorist attacks, 64 and accidental falls.65 When presented with injuries occurring during normal flight operations, however, courts were forced to look deeper into the meaning and limitation of the “accident” prerequisite.

The court in Warshaw v. Trans World Airlines, Inc., 66 was the first court confronted with this quandary. 67 After noting that the Montreal Agreement established an absolute liability standard without altering other provisions of the Convention, the court determined that all the prior cases recognizing accidents shared a common characteristic—an unusual, unanticipated incident as the immediate proximate cause of the injury.68 The court, thereby, held that an abnormal happening 69 was the key to determining whether an “accident” occurred and thus the appropriate standard to determine air carrier absolute liability for passenger injuries.70

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60. See infra text accompanying notes 65-88 (presenting unusual factual situations from which Warsaw Convention “accidents” have been claimed).
61. See supra note 52 (recognizing airplane crashes as “accidents” under Warsaw Convention).
63. See supra note 54 (finding hijackings encompassed by Warsaw Convention).
64. See supra note 55 (holding airlines liable for terrorist attacks under Warsaw Convention).
65. See Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611, 613 (S.D.N.Y. 1955) (finding accident when plaintiff fell from doorway after departure gate was removed); Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283, 18,284 (D. Md. 1983) (conceding “accident” occurred when intoxicated passenger fell on plaintiff). But see MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971) (finding “accident” did not occur when passenger fell in baggage claim area).
67. Id. at 401-05.
68. Id. at 410 (noting the lack of external factors that could have induced the injury, the court distinguished MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971)).
70. Id. (implying that an unusual or unexpected happening engenders the common meaning of the term “accident”). Other courts have used the common meaning to in-
Persuaded that an abnormal happening was the appropriate standard, other courts found that airlines could not be held liable for a passenger's internal reaction occurring during normal aircraft operation without an abnormality or malfunction causing the injury. Courts were not willing to make airlines the insurers of their passenger's health and to grant recovery under the Warsaw Convention merely because a plaintiff experienced an unfortunate incident during air travel.

In *Air France v. Saks*, the Ninth Circuit attempted to change the “accident” standard. In *Saks*, while the plane was in a routine descent for landing, a passenger suffered from a hearing loss after experiencing severe pain and pressure in her left ear. The district court applied an unusual or abnormal occurrence standard and granted summary judgment for Air France. The aircraft's depressurization system was not affected by anything unusual or unexpected. The district court, therefore, found Air France not liable for damages under the Warsaw Convention.

C. NINTH CIRCUIT'S ABSOLUTE LIABILITY STANDARD

On appeal, however, the Ninth Circuit explicitly rejected the “unusual or unexpected happening” standard. Construing the Montreal Interpret article 17 terms. See MacDonald v. Air Canada, 439 F.2d 1402, 1405 (1st Cir. 1971) (using the common meaning to define "disembarking"); Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 221 (S.D.N.Y.), aff'd, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976) (using the common meaning to define "embarking").


72. See Warshaw v. Trans World Airlines, Inc., 442 F. Supp. 400, 413 (E.D. Pa. 1977) (demonstrating the court's sympathy for the plaintiff's plight, but the court did not go so far as to provide an actionable cause without some abnormal occurrence).

73. Saks v. Air France, 724 F.2d 1383 (9th Cir. 1984), rev'd, 105 S. Ct. 1338 (1985)

74. *Id.* at 1384. As a passenger on an international flight, Saks's suit for damages was governed by article 17 of the Warsaw Convention as modified by the Montreal Agreement. *Id.* Both instruments contractually bind the United States and Air France. *Id.*


76. Saks v. Air France, 724 F.2d 1383, 1384 (9th Cir. 1984).

Agreement as imposing absolute liability on airlines for all injuries proximately caused by occurrences during air travel, the court found that absolute liability attaches under the Montreal Agreement for all risks inherent in air travel. Consequently, under the Ninth Circuit's standard, any occurrence associated with the operation of an aircraft triggers an article 17 "accident." The Ninth Circuit's absolute liability standard broadened the scope of the term "accident" thus encompassing all incidents connected with air travel.

D. SAKS: UNUSUAL OR UNEXPECTED HAPPENING STANDARD

In *Air France v. Saks*, the Supreme Court reversed the Ninth Circuit decision, rejecting that circuit's absolute liability theory. The Court specifically distinguished between the cause and effect of an injury, holding that an accident must be the cause of the injury and not the injury itself. Furthermore, the Court surmised that to hold airlines absolutely liable for passenger injuries under article 17 requires some link in the chain of causation between the injury and the unusual or unexpected event.

To support its definition in *Saks*, the Supreme Court concluded that the Montreal Agreement did not in fact establish true absolute liability. The Court reasoned that although the Montreal Agreement eliminates the due care defense, the Agreement does not expand the scope of carrier liability to include all risks inherent in air travel. The Warsaw Convention continues to apply and therefore requires an "accident"

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78. *See id.* at 1386-87 (reasoning that the Montreal Agreement created a shift from negligence to absolute liability for all injuries incurred from air "accidents").
79. *See id.* at 1384 (holding that a malfunction or abnormality was not a prerequisite for liability under the Warsaw Convention). The court argued that permitting an air carrier to assert that a passenger's injury was not caused by an accident would, in essence, permit the carrier to use the due care defense. An air carrier could not proceed with this argument, however, because the Montreal Agreement eliminated the due care defense, imposing absolute liability on airlines. Therefore, the Ninth Circuit held that liability would attach to injuries resulting even from normal aircraft operations. *Id.* at 1384-88.
81. *Id.* at 1342. The Court stressed that "it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone." *Id.* (emphasis in original).
82. *Id.*
83. *Id.* at 1346.
84. *Id.*
85. *Id.* The Court noted that the characterization of the Montreal Agreement as imposing absolute liability is not accurate because liability is absolute only to the extent that an airline cannot utilize the due care defense. *Id.* The accident issue involves analysis of the nature of the event, not the care taken by the airline. *Id.*
before absolute liability attaches.\textsuperscript{86}

Subsequent decisions construing “accident” under article 17 focused on the unexpected and unusual criteria enunciated in \textit{Saks}. For example, one court held that a landing aggravating a neck injury could not be construed as an “accident” because it was not unusual or unexpected as a landing is an anticipated operation of every flight.\textsuperscript{87} Another court held, however, that a bomb threat inducing a miscarriage was an “accident” under \textit{Saks’} definition.\textsuperscript{88} The court reasoned that the threat was an unexpected and unusual external event outside the normal operation of the aircraft. Therefore, the miscarriage induced by the bomb threat was an accident under the Warsaw Convention.\textsuperscript{89}

\section*{III. THE WARSAW CONVENTION ACCIDENT STANDARD: CLEARED FOR LANDING}

Because the Warsaw Convention is designed to provide uniform international law, courts must interpret the Warsaw Convention consistently.\textsuperscript{90} The threat of absolute liability for airline “accidents” under the Montreal Agreement necessitates formulating a uniform definition of the term. The Supreme Court in \textit{Saks} attempted to provide this uniform standard, requiring that an unusual or unexpected event cause the requisite “accident.”\textsuperscript{91} Although the Supreme Court recognized that causation is the fundamental element in determining carrier liability,\textsuperscript{92} the unusual or unexpected criteria provides inadequate guidance in the context of airline liability, and is inconsistent with the purposes and expectations of the Warsaw Convention.\textsuperscript{93} Failing to devise an aircraft-
connected standard, the Supreme Court undermined the uniformity it sought to establish. The design of the Warsaw Convention mandates an aircraft accident.

A. EFFECTUATING THE DESIGN OF THE WARSAW CONVENTION

The text of the Warsaw Convention and its negotiating history support a more technical standard for the term “accident” than the Supreme Court provided in Saks. The Warsaw Convention provides two distinct standards for air carrier liability: an “accident” is the threshold for recovery in article 17 for personal injury or death, whereas an “occurrence” is necessary to establish air carrier liability in article 18 for destruction or loss of baggage. Therefore, an “accident” is plainly not synonymous with an “occurrence.” Because “occurrence” is a broader and more relaxed standard, it follows that “accident” requires more than an unusual or unexpected happening.

An examination of the terms of various proposals to amend the Warsaw Convention makes this distinction more apparent. The Guatemala Protocol and the Montreal Protocol No. 4 both amend article 17, substituting the word “event” for “accident.” The Protocols suggest that the substitution of the word “event” for “accident” expands the scope of carrier liability under the Warsaw Convention. The amended

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94. Compare Warsaw Convention, supra note 1, at art. 17, with Warsaw Convention, supra note 1, at art. 18(1) providing:

(1) The carrier shall be liable for damages sustained in the event of destruction or loss of, or of damage to, checked baggage or goods, if the occurrence which caused the damage so sustained took place during the transportation by air. Id.

95. Air France v. Saks, 105 S. Ct. 1338, 1342 (1985). The Court stated that the drafters “otherwise logically would have used the same word in each article.” Id.

96. See Guatemala Protocol, supra note 33, at art. IV (substituting word “event” for “accident”).


98. Guatemala Protocol, supra note 33, at art. IV. The text of article 17 as amended provides:

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. Id. (emphasis added).

article 17 under the Guatemala Protocol also excludes liability for injuries resulting "solely from the state of health of the passenger." The exemption for the passengers' state of health indicates that the expansion still does not include every injury occurring during a flight, particularly internal physical reactions. Since the United States is not a party to these Protocols and thus continues to adhere to the original Warsaw Convention, courts remain bound to apply the article 17 "accident" requirement.

B. SAKS: NO FLIGHT PLAN FILED

When considering an article 17 accident under the Warsaw Convention, the proper focus should be on a malfunction or interference in the operation of an aircraft. By linking an "accident" to aircraft operation, the carrier will be liable for mishaps happening within the airline's control of the functioning aircraft. This standard, however, will not create carrier liability for accidents occurring on board that have no connection with physical air transportation. The Warsaw Convention does not impose liability for all events connected with international flights. Recovery for damages under article 17 requires more than travel or an occurrence, it requires an accident.

A more precise aircraft malfunction standard recognizes that causa-
tion is the intrinsic basis for liability.\(^{107}\) Concurrently, the standard dis-
associates itself from negligence to avoid undermining the Montreal
Agreement that eliminated the due care defense. In accordance with
the objectives of both the Warsaw Convention and the Montreal
Agreement, this aircraft malfunction standard deters drawn out litiga-
tion on the liability issue.\(^{108}\) Moreover, this standard alleviates exten-
sive judicial inquiry, automatically excluding all injuries that occur
during the normal operation of an aircraft and injuries caused by the
peculiar physical conditions of passengers. At the same time, the stan-
dard includes hijackings and terrorist attacks as “accidents” since they
interfere with the scheduled operation of the aircraft.

Courts, including the Supreme Court in Saks, alluded to a more
technical standard, but failed to adequately define its scope or empha-
size its utility.\(^{109}\) Common sense dictates that linking the definition of
“accident” to the operation of the aircraft, rather than resorting to its
ordinary meaning,\(^{110}\) best effectuates the intended purpose of the Con-
vention. Furthermore, an aircraft accident standard is consistent with
the context of the Convention as well as the genuine shared expecta-
tions of all the parties to the Convention.\(^{111}\)

C. Judicial Legislation

The judiciary’s tendency to expand the scope of Warsaw Convention
“accidents” may be due to blurred perceptions of the treaty. Perceiving
inequities in the Convention’s low liability limits,\(^{112}\) courts actively at-
tempt to reconstruct these liability provisions to expand the carrier’s

\(^{107}\) See Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491 (1934) (recogniz-
ing the fundamental distinction between an accident that is the cause of the injury and
an injury that is the accident itself).

1977) (emphasizing the United States goal in maintaining its participation in the War-
saw Convention through the Montreal Agreement is the rapid settlement of disputes).

1977) (noting that the easiest way to solve the difficulty would be to limit absolute
liability for aircraft accidents) (emphasis added).

\(^{110}\) See 1 LAW & COMMERCIAL DICTIONARY IN FIVE LANGUAGES 15 (1985) (de-
fining “accident” as “an undesigned, sudden, and unexpected event”); 1 THE OXFORD
ENGLISH DICTIONARY 55 (1933) (defining “accident” as “anything that happens with-
out foresight or expectation”).

\(^{111}\) See Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), aff’d, 373
U.S. 49 (1963) (stressing that specific words of treaties should be given meaning con-
sistent with genuine shared expectations of the contracting parties).

\(^{112}\) See Stratis v. Eastern Airlines, 682 F.2d 406, 412 (2d Cir. 1982); Reed v.
Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977) (acknowledging that unfairness of liability
limitation under the Warsaw Convention should not affect courts’ interpretative role).
liability by broadening the scope of the "accident" prerequisite.\textsuperscript{113} Courts, however, have no authority to alter the Warsaw Convention through active judicial interpretation.\textsuperscript{114} Treaty revision is a function reserved for the political branches.\textsuperscript{115} Courts possess an interpretive role in the treaty process, and can construe a treaty only within the guidelines established by executive and legislative action.\textsuperscript{116}

**CONCLUSION**

The "accident" requirement is pivotal to airline liability under the Warsaw Convention. In ascertaining whether an "accident" occurred, courts responded with conflicting interpretations due to the Montreal Agreement's modified liability scheme. The Supreme Court in *Saks* ultimately defined an article 17 accident as an unusual or unexpected happening external to the passenger. The history of the Warsaw Convention, however, clearly indicates that the parties did not intend article 17 to apply to accidents unrelated to aircraft operations, a result that is inevitable under the broad terms of the Court's standard. Accordingly, if the United States intends to be a party to the uniform system of airline regulation, the Warsaw Convention warrants a more technically attuned definition of the "accident" standard.

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\textsuperscript{113} See *Saks* v. Air France, 724 F.2d 1383 (9th Cir. 1984) (attempting to expand air carrier liability for all accidents resulting from air travel).


\textsuperscript{115} The Court's role in relation to treaties was clearly described by Justice Story in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1 (1821):

In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty . . . We are to find out the intention of the parties, by just rules of interpretation applied to the subject-matter; and having found that, our duty is to follow it, so far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

*Id.* at 70.

\textsuperscript{116} See *In re Korean Airlines Disaster of September 1, 1983*, 19 Av. Cas. (CCH) 17,584, 17,594 (D.D.C. 1985) (noting that "[w]hile American courts may be justifiably frustrated with the anachronism which the treaty limitation has become, it is not within the province of the judiciary to alter the quid pro quo agreed to by the political branches"); see also Note, *A Proposed Revision of the Warsaw Convention*, 57 Ind. L. J. 297 (1982) (claiming alteration of Warsaw Convention is not prerogative of the judiciary and insisting that judicial branch uniformly adhere to liability limitations until action is taken by the executive branch).