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Air France v. Saks:
**The Applicability of the Warsaw Convention to a
Passenger Injury Sustained During a Routine
International Flight**

The liability of an air carrier for injuries sustained by passengers in the course of international air travel is governed by the Warsaw Convention.¹ Article 17 of this treaty permits recovery if an "accident" causes injury to the passenger.² In *Air France v. Saks*³ the Supreme Court addressed the issue whether the normal operation of an aircraft's pressurization system, which allegedly caused a passenger's deafness, qualified as an accident under article 17 of the Warsaw Convention.⁴

In holding that the carrier was not liable for the traveler's injury,⁵ the Court construes the article 17 accident provision as applicable only to events which are unusual or unexpected. This note will analyze the Supreme Court's interpretation of article 17 in light of the negotiating history of the Warsaw Convention and other court decisions defining the liability of air carriers under this treaty.

In *Air France* the passenger, Valerie Saks, was on board an aircraft en route from Paris to Los Angeles.⁶ As the plane began its descent, Saks experienced pain and pressure in her left ear. The aircraft's pressurization system was operating normally at the time. The plane landed and Saks disembarked. Five days later, a doctor concluded that Saks had suffered permanent deafness in her left ear.⁷

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) [hereinafter cited as Warsaw Convention].

² Article 17 provides:

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

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

³ 105 S. Ct. 1338 (1985).

⁴ *Air France*, 105 S. Ct. at 1341.

⁵ *Id.* at 1345.

⁶ This flight qualifies as international transportation as defined in the Warsaw Convention, *supra* note 1, art. 1(2).

⁷ *Air France*, 105 S. Ct. at 1340.

In a personal injury suit filed against *Air France*, Saks claimed that deafness caused by normal pressurization changes was an accident within the meaning of article 17 of the Warsaw Convention. The plaintiff defined accident as a risk of air travel and claimed that the potential for pressure changes causing hearing loss was such a hazard.⁸

The United States District Court for the Northern District of California granted Air France's motion for summary judgment on the ground that Saks had not sustained her burden of proving that an accident had caused her injury.⁹ The Court of Appeals for the Ninth Circuit reversed, holding that pressurization of an aircraft does fit the definition of "aircraft accident" as that term is used in the aviation context.¹⁰ In reaching its decision, the court emphasized that the trend is to construe broadly the accident provision of article 17 to afford greater protection to passengers.¹¹ As a policy consideration, the court noted that an air carrier is in the best position to allocate efficiently the costs of liability for passenger injuries.¹²

The Supreme Court reversed the court of appeals, ruling that an injury resulting from the normal operation of an airplane's pressurization system is not covered by the accident provision of article 17.¹³ In defining the term "accident" as used in this international air treaty, the Court looked to the text of the Convention. Speaking for the majority, Justice O'Connor reasoned that because the drafters used the word "accident" in the article 17 provision dealing with passenger injuries¹⁴ and "occurrence" to apply to damage to baggage under article 18,¹⁵ they intended these terms to have different

⁸ *Id.*

⁹ The court defined accident as an "unusual or unexpected" occurrence and found that the normal operation of a plane's pressurization system does not fit within this definition. *Id.*

¹⁰ *Saks v. Air France*, 724 F.2d 1383, 1385 (9th Cir. 1984), *rev'd*, 105 S. Ct. 1338 (1985). The court of appeals defined aircraft accident as "an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked . . ." Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo, and Records, 49 C.F.R. § 830.2 (1977). A change in the pressurization system in an aircraft during flight would be such an occurrence.

¹¹ *Saks*, 724 F.2d at 1387. In support of this proposition, the court cited cases which have held that hijackings and terrorist attacks are accidents within the meaning of article 17. See *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y.), *aff'd*, 485 F.2d 1240 (2d Cir. 1972).

¹² *Saks*, 724 F.2d at 1387.

¹³ *Air France v. Saks*, 105 S. Ct. 1338, 1346 (1985).

¹⁴ Warsaw Convention, *supra* note 1, art. 17.

¹⁵ *Id.* art. 18.

meanings.¹⁶

Because the Convention was written in French, the Court also considered the French legal definition of accident.¹⁷ This term is defined as "a fortuitous, unexpected, unusual, or unintended event"¹⁸—a meaning consistent with the negotiating history of the treaty,¹⁹ the conduct of the parties subsequent to the adoption of the treaty,²⁰ and other court decisions interpreting this term.²¹ Accordingly, the Court concluded that to establish an accident, a mere risk of air travel is not enough. An external event, which is unusual or unexpected, must cause the passenger's injury.²² The evidence in *Air France* indicated that the changes in air pressure as the aircraft descended were normal. Thus, Saks was denied recovery for deafness caused by her "own internal reaction to the usual, normal, and expected operation of the aircraft."²³

Because the text of the Warsaw Convention provides little guidance to the drafters' intended meaning of the term, "accident," the Supreme Court in *Air France* looked to extrinsic evidence. Generally, the Court liberally construes the terms of a treaty.²⁴ Important fac-

¹⁶ *Air France*, 105 S. Ct. at 1341. Based on this distinction between accident and occurrence, the Court was critical of the court of appeals' conclusion that the two terms had identical meanings. *Id.* at 1342. The Supreme Court noted that the lower court's definition of accident applies to accident investigations and not to article 17 injuries and liability. *Id.* at 1346.

¹⁷ *Id.* at 1343. See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968) (legally binding meaning of Warsaw Convention provisions is French meaning). See also *Maximov v. United States*, 373 U.S. 49, 54 (1962) (terms of treaty should be given ordinary meaning unless contrary intent shown). For helpful background on the rules of treaty interpretation, see generally A. McNAIR, *THE LAWS OF TREATIES* (1961).

¹⁸ *Air France*, 105 S. Ct. at 1343.

¹⁹ The Court analyzed the work of the drafting committee in formulating the text of articles 17 and 18. They concluded from these negotiations and the various changes made in the text that "a passenger's injury must be caused by an accident, and an accident must mean something different than an 'occurrence' on the plane." *Id.* at 1343, 1344.

²⁰ *Id.* at 1343. The Court referred specifically to an air law conference held in Guatemala City in 1971 in which an amendment to article 17 was approved by some member nations (although not the United States). This amendment inserted the term "event" in place of "accident" to broaden the scope of an air carrier's liability to injured passengers. This change in terminology implies that an accident has a more narrow meaning than event. *Id.* at 1344. For the text of this amendment, see A Protocol to Amend the Convention for the Unification of Certain Rules Pertaining to International Carriage by Air, Mar. 1971, ICAO Doc. 8932 [hereinafter cited as *Guatemala Protocol*].

²¹ *Air France*, 105 S. Ct. at 1344. The Court cited several decisions in support of its definition of "accident." See *Air France v. Haddad*, Judgment of June 19, 1979, Cour d'appel, Paris, 1979, 1979 *Revue Francaise de Droit Aérien* 327, *aff'd*, Judgment of Feb. 16, 1982, Cour de Cassation, Paris, 1982 Bull. Civ. I 63; *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), cert. denied, 105 S. Ct. 1776 (1985); *McDonald v. Air Can.*, 439 F.2d 1402 (1st Cir. 1971); *Scherer v. Pan Am. World Airways*, 54 A.D.2d 636, 387 N.Y.S.2d 580 (1976).

²² *Air France*, 105 S. Ct. at 1345.

²³ *Id.* at 1346.

²⁴ 2 C. HYDE, *INTERNATIONAL LAW* § 531, at 1479 (2d ed. 1945). See *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1942).

tors in treaty interpretation are the intent of the parties²⁵ and the negotiating history, prior and subsequent to the treaty.²⁶ To understand more fully the Court's interpretation of article 17, a brief chronology of the history of the Warsaw Convention is necessary.²⁷

The two major goals of the Warsaw Convention²⁸ drafters were to create a uniform body of law for claims arising in the course of international air transportation and to place a monetary limit on carriers' liability to passengers for injuries suffered during such travel.²⁹ Of primary concern was a desire to stabilize economically the airline industry, which was still in its infancy.³⁰ The United States, in ratifying this treaty, expressed its commitment to these objectives.³¹

Although the protection of a developing air transportation industry³² was a major aim at the time the Warsaw Convention was adopted, this goal became less significant as time passed. By 1955 air travel was a multi-billion dollar business³³ and increasing emphasis was placed on providing adequate protection to passengers.³⁴

The United States expressed dissatisfaction with the limits of

²⁵ *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir. 1977). See also *A. McNair*, *supra* note 17, at 365 (intent of parties must be considered in light of all relevant factors).

²⁶ 2 C. HYDE, *supra* note 24, § 534, at 1497. See *Day*, 528 F.2d at 31, 35 (conduct of parties after treaty ratification aids in interpreting its provisions); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 411 (E.D. Pa. 1977) (parties' subsequent interpretations reveal intent in matters not anticipated at time of Convention); *Husserl*, 351 F. Supp. at 702, 707 (subsequent conduct of parties relevant to treaty interpretation).

²⁷ *Choctaw Nation*, 318 U.S. at 432. See also *Block*, 386 F.2d at 336 (considerations of how Convention was conceived and developed are helpful in treaty interpretation).

²⁸ The Warsaw Convention was adopted on October 12, 1929 and officially accepted by the United States in 1934. Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 *FORDHAM L. REV.* 369, 370 (1976). For an excellent general discussion of the background of the Warsaw Convention, see generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 *HARV. L. REV.* 497 (1967).

²⁹ Comment, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 *J. AIR L. & COM.* 653, 658 (1980).

³⁰ Unlimited liability might impede persons from investing in airlines. Lowenfeld & Mendelsohn, *supra* note 28, at 499. Furthermore, the economic well being of the airline industry would be greatly threatened if unlimited liability were imposed in a major air accident. *McDonald*, 439 F.2d at 1402, 1406.

³¹ In his letter to the U.S. Senate recommending ratification of the Warsaw Convention, Secretary of State Cordell Hull wrote, "It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation . . ." Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934).

³² In 1929 international air travel was in its beginning stages. Pan American was the sole international air carrier in the United States and its flights were limited to Cuba. Air France served as a link between only France, England, and Africa. No flights took place at night and the maximum speed of carriers was 150 miles an hour. 1 L. KREINDLER, *AVIATION ACCIDENT LAW* § 11.02(2) (1971).

³³ Comment, *supra* note 29, at 661.

³⁴ Note, *Maximizing Passenger Recovery Under the Warsaw Convention: Articles 17 and 22*, 34 *WASH. & LEE L. REV.* 141, 148 (1977).

carrier liability specified in the treaty.³⁵ An air conference held at The Hague in 1955 resulted in the adoption of an increase in carrier liability from 8,300 U.S. dollars to approximately 16,600 dollars.³⁶ The United States did not, however, ratify this amendment.³⁷ In the administration's view, the Hague Protocol did not set liability limits which would adequately compensate travelers for injuries.³⁸

In 1965, as a result of continued discontent with the limits of liability, the United States gave notice of its denunciation of the Warsaw Convention.³⁹ In response to this threatened withdrawal, the International Air Transportation Association initiated discussions among various air carriers which resulted in the Montreal Agreement, an interim contract that became effective on May 16, 1966.⁴⁰ Under the terms of this contract, the limit of an air carrier's liability for injuries sustained by passengers was raised to 75,000 U.S. dollars.⁴¹ Additionally, the carrier waived the defense of due care provided under article 20(1)⁴² the effect of which was to impose absolute liability on the carrier if all requirements of the Warsaw Convention are met.⁴³ The United States approved this agreement and withdrew its notice of denunciation.⁴⁴ The Montreal Agreement, as a special contract, did not supersede the Warsaw Convention.⁴⁵ Instead, it expanded carrier liability and increased passenger protection in those cases in which the Convention is applicable.⁴⁶

Further changes in the liability imposed on air carriers resulted from an international air conference held in 1971. The Guatemala Protocol, adopted on March 8, 1971,⁴⁷ provided that air carriers

³⁵ The liability limit in the original treaty was 8,300 U.S. dollars. Warsaw Convention, *supra* note 1, art. 22.

³⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on Oct. 12, 1929. Done at The Hague on Sept. 28, 1955, ICAO Doc. 7632, 48 U.N.T.S. 372 (1963) [hereinafter cited as Hague Protocol].

³⁷ 1 L. KREINDLER, *supra* note 32, at § 12.01.

³⁸ Lowenfeld & Mendelsohn, *supra* note 28, at 546-47.

³⁹ Dep't of State Press Release No. 268 (Nov. 15, 1965), 53 DEP'T ST. BULL. 923 (1965).

⁴⁰ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement No. 18,900, 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement].

⁴¹ *Id.*

⁴² Warsaw Convention, *supra* note 1, art. 20(1).

⁴³ Montreal Agreement, *supra* note 40. This contract applies only to air transportation to and from the United States. A passenger becomes bound to its terms by "[p]roper tendering of a ticket combined with reasonable notice of its contents." Comment, *supra* note 29, at 669.

⁴⁴ Federal Aviation Program, 49 U.S.C. § 1502 (1976).

⁴⁵ The Montreal Agreement contractually changed the tariffs of air carriers. If its drafters had attempted to amend article 17, its legal effectiveness would be conditioned on ratification by the U.S. Senate. See *Warsaw*, 442 F. Supp. at 400, 408. See also *Day*, 528 F.2d at 36.

⁴⁶ Lowenfeld & Mendelsohn, *supra* note 28, at 597.

⁴⁷ Guatemala Protocol, *supra* note 20.

would be liable for injuries to passengers up to 100,000 U.S. dollars.⁴⁸ Of particular significance, this Protocol changed article 17 such that absolute liability would result if an *event* as opposed to an *accident* caused passenger injury during an international flight.⁴⁹ Although the United States signed this Protocol, it has not yet been ratified by the Senate and, thus, lacks the force of law.⁵⁰

The foregoing analysis illustrates that adequate passenger protection has become an important consideration in the context of the Warsaw Convention and subsequent amendments to this international air treaty. Liability against a carrier is not, however, automatic. The Warsaw Convention, as amended by the Montreal Agreement, continues to be the legally binding treaty governing international air transportation. To have a valid claim, therefore, the accident requirement of article 17 must be met. In interpreting the meaning of "accident," courts have recognized their duty to ascertain the intent of the treaty drafters while, at the same time, taking into account policy considerations and legislative action subsequent to the adoption of the treaty.⁵¹

Generally, courts have defined accident to mean an undesigned, unintended, or unexpected event.⁵² In the context of air transportation and, specifically, in cases factually similar to *Air France*, the term accident has been defined as an unusual or abnormal happening.

In *Warsaw v. Trans World Airlines, Inc.*,⁵³ for example, a passenger brought suit under the Warsaw Convention for injury to her inner ear resulting from normal cabin repressurization as the aircraft descended.⁵⁴ The district court initially noted that a causal connection must be found between the alleged accident and the passenger's injury.⁵⁵ In reviewing other decisions interpreting article 17, the court found that a commonality for carrier liability was "a happening

⁴⁸ *Id.*

⁴⁹ The revised version of article 17 reads:

The carrier is liable for damage sustained in the 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.

Guatemala Protocol, *supra* note 20 (emphasis added).

⁵⁰ 1 L. KREINDLER, *supra* note 32, at § 12B.01. See also Topical Survey, *Aviation—Warsaw Convention—Air Carrier's Liability for "Accidents" Under Article 17 Defined To Exclude Injury Caused by Routine Repressurization of Jet Aircraft*, 4 INT'L TRADE L.J. 285 (1979).

⁵¹ Topical Survey, *supra* note 50, at 289.

⁵² *Koehring Co. v. American Auto. Ins.*, 353 F.2d 993, 996 (7th Cir. 1965). See also *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1969).

⁵³ 442 F. Supp. 400 (E.D. Pa. 1977).

⁵⁴ *Id.* at 405.

⁵⁵ Based on the testimony of a medical expert, the court concluded that although a cause of the passenger's injury was the cabin repressurization, another contributing factor was that the passenger had previously undergone a stapendectomy. This factor alone, however, would not have caused the injury. *Id.* at 405.

or an event which in each case was beyond the normal and preferred mode of operation for the flight."⁵⁶ In comparing the term "accident" in article 17 with "occurrence" in article 18, the court reasoned that liability to passengers must be conditioned on a risk of air travel while liability for damage to baggage can result from the mere happening of an event.⁵⁷ After discussing negotiations related to the Guatemala Protocol,⁵⁸ the court concluded that to qualify as an accident, there must be "an untoward event, out of the ordinary, triggered by some external event."⁵⁹ Although the passenger's injury was caused by an external event, namely, the cabin repressurization, the accident requirement was not met because the pressure system was operating in its normal, ordinary manner.⁶⁰ Thus, the passenger was denied recovery under the Warsaw Convention.

In the analogous case of *DeMarines v. KLM Royal Dutch Airlines*⁶¹ a passenger suffered permanent loss of equilibrium while aboard an international flight and filed suit under the Warsaw Convention claiming that the plane's pressurization system caused the injury.⁶² In interpreting the accident provision of article 17, the Court of Appeals for the Third Circuit agreed with the district court's jury charge defining accident as an unexpected happening.⁶³ Relying on *Warsaw*, the circuit court concluded that the evidence was insufficient for a jury to infer that the pressurization system was operating abnormally, a prerequisite to holding the carrier liable.⁶⁴

Six years later, in *Abramson v. Japan Airlines Co.*⁶⁵ the Third Cir-

⁵⁶ *Id.* at 410.

⁵⁷ *Id.* at 411. Based on this analysis, the district court viewed an accident as an unusual, out of the ordinary event while an occurrence could happen under normal conditions. *Id.* at 412.

⁵⁸ Guatemala Protocol, *supra* note 20.

⁵⁹ *Warsaw*, 442 F. Supp. at 412. The court emphasized that an accident would not encompass injury due to a passenger's health condition that had no relation to the flight itself. *Id.* at 412.

⁶⁰ *Id.* at 413.

⁶¹ 433 F. Supp. 1047 (E.D. Pa. 1977), *rev'd*, 580 F.2d 1193 (3d Cir. 1978).

⁶² *DeMarines*, 580 F.2d at 1195. The testimony of medical experts established that rapid decompression contributed to the passenger's injury. *Id.* at 1197.

⁶³ *Id.* at 1196. The charge to the jury by the district court was as follows:

An accident is an event, a physical circumstance, which takes place not according to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening.

Id.

⁶⁴ *Id.* at 1197, 1198. The court of appeals remanded the case to the district court for a new trial due to procedural errors. The interpretation of the term accident was given as a guideline to aid the lower court in its new trial. The plaintiff's argument, which the district court accepted, was that because several passengers experienced discomfort, the pressurization system was malfunctioning. The circuit court viewed evidence that six out of 190 passengers experienced some pain to be insufficient to establish abnormality, and noted that it was equally plausible that the pain resulted from the individuals' peculiar susceptibilities. *Id.* at 1197.

⁶⁵ 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1776 (1985).

cuit again considered the applicability of the Warsaw Convention to a passenger injury occurring during an international flight. While en route from Alaska to Japan, the passenger, Stanley Abramson, experienced a hernia attack.⁶⁶ Abramson's requested permission to lie down in order to alleviate the attack⁶⁷ was denied by a stewardess.⁶⁸ Citing *DeMarines*, the passenger claimed that the airline's refusal to allow him to lie down was an unusual event causing the aggravation of his hernia condition.⁶⁹ Abramson analogized his situation to terrorist attacks, bombings, and hijackings, all of which are treated as accidents under article 17.⁷⁰ The court, unpersuaded by this reasoning, distinguished *Abramson* on the ground that it involved an ordinary, routine flight while those other cases did not.⁷¹ In refusing to impose liability against Japan Airlines, the Court of Appeals for the Third Circuit held that "in the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight" did not meet the requirements of article 17.⁷² The court viewed external factors in relation to the operation of the aircraft, not to the acts of airline personnel.

In contrast, the court in *Chutter v. KLM Royal Dutch Airlines*⁷³ found that an event on board an air carrier that caused injury to a passenger did constitute an accident.⁷⁴ After boarding a flight bound for Athens, Greece the passenger in *Chutter* left her seat and went to the rear door of the aircraft to wave goodbye to her daughter. Unaware that the boarding ramp had just been removed, the passenger stepped out of the plane and fell to the ground.⁷⁵ Without explicating its reasoning,⁷⁶ the court ruled that in this situation, the accident provision of article 17 had been met.⁷⁷

⁶⁶ The passenger had "a pre-existing parasophageal hiatal hernia." *Id.* at 131.

⁶⁷ In the past, Abramson had been able to ward off these attacks by lying down and massaging his stomach. *Id.*

⁶⁸ *Id.* at 131.

⁶⁹ *Id.* at 132.

⁷⁰ *Id.* at 132, 133.

⁷¹ *Id.* at 133.

⁷² *Id.* Cf. *Scherer v. Pan Am. World Airways*, 54 A.D.2d 636, 387 N.Y.S.2d 580 (1976) (development of thrombophlebitis as result of sitting on board airplane not injury caused by accident absent some evidence of turbulence, collision, or unusual event).

⁷³ 132 F. Supp. 611 (S.D.N.Y. 1955).

⁷⁴ *Id.* at 613.

⁷⁵ *Id.* at 612, 613.

⁷⁶ The language of the opinion seems to indicate that the court defined the term accident from the passenger's perspective and considered whether an accidental result had occurred. This is in contrast to most cases which inquire into whether the act causing the injury (i.e., the removal of the ramp) was a departure from the normal mode of the aircraft operation. The court stated, "Without embarking upon a detailed analysis of the plaintiff's physical position at the time of her fall, I am satisfied that the accident causing the damage occurred, within the terms of article 17 of the Convention" *Id.* at 613.

⁷⁷ *Id.* Although the situation in this case was covered under article 17, the complaint was dismissed because the two-year statute of limitations had run and, additionally, the court found the passenger was contributorily negligent. *Id.* at 616.

In addition to interpreting the applicability of the Warsaw Convention to passenger injuries on board an aircraft, courts have also considered whether this international treaty covers certain injuries sustained in the air terminal area.⁷⁸ In *McDonald v. Air Canada*⁷⁹ the passenger, a seventy-four year old woman, sought recovery under the Warsaw Convention for injuries suffered as a result of a fall in the baggage area of the terminal.⁸⁰ The passenger had become mentally incompetent by the time of the trial and there was no evidence indicating how or why she fell.⁸¹ The court found the basis of liability too tenuous and noted that the injury could just as likely have occurred due to an internal condition of the plaintiff.⁸²

In recent years, courts have broadened the scope of the accident provision in article 17 to include intentional acts of third parties.⁸³ In doing so, the focus has shifted from the more narrow approach of whether the happening is an unusual or unexpected change in the normal operation of an air carrier to a broader inquiry into whether an unusual event, which may or may not be related to the functioning of the carrier, caused the injury.

In *Husserl v. Swiss Air Transport Co.*⁸⁴ the court held that an airplane hijacking was an accident and found the carrier liable for passenger injuries as a result of this occurrence.⁸⁵ This decision was based on the court's view that proceedings surrounding the Montreal Agreement revealed that the parties intended for a carrier to be liable to "innocent victims of willful acts by others."⁸⁶ Additionally, the court, in examining policy considerations, found the airline to be in the best position to avoid hijackings, to insure against them, and to allocate efficiently the costs of such measures.⁸⁷

Other intentional acts, such as terrorist attacks occurring in air terminals during the course of embarking or disembarking from

⁷⁸ The applicable portion of article 17 reads: "The carrier shall be liable . . . if the accident which caused the damage . . . took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (emphasis added) Warsaw Convention, *supra* note 1, art. 17. For those cases in which the injury occurs in an area other than within the aircraft, courts must interpret the meaning of the embarking and disembarking provision. Important factors are situs of the accident, control exercised by the airlines, and passenger activity. See *Day*, 528 F.2d at 33.

⁷⁹ 439 F.2d 1402 (1st Cir. 1971).

⁸⁰ *Id.* at 1404.

⁸¹ *Id.*

⁸² *Id.* at 1404, 1405. The court implied that had there been evidence that the area was poorly lit and, as a result, the passenger had not seen the bags she fell over, a reasonable assumption could be made that an accident caused the injury. *Id.* at 1405.

⁸³ See *Maugnie*, 549 F.2d at 1259; *Day*, 528 F.2d at 34.

⁸⁴ 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

⁸⁵ *Id.* at 707. See also *Karfunkel*, 427 F. Supp. at 971; *Krystal*, 403 F. Supp. at 1322; *Burnette v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973); *People ex rel Compagnie Nationale Air France v. Gilberto*, 74 Ill. 2d 90, 383 N.E.2d 977, *cert. denied*, 441 U.S. 932 (1978).

⁸⁶ *Husserl*, 351 F. Supp. at 707.

⁸⁷ *Id.*

planes, have been held to be within the scope of article 17 of the Warsaw Convention.⁸⁸ Analogizing to the hijacking cases, courts have applied broad cost-allocation theories, and in addition, have recognized that airlines are best able to implement safety measures to guard against these sieges.⁸⁹

Viewed against this background, the Supreme Court ruling in *Air France* follows the general trend of lower court decisions interpreting the accident clause of Article 17. It is, however, somewhat inconsistent with the present expectations of parties to the Warsaw Convention.

A main objective in drafting the Warsaw Convention was to place limits on a carrier's liability to passengers.⁹⁰ The goals of parties to a treaty may be modified over time, however, and subsequent interpretations are useful to ascertain these changed expectations.⁹¹ As indicated by the Montreal Agreement and Guatemala Protocol, passenger protection has become an important goal. Increasing emphasis has been placed on adequately compensating air travelers for injuries occurring during international flights.⁹² At the same time there is concern that air carriers not become insurers of *all* injuries which befall international travelers.⁹³ Court decisions reveal an attempt to reconcile these objectives.

In attempting to define the elusive accident provision of article 17, courts have looked to the text of the Convention. Courts have reasonably concluded that unless the drafters intended for an accident to mean something more substantial than a mere occurrence, the same language would have been used in articles 17 and 18.⁹⁴ As the Convention presently reads, liability is imposed if an accident causes injury to a passenger⁹⁵ while only an occurrence is required to recover for damage to baggage.⁹⁶

Consistent with its French legal definition and the negotiating history of the Convention, courts have defined accident as an un-

⁸⁸ See, e.g., *Evangelinos*, 550 F.2d at 152 (injuries resulting from terrorists firing weapons upon group of passengers going through pre-boarding procedures); *Day*, 528 F.2d at 31 (passengers standing in line to board plane injured by terrorist attack); *In re Tel Aviv*, 405 F. Supp. 154 (D.P.R. 1975), *aff'd*, 545 F.2d 279 (1st Cir.), *cert. denied*, 430 U.S. 950 (1976) (passengers attacked by terrorists in baggage area of terminal). Although the above cases turned on whether the area of attack was within the course of embarking or disembarking from the plane, the courts specifically noted that terrorist attacks do constitute accidents. *But see* *Martinez v. Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977) (terrorist attack in baggage area of terminal not accident because risk of such violence not peculiar to air travel).

⁸⁹ See *Day*, 528 F.2d at 34.

⁹⁰ Comment, *supra* note 29, at 658.

⁹¹ *Warshaw*, 442 F. Supp. at 411.

⁹² See Montreal Agreement, *supra* note 40; see also Note, *supra* note 34, at 148.

⁹³ Guatemala Protocol, *supra* note 20.

⁹⁴ Warsaw Convention, *supra* note 1, arts. 17, 18.

⁹⁵ *Id.* art. 17.

⁹⁶ *Id.* art. 18.

sual, fortuitous, or unexpected external event.⁹⁷ Thus, it has been held that normal air pressure changes which cause deafness are not accidents within the meaning of article 17.⁹⁸ Similarly, courts have ruled that the aggravation of a pre-existing hernia condition⁹⁹ or the development of phlebitis during an ordinary flight¹⁰⁰ are not covered under the Warsaw Convention. The common thread underlying these cases is that the flights were, in all respects, normal and routine. These decisions indicate an unwillingness by courts to permit recovery where an individual's peculiar susceptibility interacts with a normal, external event to cause injury.

The perspective from which a particular court defines the term accident is of great significance in determining whether recovery will be granted under the Warsaw Convention. This term has been defined as an unexpected or unusual *result* of an event.¹⁰¹ Applying this definition to the cases discussed above, liability would more likely be imposed on the air carrier because it clearly would be unusual for one to develop phlebitis from sitting on a plane, or to experience deafness due to aircraft pressurization. In the *Chutter* case it appears that the Southern District of New York interpreted accident in just this manner. The most logical explanation for imposing liability on the carrier in *Chutter* is that the court viewed the falling out of a plane during a routine flight as an unusual, unexpected result.¹⁰² That case is, however, exceptional. Most courts have followed the text of article 17 which requires that an accident *cause* the injury.¹⁰³ In adhering to the rule that the language used in treaty provisions indicates drafter intent, the interpretation of the accident provision by the majority of courts would seem to be the proper reference point for an analysis of article 17.

Additionally, the finding of a causal connection between an accident and the passenger injury is an essential requirement for imposing liability.¹⁰⁴ As illustrated by *McDonald*, in cases where the plaintiff is unable to satisfy the burden of proof that an unusual, external event caused the injury, the Warsaw Convention is

⁹⁷ See *Air France*, 105 S. Ct. at 1343. The *Chutter* case, 132 F. Supp. at 611, is inconsistent with the general view because it would seem logical that the removal of the ramp from the aircraft's entrance is a routine operating procedure and, thus, would not constitute an accident under the Warsaw Convention. The court in *Chutter* does not articulate its interpretation of the term accident and, therefore, it is difficult to determine the criteria on which it based this determination. For a possible explanation, see *supra* note 76 and accompanying text.

⁹⁸ See *DeMarines*, 580 F.2d at 1197, 1198; *Warsaw*, 442 F. Supp. at 413.

⁹⁹ See *Abramson*, 739 F.2d at 130.

¹⁰⁰ See *Scherer*, 54 A.D.2d at 636, 387 N.Y.S.2d at 580.

¹⁰¹ *Air France*, 105 S. Ct. at 1342 (quoting *Fenton v. J. Thorley & Co.*, 1903 A.C. 443, 453).

¹⁰² See *Chutter*, 132 F. Supp. at 611.

¹⁰³ Warsaw Convention, *supra* note 1, art. 17.

¹⁰⁴ M. MILDE, PROBLEMS OF LIABILITY IN INTERNATIONAL CARRIAGE BY AIR 58 (1963).

inapplicable.¹⁰⁵

The scope of article 17 has been broadened through its application to hijackings, terrorist attacks, and bombings.¹⁰⁶ Courts have held that such incidents do constitute accidents, although they are created by third persons over whom the air carrier has no control. The courts emphasize that these events are unusual, unexpected, and out of the ordinary and, therefore, qualify as accidents under article 17.

The analysis used in cases involving intentional acts of third parties differs, however, from typical article 17 cases in which an accident is defined in terms of the functioning of the aircraft and air terminal. This more liberal interpretation of the accident provision, whereby carriers are held liable for events non related to airline operations, can best be understood in terms of policy considerations. Courts abhor innocent victims suffering from the intentional wrongdoing of others. Furthermore, in terms of cost allocation, the view is that the air carrier can spread the costs of liability over all of its passengers, and is in the best position to implement safety measures to reduce the risk of hijackings, bombings, or terrorist attacks.¹⁰⁷

Applying the above standards to *Air France*, there was no extraordinary, unusual event that caused the passenger's injury. The aircraft's pressurization system was operating normally during the plane's descent. Thus, even if the pressure changes caused deafness in a passenger who was unusually sensitive, recovery could not be granted under article 17, as this provision of the Warsaw Convention is presently interpreted by the majority of courts.

The increasing emphasis on passenger protection as reflected in the Montreal Agreement and Guatemala Protocol illustrates that parties to a treaty can change their expectations regarding a pact. The amended language of article 17 exemplified in the Guatemala Protocol reveals a desire by signatory countries to impose liability on carriers for all events which cause injury to passengers.¹⁰⁸ Although this Protocol lacks the force of law, it is a useful indication of the intent of the contracting parties.¹⁰⁹ Moreover, air transportation has become an extremely safe mode of travel, resulting in very reasonable insurance rates for air carriers.¹¹⁰

The relative stability of the airline industry coupled with a strong desire to compensate travelers for injuries provides a forceful impetus for a re-examination of cases such as *Air France*, in which an

¹⁰⁵ *McDonald*, 439 F.2d at 1405.

¹⁰⁶ See *supra* notes 85-90 and accompanying text.

¹⁰⁷ *Husserl*, 351 F. Supp. at 707.

¹⁰⁸ Guatemala Protocol, *supra* note 20.

¹⁰⁹ Topical Survey, *supra* note 50, at 286.

¹¹⁰ Bosco, *Application of Warsaw Convention and Montreal Agreement in Regard to What Is an "Accident,"* TRIAL LAW. GUIDE 223 (1984).

event related to air travel causes passenger injury. The same policy considerations used to impose liability on carriers for injuries resulting from hijackings, bombings, or terrorist attacks are applicable to situations in which an occurrence related to the operation of the carrier causes injury to a traveler. The rationale for liability in such instances may, in fact, be stronger in that it makes more sense to hold an air carrier responsible for acts directly related to the functioning of the aircraft than for intentional acts by third parties, which bear no logical relationship to such operation.

In terms of social justice, it is likely that the injured passenger is least able to bear the cost of the injury. If the air traveler is unable to establish a cause of action under the Warsaw Convention, the only remaining remedy is a negligence claim, where the chances of recovery are slim, unless a breach of duty of care can be proven.¹¹¹

Under a cost allocation theory, the air carrier is best able to obtain insurance against injuries and to spread the cost of liability over all of its passengers.¹¹² The Supplemental Compensation Plan, approved by the Civil Aeronautics Board, demonstrates how an air carrier could provide adequate compensation for passenger injury through risk spreading. Under this plan, international air travelers contribute two dollars and fifty cents per ticket as insurance against injuries. The money is placed into a fund underwritten by an insurance company and used, in appropriate situations, to compensate travelers.¹¹³

Additionally, the carrier is in the best position to implement measures to prevent injuries. Evidence does indicate, however, that in a situation such as that posed in *Air France*, the airline is not technologically able to alter the pressurization system to avoid risks of passenger injuries.¹¹⁴ Nevertheless, in view of the inequity of requiring the passenger to bear the cost and the feasibility of carriers obtaining reasonable insurance rates, on balance, it seems more fair that liability should be imposed on the carrier.

These policy reasons for allowing recovery under article 17 would not be contrary to the intent of the Warsaw Convention. No liability would be imposed if there did not exist a causal connection between an external event and injury to the passenger. Injury caused solely by a passenger's health condition would not be covered under article 17, as such an event could just as likely have occurred elsewhere. This would ensure that the carrier would not become the absolute insurer of all mishaps involving passengers, a predicament

¹¹¹ Note, *supra* note 28, at 369.

¹¹² Lowenfeld & Mendelsohn, *supra* note 28, at 599-600.

¹¹³ Comment, *supra* note 29, at 679, 681.

¹¹⁴ Bosco, *supra* note 110, at 223.

sought to be avoided by the drafters of the Guatemala Protocol.¹¹⁵ Finally, because the Warsaw Convention as modified by the Montreal Agreement places monetary limits on a carrier's liability,¹¹⁶ passenger injuries caused by an event related to air travel could be compensated for under the treaty and still satisfy the drafters' intent to limit carrier liability.

In *Air France* Justice O'Connor set forth the standard by which courts should interpret the accident clause in article 17 of the Warsaw Convention. She suggested a totality of circumstances approach in which only a single link in a causal chain of events need be "an unusual or unexpected event external to the passenger."¹¹⁷ Although this indicates a desire by the Supreme Court to construe broadly article 17, the decision does not go far enough. In light of the relatively prosperous state of the airline industry, the important goal of adequate passenger compensation, and the unfairness of requiring travelers to bear the cost of injuries related to air transportation, article 17 of the Warsaw Convention should be interpreted to include any events connected with air travel that cause passenger injuries.

—LAURIE S. TRUESDELL

¹¹⁵ See *supra* note 49.

¹¹⁶ Montreal Agreement, *supra* note 40.

¹¹⁷ *Air France*, 105 S. Ct. at 1346.