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## COMMENT

### Saks: A Clarification of the Warsaw Convention Passenger Liability Standards

Valerie Saks was a passenger on a flight originating in Paris and bound for Los Angeles.<sup>1</sup> During descent, and while cabin pressure was being adjusted, Saks felt an uncomfortable "ringing" in her ears.<sup>2</sup> Several days later, doctors diagnosed Saks' condition as a permanent hearing loss in her left ear.<sup>3</sup> Saks filed suit against Air France in San Francisco superior court, but later removed to the U.S. district court.<sup>4</sup> In her suit, Saks alleged that the cause of her injury was a normal change in cabin pressurization during landing, and further alleged that this occurrence was sufficient to impose liability on the airline under the Warsaw Convention<sup>5</sup> as modified by the Montreal (Interim) Agreement.<sup>6</sup> Article 17 of the Warsaw Convention imposes liability on an airline for a passenger's injury "if the accident which caused the damage so sustained took place on board the aircraft."<sup>7</sup> The United States District Court for the Northern District of California granted Air France's motion for summary judgment on the grounds that the changes in cabin pressure were normal and did not constitute an accident within the

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1. Carrizosa, *Ninth Circuit OKs Deaf Woman's Suit Against Air France*, L.A. Daily J., Feb. 1, 1984, at 1, col. 3.

2. *Id.*

3. *Id.*

4. *Id.*

5. 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) *reprinted in* 49 U.S.C. §1502 (1976) [hereinafter cited as Warsaw Convention].

6. CIVIL AERONAUTICS BOARD AGREEMENT 18900, AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION AND THE HAGUE PROTOCOL (1966) *approved by* CIVIL AERONAUTICS BOARD, ORDER No. E-23680 *reprinted in* 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement].

7. Warsaw Convention, *supra* note 5 art. 17. The full text of article 17 reads:

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.

meaning of article 17.<sup>8</sup> On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision on the ground that article 17 of the Warsaw Convention, as modified by the Montreal Agreement, imposed absolute liability on the air carrier and, therefore, a showing of a malfunction or abnormality in the aircraft's operation was not a prerequisite for the plaintiff's recovery as long as the injury was the result of an inherent risk in air travel.<sup>9</sup> The United States Supreme Court granted certiorari review. On March 4, 1985, the Court reversed, holding that an air carrier, under article 17 of the Warsaw Convention, is liable for a passenger's injury only if that injury was caused by an unexpected or unusual event or happening that is external to the passenger.<sup>10</sup>

This comment will briefly examine the history of the Warsaw Convention. Next, it will address the standards developed by the federal courts for invoking the Convention's airline liability provisions. Finally, the Supreme Court's decision resolving the split between the circuits will be examined.

In 1934 the U.S. Senate ratified the Warsaw Convention making it a U.S. treaty.<sup>11</sup> Today the treaty is in force in over 100 countries. The Warsaw Convention had several goals. First the Convention was designed to provide uniform rules to govern the rights and liabilities of airlines and their passengers. This was accomplished by defining international transportation,<sup>12</sup> by establishing rules governing jurisdiction,<sup>13</sup> and by creating a two-year period of limitations.<sup>14</sup> Second, the Convention was designed to protect the new airline industry from potentially ruinous financial exposure by placing a ceiling on liability,<sup>15</sup> thus ensuring its survival and growth.<sup>16</sup> This goal was achieved by limiting the carriers' liability

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

9. *Id.* at 1385.

10. *Air France v. Saks*, 724 F.2d 1383 (9th Cir. 1984), *rev'd*, 53 U.S.L.W. 4270 (March 4, 1985) (No. 83-1785).

11. Warsaw Convention, *supra* note 5. As a treaty, the Convention supersedes all domestic law in the area of liability of international air carriers. U.S. Const. art. VI, cl. 2.

12. Article 1(2) defines international transportation as transportation between contracting states, or transportation within a single contracting state if there is a stopping place within the territory of a non-contracting state. Warsaw Convention, *supra* note 5, art. 1(2).

13. Article 28 makes jurisdiction over the carrier proper where the carrier is domiciled, where it has its principal place of business, where the contract for carriage was entered into, or the place of destination of the flight. Warsaw Convention, *supra* note 5, art. 28.

14. Warsaw Convention, *supra* note 5, art. 29.

15. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

16. *See id.*, at 499-500. When submitting the Warsaw Convention to the United States

to approximately \$8,300.<sup>17</sup> To offset this burden on the passenger, the Convention imposed on the carrier a rebuttable presumption of negligence in case of accident.<sup>18</sup> To overcome this presumption the carrier had to prove that all possible measures were taken to avoid the accident, or prove that it was impossible to avoid the accident.<sup>19</sup> This constituted, in essence, a defense of due care. If it was shown that the carrier had engaged in willful misconduct, then the carrier was barred from claiming any limitations on liability.<sup>20</sup>

Not long after the United States became a party to the treaty, the signatory countries began proposing revisions of a number of the Convention's provisions,<sup>21</sup> especially those concerning limitations on air carrier liability.<sup>22</sup> Those who were in favor of raising the limits on a passenger's recovery argued that damage awards for personal injury and death in many developed countries were higher than those allowed under the Convention. Another argument was that because of the availability of low-cost liability insurance, the burden on airlines would be minimal. Finally, although the initial purpose of the limitations was to protect the young airline industry, this purpose would be largely irrelevant since the industry had become well established. Raising these views brought forth some results. In 1955, the Convention's signatories reconvened at the

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Senate, 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, 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.

Senate Committee on Foreign Relations, *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).

17. Article 22(1) limited any recovery to 125,000 Poincare francs which, at the time of the signing of the Convention, was equivalent to \$8,292. Comment, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHI. KENT. L. REV. 851, 851 n.6 (1978) [hereinafter cited as Comment, *Attempts to Circumvent the Limitations*].

18. See, Warsaw Convention, *supra* note 5, for the text of article 17.

19. Article 20(1) provides in part: "In the carriage of passengers. . . the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures." Warsaw Convention, *supra* note 5, art. 20.

20. Warsaw Convention, *supra* note 5, art. 25.

21. Lowenfeld & Mendelsohn, *supra* note 15, at 502.

22. *Id.* at 504.

Hague. The United States suggested that the limitation on liability be raised to approximately \$25,000.<sup>23</sup> The U.S. lowered its proposed figure to \$20,000 because of hostility from other conference delegates.<sup>24</sup> When even this proposal was rejected, the United States threatened to denounce the treaty. In the face of this threat, it was agreed to raise the limit on liability to \$16,000.<sup>25</sup> This agreement resulted in the Hague Protocol.<sup>26</sup>

Inevitably, dissatisfaction persisted. In 1965, the United States formally denounced the Warsaw Convention.<sup>27</sup> In a State Department press release, the United States indicated that if a higher recovery limit could be agreed upon,<sup>28</sup> then the United States would retract its notice of denunciation before the notice would take effect.<sup>29</sup> Such raised recovery limits could be effected by a revision of the existing Convention, or by a contractual agreement among the air carriers.<sup>30</sup> The prospect of United States' withdrawal from the Warsaw Convention prodded other member nations to meet with the United States in Montreal during February of 1966.<sup>31</sup> These meetings culminated in the Montreal Agreement.<sup>32</sup>

The Montreal Agreement provides that most foreign and all United States air carriers waive liability limitations up to a \$75,000

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23. Comment, *The Revised Warsaw Convention and Other Aviation Disasters*, 8 CUM. L. REV. 764, 768 (1978) [hereinafter cited as Comment, *Other Aviation Disasters*].

24. *Id.*

25. *Id.* This figure approximately doubled the amount of a possible recovery under the Convention.

26. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw, on October 12, 1929, 478 U.N.T.S. 371 (1955) [hereinafter cited as Hague Protocol].

27. Comment, *Other Aviation Disasters*, *supra* note 23, at 771 n.32. The text of the notice of denunciation is printed in Press Release No. 268, November 15, 1965, 50 DEP'T. ST. BULL. 923, 929 (1965).

28. *Id.* The United States indicated that an acceptable limitation would range between \$75,000 and \$100,000 per passenger.

29. Article 39 of the Warsaw Convention provides that any member country may denounce the Convention upon six months notice. Warsaw Convention, *supra* note 5, art. 39.

30. Comment, *Other Aviation Disasters*, *supra* note 23, at 771.

31. Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 812 (1983). See also Lowenfeld & Mendelsohn, *supra* note 15, for a detailed discussion of the events leading up to the Montreal Agreement, as well as the relevant negotiations.

32. The Montreal Agreement is a contractual modification of the Warsaw Convention as permitted under article 22(1). Warsaw Convention, *supra* note 5, art. 22(1). The modification was undersigned by the airlines involved and not the member nations. As a contractual modification, the Montreal Agreement will not have the binding effect of a treaty until it has been ratified by the United States Senate. Comment, *Attempts to Circumvent the Limitations*, *supra* note 17, at 853.

ceiling, inclusive of legal fees and costs.<sup>33</sup> In return for the retention of a limitation on recovery, the air carriers also agreed to waive the due care defense available under article 20(1) of the Warsaw Convention.<sup>34</sup> This, in effect, imposes strict liability on the air carriers.<sup>35</sup>

In 1971, the Guatamala Protocol<sup>36</sup> raised the limit on liability to \$100,000 and adopted the Montreal Agreement's standard of strict liability.<sup>37</sup> Unlike the Montreal Agreement, the Guatamala Protocol required the member nations, rather than the airlines, to agree to the terms of the Protocol. In addition, the Guatamala Protocol exempted the airlines from liability for injuries which were solely the result of the passenger's pre-existing physical condition. The Guatemala Protocol has not been ratified in the United States.<sup>38</sup>

The most recent attempt at raising the liability limitations took place in 1983 when the United States Senate voted against the ratification of Montreal Protocols 3 and 4.<sup>39</sup> The primary effect of Protocols 3 and 4 would have been to raise the limitation on liability from \$75,000 to \$109,000, and to place a new ceiling on awards while removing the exceptions provided for wilful misconduct or failure to give notice of the limitations.<sup>40</sup>

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33. Note, *Aviation Liability Limitations for Wrongful Death or Personal Injury — A Contemporary Analysis of the Warsaw System*, 10 BROOKLYN J. INT'L L. 381, 386-87 (1984).

34. See Warsaw Convention, *supra* note 19.

35. Comment, *Attempts to Circumvent the Limitations*, *supra* note 17, at 853. The effect of the elimination of the due care defense is to impose liability on the carrier for all airplane crashes or disappearances, regardless of fault. The carrier can still raise the defense of contributory negligence or of an international act of the party bringing the action as a defense.

36. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO Doc. No. 8932 (1971) [hereinafter cited as Guatamala Protocol].

37. *Id.*

38. Comment, *Attempts to Circumvent the Limitations*, *supra* note 17, at 854. There are several possible reasons for the non-ratification of the Guatemala Protocol by the United States. The first may be that even the raised \$100,000 limitation may be deemed inadequate. Another reason may be that the air carriers have successfully lobbied to bar further raising of liability.

39. 129 CONG. REC. S2279 (daily ed. March 8, 1983).

40. De Vivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71, 75 (1983).

## I. LOWER FEDERAL COURT DECISIONS

A. *Warsaw; the Seminal Case*

In addition to the various Warsaw Convention revisions, the U.S. courts have gone to great lengths to provide recoveries.<sup>41</sup> For example, the Ninth Circuit, in *Saks*, attempted to make one of the strongest statements against airline liability limitations to date. By imposing liability for injuries resulting from normal aircraft operations, the Ninth Circuit reached a decision completely contrary to that of the Third Circuit on nearly identical facts. It was this conflict among the circuits that prompted the United States Supreme Court to grant certorari.<sup>42</sup>

In *Warsaw v. Trans World Airlines, Inc.*,<sup>43</sup> the United States District Court for the Eastern District of Pennsylvania was confronted with the same issue as that later raised in *Saks*; whether, under the Warsaw Convention, a normal change in cabin pressurization, which resulted in hearing loss, qualified as an "accident" within the meaning of article 17.<sup>44</sup> The court held that such normal operation did not constitute an "accident" within the meaning of article 17, and that the resulting injuries were not actionable.<sup>45</sup>

The court had to determine whether this accident or occurrence was the type of "accident" contemplated by the Warsaw

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41. For example there are decisions which use the Warsaw Convention as a device for imposing liability, albeit limited, where no other theory is available. A second line of decisions avoid any limitation on a plaintiff's recovery by adopting a number of legal theories which circumvent the Convention entirely. *Day v. Trans World Air Lines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), and *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam* 485 F.2d 1240 (2d Cir. 1973) (the word "accident" in article 17 of the Convention includes terrorist attacks thereby affording passengers a remedy); *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam by an equally divided court*, 390 U.S. 455 (1968) (a ticket, though delivered, contained an inadequate warning concerning the liability limits); *In Re Air Crash at Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978) (because decedent passengers were not in privity with the air carrier, they were not bound by liability limitations in the contract). Thus, the Warsaw Convention is not an exclusive remedy, and does not preclude alternative theories where they are available. When it does apply, the Convention's limitation and theory are exclusive. *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3d Cir. 1984).

42. 53 U.S.L.W. at 4270.

43. 442 F. Supp. 400 (E.D. Pa. 1977).

44. *Id.* at 401.

45. *Id.* at 412-13.

Convention, thus warranting liability.<sup>46</sup> In making its determination, the court looked to the language of the Convention, the legislative history of the treaty, subsequent acts of the contracting parties, and the pertinent legal interpretation promulgated by "those courts which have jurisdiction," in an effort to give a proper construction to the term "accident." The court first observed that the Montreal Agreement created an absolute liability standard for injuries proximately caused by some "accident" occurring on board the plane or in the process of embarkation or debarkation. In its review of the text of the Warsaw Convention, the court stated that the Montreal Agreement being a contractual modification and not an amendment to the treaty, had made no substantive or other changes to article 17.<sup>47</sup> Because, in the court's view, the text of the Convention provided no basis for giving meaning to the word "accident," it next looked to U.S. case law.

At the outset of its examination of United States case law, the *Warsaw* court noted that no prior decision had dealt with a factual situation in which an injury had been caused during the course of a normal and routine flight.<sup>48</sup> The court reviewed decisions in cases where there was no dispute over the meaning of the term "accident" as used in the Convention.<sup>49</sup> These cases involved air crashes resulting in death. Finding no help in interpretation from these cases, the court next reviewed decisions involving more unusual fact situations. Several of these cases involved air carrier liability to passengers resulting from hijackings and terrorist attacks.<sup>50</sup> In these cases, the intentional actions of third persons were deemed to be "accidents" within the meaning of the Convention, as modified by the Montreal Agreement.<sup>51</sup> Finally, the court reviewed cases involving unusual falls. In one case, a woman fell

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46. *Id.* at 407.

47. *Id.* at 408.

48. *Id.* at 404.

49. *Id.* at 408. The Court cited two cases: *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*, 529 U.S. 905 (1968). The court noted that neither of these cases turned on an interpretation of the word "accident." Rather, *Berguido* dealt with the defense of due care and *Block* reviewed the applicability of the Warsaw Convention to international charter flights. In neither case was there any dispute about whether an air crash was an accident within the meaning of article 17.

50. The court cited *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972) (air carrier liable to passengers for acts of sabotage, i.e. hijacking); *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) *reh'g en Banc* (terrorist attack on passengers waiting to board aircraft is an "accident" within the meaning of article 17).

51. See *Husserl*, 351 F. Supp. at 707.



from the doorway of an aircraft when a set of movable boarding stairs were pulled away.<sup>52</sup> While the court held that this occurrence was an accident, the plaintiff's recovery was barred because she was contributorily negligent, and the running of the two-year period of limitations had expired.<sup>53</sup> In another case a woman fell while standing in the baggage claim area of an airport terminal.<sup>54</sup> The court held that the burden was on the plaintiff to prove the existence of an accident, since her fall was unwitnessed, and that this burden was not met where it seemed just as reasonable that her physical condition caused the fall, as that an accident caused the fall.<sup>55</sup> At the close of the review of the cases, the court stated:

[T]he common thread has been a happening or an event which in each case was beyond the normal and preferred mode of operation for the flight. In the case at bar, however, we are faced with a causative link with an identifiable event - *a change in cabin pressure - which is part of the normal, anticipated and established mode of procedure.*<sup>56</sup>

Thus, under United States case law, Warshaw could not recover because he had failed to satisfy the condition precedent to liability: an "accident."

After briefly reviewing the history and policy of the Convention,<sup>57</sup> the court reviewed the acts of the parties subsequent to the Montreal Agreement's enactment. The bulk of the court's discussion centered on the Guatemala Protocol<sup>58</sup> and the debates concerning some of the proposed revisions. The discussion at Guate-

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52. *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611 (S.D.N.Y. 1955). In *Chutter*, the plaintiff had been escorted to her seat and the fasten seat belt sign was lighted. Instead of fastening her seat belt, plaintiff got up, walked to the entrance of the aircraft, and then fell.

53. *Id.* at 616. Article 21 of the Convention provides: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Warsaw Convention, *supra* note 5, art. 25. Article 29 imposes a two year period of limitations. Warsaw Convention, art. 29.

54. *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971).

55. *Id.* at 1405. Plaintiff was a 74-year-old woman in good health. She fell while standing in an untrafficked section of the baggage claim area, and plaintiff failed to show the existence of any luggage in the area which may have caused her to fall.

56. Warshaw, 442 F. Supp at 410.

57. The policies underlying the principles of absolute liability and limited compensation imposed by the Montreal Agreement which the Warshaw court referred to were: (a) rapid settlement of disputes without extended litigation; (b) lowered legal fees; and (c) limited liability to air carriers in case of a major catastrophe. Warshaw, 442 F. Supp. at 410.

58. Guatemala Protocol *supra* note 36.

mala centered on article 17, which was revised to read:

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.<sup>59</sup>

The drafters were concerned that the substitution of the word "event" for the word "accident" unduly broadened the scope of the article, and for that reason included the last sentence of the revised article.<sup>60</sup> As a result of this drafting, a passenger who suffered a heart attack brought about by fright from sudden turbulence would be able to recover under the revised article 17, but a passenger who suffered a heart attack brought about by acceleration upon take-off or deceleration upon landing would not recover.<sup>61</sup> The court concluded that the term "accident" was to be given a common sense meaning.<sup>62</sup> Thus, an accident would be "an untoward event, out of the ordinary, triggered by some external event," in contrast to an occurrence which may come about under normal operating conditions as a result of the passenger's own weakness or disability.<sup>63</sup> To constitute an "accident," the occurrence which causes injury would have to be an unusual or unexpected happening.<sup>64</sup> Because the repressurization of the cabin on Mr. Warshaw's flight was not an unusual or unexpected happening, but a part of the normal aircraft operations, the court entered judgment in favor of TWA.<sup>65</sup>

The holding of the court in *Warshaw* is straightforward: under article 17, the air carrier is liable for a passenger's injuries when the injuries are the result of an unusual or unexpected happening.<sup>66</sup> This tracks the language of article 17, and is consistent with all prior decisions under the Convention. The *Warshaw* rationale has been accepted in numerous subsequent decisions, including *De*

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59. *Id.* art. 17.

60. *Warshaw*, 442 F. Supp. at 411.

61. *Id.* at 412.

62. *Id.*

63. *Id.*

64. *Id.* at 413.

65. *Id.*

66. Note, *Aviation - Warsaw Convention - Air Carriers' Liability for "Accidents" Under Article 17 Defined to Exclude Injury Caused by Routine Repressurization of Jet Aircraft*, 4 INT'L TRADE L. J. 281, 291 (1979).

*Marines v. KLM Royal Dutch Airlines*,<sup>67</sup> where the Third Circuit was presented with a nearly identical fact situation. Most recently, the *Warsaw* result was followed by the Supreme Court in its reversal of the Ninth Circuit's decision in *Saks*.

### B. *The Ninth Circuit's Decision in Saks*

The Ninth Circuit was guided by the notion that the Convention no longer mandated a showing of malfunction or abnormality in the operation of the aircraft as a condition precedent to recovery.<sup>68</sup> The basis of this conclusion was that the "[i]mposition of such a requirement is not supported by either the language and history of the Warsaw Convention . . . or the decisions of many courts, including this one, which now interpret the convention as imposing absolute liability for injuries proximately caused by the risks inherent in air travel."<sup>69</sup> Accordingly, the court began its analysis with a review of the language of the treaty.

The majority first noted that before article 17 could be invoked, an accident must have occurred.<sup>70</sup> The Convention, however, failed to define the term "accident." To find an appropriate definition, the court of appeals looked to two sources: the common dictionary definition and the definition contained in the Convention on International Aviation.<sup>71</sup> The former defined an accident as an "event occurring by chance or arising from unknown causes."<sup>72</sup> The Convention on International Aviation defines an accident as "an occurrence associated with the operation of an aircraft which

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67. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978). *See also*, *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984) (aggravation of a passenger's hernia allegedly due to the crew's failure to provide a place to lie down did not constitute an "accident" within the meaning of article 17); *Oliver v. Scandinavian Airlines System*, 17 Av. Cas. (CCH) ¶ 18,283 (D. Md. 1983) (injury was caused by an accident where an intoxicated passenger fell on plaintiff); *Lautore v. United Airlines, Inc.*, 16 Av. Cas. (CCH) ¶ 17,944 (S.D.N.Y. 1981) (dismissed on motion for summary judgment where plaintiff conceded there had been no "accident"); *Weintraub v. Capitol International Airways*, 16 Av. Cas. (CCH) ¶ 18,058 (N.Y. Supp. App. Term 1981) (severe air turbulence causing a precipitous descent constituted an "accident" resulting in passenger's hearing impairment).

68. *Saks*, 724 F.2d at 1384.

69. *Id.*

70. *Id.* at 1385. On its face, it seems contradictory that the court would recognize article 17's requirement of an "accident" and yet discount the need for a malfunction in the aircraft's operations as a condition precedent to recovery. However, this incongruity is resolved through the ultimate definition of the term "accident," which is central to the court's analysis.

71. *Id.*

72. *Id.*

takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.”<sup>73</sup> The court found that the injury suffered by Saks (*hearing loss resulting from cabin depressurization*), squarely fit the second definition as an “occurrence associated with the operation of an aircraft.”<sup>74</sup> Under this definition, although there was no malfunction or abnormality in the operation of the aircraft, there had been an accident within the meaning of article 17. That the facts of the case fit the definition was found persuasive, but not dispositive of the issue.

The court of appeals next reviewed the history of the Convention; it originally established a fault-based system for liability. The air carrier had the burden of establishing a lack of negligence.<sup>75</sup> Next, the court found that the contractual modification of the Convention by the Montreal Agreement had imposed absolute liability on the air carriers, eliminating any defense of due care in article 20(1).<sup>76</sup> The court concluded that allowing a carrier to avoid liability under the Convention by showing that a plaintiff's injury was not the result of an accident because it had resulted from normal aircraft operations was, in effect, a restatement of the defense of due care.<sup>77</sup> Thus, to require an “accident” as a condition precedent to recovery would frustrate the policy of the revised Convention. U.S. courts have been construing the word “accident” broadly in order to effectuate better passenger protection.<sup>78</sup> For example “accident” has been construed to result in air carrier liability for hijackings and other terrorist activities.<sup>79</sup> Tangential to this analysis, the court reviewed the policies underlying the decision to switch from negligence to absolute liability. The court found three motivating factors: a desire to provide an incentive for the air car-

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1385-86.

77. 724 F.2d at 1385.

78. *Id.* at 1387.

79. *Id.* *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. at 706. Hijacking's were probably not within the contemplation of the parties at the time the Warsaw Convention was promulgated. The Montreal Agreement serves to resolve whatever doubt existed regarding the construction of the word “accident.” Neither State Department press releases nor Civil Aeronautics Board orders mention the word “accident” in the context of recovering for personal injury. Instead they seem to accept the proposition that the Montreal Agreement imposes “absolute liability” upon the carrier.

riers to reach quick and inexpensive settlements; under theories of accident cost allocation, the belief that airlines were better able to bear the burden of costs; and because the passenger was in the carrier's control, the belief that the carrier was in the best position to prevent accidents.<sup>80</sup> The court felt justified in imposing liability for injuries resulting from normal aircraft operations. The majority concluded that causation should be the only issue considered by future courts.<sup>81</sup>

Thus, for the court of appeals, the only question was whether the depressurization caused the hearing loss. The court stated that the Second and Third Circuits, by analyzing "how the carrier was operating at the time the injury occurred" were out of step with the current trend of imposing absolute liability on air carriers for flight related injuries.<sup>82</sup>

The dissent in *Saks* adhered to the Third Circuit's "unusual and unexpected happening" standard. It found that normal cabin depressurization did not constitute an accident within the meaning of the Convention. While acknowledging that the majority had well-supported its conclusion, the dissent did not find it necessary to go outside of the text of the Convention to find a definition for the word "accident." Instead, the dissent looked to article 18(1) for help in finding a definition.<sup>83</sup> It concluded that the Convention contemplated "carrier liability for *accidents* injuring people and for *occurrences* damaging goods."<sup>84</sup> Since the Convention itself distinguished between accidents and occurrences, the court should have tailored its definition in a similar fashion. The dissent looked favorably on the Third Circuit's distinction which required some "unusual or unexpected happening." The dissent determined that since this definition had nothing to do with negligence, or the lack thereof, it would not undermine any concern for the elimination of the due care defense.<sup>85</sup>

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80. *Saks*, 724 F.2d. at 1387.

81. *Id.* at 1384. The court stated that it interpreted the Convention as imposing absolute liability for "injuries proximately caused by the risks inherent in air travel."

82. *Id.* at 1388. To pursue such an analysis would, in effect, be to determine whether or not the carrier was negligent at the time the injury occurred.

83. *Id.* at 1388. The full text of article 18(1) reads: "The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air." Warsaw Convention, *supra* note 5, art. 18.

84. 724 F.2d at 1389.

85. *Id.* at 1389.

The dissent was careful to note two features of the majority decision which it found to raise serious problems. First, the effect of the majority decision was to make the air carrier the insurer of the health of its passengers.<sup>86</sup> Second, the majority's decision created a conflict between the circuits, frustrating any uniformity in the Convention's interpretation.<sup>87</sup>

The dissent concluded that it would have affirmed the district court.<sup>88</sup> This decision was based, in part, on a literal reading of the Convention's text. The dissent also took into account the possible impact the majority's decision might have on the air industry.

## II. THE SUPREME COURT'S RESOLUTION OF THE CONFLICT AMONG THE CIRCUITS

The Supreme Court reversed the Ninth Circuit's decision<sup>89</sup> finding that a normal change in cabin pressure, resulting in injury to a passenger, does not constitute a sufficient "accident" within the meaning of article 17 to establish liability. To warrant air carrier liability, a passenger's injury must be caused by an "unexpected or unusual event or happening that is external to the passenger."<sup>90</sup> The Court based this determination upon an analysis of the text, the negotiating history and the treatment of the Warsaw Convention in American courts and courts of other signatory nations.

The Supreme Court stated that Air France could only be liable to Saks if she proved that an "accident" was the cause of her injury. Whether an injury caused by normal aircraft operations, as here, would satisfy this requirement would depend upon an interpretation of article 17.<sup>91</sup> The Court's analysis began with the text of the Convention, comparing the wording of article 17<sup>92</sup> and arti-

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86. *Id.* The dissent stated that under the majority's holding, the carrier would be absolutely liable for any happening causing injury to a passenger. Thus a heart patient who suffered a heart attack during a normal takeoff would be able to recover, despite the fact that a takeoff is not an *unusual* occurrence. The dissent also pointed out that under the Third Circuits test, which requires an "unusual or unexpected occurrence," a passenger would be able to recover for even minor accidents, such as burns resulting from coffee spilled during air turbulence.

87. 724 F.2d at 1390.

88. *Id.*

89. *Air France v. Saks*, 53 U.S.L.W. at 4271.

90. *Id.* at 4273.

91. *Id.* at 4271.

92. See *supra* note 7 for the text of article 17.

cle 18.<sup>93</sup> First, the Court noted that article 17 described the terms by which an airline would be liable to passengers. Article 17 employed the word "accident" in describing the condition precedent. Article 18, on the other hand, described an airline's liability for damages to baggage and employed the word "occurrence" in describing the condition precedent. The court reasoned that the drafters did not intend that an "occurrence" would result in liability to a passenger. The use of the different operative words is indicative of a difference in meaning.<sup>94</sup> Second, the Court concluded that article 17 required that an "accident," no matter how defined, be the cause of the injury.<sup>95</sup> While the mere occurrence of an injury could be loosely termed an "accident," in regard to legal liabilities an "accident" denotes the cause of an injury.<sup>96</sup>

The Court next looked to the French legal meaning of the word "accident." Because the Convention was originally drafted in French, the Court reasoned that the French legal meaning of "accident" would provide a "meaning consistent with the shared expectations of the contracting parties."<sup>97</sup> The Court looked to French cases and dictionaries, and concluded that the word "accident" had virtually the same meaning in French, English, German, and American jurisprudence.<sup>98</sup> The Court stated that when the French word for accident is used to describe the cause of an injury, it is "usually defined as a fortuitous, unexpected, unusual, or unintended event,"<sup>99</sup> and that this parallels the American usage.<sup>100</sup> The Court concluded that on the basis of its understanding of the text of the Convention, any injury would have to be caused by an unexpected or unusual event.<sup>101</sup>

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93. See *supra* note 83 for the text of article 18(1).

94. 53 U.S.L.W. at 4271.

95. 53 U.S.L.W. at 4271-72. The Court noted:

The word accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.

*Id.* (Quoting from *Fenton v. Thorly & Co.*, A.C. 443, 453 (1903)).

96. *Id.* at 4272.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

The Court was further persuaded in its reasoning by reviewing the negotiating history of the Convention and the subsequent conduct of the parties. The Court's initial focus was on the separate liability provisions incorporated in articles 17 and 18. These were developed because of objections by various delegates to the text of the original draft.<sup>102</sup> Many felt that liability for damage to, or loss of, baggage should commence upon embarkation.<sup>103</sup> The result was the current distinction between liability under article 17 and article 18. The President of the drafting committee suggested that it would be better to separate the various liability provisions.<sup>104</sup> Consequently, the Court reasoned that the *causes* of liability under each provision were to be different.<sup>105</sup> On this basis, the Court concluded that the drafting history of the Convention supported the theory that an "accident" must be the cause of the injury, and not be the injury itself. In reviewing the subsequent conduct of the parties, the Court looked to the negotiations in Guatemala, especially those concerning revisions of article 17.<sup>106</sup> During the negotiations, the Convention signatories amended the Convention to impose liability on the carrier for an "event" which caused death or injury, rather than for an "accident" producing those results.<sup>107</sup> The Court found it significant that the Guatemala delegates viewed the substitution of the word "event" for the word "accident" as "expanding the scope of carrier liability to passengers."<sup>108</sup> Consequently, the Court was further persuaded to give a narrow construction to the word "accident" in article 17.

Finally, the Court looked to the judicial opinions of other sig-

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102. *Id.* The original draft provided:

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.

(International Conference on Air Law Affecting Air Questions, Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw 264-65 (R. Horner & D. Legrez trans. 1975)) [hereinafter Warsaw Proceedings].

103. 53 U.S.L.W. at 4272.

104. *Id.* at 4272-73. The President stated: "[G]iven that there are entirely different liability cases: death or wounding, disappearance of goods, delay, we have deemed that it would be better to begin by setting out the causes of liability for persons, then for goods and baggage, and finally for liability in the case of delay. *Id.* at 4273 (Warsaw Proceedings at 205).

105. 53 U.S.L.W. at 4273.

106. *Id.* See, *supra* text accompanying note 59 for the revised article 17.

107. 53 U.S.L.W. at 4273.

108. *Id.*



natory nations. The Court noted that French courts interpreted article 17 to require fortuitous or unpredictable causes of injury.<sup>109</sup> Likewise, other European legal scholars interpreted article 17 to require the injury to have been caused by an event other than normal aircraft operations.<sup>110</sup> The Court found that these views were consistent with American interpretations, and that while the U.S. courts defined "accident" broadly, they "refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger."<sup>111</sup>

The Court's ultimate conclusion was that carrier liability under article 17 arises only if the passenger's injury was the result of an unexpected or unusual event external to the passenger. A broad interpretation of "accident" would allow recovery in case of torts committed by other passengers.<sup>112</sup> In no case, however, would the carrier be liable to a passenger who's injury was the result of normal aircraft operations coupled with the passenger's own internal infirmity. To satisfy the provisions of article 17, a passenger would only have to establish that some link in the chain of causation of his injury was an unusual or unexpected event.<sup>113</sup>

The Court, while acknowledging that the Montreal Agreement eliminated the due care defense under article 20(1),<sup>114</sup> stated that the Convention did not provide for true absolute liability.<sup>115</sup> Article 17 and article 20(1) are separate provisions, and involve different inquiries. Article 17 does not inquire into the care taken by the airline to avoid injury, but only into the nature of the event which caused the injury. The elimination of article 20(1) does not redefine the air carrier's liability, but only takes one of its defenses.<sup>116</sup>

Finally, the Court found that definitions of "accidents" provided in Annex 13 to the Convention on International Aviation were inapplicable here. Annex 13 deals with accident investigations; not aircraft liability for accidents.<sup>117</sup>

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* The Court cited decisions allowing recovery for injuries caused by intoxicated passengers, or terrorist attacks.

113. *Id.* at 4274.

114. *See supra* notes 19 and 35.

115. 53 U.S.L.W. at 4274.

116. *Id.*

117. *Id.* The Court also declined to determine the merits of Saks' state law claims, leaving them to the appellate court in the first instance.

III. ANALYSIS OF THE SUPREME COURT DECISION IN *SAKS*

Whether conscious or not, the Supreme Court's analysis in *Saks* is strikingly similar to the analysis employed in *Warsaw*. Both focus on the "accident" element, and define it as an unusual or unexpected happening causing injury.<sup>118</sup> Both also require the accident to have been the cause of the injury. The Supreme Court's decision and the Ninth Circuit opinion in *Saks*, while differing sharply in analysis and result, also have characteristics in common.

The Ninth Circuit's test was whether an "accident," defined as a risk inherent in air travel, was the cause of the injury.<sup>119</sup> Thus, the court would have assigned liability under article 17 if *any* aircraft operation caused the injury, even if that operation was normal.

The "risk inherent in air travel" definition was based primarily on two factors: the Convention on International Aviation's definition and the Montreal Agreement's apparent imposition of absolute liability on the air carriers.<sup>120</sup> At first glance, the Supreme Court's rejection of these factors appears well grounded. The court of appeals reviewed sources *outside* of the Convention to interpret the word "accident." It gave no justification for this approach, and the definition selected was suspiciously self-serving. The Supreme Court's reliance on the distinctions between article 17 and article 18 allowed it to use the language of the Convention in context to discern the meanings of its words.

The Court was astute to discern that when the Montreal Agreement eliminated article 20(1)'s due care defense, none of the other provisions were affected. The Court's conclusion that an "accident" is still required is logically correct.

The Supreme Court's test for air carrier liability, whether an accident, defined as an unexpected or unusual event,<sup>121</sup> was the cause of the injury, allows recovery only if the injury was caused by some sort of aircraft malfunction.<sup>122</sup> The Court noted that even in French, the word "accident" is defined in more than one way.<sup>123</sup>

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118. See *supra* text accompanying notes 63 and 90.

119. See *supra* text accompanying note 69.

120. See *supra* text accompanying notes 73 and 76.

121. 53 U.S.L.W. at 4273.

122. *Id.*

123. *Id.* at 4272. The Court's French definition indicated that an "accident" can "refer

The Court chose the meaning that supported its contention that an "accident" describes the cause of the injury, and not the injury itself. No explicit reason, however, was given for choosing the former usage over the latter.

The Court garnered further support for its interpretation of article 17 by turning to the actions of fellow signatory nations. The Court found their positions to be in accord with U.S. interpretations.<sup>124</sup> Again, the Court gave virtually no explanation for its decision to rely on the way in which other countries construed article 17.

Despite the different approaches to the definition of the word "accident," both the Supreme Court and the Ninth Circuit agree that causation is fundamental.<sup>125</sup> It is conceivable that in future cases a plaintiff could recover for hearing loss caused by "normal" cabin pressurization by scrutinizing the standards for what is normal, and establishing negligence. A plaintiff would have to prove that the industry standards governing the rate of descent and adjustments in cabin pressure are themselves below a judicially imposed standard of care.<sup>126</sup> Establishing this would permit a court to find that the aircraft's operations had in fact been abnormal, thus warranting a finding that there was an accident causing injury.

#### IV. CONCLUSION

While the Supreme Court's decision in *Saks* is doctrinally sound, as a matter of policy, a different result is dictated. When a passenger is injured on a flight, it is clearly the airline that is best able to bear the costs. Passengers certainly don't anticipate being injured on normal, routine flights. They more likely than not have made no provisions for such an event. The result is a passenger bearing the costs which are more easily born by a carrier with greater resources. Requiring the air carrier to indemnify the pas-

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to the event of an injury" or could describe the cause. In support of the latter, the Court defined "accident" as an "Événement fortuit et fâcheux, causant des dommages corporel ou matériels" (1 Grand Larousse de La Langue Francais 29 (1971)).

124. 53 U.S.L.W. at 4273.

125. See *supra* text accompanying notes 119 and 122.

126. As one court has stated: "[A] whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." The T.J. Hooper, 60 F.2d 734, 740 (2nd Cir. 1932) (tug boat owners negligent for not installing radio sets on tugs despite lack of such industry custom).

sengers who are injured through no fault of their own also makes sense in terms of who is better able to allocate the risks. The air carrier is in a position to take into account the rare occurrence of a passenger injured by normal operations. To recover any amounts paid to passengers, the air carrier could simply raise its rates. Any rate increases to individual passengers would be nominal. Since many of the foreign air carriers are already government subsidized, this form of risk spreading becomes less harsh. Finally, imposing liability on the air carrier in this situation may serve as an impetus to improve air travel safety. Air carriers may be encouraged to find ways of making flights safer and more comfortable. Their goal would be to eliminate all "normal operations" that lead to injury.

Had the Supreme Court adopted the Ninth Circuit's view, the decision would likely have been subject to a conflicting reception by both the airline industry and their insurance underwriters. The initial reaction would have been hostile. The carriers would have been liable to a new class of plaintiffs for injuries, which at the time, they could not conceivably prevent. As a result of an increase in litigation and damage awards (or settlements), insurance underwriters would raise their rates. On the other hand, both the airline industry and their insurance underwriters would have perceived a long term benefit. The Warsaw Convention has been subject to numerous attacks in recent years. In fact, some have suggested making unlimited liability available to international passengers. Air carriers would obviously prefer to avoid this turn of events. The Ninth Circuit's decision in *Saks* could have served the airline industry by at least delaying the complete elimination of limited liability. While the Ninth Circuit decision expanded the class of plaintiffs who could recover from the air carriers, all plaintiffs subject to the Convention would still have been limited to a maximum recovery of \$75,000. For the carriers it may indeed have been preferable to have more claims brought against them, subject to limited recoveries, than it would be to have fewer claims with unlimited liability. The Ninth Circuit decision could, therefore, have been a happy medium. The Congress would have been placated into allowing the Convention to stand because of the expanded cause of action, and the airlines would have been pleased with any trade-off necessary to retain limited liability.

By reversing the Ninth Circuit, and adhering to a narrow interpretation of article 17, the Supreme Court has seemingly indi-

cated that it considers the Convention a viable treaty. The decision does not, unfortunately, resolve remaining dissatisfaction with the limitations on liability. The lower courts have manifested their dissatisfaction with the limitations through creative avoidance of the Convention's terms. The Supreme Court in *Saks* has shut off one such potential avenue of avoidance. By doing so, the Supreme Court has, in effect, indicated that it does not consider it the Court's duty to act in this matter. Rather, the Court is leaving it to Congress to act. This may be based, in part, on the recognition that an entirely new system is needed for regulating air carrier liability.

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