Surprises in the Skies: Resolving the Circuit Split on How Courts Should Determine Whether an "Accident" is "Unexpected or Unusual" Under the Montreal Convention

Ashley Tang
University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Air and Space Law Commons, Civil Law Commons, Commercial Law Commons, Comparative and Foreign Law Commons, Conflict of Laws Commons, Courts Commons, Dispute Resolution and Arbitration Commons, International Law Commons, Jurisdiction Commons, Other Law Commons, Torts Commons, Transnational Law Commons, and the Transportation Law Commons

Recommended Citation
Ashley Tang, Comment, Surprises in the Skies: Resolving the Circuit Split on How Courts Should Determine Whether an "Accident" is "Unexpected or Unusual" Under the Montreal Convention, 98 Wash. L. Rev. 1449 (2023).

This Comment is brought to you for free and open access by the Washington Law Review at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.
SURPRISES IN THE SKIES: RESOLVING THE CIRCUIT SPLIT ON HOW COURTS SHOULD DETERMINE WHETHER AN “ACCIDENT” IS “UNEXPECTED OR UNUSUAL” UNDER THE MONTREAL CONVENTION

Ashley Tang *

Abstract: Article 17 of both the Montreal Convention and its predecessor, the Warsaw Convention, imposes liability onto air carriers for certain injuries and damages from “accidents” incurred by passengers during international air carriage. However, neither Convention defines the term “accident.” While the United States Supreme Court opined that, for the purposes of Article 17, an air carrier’s liability “arises only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger,” it did not explain what standards lower courts should employ to discern whether an event is “unexpected or unusual.” In 2004, the Fifth Circuit looked to industry standards; in 2022, the First Circuit looked to the perspectives of a reasonable passenger. As a result, courts are now split on which methods they should adopt to determine whether an event constitutes an Article 17 “accident.”

This Comment looks at the history of the Warsaw and Montreal Conventions and how courts have traditionally interpreted the language of Article 17 to define “accidents.” It highlights the recent circuit split on the standards courts should adopt to determine if an event can properly be described as “unexpected and unusual” to constitute an Article 17 “accident.” Taking into consideration unique aspects of the commercial aviation industry, this Comment introduces a solution based on the existing “block time” model and proposes that courts should adopt separate standards depending on when the event takes place to determine whether an event can be classified as “unexpected or unusual” and thereby recoverable as an Article 17 “accident.”

INTRODUCTION

“[W]hat is or is not expected often lies in the eye of the beholder. An occurrence long foreseen by one person may blindside another. . . . [W]hat an airline expects to happen in the course of a flight may not perfectly match a passenger’s expectations.”

Moore v. British Airways PLC

*J.D. Candidate, University of Washington School of Law, Class of 2024. Thank you to Professor Dongsheng Zang and all my colleagues on Washington Law Review for their thoughtful suggestions throughout the publishing process. Thank you to my family for their support as I worked toward accomplishing my bucket list goal of becoming a published author, especially to my mom for letting me repeatedly commandeer her triple monitor setup.

On September 15, 2018, Jennifer Moore’s British Airways flight from Boston touched down at London’s Heathrow Airport at around 9:00 a.m.\(^2\) As the aircraft was taxiing to the gate, the flight crew learned that the jet bridge\(^3\) ordinarily used to deplane passengers was “inoperable” and the ground crew deployed a mobile staircase instead.\(^4\) The stairs were clean; the weather was clear;\(^5\) and passengers began disembarking “single file without any noticeable jostling or other untoward behavior.”\(^6\) While a flight attendant stationed at the top of the staircase had advised passengers to watch their step,\(^7\) the passengers were not explicitly warned about the height of the final step, and no British Airways employee was stationed at the bottom of the stairs for assistance.\(^8\)

Ms. Moore’s travel companion, Tammy Burnett, descended the mobile staircase first.\(^9\) Ms. Burnett testified to being “surprised at the last step being a little further than a normal cadence of a staircase” and stated that “the bottom step didn’t arrive when [she] thought it would.”\(^10\) Ms. Burnett kept her balance and “turned around to tell [Ms. Moore] to watch her step,” only to find Ms. Moore had lost her footing and fallen.\(^11\) Ms. Moore described the last step as being “further down than [she] was expecting,” which threw off her balance and caused both of her ankles to turn as she went down.\(^12\) Ms. Moore sustained severe injuries as a result of her fall.\(^13\)

After Ms. Moore’s fall, British Airways took the staircase out of service and inspected it for defects—in accordance with their internal policy.\(^14\) The inspection revealed the stairs to be “in their normal operating condition, free of defects and working as intended at the time of the incident.”\(^15\) It also verified that the distance between the bottom step and the ground was “noticeably slightly different” than the distance between the steps themselves.\(^16\)
Ms. Moore brought suit against British Airways, alleging that her injuries resulted from an “accident” within the meaning of Article 17 of the Montreal Convention, a multilateral treaty that establishes airline liability for certain injuries and damages sustained during international air carriage. To recover under Article 17, a plaintiff must demonstrate that an “accident” which proximately caused a passenger’s death or injury took place either on board the aircraft or while embarking or disembarking had occurred.

Neither the Montreal Convention nor its predecessor, the Warsaw Convention, explained what constitutes an “accident” for the purposes of recovering under Article 17. The United States Supreme Court eventually defined the term in Air France v. Saks as “an unexpected or unusual event or happening that is external to the passenger.” However, it did not answer the question of how a court should determine whether an event is “unexpected or unusual.” Should the judge consider the event from the perspective of the airline industry or that of the passenger?

On appeal from the District Court of Massachusetts, the First Circuit Court of Appeals held that the accident analysis proposed by the United States Supreme Court in Saks should proceed “from the perspective of a reasonable passenger with ordinary experience in commercial air travel.” The First Circuit acknowledged in a footnote that its decision to adopt reasonable passenger standards diverged from the precedent set by the Fifth Circuit Court of Appeals in Blansett v. Continental Airlines, which looked at the commercial airline industry standards to determine whether an event was “unexpected or unusual” and therefore an “accident.” Such disagreement between the circuits will have significant implications as the airline industry begins its return to profitability after

17. Id. at 113–14.
19. Id. art. 17(1).
20. This Comment refers to Articles 17 of the Montreal Convention and Warsaw Convention jointly in the singular for simplicity and because they are treated identically by the courts. See infra Part II.
22. Id. at 405.
23. Id.
25. Id. at 119 n.7.
26. 379 F.3d 177 (5th Cir. 2004).
27. Id. at 182 (“Some departures from an ‘industry standard’ might be qualifying accidents under Article 17, and some may not.”).
sustaining significant losses during the COVID-19 pandemic.\footnote{\textbf{28. INT’L AIR TRANSP. ASS’N, GLOBAL OUTLOOK FOR AIR TRANSPORT: TIMES OF TURBULENCE (2022), https://www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance---june-2022---report/ [https://perma.cc/3A9V-SHGU] (observing that the COVID-19 pandemic posed “the greatest challenge the aviation industry has ever faced” and “erased essentially 20 years of gains in passenger traffic in one sudden move”).}} While aviation has become one of the safest and most reliable modes of transportation in the world today,\footnote{\textbf{29. Travel & Safety, IATA, https://www.iata.org/en/youandiata/travelers/aviation-safety/ [https://perma.cc/A4QX-H3V8].}} in-flight injuries remain a reality, particularly arising out of in-flight disturbances caused by passengers.\footnote{\textbf{30. Suzi T. Collins & John Scott Hoff, In-Flight Incivility Today: The Unruly Passenger, 12 AIR & SPACE L. 1, 23 (1998) (noting how in-flight disturbances and outright physical violence are “increasing at an alarming rate” as a result of “the dramatic changes in air travel that have occurred over the years”).}} As countries reopen their borders and consumers embark on “revenge travel,”\footnote{\textbf{31. Cecily Mauran, Revenge Travel: Consumers Seek Vengeance on Covid For Cancelling Their Plans, MASHABLE (Aug. 27, 2022), https://mashable.com/article/what-is-revenge-travel-explainer [https://perma.cc/6NZZ-Y2HE] (“Revenge travel is a term that means traveling as a way of making up for lost time during the pandemic . . . . [I]t generally refers to the frustration and anger that people felt towards COVID-19 for cancelling their plans and disrupting their lives.”).}} the number of cases being brought under the Montreal Convention will likely increase over time. Accordingly, it is important to resolve this circuit split to ensure a consistent application of international law.

This Comment analyzes the ambiguities of the Montreal Convention and the realities of modern air travel that have led to the recent circuit split between the First and Fifth Circuits on how courts should determine if an incident constitutes an “accident” based on whether it was “unexpected or unusual.” Part I describes the history of treaties regulating airline liability for accidents occurring on international flights. Part II discusses how courts have historically interpreted the language of Article 17 of both the Warsaw and Montreal Conventions to define “accidents” that trigger the presumption of airline liability. Part III addresses the recent circuit split between the First and Fifth Circuits on how courts determine if an event is sufficiently “unexpected and unusual” to constitute an Article 17 “accident,” while Part IV discusses the split’s implications. Part V highlights several aspects of the airline industry that should be considered in resolving the circuit split. Finally, Part VI proposes that courts should redefine the term “accident” and adopt separate standards depending on when the “accident” takes place.
I. TREATIES REGULATING AIRLINE LIABILITY FOR INTERNATIONAL AVIATION ACCIDENTS

The experiences of the world’s first scheduled commercial air service in 1914 paved the way for the commercial aviation industry to grow into a multi-billion-dollar business over the course of a century. Before the COVID-19 pandemic, the industry was set to carry over four-and-a-half billion passengers on scheduled flight services and exceeded 23,000 unique cities-pair connections for the first time in 2019.

Nevertheless, at its core, the industry is economically “fragile” and “needs insulation from devastating financial loss through certain limitations on liability.” The Warsaw and Montreal Conventions were consequently developed to protect the commercial airline industry by setting out liability principles for injuries that occur on aircrafts. However, when courts have attempted to interpret these two Conventions, they are often challenged by the ambiguities and lack of clear definitions.

32. The Story of the World’s First Airline, IATA, https://www.iata.org/en/about/history/flying-100-years/firstairline-story/ (“The airline served as a prototype for the future.”). On New Year’s Day 1914, the world’s first schedule commercial air service took off from St. Petersburg, Florida, and landed safely in Tampa. Eugene F. Provenzo, Jr., The St. Petersburg-Tampa Airboat Line, 58 FLA. HIST. Q. 72 (1979). Throughout its three months of operation, the St. Petersburg-Tampa Airboat Line carried a total of 1,204 passengers. See Clifford Winston, Airports and Air Traffic Control, in LAST EXIT: PRIVATIZATION AND Deregulation of the U.S. Transportation Systems 76, 76 (2010); Provenzo, supra, at 76.


in the two treaties’ language. To properly interpret both the Warsaw and Montreal Conventions, it is important to understand the drafters’ objectives and concerns. This Part analyzes the legislative histories and textual differences between the two treaties.

A. The Warsaw Convention (1929)

On October 4, 1929, representatives from thirty nations met in Warsaw, Poland, to develop a set of uniform air carrier liability standards. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) established a uniform set of rules regulating liability for international carriage of persons, baggage, and cargo. Ratified by 152 states, it applies to claims that arise during international air travel between two nations that are parties to the Convention or between two places in a single signatory nation if the transportation involves an agreed upon stopping place in another nation. The applicability of the Convention is not affected by incidental occurrences, such as emergency landings.

The use of the term “Certain Rules” in the Warsaw Convention’s full nomenclature suggests that it was not intended to create a complete body of law, and it did not. On several occasions, the Warsaw Convention was amended by international protocols and country-specific intercarrier agreements that ultimately created a “patchwork of airline liability regimes.” Most significantly, many signatories to the Warsaw Convention found the $8,300 liability limit too low to justly compensate the plaintiffs. To address these issues, the 1955 Hague Protocol doubled

38. See, e.g., Baah v. Virgin Atl. Airways Ltd., 473 F. Supp. 2d 591, 594–95 (S.D.N.Y. 2007) (noting that the ordinary meaning of the jurisdiction provisions in both the Warsaw and Montreal Conventions “leaves ambiguous whether ‘place of destination’ refers to the final point of destination on a round-trip ticket or the endpoint of the outbound portion of the trip”).


40. Warsaw Convention, supra note 37.


42. LEE S. KREINDLER, 1 AVIATION ACCIDENT LAW § 10.01 (Justin T. Green ed., 2023) [hereinafter AVIATION ACCIDENT LAW].


44. See Maugnie v. Compagnie Nationale Air Fr., 549 F.2d 1256, 1258 (9th Cir. 1977) (noting how the United States formally denounced the Warsaw Convention for its low limitation on damages).
the monetary limit on recoverable damages for accidents under Article 17 of the Warsaw Convention.\textsuperscript{45} Throughout the next forty years, more amendments were made to the Warsaw Convention, including the Guadalajara Supplementary Convention (1961),\textsuperscript{46} the Guatemala City Protocol (1971),\textsuperscript{47} and the four Montreal Protocols (1975).\textsuperscript{48} However, because not all the signatories executed the additional instruments, the Warsaw Convention was ultimately left far from uniform.\textsuperscript{49} This lack of uniformity ultimately pushed the adoption of another milestone treaty in international air law—the Montreal Convention.


To streamline forty years’ worth of amendments to the Warsaw Convention, representatives from 118 countries met in Montreal, Canada, in 1999.\textsuperscript{50} The representatives sought to create a new, uniform set of international air liability standards that reflected the amendments’ intended expansions. These standards are known as the Convention for

\textsuperscript{46} Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31.
\textsuperscript{49} HODGKINSON & JOHNSTON, supra note 47, at 10 (“The Warsaw System was now plagued by inconsistent and uneven ratifications of various instruments.”).
the Unification of Certain Rules for International Carriage by Air (Montreal Convention).\footnote{51}

The drafters never intended the Montreal Convention to be another amendment to the Warsaw Convention.\footnote{52} Instead, it is “an entirely new treaty that unifies and replaces the system of liability [derived] from the Warsaw Convention.”\footnote{53} The Montreal Convention applies to round-trip flights between a Montreal Convention signatory and a Warsaw Convention signatory.\footnote{54} It also applies to round-trip flights between a Montreal Convention signatory and a nation that has neither signed the Warsaw nor Montreal Conventions.\footnote{55} In other words, its supremacy over other previous agreements is only relevant to state parties that actually ratify the new Convention. “[T]he aim of the signatories to the Montreal Convention was to phase out the Warsaw scheme and have the Montreal Convention ratified by all countries engaged in international airline travel and trade.”\footnote{56} However, so far, not every country that adopted the original Warsaw Convention has adopted the Montreal Convention: as of 2023, only 139 countries have ratified the Montreal Convention.\footnote{57}

At their core, both the Warsaw and Montreal Conventions are based on the principle that there is a presumption of liability on air carriers for damages incurred on international flights. However, the Montreal Convention is widely considered to be a treaty that, in comparison to its

\footnote{51} Montreal Convention, supra note 18.
\footnote{53} Id.; see also Montreal Convention, supra note 18, art. 55 (providing that the Montreal Convention prevails over the Warsaw Convention (1929), the Hague Protocol (1955), the Guatemala City Protocol (1971), and the Montreal Protocols (1975)).
\footnote{54} Knowlton v. Am. Airlines, Inc., No. CIV.A. RDB-06-854, 2007 WL 273794, at *1 n.1 (D. Md. Jan. 31, 2007) (noting that “a one-way trip from the United States to the Dominican Republic would only be governed by the Warsaw Convention while a round-trip ticket would be governed by the superseding Montreal Convention.”) At the time, the Dominican Republic was a party to the Warsaw Convention but had not ratified the Montreal Convention. Id.
\footnote{55} In re Air Crash at Lexington, 501 F. Supp. 2d 902, 908 (E.D. Ky. 2007) (opining that based on the Montreal Convention’s scope of application, a plaintiff’s “round-trip ticket from the United States with an agreed upon stop in St. Lucia would be governed by the Montreal Convention, notwithstanding the fact that St. Lucia is not a signatory to that convention”).
Surprises in the Skies 1457

predecessor, favors passengers more than air carriers. Nevertheless, the drafters of the Montreal Convention tried to embrace the language of the original Warsaw Convention and its amendments wherever possible to not disrupt the existing jurisprudence. This intended parity between the two Conventions has led some observers to even argue that it is “unwarranted” for courts to impose a passenger-friendly test to an airline-friendly treaty. In sum, the “common law” of the Warsaw jurisprudence is vitally important to the interpretation of the Montreal Convention, and while courts have frequently cited cases analyzing similar provisions in the Warsaw Convention when applying the Montreal Convention, interpreting the express terms of Article 17 remains a challenge due to the ambiguities in the text and the Supreme Court’s ruling in Saks.

II. INTERPRETING ARTICLE 17

The Warsaw and Montreal Conventions both provide relief for passengers who are injured during their air travels. For either Convention to apply, a court must determine whether recovery is permitted under it. Each Convention contains an Article 17, which defines the liability of the air carrier for passenger injury and is key to a court’s determination. Article 17 of the Warsaw Convention provides:

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

The Montreal Convention made “inconsequential changes” to the language above when adopting its own Article 17,\(^\text{66}\) which partially provides that “[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”\(^\text{67}\)

While Article 17 of the Montreal Convention was expanded to include new language regarding damage to baggage, the drafters were careful to keep the language of the Warsaw Convention’s Article 17 mostly intact to leave the legal precedent undisturbed.\(^\text{68}\) For this reason, the requirements for recovery are “effectually identical” and “the past jurisdiction based on the Warsaw system remains highly relevant, if not determinative.”\(^\text{69}\) In short, it is widely recognized by both domestic and international courts that liability is imposed upon an air carrier pursuant to Article 17 if a plaintiff proves that (1) an accident (2) caused (3) death or bodily injury (4) while the passenger was on board the aircraft or was in the process of embarking or disembarking.\(^\text{70}\) This Part will analyze each factor and its respective nuances.

A. “Accident”

The word “accident” used in Article 17 is a term of art particularly significant to the Warsaw and Montreal Conventions.\(^\text{71}\) Both texts use the term “accident” as the trigger for recovery for passenger death or bodily injury, but neither expressly defines what qualifies as an “accident.”\(^\text{72}\) In 1985, the United States Supreme Court provided the basic framework for analyzing whether an event qualifies as an “accident” and whether a plaintiff is therefore entitled to recovery under Article 17 in \textit{Air France v.}

---

\(^{66}\) Paul Stephen Dempsey, \textit{Accidents and Injuries in International Air Law: The Clash of the Titans}, 34 \textit{ANNALS AIR & SPACE} L. 285, 286 (2009) (“Though the phrase ‘or wounding of a passenger’ was not carried forward into the Montreal Convention, it appears that the language was merely deleted as redundant of the phrase ‘bodily injury,’ which was retained in the [Montreal] Convention.”).

\(^{67}\) \textit{Montreal Convention, supra} note 18, art. 17(1). Article 17 also defines and addresses damage to baggage. \textit{Id.} art. 17(2)–(4). This Comment does not discuss an air carrier’s liability for damages to checked or carry-on baggage.

\(^{68}\) While the Montreal Convention did not retain the Warsaw Convention’s phrase “or wounding of a passenger,” the phrase was most likely removed for being redundant to the Montreal Convention’s language on “bodily injury.” Dempsey, \textit{supra} note 66, at 286.

\(^{69}\) \textit{Id.} at 287.


Saks. To the Court, the language of Article 17 was “stark and undefined,” and the justices granted certiorari to resolve the conflict “as to the proper definition of the word ‘accident’ as used in [the treaty].”

In Saks, the plaintiff alleged that she suffered permanent hearing loss in her left ear as a result of the defendant airline’s negligent maintenance and repair of its pressurization system. All the evidence indicated that the aircraft operated in its usual manner and the plaintiff acknowledged that the injury was caused by the “normal operation of the aircraft’s pressurization system.” As such, the narrow issue before the Court was whether the plaintiff could meet the burden of proving that an “accident” was the cause of her injury.

The Court ultimately found that an “accident” did not take place and that the plaintiff was not entitled to recovery under Article 17. The Court concluded that an air carrier’s liability under Article 17 “arises only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger,” only then would an incident qualify as an “accident.” “[W]hen the injury indisputably results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.”

Saks effectively laid the foundation for the global interpretation of the term “accident” as many courts outside the United States have likewise adopted the Court’s approach. An interesting outlier is the Court of Justice of the European Union’s (CJEU) first application of the Montreal Convention’s Article 17 in GN v. ZU, where it notably did not cite Saks and instead offered its own interpretation of “accident” as “an unforeseen, harmful and involuntary event.” Regardless, while seemingly

---

74. Id. at 399.
75. Id. at 394.
76. Id.
77. Id. at 395.
80. Id. at 405 (emphasis added).
81. Id. at 406.
84. Id. ¶ 35.
straightforward, the *Saks* definition of “accident” ultimately failed to create a uniform standard among federal circuit courts in the United States.

B. “Caused”

On the issue of causation, the Supreme Court looked to whether an airline’s actions served as a link in the chain that resulted in a passenger’s harm. Later courts heavily relied upon the *Saks* definition, which the Court had urged to “be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries,”85 in its original form until 2004. In *Olympic Airways v. Husain*,86 the Court found that the defendant airline’s repeated failure to reseat a distressed passenger was an “accident” under *Saks*.87 The plaintiff suffered from asthma and a serious sensitivity to cigarette smoke but was assigned a seat near the smoking section.88 The flight attendant denied the plaintiff’s three requests for a seat change and falsely informed him and his wife that there were no vacant seats.89 As the smoking noticeably increased, the plaintiff became distressed and ultimately died even after receiving in-flight medical assistance.90

The Court noted that the flight attendant’s conduct was unusual and unexpected given the industry custom to reseat a passenger under similar circumstances.91 Furthermore, the Court rejected the defense’s arguments that the ambient smoke was the sole injury-causing event and that Article 17 required an airline to have committed an affirmative act.92 The Court held that the defendant’s inaction was a “link in the chain” that resulted in an aggravation of the plaintiff’s pre-existing medical condition

85. *Saks*, 470 U.S. at 405. As examples, the Court also cited with approval to “lower courts in this country [that] have interpreted Article 17 broadly enough to encompass torts committed by terrorists or fellow passengers.” *Id.*
87. *Id.* at 657.
88. *Id.* at 647.
89. *Id.*
90. *Id.* at 648.
91. *Id.* at 652–53 (noting that because no party challenged the Ninth Circuit’s finding with regards to the flight attendant’s actions, the Court “[did] not dispositively determine whether the flight attendant’s conduct qualified as ‘unusual or unexpected’ under *Saks*,” but the Court “assume[d] that it was for purposes of this opinion”).
92. *Id.* at 651.
through exposure to, at that time, a normal condition in the aircraft cabin. Given that *Saks* only called for proof that an event be unexpected, unusual, and external, and *Husain* did not otherwise elaborate on how plaintiffs should demonstrate a chain of causation, a number of lower courts have taken it upon themselves to impose their own inquiries and requirements to aid their determination of whether an incident constitutes an “accident.” Common inquiries include asking whether a plaintiff’s alleged injuries (1) arose from a risk characteristic of air travel, (2) arose from abnormal flight operations, or (3) were exacerbated by the defendant airline’s failure to render reasonable medical assistance.

1. *Was the Injury from a Risk Characteristic of Air Travel?*

Some courts require that the injury result from a risk that is characteristic of (or at least increased by) air travel. In order to be considered “characteristic” of air travel, the risk “must be present exclusively in an aircraft or during air travel.” For example, an assault between passengers is often debated as to whether it meets this definition. It was not until 2000 when the United States fully banned smoking on all flights to, from, and within the country. See Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61.

Husain, 540 U.S. at 653. In dissent, Justice Scalia pointed to appellate decisions in England and Australia, fellow signatories to the Warsaw Convention, that gave extensive consideration to American decisions analyzing Article 17 and would have held that inaction is not an “event” and thus cannot be considered an “accident.” Id. at 659. Justice Thomas, writing for the *Husain* majority, dismissed those cases as mere intermediate court decisions that are not binding on the United States Supreme Court. *Husain*, 540 U.S. at 655 n.9. Both cases eventually made their way up to the highest courts in their respective jurisdictions, and were notably critical of the United States Supreme Court’s analysis in *Saks* and *Husain*. See *In re Deep Vein Thrombosis, Air Travel Grp. Litig. [2005]* 72 UKHL 156 (appeal taken from Eng.); *Povey v Qantas Ltd. [2005]* 223 CLR 189 (Austl.).

These additional tests are not universally accepted, with some courts believing that they are an improper narrowing of *Saks*. See Girard v. Am. Airlines, Inc., No. 00-CV-4559, 2003 WL 21989978, at *3–9 (E.D.N.Y. Aug. 21, 2003) (concluding that it was improper to apply anything more than the *Saks* test in an action arising out of a plaintiff’s fall on the stairs of a bus used to transport passengers to a waiting aircraft); see also Wallace v. Korean Air, 214 F.3d 293, 300 (2d Cir. 2000) (Pooler, J., concurring) (“Although the Court stated that its definition should ‘be flexibly applied,’ . . . the Court did not thereby authorize courts to add more hurdles for a plaintiff to overcome.”). AVIATION ACCIDENT LAW, supra note 42, § 10.05.

See, e.g., Scala v. Am. Airlines, 249 F. Supp. 2d 176, 180–81 (D. Conn. 2003) (determining that accidental service of an alcoholic beverage to a passenger who had ordered a nonalcoholic beverage was an “accident” per the Warsaw Convention because an aircraft passenger suffers the special risk of not being able to fix their own drink or even observe its preparation).

Davis L. Wright, *Flying the Overly Friendly Skies: Expanding the Definition of an Accident Under the Warsaw Convention to Include Co-Passenger Sexual Assaults*, 46 VILL. L. REV. 453, 468 (2001) (citing Martinez Hernandez v. Air Fr., 545 F.2d 279, 284–85 (1st Cir. 1976)).

See West, supra note 36, at 1481–82.
example, in *Wallace v. Korean Air*, the plaintiff was sexually molested by a fellow passenger during a flight from Seoul to Los Angeles. The district court focused its analysis on whether the cause of injury was a risk characteristic of air travel. The court found that sexual assault did not constitute an “accident” under Article 17 because the defendant airline was “not in a special position to develop defensive measures or insure against such incidents.” On appeal, the Second Circuit reversed and held that because the characteristics of air travel increased the plaintiff’s vulnerability to being assaulted, the incident fell within the flexible definition of “accident” under Article 17.

As demonstrated, an assault between passengers is an issue that challenges the definition of “accident.” In theory, an assault from another passenger amounts to an “unexpected or unusual event . . . external to the passenger” and thereby triggers a presumption of liability under Article 17 that is then up to the defendant airline to rebut. However, airlines have argued that in such cases, they should not be found negligent because they did not contribute to the assault and the incident accordingly does not constitute an “accident.” Nevertheless, importing a negligence-based analysis at the “accident” determination stage is improper, as it should only be used after it has been determined whether an accident has occurred.

At least one court has recognized the impropriety of applying a fault-based analysis to the “accident” determination stage. In *Lahey v. Singapore Airlines, Ltd.*, the plaintiff was seated in the confined space

---

100. 214 F.3d 293 (2d Cir. 2000).
101. Id. at 295.
103. Id.
104. The Second Circuit highlighted that the plaintiff “was cramped into a confined space beside two men” randomly assigned next to her; “the lights were turned down, and the sexual predator was left unsupervised in the dark.” *Wallace*, 214 F.3d at 299.
105. Id.
107. *Lahey v. Sing. Airlines, Ltd.*, 115 F. Supp. 2d 464, 467 (S.D.N.Y. 2000) (discussing and rejecting the defendant’s argument that the crew’s actions should be relevant to the determination of whether the assault was an ”accident”).
108. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004). On appeal, the petitioner airline contended that “the Ninth Circuit improperly created a negligence-based ‘accident’ standard under Article 17 by focusing on the flight crew’s negligence as the ‘accident.’” Id. The Court noted that while the Ninth Circuit “does seem to approve of a negligence-based approach . . ., no party dispute[d] the Ninth Circuit’s holding that the flight attendant’s conduct was ‘unexpected and unusual,’ . . . which is the operative language under Saks and the correct Article 17 analysis.” Id.
109. AVIATION ACCIDENT LAW, supra note 42, § 10.05.
of economy class in front of an unknown man who responded violently towards the plaintiff’s desire to recline their own seat. At trial, the defendant airline argued that they were exempt from Article 17 liability as their flight attendants did not contribute to the altercation. The Southern District of New York disagreed, noting that the crew’s conduct was irrelevant because “nothing in the term ‘accident’ suggests a requirement of culpable conduct on the part of the airline crew.” Because no one had expected the passenger to throw his food tray at the plaintiff, there was no doubt that the assault constituted an “accident.”

2. Was the Injury from Abnormal Flight Operations?

Some courts have also interpreted the Article 17 “accident” requirement as asking whether a passenger’s injury was the result of an abnormal operation of the flight or from the passenger’s own unusual or idiosyncratic reaction to the normal operation of the aircraft. The drafters of both the Warsaw and Montreal Conventions did not intend to impose absolute liability on airlines for the passengers’ personal reactions to “routine operating procedures,” which courts call the “price passengers pay for the degree of airline safety so far afforded them.” The idea that an “accident” must relate to the aircraft’s operation can be traced back to the treatise of Professor D. Goedhuis, the official reporter at the Warsaw Convention. Professor Goedhuis reasoned that “[t]he carrier does not guarantee safety; [they are] only obliged to take all the measures which a good carrier would take for the safety of his passengers.” Although Professor Goedhuis’s suggestion was ultimately not incorporated into the text of the Warsaw Convention, most courts have adopted Goedhuis’s interpretation when analyzing the “accident” requirement.

---

111. Id. at 465–66.
112. See id. at 467.
113. Id.
114. Id.
117. GOEDHUIS, supra note 116, at 200 (emphasis in original).
118. The Supreme Court cited Professor Goedhuis’s treatise to support the notion that liability under the Warsaw Convention only arises when the plaintiff established that their injury was caused by the alleged “accident.” See Air Fr. v. Saks, 470 U.S. 392, 396 (1985); cf. Gezzi v. Brit. Airways PLC, 991 F.2d 603, 605 n.4 (9th Cir. 1993) (arguing that Saks never explicitly states that an “accident” must relate to the operation of an aircraft, alluding to the fact that Professor Goedhuis’s suggestion was never officially included in the Warsaw Convention).
Courts have routinely found no “accident” under Article 17 and denied plaintiffs’ recovery if the injury stemmed from normal flight operations. For example, in Salce v. Aer Lingus Air Lines, the Southern District of New York dismissed the plaintiffs’ complaint because, despite suffering severe neck injuries from the hard landing in Dublin, they did not “establish[] that the landing was anything other than normal and routine.” Similarly, in Potter v. Delta Air Lines, Inc., the Fifth Circuit determined that the presence of a fully reclined sleeping passenger is not unexpected or unusual on an airplane, and therefore, a plaintiff’s knee injury while circumventing the sleeping passenger to return to her seat was not an “accident.” In Sethy v. Malev-Hungarian Airlines, Inc., the Second Circuit likewise found that a boarding plaintiff who tripped over a carry-on bag protruding into the aisle did not demonstrate an Article 17 “accident.”

Conversely, if flight conditions are deemed abnormal, courts have generally concluded that an “accident” occurred under Article 17. Examples of abnormal conditions include being kept on delayed aircraft for hours without food, excessive engine noises, and biting into foreign objects present in in-flight meals.

3. Was the Injury Exacerbated by the Airline’s Failure to Render Reasonable Medical Assistance?

Aside from physical injuries sustained on aircrafts, subsequent injuries stemming from in-flight medical emergencies are also commonly brought under the Warsaw and Montreal Conventions. While flight crews are...
trained in advanced first aid and aviation medicine, they are not medical professionals and often are limited by the resources available on the aircraft in their response to medical emergencies. Accordingly, many courts have reasoned that without some showing of unexpected circumstances, “even a flight crew’s arguably imperfect response to a passenger’s medical emergency does not necessarily constitute an Article 17 ‘accident.’”

Courts in general have found that an “accident” has occurred if there is evidence that airline personnel failed to render reasonable medical assistance to the passenger who developed a medical problem and exacerbated their injury. Article 17 “involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury.” If a passenger’s medical outcome was proven to be adversely affected by the airline’s delayed medical care or mistreatment, a court is likely to find that an “accident” has occurred per Article 17. On the other hand, if the passenger’s medical condition was not adversely affected by delay or medical mistreatment, courts typically deem the injury to be a result of an intrinsic condition of the passenger,

issues are very likely underreported. Jose V. Nable, Christina L. Tupe, Bruce D. Gehle & William J. Brady, In-Flight Medical Emergencies During Commercial Travel, NEW ENG. J. MED. 939, 939 (2015).

129. As part of their initial training, flight attendants are required to learn how to perform cardiopulmonary resuscitation and properly use of automated external defibrillators; they are also required to receive recurrent training every other year. See Fed. Aviation Admin., ADVISORY CIRCULAR NO. 121-34B, EMERGENCY MEDICAL EQUIPMENT TRAINING (2006), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC121-34B.pdf [https://perma.cc/2V9E-G365].


131. White v. Emirates Airlines, Inc., 493 F. App’x 526, 531 (5th Cir. 2012); see also Aviation Medical Assistance Act of 1998, Pub. L. No. 105-170, 112 Stat. 47 (“An individual shall not be liable for damages in any action brought in a Federal or State court arising out of the acts or omissions of the individual in providing or attempting to provide assistance in the case of an in-flight medical emergency unless the individual, while rendering such assistance, is guilty of gross negligence or willful misconduct.”).


134. See, e.g., Fulop v. Malev Hungarian Airlines, 175 F. Supp. 2d 651, 671–73 (S.D.N.Y. 2001). In this case, the plaintiff suffered a heart attack while traveling from Budapest to New York. Id. at 652. Instead of an emergency landing in Europe, the flight landed in its intended destination and the plaintiff underwent a triple bypass surgery two days later. Id. The plaintiff claimed that they would not have suffered permanent damage had the aircraft been diverted. Id. The court determined that the “accident” at issue was not the plaintiff’s initial heart attack, but rather the subsequent aggravated harm caused by the defendant airline’s failure to adhere to established operational standards of diverting the flight for medical emergencies. Id. at 671–73.
and therefore, no “accident” has occurred. In *White v. Emirates Airlines, Inc.*, the Fifth Circuit determined that no “accident” occurred under the Montreal Convention despite a flight crew’s alleged failure to follow all relevant measures set forth by airline policy after a passenger passed out in the lavatory. The passenger suffered a heart attack shortly before the flight landed. The court reasoned that because the flight was in its final descent when the passenger was discovered, “the flight crew’s ability to respond was limited by the short time period in which it had to act and by the need to ensure the safety of other passengers and crew.”

C. “Bodily Injury”

While an “accident” that results in a *fatality* is automatically recoverable under Article 17, not every plaintiff who suffered a *non-fatal* injury has a right to recovery even if an event is determined to be an “accident” in accordance with the Supreme Court’s *Saks* definition. Both the Warsaw and Montreal Conventions draw distinctions between the mind and the body, and a plaintiff must establish that they suffered a “bodily injury.” Courts across the country faced the question of whether a purely psychological injury was compensable under Article 17 after a string of terrorist acts against air travelers in the 1970s provoked considerable litigation. Some courts granted recovery, reasoning that expansive construction of the term “injury” is necessary to achieve the Convention’s avowed purpose. Other courts held that because the ordinary meaning of “bodily injury” implied a “palpable, conspicuous[,] physical injury,” psychological injuries are not recoverable without the presence of a physical injury.

The Supreme Court partially resolved this debate in *Eastern Airlines, Inc. v. Floyd*, holding that plaintiffs are prohibited from recovering for purely psychological injuries. However, the Court left the door open for questions on whether physical manifestations of psychological injuries, as

135. 493 F. App’x 526 (5th Cir. 2012).
136. *Id.* at 534.
137. *Id.*
138. *Id.*
139. *Warsaw Convention*, supra note 37, art 17; *Montreal Convention*, supra note 18, art 17(1).
140. *Warsaw Convention*, supra note 37, art 17; *Montreal Convention*, supra note 18, art 17(1) (emphasis added).
144. *Id.* at 536–37.
well as psychological injuries stemming from physical injuries, are compensable.  

1. **Recovery for Purely Psychological Injuries Is Prohibited**

   In *Floyd*, a flight from Miami to the Bahamas lost power in all three of its engines shortly after takeoff, and the pilot announced that they intended to “ditch[]” the aircraft in the Atlantic Ocean. Fortunately, the crew was able to restart one of the engines, and the plane ultimately landed safely in Miami after a period of quick descent. Nevertheless, a group of passengers brought suit alleging mental distress arising from the incident.

   Looking at the original French text of the Warsaw Convention, the Supreme Court could not find anything that demonstrated that the relevant phrase in Article 17, “lésion corporelle,” should be translated as anything other than “bodily injury,” thus excluding mental or psychic injuries. The Court defined the necessary injury as “death, physical injury, or physical manifestation of an injury” and accordingly found that the plaintiffs could not recover under Article 17 solely for their mental distress.

2. **Recovery for Physical Manifestations of Psychological Injuries Depends on the Jurisdiction**

   In dictum, the Supreme Court qualified that *Floyd* “express[es] no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries.” This statement has left the door open for related litigation, particularly because the Court did not elaborate on the meaning of “physical manifestation of injury.” Accordingly, it

145. *See id.*
146. *Id.* at 533.
147. *Id.*
148. *Id.*
149. *Id.* at 536, 542. The original French text of Article 17 of the Warsaw Convention reads: “Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l’accident qui a causé le dommage s’est produit à bord de l’aéronef ou au cours de toutes opérations d’embarquement et de débarquement.” *Id.* at 535 (emphasis in original).
150. *Id.* at 552–53.
151. *Id.*
remains unclear whether plaintiffs may recover for physical manifestations of purely psychological injuries.  

Some lower courts have held that physical manifestations of emotional injury are not recoverable under Article 17. The Third Circuit in *Terrafranca v. Virgin Atlantic Airways Ltd.* held that a plaintiff “must demonstrate [a] direct, concrete bodily injury” when it rejected a plaintiff’s contentions that the anorexia she developed after her scheduled flight received a bomb threat was a “physical manifestation of injury” as defined by *Floyd.* The court determined that the Supreme Court’s choice of words in the phrase “physical manifestation of injury” was a mistake—“it cannot mean anything less than bodily injury, which is specifically required by Article 17.” Likewise, in *Carey v. United Airlines,* the Ninth Circuit rejected a plaintiff’s claims that the physical manifestations (nausea, cramps, perspiration, and sleeplessness) of the emotional and mental distress he experienced after a heated in-flight dispute satisfied the “bodily injury” requirement. The court was concerned that plaintiffs would skirt the bar on pure mental distress by alleging some physical manifestation of those injuries, and thus undermine *Floyd.* By contrast, other courts have viewed the “bodily injury” requirement more liberally at the pleading stage and held that such physical manifestations do satisfy the bodily injury requirement.  

---

152. Psychological injuries, such as post-traumatic stress disorder (PTSD), anxiety, and depression, are “stress-related emotional conditions resulting from real or imagined threats or injuries.” WILLIAM J. KOCH, KEVIN S. DOUGLAS, TONIA L. NICHOLLS & MELANIE L. O’NEILL, PSYCHOLOGICAL INJURIES: FORENSIC ASSESSMENT, TREATMENT, AND LAW 3 (2006). Examples of physical manifestations of psychological injuries such as PTSD reportedly include sleep abnormalities and impacted thyroid function. See John F. Easton, Jennifer E. Trock & Kevin A. Radford, *Post-Traumatic “Lésion Corporelle”: A Continuum of Bodily Injury Under the Warsaw Convention*, 68 J. AIR L. & COM. 665, 672 (2003).  
153. See, e.g., *In re Air Crash at Little Rock Ark.*, on June 1, 1999, 291 F.3d 503, 512 (8th Cir. 2002) (“[P]hysical manifestation of mental injuries such as weight loss, sleeplessness, or physical changes in the brain resulting from chronic PTSD are not compensable under the [Warsaw Convention].”); *Hermano v. United Airlines*, No. C 99-0105, 1999 WL 1269187, at *4 (N.D. Cal. Dec. 21, 1999) (“The Court finds that headaches, nausea, panic attacks, trembling, and palpitations caused solely by plaintiff’s emotional distress over the incident complained of, do not qualify as physical injury under the Warsaw Convention.”).  
154. 151 F.3d 108 (3d Cir. 1998).  
155. *Id.* at 110–11.  
156. *Id.* at 111.  
157. 255 F.3d 1044 (9th Cir. 2001).  
158. *Id.* at 1052.  
159. *Id.*  
least one court deferred to medical science to determine whether a plaintiff is suffering from a physical injury or is exhibiting physical manifestations of mental distress.\textsuperscript{161}

3. \textit{Recovery for Psychological Injuries Stemming from Physical Injury Depends on the Extent to Which They Are Related}

However, when a plaintiff alleges separate instances of physical injury and mental distress, or if the connection between them is too tenuous, courts have generally refused to allow recovery under Article 17.\textsuperscript{162} In other words, even if they arise from the same incident, courts have held that mental distresses that do not proximately flow from the physical injury are not recoverable. Conversely, all courts agree that recovery for mental distress that flows proximately from that physical injury is recoverable under the Warsaw and Montreal Conventions once a plaintiff has met the “bodily injury” requirement.\textsuperscript{163}

D. \textit{“In the Course of Any of the Operations of Embarking or Disembarking”}

Lastly, to recover under Article 17, the accident must have occurred while the passenger was either on board the aircraft or during the process of embarking or disembarking.\textsuperscript{164} Compared with the analysis of whether a passenger was physically on board the aircraft when the accident occurred, determining whether the accident took place during the operations of embarking or disembarking is a less straightforward question for the courts. Because neither the Warsaw nor Montreal Conventions define the terms “embarking” and “disembarking,” courts have struggled to determine when a passenger begins embarking and completes disembarking.\textsuperscript{165}

In a case involving a terrorist attack at the international transit lounge of an Athens airport, the Second Circuit construed a three-part test to determine whether passengers are in the process of embarking or


\textsuperscript{162} See also Marks v. Virgin Atl. Airways Ltd., No. 04 Civ. 0251, 2004 WL 1574637, at *2 (S.D.N.Y. July 14, 2004) (holding that a pregnant woman who tripped and fell could not recover for alleged emotional injuries—concern for the well-being of her unborn child—because the physical injuries she suffered were wholly separate and unrelated to her alleged emotional claims).

\textsuperscript{163} See Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 667–68 (N.D. Cal. 1994) (concluding that recovery for mental injuries brought on by physical injuries are not barred by \textit{Floyd}).

\textsuperscript{164} \textit{Warsaw Convention, supra} note 37, art. 17; \textit{Montreal Convention, supra} note 18, art. 17(1).

disembarking and thereby within the Warsaw and Montreal Conventions’ purview. The factors the court considered include (1) the airline’s degree of control over the passenger, (2) the passenger’s physical proximity to the aircraft, and (3) the passenger’s activity at the time of the event. Later courts added a fourth factor that considers the imminence of actual boarding to specifically determine whether the passenger was in the process of embarking.

Courts tend to construe the acts of embarking and disembarking narrowly. Courts have generally found that passengers are embarking if they have completed the preliminary ticketing procedures, are in a part of the terminal restricted to travelers, and are acting at the direction of airline personnel (even if that direction is simply a boarding announcement made at the departure gate area). If passengers are still in areas of the terminal open to the public (or are at least generally occupied by passengers departing on many different flights), they are not considered to be in the process of embarkation.

Case law reveals how courts have struggled to interpret the text of the Warsaw and Montreal Conventions. In analyzing two separate passenger injury cases, courts have also disagreed on what is considered a recoverable “accident” under Article 17. The next Part of this Comment highlights the two main opinions federal circuits in the United States hold when adjudicating cases brought under Article 17.

III. RECENT CIRCUIT SPLIT ON THE “UNEXPECTED OR UNUSUAL” DETERMINATION STANDARDS

While the Supreme Court in Saks defined an “accident” under Article 17 as “an unexpected or unusual event or happening that is external to the passenger,” it did not specify what standards courts should
adopt to determine whether an incident fits that definition.\textsuperscript{171} This ambiguity has led to a circuit split on how courts should determine whether an Article 17 “accident” occurred on an international flight: the Fifth Circuit considered industry standards,\textsuperscript{172} whereas the First Circuit considered the perspectives of an “ordinary, reasonable passenger in the plaintiff’s position.”\textsuperscript{173}

\textbf{A. The Fifth Circuit’s Approach: Industry Standards}

In \textit{Blansett v. Continental Airlines, Inc.}, the Fifth Circuit looked at industry standards to decide whether an event was unexpected.\textsuperscript{174} Michael “Shawn” Blansett brought suit against Continental Airlines under the Warsaw Convention after he suffered an episode of deep vein thrombosis (DVT), which resulted in a cerebral stroke that left him permanently debilitated.\textsuperscript{175}

The district court denied Continental’s motion for partial summary judgment on Mr. Blansett’s failure-to-warn claims, holding that an airline’s failure to follow alleged industry customs to warn of the risk of DVT could constitute an “accident” under Article 17, and genuine issues of material fact remained as to whether there is an industry custom to warn passengers on international flights of the risk of developing DVT.\textsuperscript{176} On appeal, the Fifth Circuit held that failure to warn of the risk of developing DVT syndrome could not be an accident under Article 17 because the airline’s “policy [of not requiring such warnings] was far from unique” among international carriers at the time “and was fully in accord with the expectations of the [Federal Aviation Administration].”\textsuperscript{177}

The Fifth Circuit assumed that the failure to warn of DVT is a departure from “an industry standard of care,” and acknowledged \textit{Husain}’s holding that a specific refusal to render requested assistance may constitute an Article 17 “accident.”\textsuperscript{178} However, in keeping with the Supreme Court’s holding by avoiding “a per se rule that any departure from an industry standard of care must be an ‘accident,’” the court ruled that Continental’s failure to warn of DVT did not qualify as an “accident” because it was not

\begin{footnotesize}
\begin{enumerate}
    \item Blansett v. Cont’l Airlines, Inc., 379 F.3d 177, 181 (5th Cir. 2004).
    \item Moore v. Brit. Airways PLC, 32 F.4th 110, 118 (1st Cir. 2022).
    \item \textit{Blansett}, 379 F.3d at 182.
    \item \textit{Id.} at 178.
    \item Blansett, 379 F.3d at 182.
    \item \textit{Id.} at 181–82.
\end{enumerate}
\end{footnotesize}
“unexpected or unusual.” While there were international carriers that warned passengers of DVT at the time, it was undisputed that there were also many that did not. Furthermore, Continental’s other warnings were in accordance with the Federal Aviation Administration’s (FAA) policies.

Courts in other districts and circuits have similarly looked to industry standards and airline policies to determine whether an event is “unexpected or unusual.” In Aziz v. Air India Ltd, the court granted summary judgment for the defendant airline because the plaintiff’s family did not “proffer any evidence establishing that there was in fact an industry standard to provide such [automated external defibrillator] devices on board international flights” and therefore failed to show that the plaintiff’s death was an Article 17 “accident.” Likewise, in Sook Jung Lee v. Korean Air Lines Co., the court granted summary judgment for the defendant airline because the plaintiff, who alleged that the flight crew’s medical treatment of their stroke was insufficient, “failed to proffer any evidence of industry standards” that the flight crew should have but failed to follow which would have made their treatment of the plaintiff “unexpected or unusual.”

B. The First Circuit’s Approach: Reasonable Passenger Standard

In Moore v. British Airways PLC, the First Circuit ruled that whether an event is “unexpected” under the Saks definition of “accident” should be judged from “the perspective of a reasonable passenger with ordinary experience in commercial air travel.” Ms. Moore brought an action against British Airways under the Montreal Convention to recover for injuries she allegedly suffered while disembarking. The district court granted summary judgment in favor of British Airways and dismissed Ms. Moore’s suit because she failed to show that the height of the last step

179. Id. at 182.
180. Id.
181. Id. The FAA prescribes a list of warnings that airlines are required to issue to passengers. Id.
183. Id. at 1154 (emphasis omitted).
184. Id. at 1155.
186. Id. at *6.
187. Id. at *7.
188. 32 F.4th 110 (1st Cir. 2022).
189. Id. at 117 (emphasis added).
190. Id. at 112.
was “unusual for mobile staircases” or otherwise “atypical from other mobile staircase” designs.

On appeal, the First Circuit reversed and held that a question of fact remained as to whether “disembarking on a staircase constructed in this way should be considered ‘unexpected or unusual’ under the circumstances” and remanded the case for further proceedings. Highlighting the distinctions between the terms “unexpected” and “unusual” under the Saks definition, the First Circuit—while accepting the district court’s reasoning that the event was not “unusual”—held that the district court erred by not also analyzing whether the event was “unexpected.”

To analyze an event’s “unexpected” nature, British Airways advocated that the proper perspective the court should consider is “that of the airline industry” because the use of the steps in question was “normal and routine” in practice. Despite identifying Blansett as an outlier in a footnote, the First Circuit ultimately adopted a test more closely aligned with Ms. Moore’s proposal, and held that whether or not an event was “unexpected” should be determined from “the perspective of a reasonable passenger with ordinary experience in commercial air travel” (hereinafter the reasonable passenger standard). Applying the reasonable passenger standard, the First Circuit concluded that the record presented sufficient evidence for a reasonable jury to find that Ms. Moore’s injuries were caused by an Article 17 “accident.”

The different approaches implemented by the Fifth and First Circuits have created both procedural concerns for future flight passenger legal actions and a confusion on the objectives of the Conventions. But before a proper solution to resolving the circuit split can be proposed, it is worth

192. Id. at 7.
194. Id. at 123.
195. Id. at 116–17.
196. Id. at 117. By contrast, Ms. Moore proposed a test of a “hypothetical ‘average traveler.’” Id.
197. Id. at 119 n.7 (“One outlier may be Blansett v. Continental Airlines, Inc., in which the Fifth Circuit held that failure to warn of the risk of developing deep vein thrombosis syndrome could not be an accident under Article 17 because the airline’s ‘policy [of not requiring such warnings] was far from unique’ among international carriers at the time ‘and was fully in accord with the expectations of the [Federal Aviation Administration].’” To the extent—if at all—that Blansett spurns a passenger-focused perspective as to whether an event is unexpected, we reject its reasoning.” (alterations in original) (citations omitted)).
198. See id. at 117 (looking to the language from the Montreal Convention, its elucidation by both American and foreign courts, and its objects and purposes in deriving its conclusion).
199. Id. at 121.
evaluating the implications of each approach in the era where “taking to the skies feels like it has reached a nadir.”

IV. IMPLICATIONS BROUGHT ON BY THE CIRCUIT SPLIT

“When considering the interpretation of the Montreal Convention, the importance of uniformity, both among nations and among the circuits, cannot be overstated.” The divergence in standards that courts have adopted to determine whether an event is “unexpected or unusual” under Article 17 has raised concerns regarding the creation of forum-shopping incentives for plaintiffs which can affect the predictability of airlines’ exposure to liability. Relying on industry and reasonable passenger standards effectuates distinct goals by favoring the defendant airlines or the plaintiff passengers, respectively. This Part will address the real-world implications each standard brings about for both the industry at large and the everyday passenger.


202. Forum-shopping is “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.” Forum-shopping, BLACK’S LAW DICTIONARY (11th ed. 2019).


204. See Naji Alabed, The Montreal Convention: Divergent Framings of the “Unusual or Unexpected” Inquiry, COLUM. BUS. L. REV (Apr. 4, 2023), https://journals.library.columbia.edu/index.php/CBLR/announcement/view/623 [https://perma.cc/W6LP-A53C] (contending that airlines would face “increased compliance costs and exposure to liability” if more courts adopt the reasonable passenger standard advanced in Moore because they “would no longer be able to assert that deficiencies in their protocols, procedures, or airplane and equipment designs cannot be found to be ‘unexpected’ simply because the same are ‘normal or routine’ across the industry, as occurred in Blansett, if an ordinary reasonable passenger would find the conditions to be unexpected”).
A. Industry Standards Bring Clarity and Uniformity, but Reward Corporate Greed at the Expense of Passengers

The airline industry standards\(^{205}\) are a predictable method for determining the requisite standard of care\(^{206}\) and whether an event was foreseeable, which in turn offers uniformity in application. This was evident in Moore, where the plaintiff’s expert cited to various foreign standards in their report to suggest that British Airways’s use of the mobile staircase did not conform to industry standards\(^{207}\) and therefore a jury could find the accident “unexpected.”\(^{208}\) However, in reality, not every regulatable aspect of a commercial aircraft, such as cabin seating,\(^{209}\) is subject to regulation.

Airlines financially benefit from tightly packed cabin seating.\(^{210}\) Prior to 1978, the federal government controlled whether a new airline could

---

205. Standards for the airline industry can be found in the provisions from organizations such as the FAA. Title 49 of the United States Code empowers the FAA to prescribe regulations and minimum safety standards for air carriers. Federal aviation regulations applicable to the design and operation of commercial aircrafts can be found in Title 14, Chapter 1 of the Code of Federal Regulations. For the FAA’s Cabin Safety Subject Index, see FED. AVIATION ADMIN., CABIN SAFETY SUBJECT INDEX (2020), https://www.faa.gov/sites/faa.gov/files/about/initiatives/cabin_safety/regs/CabinSafetyIndex.pdf [https://perma.cc/9EU5-FBSR].

206. See 57A AM. JUR. 2d Negligence § 160 (2023) (“Evidence of the custom and practice of persons engaged in a trade or business similar to the trade or business of a party to a negligence suit is admissible and probative in regard to the requisite standard of care. Industry custom and practice are commonly looked to for an illumination of the appropriate standard of care in a negligence case, as proof of common practice aids in formulating a general expectation as to how individuals will act in the course of their undertaking.”).


208. See id. at 122.

209. Despite years of passenger outcry, there is currently no requirement from the FAA for the minimum size of airplane seats. See FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 577, 132 Stat. 3186, 3394 (stating that “the Administrator of the [FAA] shall issue regulations that establish minimum dimensions for passenger seats on aircraft . . . including minimums for seat pitch, width, and length, and that are necessary for the safety of passengers” within one year of the bill’s passage). Delayed by over three years, the FAA finally took public comments on the possibility of a minimum standard size for commercial airline seating in August 2022. Request for Comments in Minimum Seat Dimensions Necessary for Safety of Air Passengers (Emergency Evacuation), FED. AVIATION ADMIN., https://www.faa.gov/seat-size-comments [https://perma.cc/NUU2-3YES] (last updated Aug. 3, 2022); see also In re Flyers Rights Educ. Fund, Inc., 61 F.4th 166, 168–69 (D.C. Cir. 2023) (holding that an advocacy group had no right to force the FAA to adopt seating rules because it was not “clear and indisputable” that tight seating, while uncomfortable, was also dangerous).

fly to a certain city, charge a certain price, or even exist in the first place.\textsuperscript{211} While such competition-limiting measures guaranteed airlines profits\textsuperscript{212} and allowed the industry to prosper in its infancy, it kept fares high and prevented a vast majority of Americans from being able to afford a ticket.\textsuperscript{213} Once the industry was deregulated,\textsuperscript{214} airlines had to start competing on price.\textsuperscript{215}

To compensate for the cheaper ticket prices, airlines are scrambling to capitalize on record demand by introducing more crowded cabins.\textsuperscript{216} More passengers are being wedged onto planes as airlines swap out heavily-padded seats for ones with thinner backs to add extra rows.\textsuperscript{217} Many airlines are also adding extra seats to each row.\textsuperscript{218} According to United Airlines’ CFO, “[i]t doesn’t cost much to add a few extra passengers to a flight beyond a little extra fuel to carry added weight and potentially an

\begin{flushright}
\textsuperscript{214} See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; see also \textit{Airline Deregulation}, supra note 213 (noting the Airline Deregulation Act of 1978 phased out the Civil Aeronautics Board’s powers of regulation by removing federal control over such things as fares, routes, and market entry of new airlines); id. (discussing how the Act introduced a free market in the commercial airline industry and led to increase in the number of flights provided, decrease in fares, and increase in the number of passengers and miles flown).
\textsuperscript{216} Leslie Josephs, \textit{How Airplane Cabins Got to Be So Cramped}, CNBC (May 17, 2018, 4:07 EDT), https://www.cnbc.com/2018/05/17/airline-passengers-and-seats-are-getting-squeezed.html [https://perma.cc/Z43T-7874] (“JetBlue for example, is retrofitting some of its Airbus A320s, taking them from 150 seats to 162. American Airlines is bumping jets that had 181 or 187 seats up to 190, and jets with 160 seats up to 172.”).
\textsuperscript{217} Joshua Freed, \textit{Skinny Seats}, DALL. MORNING NEWS, http://res.dallasnews.com/interactives/2013_October/AirlineSeats/ [https://perma.cc/Z84U-7G93] (“The new seats Southwest has put on nearly its entire fleet are [thirty-one] inches apart, about an inch less than before. . . . [Southwest was] able to add an extra row of six seats to each plane . . . . [As a result] Southwest went from 137 seats to 143.”).
extra flight attendant. The extra revenue to be had from selling a few more airfares is ‘almost always’ greater.”

Columbia Law Professor Tim Wu believes that there is an implicit agreement among the major airlines to make flying economy an “intolerable experience” regardless of which airline a passenger flies with. “[T]he modern commercial airline industry is uniquely designed to exploit passengers’ potential discomfort and anxiety to turn a profit.” Professor Wu explained:

[I]n order for fees to work, there needs be something worth paying to avoid. That necessitates, at some level, a strategy that can be described as “calculated misery.” Basic service, without fees, must be sufficiently degraded in order to make people want to pay to escape it. And that’s where the suffering begins.

Take the debate on reclining seats as an example. Reclining seats have been a feature of commercial flights since the mid-1930s when “airlines began making human passengers a priority.” Nowadays, however, an increasing number of passengers believe it is “inconsiderate” to recline one’s seat at the expense of another passenger’s comfort as the distance between rows shrink. Despite videos of violent passenger
confrontations in the reclining wars regularly going viral, airlines have been slow to resolve these disputes at the management level. And because flying takes up such a significant part of a passenger’s travel itinerary and often sets the tone for the rest of their trip, it only takes one bad flight for a passenger to voluntarily cough up more money to avoid a repeat. In other words, “[f]rom the airline’s perspective, making money on the same space twice and letting the passengers fight it out is a feature, not a bug.”

The imposition of “calculated misery” by airlines onto passengers may be analyzed against the growing popularity of premium economy, which has become “potentially even the most profitable part of a commercial plane, per square foot” and therefore “quite a cash cow for the airlines.” Pioneered in the early 1990s by Taiwan’s EVA Air, premium economy travel has soared in popularity over the past decade “partly in response to the growing divergence between an economy class that has become increasingly cramped and a business class that has become much more luxurious, taking on much of the opulent features of first class with offerings of fully flat beds to fine wines.” Over fifty airlines currently offer some version of premium economy class and industry analysts expect the growth to continue. Premium economy provides airlines “the opportunity to attain a high yield revenue opportunity for a minimal increase in real estate consumption and service.


226. Elliott, supra note 224.


231. Powley, supra note 229.


233. Powley, supra note 229 (noting in its 2019 aircraft interiors report, Counterpoint Market Intelligence forecast a compound annual growth rate of nine percent from 2020 to 2028 for premium economy travel).
SURPRISES IN THE SKIES

2023]

costs”\(^{234}\) and many airlines have accordingly reported that their premium economy classes are among their most productive cabins.\(^{235}\) The introduction of premium economy has offered passengers an affordable access to greater legroom and complimentary perks.\(^{236}\) However, it also has the potential of driving up instances of air rage.\(^{237}\) A 2016 study found that airline service class inequality is a leading trigger of air rage.\(^{238}\) In particular, researchers found that having two classes of seating on an aircraft increases the frequency of antisocial behaviors by passengers, especially when the economy passengers boarded at the front and walked past the better seats on the way to their own.\(^{239}\)

Incidents of air rage may escalate as class-based seating becomes increasingly unequal and higher travel classes take up greater shares of limited cabin space.\(^{240}\) Combined with the continuous shrinking of personal space in economy class, it is foreseeable that there will be more fights over control of the armrests and reclining seats—which have previously led to lawsuits brought under Article 17.\(^{241}\)

Even though there is “a fine line as to how much [airlines] can do without irritating customers,”\(^{242}\) there are realistically not many incentives for airlines to improve their services.\(^{243}\) As airlines merge, competitors


\(^{237}\) Air rage is “a form of antisocial behavior by airplane passengers becoming abusive or unruly, antagonizing crew members and other passengers, and endangering flight safety.” Katherine A. DeCelles & Michael I. Norton, *Physical and Situational Inequality on Airplanes Predicts Air Rage*, 113 PROC. NAT’L ACADEM. SCI. 5588, 5588 (2016).

\(^{238}\) *Id.* at 5588–91.

\(^{239}\) *Id.* at 5589.

\(^{240}\) *Id.* at 5590.

\(^{241}\) *See, e.g.*, Lahey v. Sing. Airlines, Ltd., 115 F. Supp. 2d 464, 467 (S.D.N.Y. Oct. 5, 2000) (alleging that the plaintiff was assaulted by the passenger sitting behind them because the plaintiff tried to recline in their seat).

\(^{242}\) Zumbach, *supra* note 219.

\(^{243}\) *See Wu, supra* note 220.
collude by taking turns raising fees or providing a lower level of service, making the bad treatment of consumers contagious." 244 It is unfair for passengers to be forced to bear the cost of the airlines’ profit-maximizing measures in the form of injuries just because it is a standardized practice among the commercial airline industry. 245

B. Reasonable Passenger Standards Favor Passengers, but Are Generally Unpredictable, Classist, and Cause Disruption in the Industry

Relative to the industry standards relied on by the Fifth Circuit in Blansett, Moore’s reasonable passenger standard naturally favors the plaintiff passengers over the defendant airlines. As the First Circuit pointed out, an airline is generally guaranteed to be the economically stronger party in every Article 17 case and is thereby better equipped to distribute the risk, irrespective of its negligence. 246 It would therefore be “perverse to force injured plaintiffs to bear the cost of accidents unforeseeable to reasonable passengers with ordinary experience in commercial air travel, especially when such incidents are within the reasonable anticipation of airlines and thus more easily built into their actuarial calculus.” 247

Any measure of reasonability differs according to one’s perspective. The Supreme Court in Saks recognized that “any standard requiring courts to distinguish causes that are ‘accidents’ from causes that are ‘occurrences’ requires drawing a line,” and acknowledged that “reasonable [people] may differ widely as to the place where the line...” 248

---


247. Id.
should fall.”\footnote{Id. at 406. Specifically, the Court rejected attributing its reason for distinguishing between “accidents” and mere occurrences in \textit{Saks} to “any desire to plunge into the ‘Serbonian bog’ that accompanies attempts to distinguish between causes that are accidents and injuries that are accidents.” Id. (citing \textit{Landress v. Phx. Mut. Life Ins. Co.}, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting)).}

Nevertheless, the Court found it necessary to draw that line because the language of Article 17 demanded it.\footnote{Id. at 118; see Gotz v. Delta Air Lines, Inc., 12 F. Supp. 2d 199, 202 (D. Mass. 1998) (opining that \textit{Saks} only called for an objective inquiry into the unusual nature of an event and did not imply that a “plaintiff’s subjective expectations” should control); Craig v. Compagnie Nationale Air Fr., 45 F.3d 435, 1994 WL 711916, at *3 (9th Cir. Dec. 21, 2024) (unpublished table opinion) (holding that the plaintiff’s “belief is not controlling” in the court’s analysis on whether an event was “unexpected”); see also Case C-70/20, YL v. Altenrhein Luftfahrt GmbH, ECLI:EU:C:2021:379, ¶ 35–36 (May 12, 2021) (rejecting any reading of “accident” that is “based on the perspective of each passenger,” and explaining that a subjective interpretation could “lead to a paradoxical result if the same event were classified as ‘unforeseen’ and, therefore, as an ‘accident’ for certain passengers, but not for others,” and “extend [the concept of ‘accident’] in an unreasonable manner to the detriment of air carriers”).}

However, unlike industry standards that can be referenced in company policies or international guidelines, the phrase “reasonable passenger standard” is vague and open to various interpretations. Moore proposed that courts should conduct an “objective inquiry” into whether an event constitutes an Article 17 “accident” from “the perspective of a reasonable passenger with ordinary experience in commercial air travel,” but never defined what “ordinary experience in commercial air travel” would entail.\footnote{Moore, 32 F.4th at 117, 119.}

Moore simply cautioned that courts, both domestic and foreign, have “[b]y and large” found against adopting a test that accounts for passengers’ subjective expectations.\footnote{Id. at 118; see Gotz v. Delta Air Lines, Inc., 12 F. Supp. 2d 199, 202 (D. Mass. 1998) (opining that \textit{Saks} only called for an objective inquiry into the unusual nature of an event and did not imply that a “plaintiff’s subjective expectations” should control); Craig v. Compagnie Nationale Air Fr., 45 F.3d 435, 1994 WL 711916, at *3 (9th Cir. Dec. 21, 2024) (unpublished table opinion) (holding that the plaintiff’s “belief is not controlling” in the court’s analysis on whether an event was “unexpected”); see also Case C-70/20, YL v. Altenrhein Luftfahrt GmbH, ECLI:EU:C:2021:379, ¶ 35–36 (May 12, 2021) (rejecting any reading of “accident” that is “based on the perspective of each passenger,” and explaining that a subjective interpretation could “lead to a paradoxical result if the same event were classified as ‘unforeseen’ and, therefore, as an ‘accident’ for certain passengers, but not for others,” and “extend [the concept of ‘accident’] in an unreasonable manner to the detriment of air carriers”).} Without further elaboration by the court on what “ordinary experience in commercial air travel” signifies, the First Circuit’s qualification left behind much ambiguity that could lead to unpredictable outcomes depending on the jurisdiction.

The “ordinary experience in commercial air travel” caveat is also fundamentally classist\footnote{“Classism” is “a belief that a person’s social or economic station in society determines their value in that society.” \textit{Classism}, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/classism [https://perma.cc/DJ65-NEAM] (last updated Oct. 17, 2023).} in that it favors experienced travelers who are typically of middle to upper class. In 2017, then-CEO of Boeing Dennis A. Muilenburg claimed that “[l]ess than 20 percent of the world’s population has ever taken a single flight.”\footnote{Lizzy Gurdus, \textit{Boeing CEO: Over 80% of the World Has Never Taken a Flight. We’re Leveraging That for Growth}, CNBC (Dec. 7, 2017, 7:08 EST), https://www.cnbc.com/2017/12/07/boeing-ceo-80-percent-of-people-never-flown-for-us-that-means-growth.html [https://perma.cc/FUK2-QVRE].}
flown in an airplane, and forty percent have never left the country.²⁵⁴ Among those who have never left the country, sixty-three percent of respondents revealed that although they want travel more than they do currently, an international trip is simply “out of their price range.”²⁵⁵ Flying—especially internationally—is a privilege available only to certain economic classes. Even as airfares become more affordable and more people take to the skies, the truth remains that it takes money to fly.²⁵⁶ It is an expensive proposition that not everyone will have access to during their lifetime. Many save up for months (if not years) to afford their first flight. Traveling by air is inherently stressful, and there are many blog posts dedicated to detailing must-know tips for first-time flyers.²⁵⁷ Therefore, it is reasonable to believe that holding first-time flyers to the same standard as routine jetsetters with “ordinary experience in commercial air travel” is fundamentally unfair.

Additionally, industry experts fear that the court’s decision in Moore would “leave[] airlines in a difficult position, as setting up air stairs in the ‘usual’ manner [standardized across the industry] now might be deemed ‘unexpected’ so as to support liability under the Montreal Convention.”²⁵⁸ Thus, in order to avoid similar litigation in the future, airlines may be forced to change their policies—which could bring about major inconvenience to the industry.

²⁵⁵ Id.
²⁵⁶ Stefan Gössling, Paul Hanna, James Higham, Scott Cohen & Debbie Hopkins, Can We Fly Less? Evaluating the ‘Necessity’ of Air Travel, 81 J. AIR TRANSP. MGMT., 2019, at 1, 2 (“[T]he reality [is] that most flights are taken by the most privileged social classes in the most affluent societies.”).
V. INDUSTRY-SPECIFIC CONSIDERATIONS

Given the sheer number of “accident” claims annually, air travel generally means stress for many passengers. Modern commercial aircrafts “operate in an environment that is potentially hazardous to humankind,” and traveling at 36,000 feet above sea level innately poses unique challenges for both passengers and flight crew members. Passengers are more likely to be stressed simply by the nature of air travel, and the options flight attendants have for assisting passengers are much more limited than those available on other forms of ground transportation. It is thus important to note certain intricacies about the commercial airline industry. This Part discusses three unique aspects of commercial air travel—namely the common medical risks associated with flying, passengers’ inattention to in-flight safety demonstrations, and the controversial “block time” model that determines how flight attendants are paid—that must be taken into consideration when attempting to resolve the current circuit split over the proper determination standard for Article 17 “accidents.”

A. Common Medical Risks Associated with Flying

A court’s determination of whether an Article 17 “accident” occurred should account for the likelihood of known medical risks being triggered and/or exacerbated by the act of flying. Unlike other modes of transportation, traveling by plane—especially on long-haul international flights covered by the Warsaw and Montreal Conventions—carries additional medical risks (notably DVT caused by long periods of immobility and dehydration caused by the low humidity levels in the air) idiosyncratic to the experience of air travel. Across jurisdictions,

261. DVT, commonly referred to as “economy class syndrome,” is a medical condition that occurs when a blood clot (thrombus) forms in a vein deep in the body (usually in the lower leg or thigh) and can break loose and travel through the blood stream to the lung and cause a pulmonary embolism. In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055, 1058 (N.D. Cal. 2005); see also McKeeGAN & RanIERI, supra note 58, at 27 (“While no proven scientific or clinical link exists between air travel and DVT, per se, the problem is common in the airline industry due to the prolonged periods of the air travel requiring passengers to sit with their legs bent at the knee.”).
262. Due to the conditions and behaviors while in the air, air travel passengers are more susceptible to dehydration. See Damir Zubac, Alex Buote Stella & Shawnda A. Morrison, Up in the Air:
these risks have been the subject of many lawsuits brought by plaintiffs under Article 17.263

More importantly, such risks need to be taken into account as airlines push the industry to new heights. For example, an increasing number of airlines are introducing ultra-long-haul flights.264 In 2019, Qantas landed the first ever non-stop commercial flight from New York to Sydney after over nineteen hours in the air.265 The flight was part of Qantas’s Project Sunrise experiment to conduct scientific research on passengers and crew members on ultra-long-haul flights to enhance the travel experience for passengers and identify optimum rest and work periods for the flight crew.266 To combat the risk of DVT, passengers were guided to in-flight exercise sessions, to which the passengers reported “feeling fairly invigorated” and “enlivened” afterwards.267 Following the positive results, Qantas announced that it will begin offering non-stop flights to Australia from any other city as early as 2025,268 as well as its plans to specifically configure the new fleet of aircrafts to improve passenger

Evidence of Dehydration Risk and Long-Haul Flight on Athletic Performance, 12 NUTRIENTS, Aug. 25, 2020, 1, 1. It is reported that resting ventilatory water losses increases when relative humidity decreases, which, when combined with decreased routine fluid intake, may have contributed to cases of in-flight hypovolemia (also known as volume depletion). See id. at 2.

263. For cases involving DVT, see, e.g., Rodriguez v. Ansett Austl. Ltd., No. CV01-7882JFW, 2002 WL 32153953, at *1–2 (C.D. Cal. Aug. 8, 2002), aff’d, 383 F.3d 914 (9th Cir. 2004) (noting that the plaintiff incurred DVT because of the flight itself and therefore an “accident” occurred); Caman v. Cont’l Airlines, Inc., 455 F.3d 1087, 1089 (9th Cir. 2006) (alleging that the airline’s failure to warn the plaintiff about the risks of DVT constituted an “accident”). For cases involving dehydration, see, e.g., Vumbaca v. Terminal One Grp. Ass’n, 859 F.Supp.2d 343, 352, 359 (E.D.N.Y. Apr. 20, 2012) (alleging that after being locked in an aircraft on the ground without food, water, or adequate sanitary facilities for seven hours, the plaintiff suffered from dehydration, headache, nausea, disgust, hunger, thirst, and discomfort); Di Falco v Emirates [No. 2] (2019) VSC 654 (Austl.) (claiming that dehydration had caused the plaintiff to faint on their way to the lavatory and fracture their ankle).

264. An “ultra-long-haul flight” is commonly defined as a non-stop flight taking over sixteen hours. Alex McWhitter, Are Ultra Long-Haul Flights Viable?, BUS. TRAVELLER, Feb. 2023, 52, 52.


comfort, which will include dedicated Wellbeing Zones “designed for movement, stretching, and hydration.”

On the other end of the spectrum, an increasing number of airlines are now charging for what used to be complimentary meals. On both domestic and international flights, U.S. airlines are only required to provide complimentary food and water if there is a significant tarmac delay, which occurs when an airplane is either waiting to take off or is unable to let passengers off the plane after landing. Under regular circumstances, airlines in the United States are not obligated to supply free water. Spirit Airlines CEO Ben Baldanza once explained why the airline does not offer free water:

Do we not pour you a glass of water for free because we’re mean? No. It’s very expensive to bring water onboard the airplane. The bottle of water isn’t expensive to buy, but its several hundred dollars to cater that cart to the airplane. The reality is that if we gave water away for free on the airplane we’d have to raise every ticket by $0.25 fare cents. That process is what creates high fares over time.

It is understandable not to expect low-cost carriers to provide the same level of amenities as standard airlines given that their tickets are a fraction of a standard airline’s regular price. Over the years, the budget airline sub-industry has successfully trained passengers to expect to pay more for amenities like checked bags, hot meals, wired earphones, and even seat

---

269. Id. For the official design renderings of the Qantas A350 Airbus Wellbeing Zones, see A350 First Class Cabin and Wellbeing Zone, QANTAS MEDIA, https://www.dropbox.com/sh/0yjiojcpff2gzzc/AAAdsFCZUpgJyppyJDtEmrsw/a?dl=0 [https://perma.cc/TZY3-KRP3].


assignments when booking travel.\textsuperscript{275} However, scientists\textsuperscript{276} and flight attendants\textsuperscript{277} have publicly warned about the dangers of drinking in-flight tap water.\textsuperscript{278} This begs the question: should airlines truly be allowed to deprive passengers of water, “the essence of life and human dignity”?\textsuperscript{279}

B. Passengers’ Inattention to Pre-Flight Safety Briefings

Another aspect of air travel that should be accounted for is the reality that not every passenger pays attention to the safety briefings shown before takeoff. In determining whether recovery is permitted under Article 17, courts should also consider whether a passenger had been adequately warned about the hazards of air travel.

Pre-flight video safety briefings have been “a quintessential feature of commercial aviation” since the introduction of in-flight entertainment screens in the 1980s.\textsuperscript{280} The International Civil Aviation Organization (ICAO) recommends that each nation’s civil aviation authority require

\textsuperscript{275} See Steven Perlberg, \textit{Air France Is Offering First Class Food to Coach Class Passengers, BUS. INSIDER} (June 5, 2013, 6:32 AM PDT), https://www.businessinsider.com/air-france-foie-gras-2013-6 [https://perma.cc/V24U-G7EE] (“For all the tired jokes about its taste, airline food used to come gratis. The industry has been forced to adapt now that low-cost airlines like Ryanair and EasyJet have successfully conditioned passengers to pay for everything.”); see also Clive Irving, \textit{Flying Coach Is the New Hell: How Airlines Engineer You Out of Room}, DAILY BEAST (Nov. 27, 2014, 12:58 PM EST), https://www.thedailybeast.com/flying-coach-is-the-new-hell-how-airlines-engineer-you-out-of-room (last visited Oct. 27, 2023) (“The airlines have indoctrinated us to accept a ‘steerage complex.’ We are being conditioned to believe that in exchange for a bargain, we just have no right to expect comfort in return.”).

\textsuperscript{276} See Harald Handschuh, Jean O’Dwyer & Catherine C. Adley, \textit{Bacteria that Travel: The Quality of Aircraft Water}, 12 INT’L J. ENV’T RSCH. & PUB. HEALTH 13938, 13948 (2015) (finding that the quality of water in the aircraft water tanks are “conducive for microbial growth”).


\textsuperscript{278} See Press Release, Env’t Prot. Agency, EPA Announces Drinking Water Agreements with 24 Domestic Airlines (Oct. 19, 2005), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/0b6df456b61ce6fa8525709f0064c1c7.html [https://perma.cc/TKW3-FBP6] (finding that fifteen percent of drinking water samples taken by the EPA from 327 United States and foreign planes across nineteen airports were contaminated with coliform, a bacteria commonly found in feces); see also \textit{Coliform Bacteria in Drinking Water}, WASH. DEPT. OF HEALTH, https://doh.wa.gov/community-and-environment/drinking-water/contaminants/coliform [https://perma.cc/NTS6-HTAP] [explaining how coliform bacteria can be found in the feces of both humans and animals, and that “their presence in drinking water indicates that disease-causing organisms (pathogens) could be in the water system”).


airlines to orally brief their passengers before each takeoff in both the language of operation and English to reach as many passengers as possible. ICAO provisions also require that through the briefings, passengers are made familiar with the location and uses of seat belts, emergency exits, life jackets, oxygen masks, and other emergency equipment provided for individual use.

In the United States, aside from the requirement that passengers are “orally briefed by [an] appropriate crewmember” before each take-off, aviation regulations do not dictate how an airline has to deliver the briefing. So, depending on the type of in-flight entertainment system and the airline’s internal policies, the pre-flight safety demonstration may be presented through a pre-recorded briefing or live by flight attendants. Some airlines even turn to various marketing techniques, such as using humor or getting celebrities to deliver their message in attempts to increase passenger interest in the pre-flight demonstrations.

While aviation regulatory authorities can mandate that airlines brief passengers on their emergency procedures before every flight, they unfortunately cannot guarantee that every passenger pays attention to these briefings. In the rare chance of an emergency, such inattention can potentially have real consequences, as passengers who do not pay attention to the pre-flight safety demonstrations are found to underestimate the importance of the materials contained. For example, the U.S. National Transportation Safety Board’s (NTSB) accident report regarding the 2009 Hudson River crash revealed that about seventy...
percent of passengers did not watch any of the pre-flight safety demonstration, and over ninety percent did not read the safety information card before or during the flight.\footnote{KMS9} Memorably, in the incident now dubbed the “miracle on the Hudson,” all 153 people aboard survived the crash.\footnote{IRCRAFT ACCIDENT REPORT, supra note 287, at 117. Most of the passengers said that they were “frequent travelers who were very familiar with the preflight briefing and that, over the years, the information about the seat cushions had “sunk in” to their consciousness.” Id. at 112.} Weather and location were two of the many reasons why there were no fatalities from the crash itself, hypothermia, or drowning—all of which were possible outcomes for a winter water landing.\footnote{289. David Paterson, Governor of New York at the time, described the rescue a “miracle on the Hudson.” Margot Adler & Melissa Block, Paterson Lauds ‘Miracle on the Hudson,’ NPR (Jan. 15, 2009, 7:33 PM ET), https://www.npr.org/templates/story/story.php?storyId=99442906 [https://perma.cc/T238-T3AL].} However, the NTSB reported that only seventy-seven passengers retrieved flotation seat cushions during the evacuation, and only ten retrieved life vests themselves after impact.\footnote{290. See also AIRCRAFT ACCIDENT REPORT, supra note 287, at 44.} Had the plane crashed in the middle of the Atlantic Ocean, for instance, with the same life vest retrieval rates, the waves and swells could have easily resulted in a mass tragedy.\footnote{292. Cf. Greenberg, supra note 290 (“If [the plane had crashed] in the Atlantic, the waves and swells probably would have resulted in something different. There are just so many variables that could have taken place.”).} Rather than evacuating passengers, emergency responders would instead be facilitating recovery operations.

C. Flight Attendants Are Not Being Paid During Boarding

Because a number of plaintiffs who brought suit under Article 17 have alleged some wrongdoing by the airline’s staff, it is of value to understand the responsibilities of flight attendants and, more importantly, the controversial way they are compensated by their employers.

By law, all airplanes carrying more than nineteen passengers are required to have at least one flight attendant aboard the aircraft to ensure

\footnote{288. AIRCRAFT ACCIDENT REPORT, supra note 287, at 103 (“[T]he postcrash environment, which included a 41°F water temperature and a 2°F wind chill factor and a lack of sufficient slide/rafts (resulting from water entering the aft fuselage) posed an immediate threat to the occupants’ lives. . . . Medical literature indicates that cold-water immersion causes cold shock, which can kill a person within 3 to 5 minutes, and swimming failure, which can kill a person within 5 to 30 minutes.”).}

\footnote{291. AIRCRAFT ACCIDENT REPORT, supra note 287, at 103 (“[T]he postcrash environment, which included a 41°F water temperature and a 2°F wind chill factor and a lack of sufficient slide/rafts (resulting from water entering the aft fuselage) posed an immediate threat to the occupants’ lives. . . . Medical literature indicates that cold-water immersion causes cold shock, which can kill a person within 3 to 5 minutes, and swimming failure, which can kill a person within 5 to 30 minutes.”).}
the safety and security of all passengers.\(^\text{293}\) While many of the public still view them as "hospitality workers at cruising altitude,"\(^\text{294}\) the foremost responsibility of flight attendants is to help passengers in the event of an emergency.\(^\text{295}\)

There are two main components to a flight attendant’s salary. *Per diem* is the compensation paid to a flight attendant for every hour they are away from base and is meant to cover living expenses while they are away from home.\(^\text{296}\) The per diem rates at most airlines are about $1.50 to $2.00 per hour, though some pay more if the flight attendant is working on an international flight.\(^\text{297}\) Most of the compensation flight attendants receive, however, comes from their *flight pay*, which is calculated by the total hours they spend on the plane with passengers navigating the taxiways and flying in the air ("block time").\(^\text{298}\)

Flight pay does not kick in until all the passengers have boarded, the plane doors have closed, and the ground crew have released the chock blocks in preparation for pushback from the gate ("block out").\(^\text{299}\) It continues to accumulate until the flight reaches its destination, parks at the gate, and the chock blocks are reset ("block in").\(^\text{300}\) This means that airlines traditionally do not pay flight attendants for their work before takeoff, despite many flight attendants publicly saying that the hardest part of their jobs is the boarding process.\(^\text{301}\) Attempts at devising new boarding methods to speed up the boarding process have largely failed.

---

297. Id.
298. Id.
299. Id.
300. Id.
over the years. A former flight attendant even started a petition on Change.org calling for airlines to compensate flight attendants during boarding.306

In April 2022, Delta Air Lines became the first major U.S. airline to announce that it would start paying flight crew members during boarding on all flights beginning on June 2, 2022.307 “Our new boarding pay component—an industry first—further recognizes how important your role is on board to ensuring a welcoming, safe, and on-time start to each flight and for each customer,” Delta said in a memo to its flight attendants.308 Delta’s announcement gave a boost to the flight attendants’ ongoing efforts at other airlines to be compensated for boarding time.309 While there is renewed hope that more airlines will follow in Delta’s footsteps, the reality remains that a majority of flight attendants in the United States are still not being paid for their services during boarding. In other words, claims brought against airlines alleging flight attendant wrongdoing during boarding likely come at a period when flight


304. See, e.g., Helen Coffey, Passengers Brawl in Plane Aisle in Row over Overhead Bin, INDEPENDENT (Apr. 13, 2021, 10:17), https://www.independent.co.uk/travel/news-and-advice/tunisair-flight-overhead-bin-flight-plane-b1830499.html [https://perma.cc/DE8D-9X7T] (reporting on a fight that was started due to a dispute over the allocation of overhead bin space and caused a five-hour delay).


308. Id.

309. Kyle Arnold, American Airlines, Southwest Flight Attendants Want to Be Paid for Boarding Planes, DALL. MORNING NEWS (May 2, 2022, 6:00 AM CDT), https://www.dallasnews.com/business/airlines/2022/05/02/american-airlines-southwest-flight-attendants-want-to-be-paid-for-boarding-planes/ (last visited Oct. 14, 2023) (noting that flight attendants at American Airlines, Southwest Airlines, and Alaska Airlines are expected to discuss boarding pay during their contract negotiations with management).
attendants are not getting compensated for their work and thus may not be motivated to perform their best.

VI. PROPOSALS FOR REFORM

In light of the industry-specific considerations named above, this Comment puts forth three main proposals for both judicial and industry reforms to reduce plaintiffs’ forum-shopping incentives and ultimately resolve the split between the First and Fifth Circuits. This Comment urges courts to streamline interpretations of Article 17 and for air carriers to put passengers on notice of the common medical risks associated with flying. Most importantly, this Comment proposes a method inspired by the “block time” model for courts to adopt when determining whether an event is “unexpected and unusual” and thus entitled to compensation under Article 17.

A. Streamline Article 17 Interpretations

Parties litigating under the Montreal Convention can obtain some level of clarity by closely reading the leading American cases interpreting Article 17 and the Saks definition. However, as identified in Part II of this Comment, absent further clarification from the Supreme Court, many lower courts have imposed their own inquiries and requirements to aid their determination of what constitutes an “accident” under Article 17.\textsuperscript{310} Depending on the requirements imposed, certain jurisdictions may be viewed by potential plaintiffs as being more favorable for specific incidents and fact patterns, which in turn encourages forum-shopping and affects the predictability of airlines’ exposure to liability.

To lessen forum-shopping tendencies, it is thus important to streamline the various interpretations of Article 17. This Comment accordingly proposes the harmonization of interpretations internationally, and the elimination of both the “risk characteristic of air travel” test and “bodily injury” requirement.

1. Harmonize Definitions Internationally

As alluded to by the First Circuit in Moore, the Saks Court considered “the weight of precedent in foreign and American courts” to aid its interpretation of Article 17.\textsuperscript{311} Therefore, to resolve the domestic circuit

\textsuperscript{310} See supra Part II.B.

split, American courts should also look to harmonizing their determination standards with foreign jurisdictions, especially due to the global nature of the international air travel and the many forums plaintiffs can choose from to bring suit against the airlines.312

While American courts have been tackling the language of Article 17 for decades, it was only in 2019 that the Court of Justice of the European Union (CJEU) interpreted the concept of an Article 17 “accident” for the first time.313 In GN v. ZU, the CJEU considered whether a cup of hot coffee placed on an attached tray table that tipped over during flight and caused second-degree scalding on a passenger constitutes an “accident” under Article 17.314 The CJEU paid no attention to case law from any of the state parties regarding the definition of an Article 17 “accident.” Instead, the CJEU looked to “[t]he ordinary meaning of [‘accident’] in its context, in the light of the object and purpose” of the Montreal Convention and settled on the definition “of an unforeseen, harmful and involuntary event.”315 It is worth noting that in 2022, the CJEU relied on its GN decision in its separate preliminary ruling in JR v. Austrian Airlines AG,316 a case factually very similar to Moore.

Unlike the definition articulated by the United States Supreme Court in Saks and the Landesgericht Korneuburg317 in GN’s earlier proceedings,
the CJEU made no mention about how the injury-causing event had to be “external” to the plaintiff. The CJEU did not explain why it excluded the “external” wording, and there is currently not enough case law to extrapolate the court’s reasonings. Nevertheless, as more Article 17 cases are litigated in courts around the world, American courts should actively attempt to harmonize their interpretations of Article 17 (to the extent they can depending on the facts of the case), such as potentially eliminating the word “external” from the current definition of “accident,” to remain consistent with the growing global jurisprudence.

2. **Abolish the “Risk Characteristic of Air Travel” Test**

   Whether purposeful or not, the Supreme Court in *Saks* did not specifically address whether the flexibility of the “accident” definition requires that the passenger’s injury be related to risks characteristic of air travel. The Court only observed that the word “accident” should not be narrowly construed but instead be applied “flexibly.”

   Rote reliance on a test requiring an analysis of the characteristic risk of air travel is at its core improper and can lead to harsh, unfair results. Concluding whether a risk is characteristic of air travel is less fact-specific and can have more precedential value than the informal inquiries into whether an injury was a result of abnormal flight operations. Once a court determines an injury not to be a characteristic risk, it effectively closes the door for future plaintiffs seeking to sue for the same type of injury within that jurisdiction. Moreover, as aviation technology advances, what could be considered a “risk characteristic of air travel” also changes.

   Instead of a risk analysis, it is more appropriate to consider whether the plaintiff’s injury bears some causal relation to the airline’s operations. Professor Goedhuis recommended that “[i]n order to avoid uncertainties [regarding the interpretation of the term ‘accident’], it is desirable to modify [A]rticle 17 . . . by adding that the accident which caused the damage must have arisen from the carriage.”

   Doing so not only would grant more plaintiffs access to remedy through case-by-case analyses but would also encourage the commercial airline industry to remedy or accommodate the known risks of air travel. Most importantly, it would deter airlines from inaction in cases involving risks that are already acknowledged by the courts as characteristic of air travel, such as sexual assault.

---

319. GOEDHUIS, supra note 116, at 200.
3. **Eliminate the “Bodily Injury” Requirement to Permit Psychological Injuries**

Established principles of personal injury compensation put forth a conceptual dichotomy between physical and psychiatric injuries. Psychological injuries, falling short of recognized psychiatric pathology, were traditionally not compensable under the law, out of “the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability.”[^321] Such barriers to compensation disfavor plaintiffs whose injuries are purely psychological and not demonstrable in the same way as broken bones and facial disfigurements. This unfair treatment is problematic because it presumes that physical injuries are more legitimate than psychological injuries.[^322]

According to Dr. Assad Kotaite, President of the Council of ICAO during the drafting of the Montreal Convention, “the rules of law must evolve in accordance with technical, social and commercial developments.”[^323] Law should reflect society’s progress. “As the physical nature of psychiatric injury become increasingly understood, including by the general public, the somatic-psychic distinction is increasingly accepted as artificial, even by lawyers trained in the jargon of ‘pure mental harm.’”[^324] And as stigmas associated with psychological injuries are gradually reduced through the prioritization of mental health, the “bodily injury” requirement should be eliminated to create greater access to remedy under Article 17 and allow plaintiffs to be fully compensated. Furthermore, defendants’ counsel still have the opportunity to cross-examine the plaintiff over psychological injuries they suspect are exaggerated or fraudulent at trial.

### B. Put Passengers on Notice of Medical Risks

The aforementioned proposals to streamline interpretations of Article 17 can be viewed as being pro-plaintiff since they generally expand passengers’ access to remedy. To balance out the legal advantage passengers now possess over the airlines and strive for the Montreal

Constitution’s objective of achieving an “equitable balance of interests,” it is thus important for airlines to modify their business practices to insulate themselves from liability.

Much like train and taxi services, airlines are common carriers and hence “owe[] both a duty of utmost care and vigilance of a very cautious person towards [its] passengers.” Despite having a legal requirement to do “all that human care, vigilance, and foresight reasonably could do under all the circumstances,” courts recognize that airlines, like other common carriers, are “not an insurer of its passengers’ safety.”

Even the slightest risk of serious passenger injury could result in legal liability for airlines, given their heightened duties as common carriers, if there are mechanisms to eliminate that risk in ways that are “consistent with the character . . . of [airline travel] and the practical operation of [that] business.” And as more research about passenger flight conditions is conducted, circumstances that were once recognized as “normal flight operations” that naturally elevated the risk of injury or illness may become intolerable and ultimately be deemed “unexpected or unusual” if airlines do not take steps to warn passengers of the medical risks.

Plaintiffs that brought suit under Article 17 alleging that they were not informed about the medical risks associated with air travel have found varying degrees of success in the courts. For airlines, it is therefore advisable to notify passengers of known medical risks related to air travel to limit liability, much like how manufacturers of packaged foods have a federal duty to warn consumers about the presence of eight major allergens believed to account for ninety percent of food allergies in the

325. Montreal Convention, supra note 18, pmbl.
326. See e.g., Wendy Gerwick, Taking Exit Row Seating Seriously, 68 J. AIR L. & COM. 449, 452–57 (2003) (arguing that holding passengers sitting at the exit row liable for damages that arise due to their inattention to the pre-flight safety briefings could “deter [them] from ignoring safety information and compensate those victims harmed as a result of exit row passengers’ inattention”); see also NAT’L TRANSP. SAFETY BD., SAFETY RECOMMENDATION 22 (July 14, 2000), https://www.ntsb.gov/safety/safety-regs/recletters/A00_72_91.pdf [https://perma.cc/WQY6-8XD7] (proposing that the FAA “conduct research and explore creative and effective methods that use state-of-the-art technology to convey safety information to passengers”).
327. A “common carrier” is “[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.” Carrier, BLACK’S LAW DICTIONARY, supra note 202.
329. Id.
330. Id. at 40 (citing Lopez v. S. Cal. Rapid Transit Dist., 710 P.2d 907, 909 (Cal. 1985)).
331. Id. (quoting Lopez, 710 P.2d at 909).
332. See Caman v. Cont’l Airlines, Inc., 455 F.3d 1087, 1092 (9th Cir. 2006).
United States. Even for injuries already determined to not be “accidents” allowing compensation, such as DVT and dehydration, airlines should nonetheless put passengers on notice and actively work to reduce the risks as an effort to protect their passengers. If the passengers do not pay attention to such notifications, it is up to them to bear the risk.

1. **Introduce In-Flight Exercises to Reduce DVT**

Common law courts around the world have generally ruled in favor of the airlines in cases involving deep vein thrombosis, holding that developing DVT after long periods of inactivity is not an “unexpected or unusual event” compensable under Article 17. On that account, airlines should include a section on the medical risks commonly experienced by passengers in their pre-flight safety demonstrations.

Traveling longer distances without a break is an attractive proposition for both airlines and some passengers, and is sometimes also necessitated by changing geopolitical tensions. While it is highly admirable for Qantas to be going above and beyond for its passengers by conducting research flights and dedicating Wellbeing Zones for passenger comfort, it is simply unrealistic to impose this scale of financial investment onto all commercial airlines and expect this to become the industry standard anytime soon. Instead, as a cost-efficient alternative, airlines should (re)introduce in-flight exercises to encourage passengers to get moving and therefore physically deter some of the known medical risks such as DVT—especially on long-haul, international flights.

---

333. See DEPT OF HEALTH & HUMAN SERVS., FOOD ALLERGEN LABELING AND CONSUMER PROTECTION ACT OF 2004 PUBLIC LAW 108-282 REP. TO U.S. SENATE COMM. ON HEALTH, EDUC., LAB., & PENSIONS & U.S. HOUSE OF REP. COMM. ON ENERGY & COM. 5, n.6 (requiring FDA-regulated products containing identified a “major food allergen”—milk, eggs, fish, Crustacean shellfish, tree nuts, peanuts, wheat, and soybeans—to be specifically labeled with “the common or usual name” of the allergen source).


335. See supra section V.A.

336. See, e.g., Press Release, JetBlue, Crunch Takes Fitness to a Higher Plane with Inflight Yoga on JetBlue Airways (May 23, 2002), https://ir.jetblue.com/news/news-details/2002/Crunch-Takes-Fitness-to-a-Higher-Plane-With-Inflight-Yoga-on-JetBlue-Airways/default.aspx [https://perma.cc/9DDW-EDHS] (announcing that in 2002, JetBlue and Crunch Fitness launched a program in which Crunch Fitness Airplane Yoga cards offered four easy-to-assume yoga positions that passengers could easily achieve without leaving their seats were available on all JetBlue flights);
easily replicable way to make the flying experience a little bit more comfortable (and fun) for the passengers, which in turn can create some much-needed brand loyalty in the highly-saturated industry where competition between airlines is fierce.

2. **Provide Free Water to Prevent Dehydration**

In addition to DVT, another common medical risk associated with air travel and raised in Article 17 litigation is dehydration. Complimentary drinks provided by airlines used to be one of the free perks passengers could enjoy when flying. Nowadays, such practice is less and less guaranteed—particularly on low-cost carriers. To prevent passengers from drinking untreated airplane tap water, as well as avoid litigation over both dehydration and waterborne illnesses, it should be mandatory for all airlines to provide complementary water to their passengers.

C. **Determine “Accident” Using a “Block Time” Model**

Before a solution to resolve the circuit split on how courts should determine whether an “accident” took place can be proposed, it is paramount to first establish whether the Montreal Convention should be interpreted to be more passenger-friendly or airline-friendly.

Many have pointed out that compared to its predecessor, the Montreal Convention appears to categorically favor passengers over air carriers. This is supported by the Convention’s emphasis on “the importance of ensuring protection of the interests of consumers in international carriage by air.” Citing the Montreal Convention’s stated purpose of protecting passengers, the First Circuit adopted the reasonable passenger standard in

---

337. See Vumbaca v. Terminal One Grp. Ass’n, 859 F. Supp. 2d 343, 359 (E.D.N.Y. 2012). At the time of writing, American courts have yet to hear a case under the Montreal Convention that alleges dehydration as the sole injury. In Australia, a plaintiff asserted dehydration as the sole injury. See Di Falco v Emirates [No. 2] (2019) VSC 654, ¶ 1–2 (Austl.).

338. See supra section V.A.

339. See, e.g., Scoot Passenger Asks for Water; Gets Cup of Ice Instead and Has to Wait for It to Melt, COCONUTS SING. (Nov. 19, 2018, 11:53 AM), https://coconuts.co/singapore/news/scoot-passenger-asks-water-gets-cup-ice-instead-wait-melt/ (describing how a passenger “wouldn’t care if [the water] was from the tap,” refused to pay for a bottle of water—the only means of obtaining water during the flight—and was allegedly told by the flight attendant “to wait for the frozen cubes to melt”).


341. Montreal Convention, supra note 18, pmbl. (emphasis added).
Moore because it would be “incongruous” with the Convention’s goals “if recovery were impossible for injuries suffered due to events that an ordinary, reasonable passenger would not expect to happen.”

Yet, some observers argue that the First Circuit’s interpretation of the Montreal Convention’s purpose to support the reasonable passenger standards is “unwarranted.” They argue that, given how the drafters of the Montreal Convention adopted the Warsaw Convention’s Article 17 almost verbatim and how courts continue to apply the precedents set during the Warsaw era, there should be no reason for courts to construe Article 17 differently to cases brought under the Montreal Convention.

In other words, “[i]f ‘accident’ carries the same meaning as it did within an airline-friendly treaty, then it should not be read to favor passengers now.”

In spite of the raised limits on airline liability and the burden of proof being shifted onto the airlines “to the advantage of the passenger” under the Montreal Convention, the drafters made sure to explicitly articulate in the preamble the Convention’s goal of “achieving an equitable balance of interests.” It is hence reasonable to infer that the Montreal Convention is drafted “to elevate the interests of passengers to match, not eclipse, the importance afforded to the airlines’ interests in the Warsaw Convention.” Accordingly, to properly honor the drafters’ intentions, any proposal of reforming how courts should evaluate Article 17 claims should be both passenger-friendly and airline-friendly. In the context of the circuit split between the First and Fifth Circuits, this means incorporating both the pro-plaintiff reasonable passenger standards and pro-defendant industry standards.

To resolve the split between the First and Fifth Circuits, courts should incorporate the strengths of both existing standards and adopt a “block time” model (inspired by the framework that determines flight attendant compensation) to decide whether an event is “unexpected and unusual” and thereby entitled to recovery under Article 17. In other words, depending on when throughout the flight the “accident” occurred, courts should apply either the reasonable passenger standard articulated in Moore or look to industry standards as put forth by Blansett.

Unlike the framework that determines flight attendants’ pay by the time the aircraft’s chock blocks are released for pushback and reset once at the

343. Roberts, supra note 60; see also Spring, supra note 201, at 157–61.
344. Roberts, supra note 60.
345. Id.
346. MCKEEGAN & RANIERI, supra note 58, at 9.
347. Montreal Convention, supra note 18, pmbl.
348. Roberts, supra note 60 (emphasis added).
gate, the “block in” period for determining the “unexpected and unusual” nature of an incident should begin once the pre-flight safety demonstration is given and end once the last announcement is made by the pilot after touchdown. Adopting such a model would both acknowledge how most flight attendants in the United States are not compensated for their work during boarding and address the concerns about the classism associated with modern air travel by factoring in the inexperience of first-time flyers.

1. If the Injury Occurred While Embarking, Apply Reasonable Passenger Standards

According to the Change.org petition calling for airlines to compensate flight attendants during boarding,349 because the “block in” period is essentially “‘free’ time for the airlines, they are able to manipulate [flight attendants] as much as they would like” by making flight attendants work longer hours, keeping them away from their homes longer, and putting significantly more stress on their physical and mental health.350 To reflect how flight attendants are currently under-compensated for the essential services they provide, as well as to encourage more airlines to pay flight attendants during “block in” periods, courts should adopt Moore’s reasonable passenger standard to incidents that occur during this traditional “block in” period.

The boarding process is notoriously slow and chaotic. For decades, airlines have attempted to devise new boarding methods to hasten the embarking process,351 but they faced backlash from flight attendants who contend that these processes create “complete chaos” among passengers and ultimately prolong the boarding period.352 And due to limited overhead luggage space and shrinking under-seat storage space as more

349. Rohrborn, supra note 306.
350. See id.
352. Martín, supra note 302.
rows are being added, “passengers are not indifferent about when they board the plane and place a high value on being allowed to board first.”

For first-time flyers, the boarding process is their introduction to both the cabin’s interiors and the general air travel etiquette. While airlines generally offer early boarding to meet the flight crew as part of their unaccompanied minor services, there are currently no comparable services for first-time flyers to be briefed on all the intricacies of air travel beforehand. Accordingly, courts should adopt the more passenger-friendly reasonable passenger standard for injuries sustained during the boarding process to account for the fact that the chaos of the boarding process significantly hinders a flight attendant’s ability to properly assist an injured passenger.

2. If the Injury Occurred After the Pre-Flight Safety Demonstration, Apply Industry Standards

Once all the passengers are seated and are prepared for takeoff, the airline-specific pre-flight safety demonstrations are shown. The information conveyed through the demonstrations are meant to explain to passengers the safety features on board and to put them on notice effectively about the risks associated with air travel, such as turbulence, sudden drops in cabin pressures, and emergency landings. Courts should therefore apply industry standards to assess injuries sustained after the pre-flight demonstration because a reasonable first-time flyer should have paid attention to the demonstration and thus be able to act according to the airline’s policies.

Flight attendants also have greater authority once the cabin doors are closed and are better equipped to assist passengers in a timely manner once the aisle traffic has cleared up. Their training, which is regulated by the FAA, prepares them to address in-flight emergencies. So, unless there is a passenger who is medically trained, flight attendants are the most qualified persons on board. Accordingly, looking to industry standards for injuries sustained in-flight where flight attendants are most responsible for the level of care passengers receive is appropriate.

353. Barro, supra note 303.

354. Although there are currently no FAA or other Department of Transportation regulations concerning children who fly alone, many airlines adopted specific procedures protecting the wellbeing of unaccompanied minors. For example, as part of American Airlines and United Airlines’ unaccompanied minor services, the child gets to board their flight first to meet the flight attendants or pilots and be shown to their seats. Unaccompanied Minors, AM. AIRLINES, https://www.aa.com/i18n/travel-info/special-assistance/unaccompanied-minors.jsp; Unaccompanied Minors, UNITED AIRLINES, https://www.united.com/en/us/fly/travel/accessibility-and-assistance/unaccompanied-minors.html (last visited Oct. 14, 2023).

3. **If the Injury Occurred While Disembarking, Apply Reasonable Passenger Standards**

Similar to the embarking process, passengers are often unfamiliar with the disembarking process—especially if they are landing in a new country or airport with different weather conditions. Additionally, many passengers with connecting flights are often in a rush to deplane, which can create a similar chaos experienced during the boarding process. Accordingly, the same reasonable passenger standard should be applied to both the embarking and disembarking process given how chaotic and unpredictable deplaning can get.

CONCLUSION

Despite its projected road to recovery, the commercial airline industry remains fundamentally fragile. Airlines need regulatory safeguards to continue thriving in this competitive market and maintain their level of service. However, the truth remains that “airlines spell safety with a dollar sign and the FAA practices regulation by death.” It is thus equally important for the government to intervene and begin curbing the profit-maximizing choices airlines make at the expense of passenger safety before more passengers are seriously injured.

British Airways ultimately settled with Ms. Moore in September 2022, a month before trial was set to be held in front of a federal jury in Massachusetts. This means that the specific set of facts in Moore will likely never be heard by the highest court of the United States, and the resulting circuit split will continue to divide the country as more courts take a stance on the issue. The Supreme Court has not yet expressed any desire to revisit the Montreal Convention. Nevertheless, after careful critique of the disagreement in Article 17 “accident” determination

---


357. Tom Incantalupo, Deregulation Hurt Airline Safety, Critics Say, CHI. SUN-TIMES, Aug. 1, 1979, at 48 (quoting Patricia Robertson Miller, head of the Association of Flight Attendants, in response to the May 25, 1979, crash on takeoff from Chicago’s O’Hare Airport that killed 275 people).


standards between the First and Fifth Circuits, this Comment proposes a new model for courts to adopt both industry and reasonable passenger standards to determine if an incident is “unexpected and usual” based on when the incident occurred. Incorporating both the pro-plaintiff reasonable passenger standards and pro-defendant industry standards would allow courts to not only take into consideration the idiosyncrasies of modern air travel but also honor the drafters’ intentions of elevating passenger interests to match the airlines.

It is unclear whether more courts will adopt the First Circuit’s reasonable passenger standard. If so, based on the Supreme Court’s recent reticence to resolve various circuit splits, it is unlikely that this issue will be resolved soon. Until then, passengers should try their best to sit back, relax, and enjoy the flight.