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FLYING THE OVERLY FRIENDLY SKIES: EXPANDING THE DEFINITION OF AN “ACCIDENT” UNDER THE WARSAW CONVENTION TO INCLUDE CO-PASSENGER SEXUAL ASSAULTS

I. INTRODUCTION

The aviation industry was still developing in 1929.1 A few brave aviators had accomplished the feats of flying from the East Coast to the West Coast of the United States, the first transatlantic and transpacific flights and crossed over both poles.2 Civil aviation, however, was “in its infancy.”3 In the period between 1925 and 1929, only 400 million passenger miles were flown and the fatality rate was 45 per 100 million passenger miles.4 Even before these milestones in aviation, members of the international community set out to create a unified legal system to regulate air

1. See I.H.PH. Diederiks-Verschoor, An Introduction to Air Law 2 (5th rev. ed. 1993) (noting that modern aviation began in 1903). The topic of civil aviation was widely discussed in 1903 due to the Wright Brothers’ first successful engine-powered flight. See id. (noting that success of first engine-powered flight increased awareness of future aviation possibilities); see also Kelly Compton Grems, Comment, Punitive Damages Under the Warsaw Convention: Revisiting the Drafters’ Intent, 41 Am. U. L. Rev. 141, 141 (1991) (noting that development of aircraft trailed automobiles in gaining acceptance as reliable mode of transportation); Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498 (1967) (noting that aviation development lagged at least one generation behind automobile development despite similar invention dates).

2. See PBS, Timeline of Aviation Milestones 1903-1935, at http://www.pbs.org/wgbh/amex/lindbergh/timeline/index.html (last visited Mar. 6, 2001) (listing notable achievements in history of aviation). In May 1923, the first nonstop transcontinental U.S. flight occurred in twenty-six hours and fifty minutes. See id. (noting that first coast-to-coast flight was flown in Fokker T-2 airplane). Charles A. Lindbergh flew from Roosevelt Field on Long Island in New York to Le Bourget Field in Paris, France in under thirty-four hours in 1927. See id. (noting Lindbergh was first pilot ever to make solo, nonstop transatlantic flight). In 1928, the first transpacific flight was made by British Captain Charles Kingsford-Smith, who started in Oakland, California, stopped in Hawaii and Fiji, and finished in Brisbane, Australia. See id. (stating Captain Smith started in Oakland in May and landed in Australia on June 9, 1928). Lt. Commander Richard Byrd flew over the North Pole in 1926 and over the South Pole in 1929, the first person to fly over both poles. See id. (noting that while some controversy exists, Byrd is first person credited with flying over North Pole).

3. See Lowenfeld & Mendelsohn, supra note 1, at 498 (noting that aviation was still growing in 1929).

4. See id. (presenting flight and fatality statistics in early days of air travel). These rates should be compared with total passengers and safety rates for 1999. According to the International Civil Aviation Organization, there were 1.56 billion commercial airline passengers in 1999. See Int’l Civil Aviation Org., 1999 Annual Report to the Council 2 (1999) (stating flight accidents per passenger miles have steadily decreased). In addition, the fatality rate has fallen to .02 fatalities per 100 million passenger-kilometers. See id. at 10 (providing safety information on civil air travel).
The international scholars that assembled to create the aviation conventions realized that the aviation industry was on the verge of becoming a major form of transportation. The different national legal systems at the time would require airlines to be subjected to liability in a variety of inconsistent formats. As a result, the drafters of the Convention for the Unification of Certain Rules Relating to International Transport by Air ("Warsaw Convention") wanted to provide a uniform set of liability rules that would apply regardless of nationality or legal system.

The Warsaw Convention created a uniform set of laws for air travel, but left differing national systems to define certain aspects of the Convention, including the definition of an Article 17 "accident." The United States Supreme Court first interpreted what an Article 17 accident was in the 1985 case of _Air France v. Saks._ The _Saks_ opinion interpreted the definition of an Article 17 accident in relation to the facts and issues.

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5. See Diederiks-Verschoor, _supra_ note 1, at 2-8 (describing beginnings of international movement to develop uniform air travel and navigation standards). The first known attempt to develop a uniform set of aviation laws took place in 1910 between France and Germany. See _id._ at 2 (noting reason for attempt was because German balloons repeatedly flew into French territory). The Paris Convention of 1919 was the first successful codification of international air law and held that the airspace above any particular country was subject to the sovereignty of that country. See _id._ at 4 (stating that this convention permitted states to assert complete sovereignty over airspace above their territory). In the western hemisphere, the United States was the driving force behind the development of the Pan-American Convention of 1928. See _id._ at 5 (noting that Pan-American Convention was signed in Havana and that Convention's biggest flaw was failure to achieve uniformity in air traffic regulations). The Chicago Convention of 1944 replaced these conventions. See _id._ at 6 (stating that these conventions, although replaced, provided basis for Chicago Convention).

6. See Lowenfeld & Mendelsohn, _supra_ note 1, at 498 (stating that Warsaw Convention planners realized growth of civil aviation was on threshold).

7. See _id._ (noting that uniformity of international aviation law was desirable because of aviation's potential to link different lands).


9. See Goldhirsh, _supra_ note 8, at 4 (stating that although Warsaw Convention is uniform international law, it must still be read in light of signatories' national legal systems).

10. 470 U.S. 392 (1985). In _Saks_, the Supreme Court interpreted the term "accident" under Article 17 of the Warsaw Convention for the first time. See _Saks_, 470 U.S. at 394 (granting certiorari to resolve conflict among circuit courts regarding proper definition of Article 17 accident).
presented, and determined whether an internal reaction that caused or exacerbated a passenger's injury resulted in an accident.11

Although courts should apply the Saks definition of an accident to an Article 17 liability analysis, liability should be limited to accidents resulting from the operation of an aircraft or the actions or inactions of a flight crew.12 This Note sets forth the law applicable to an analysis of Article 17 and advocates a revised definition of the term accident.13 First, Part II sets out the current law applicable to Article 17 of the Warsaw Convention and provides additional background material on the Convention.14 Next, Part III focuses on the factual and procedural background of Wallace v. Korean Air,15 the most recent pronouncement by the United States Court of Appeals for the Second Circuit of what constitutes an Article 17 accident.16 Finally, Part IV compares and analyzes the Second Circuit's decision in light of other federal circuit and district court decisions.17

II. AIRLINE LIABILITY

A. The Warsaw Convention: The International Community Formulates Airline Liability Standards

The planners of the Warsaw Convention decided that "[w]hat the engineers are doing for machines, we must do for the law."18 As a result, the Convention was drafted at the Second International Conference on Pri-


13. For a discussion of the law surrounding an Article 17 analysis, see infra notes 35-81 and accompanying text. For a discussion of a revised definition of accident, see infra notes 207-13 and accompanying text.

14. For a discussion of the history and judicial interpretations relating to an Article 17 accident and of the Warsaw Convention generally, see infra notes 18-99 and accompanying text.


17. For a discussion of the impact of Wallace and an alternative definition to accident, see infra notes 200-13 and accompanying text.

18. Lowenfeld & Mendelsohn, supra note 1, at 498.
vate Aeronautical Law in 1929 and went into effect in 1933. The initial purpose of the Warsaw Convention was two-fold. First, it was drafted to create a uniform set of rules for international air travel. Second, its purpose was to limit the potential liability faced by early air carriers. The drafters of the Convention realized that the development of international air travel would lead to confusion resulting from different legal systems. More importantly, the drafters hoped that the low liability limits, approximately $8500 in 1929, would help the young aviation industry attract the capital it needed to grow.

Chapter III, containing Articles 17 through 30 of the Warsaw Convention, provides for an air carrier’s liability for passengers and cargo. In particular, Article 17 provides that the airline will be liable for the death...
or bodily injury of a passenger. Article 17 of the Warsaw Convention states:

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

In order to establish an airline’s liability, a passenger must prove that: (1) there was an accident; (2) that resulted in the passenger’s death, wounding, or bodily injury, while; (3) the passenger was on board the aircraft under flight operations, embarking or disembarking from the plane.

B. The Montreal Agreement

Despite the need for uniform liability limits, U.S. lawmakers became dissatisfied with the liability limits found in the Warsaw Convention. Article 26 sets forth the conditions for receiving and complaining about damaged luggage. Article 27 provides for a survival right in the claim should the person liable for the injuries die. Article 28 provides for recovery action in one of four designated locations according to Article 29. The Convention also establishes a two-year statute of limitations. Article 30 restricts a passenger’s liability claim to the airline the passenger was actually flying on when the accident occurred.

26. See Warsaw Convention, supra note 8, at art. 17 (describing cause of action for passengers injured in course of international air travel).

27. Warsaw Convention, supra note 8, at art. 17. Because French is the governing language of the Warsaw Convention, a French translation has been set forth: “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.” Air Fr. v. Saks, 470 U.S. 392, 397 n.2 (1985) (emphasis omitted).


The United States, in accordance with Article 39 of the Warsaw Convention, deposited a notice of denunciation on November 15, 1965. The United States indicated that if the limits could be raised to an amount between $75,000 and $100,000, the denunciation would be renounced. On May 13, 1966, two days before the renunciation of the Warsaw Convention would have gone into effect, domestic and international air carriers accepted the Montreal Agreement. The Montreal Agreement applies when the United States is either the place of departure, the place of destination or an agreed upon stopping place. The Montreal Agreement in-

30. See Warsaw Convention, supra note 8, at art. 39 (describing procedure and timing issues for denouncing Warsaw Convention). Article 39 of the Warsaw Convention states:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Id.; see also 111 Cong. Rec. 20,165 (1965) (noting that United States Department of State felt Warsaw Convention should be denounced if Senate failed to ratify Hague Protocol); Lowenfeld & Mendelsohn, supra note 1, at 550 (noting that United States wanted to deposit denunciation in time to be free of it for summer tourist season).


32. See Lowenfeld & Mendelsohn, supra note 1, at 596 (noting that U.S. State Department called meeting at 5:00 p.m. on Friday, May 13, 1966, to announce acceptance of Montreal Agreement). Korean Air Lines, Inc., is a signatory of the Montreal Agreement. See Speiser & Krause, supra note 29, § 11:19, at 676 n.27 (listing domestic and international carriers that have signed Montreal Agreement).

33. See Montreal Agreement, supra note 29 (noting that Montreal Convention applies only if United States is place of departure, arrival or scheduled stopping point); see also Speiser & Krause, supra note 29, § 11:19, at 674-80 (describing application of Montreal Agreement).
creased an airline’s liability to $75,000 and eliminated the due care defense found in Article 20(1).34

C. Air France v. Saks: The Supreme Court Defines an Article 17 “Accident”

The Warsaw Convention holds airlines liable only for accidents, a phrase which indicates that not every injury on board an airplane will result in a Convention violation.35 Lower federal courts have often struggled with the factual determinations behind the term “accident.”36 In Saks, the United States Supreme Court had its first opportunity to define the term.37

34. See Montreal Agreement, supra note 29 (conditioning continued liability limitation on increased liability amount of $75,000).
35. See Air Fr. v. Saks, 470 U.S. 392, 399-400 (1985) (noting that Article 17 of Warsaw Convention applies to injuries that are caused by accidents, not injuries that are accidents); see also Wallace v. Korean Air, 214 F.3d 293, 299 (2d Cir. 2000) (noting that majority does not believe Saks resolved issue whether all co-passenger torts are accidents), cert. denied, 69 U.S.L.W 3281 (U.S. Feb. 20, 2001) (No. 00-560); Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 70 (1st Cir. 2000) (“Of course, not every tort committed by a fellow passenger is a Warsaw Convention accident.”); Goldhirsh, supra note 8, at 60 (noting that not every injury is compensable under the Warsaw System of liability).
37. See Saks, 470 U.S. at 394 (noting that Court granted certiorari to resolve circuit split over definition of Warsaw Convention accident). In Saks, Valerie Saks boarded an Air France flight from Paris, France, to Los Angeles, California. See id. (stating facts of case). The passenger had experienced an intense pain in her left ear during landing procedures, but did not inform any of the Air France airplane crew or other officials of her condition. See id. (noting that plaintiff failed to notify flight crew despite increased pressure and pain). After five days, Ms. Saks went to a doctor who concluded that she had become totally deaf in her left ear, and Ms. Saks alleged her deafness was caused by a failure of the plane’s cabin pressurization system. See id. (describing injury and effects of injury suffered by plaintiff). Air France moved for dismissal following discovery, alleging an “accident” means an “abnormal, unusual or unexpected occurrence aboard the aircraft.” See id. at 394-95. Because the pressurization system on the aircraft had worked in a normal manner, Air France argued there had been no accident. See id. at 395 (noting aircraft pressurization system had worked in expected manner). The court rejected Ms. Saks’ characterization of an accident as “a hazard of air travel” and granted summary judgment for Air France. See id. (rejecting plaintiff’s definition of accident).
Justice O’Connor delivered the Court’s opinion stating that a passenger’s injury could be considered an accident under the Warsaw Convention if the injury resulted from an “unexpected or unusual event . . . that [was] external to the passenger.” In addition to providing the definition of an accident, the Supreme Court also provided lower courts with some guidelines on the use of that definition.

First, the Supreme Court noted that the definition was to be “flexibly applied” after a court evaluated the facts of the case. Second, the Court stated that the accident had to be the cause of the injury; an accident could not be the injury itself. As a result, a passenger’s internal reaction to the normal operation of the aircraft will not result in liability to the air carrier under the Warsaw Convention. Finally, the Court stated that the Warsaw Convention and the Montreal Agreement did not impose absolute liability on the airlines for injuries to passengers.

The Supreme Court also noted that courts had interpreted the term accident broadly enough to encompass terrorist attacks and co-passenger torts. Based on the cases cited by the Supreme Court, some lower fed-

38. Saks, 470 U.S. at 405 (holding that an accident resulted from unexpected or unusual event); see also Quinn v. Canadian Airlines Int’l, Ltd., [1994] O.R.3d 94 (adopting Saks definition of accident in Ontario Court of Appeal). The United States Supreme Court, in an 8-0 vote, held that a passenger’s internal reaction to a normal airplane procedure did not constitute an accident. See Saks, 470 U.S. at 406 (noting voting pattern of Court). Justice Powell did not take part in the consideration or determination of the case. See id. at 393.

39. See Saks, 470 U.S. at 398-406 (describing conditions under which Saks definition should be used to determine airline liability for accidents).

40. See id. at 405 (stating that definition should be flexibly applied after thorough assessment of all circumstances surrounding passenger’s injury).

41. See id. at 398 (stating “[t]he text of Article 17 refers to an accident which caused the passenger’s injury, and not to an accident which is the passenger’s injury”).

42. See id. at 406 (holding injury that “indisputably results” from passenger’s internal reaction to normal airline operating procedures will not result in liability for airline).

43. See id. at 407 (stating that airlines did not relinquish contributory negligence defense and other defenses embodied in Chapter III). The Supreme Court also noted that liability could only be viewed as absolute in one sense: the carriers had given up the due care defense enjoyed under Article 20(1) prior to the Montreal Agreement. See id. at 406-07 (noting that Montreal Agreement limited use on Article 20(1) defense but not defenses in other articles). Airlines could no longer argue that they had taken all necessary measures to prevent the accident from occurring. See id. (explaining effect of Montreal Agreement on Article 20(1) due care defense).

44. See id. at 405 (stating that Article 17 had been applied in accidents resulting from terrorists and co-passengers). The Court cited Evangelinos v. Trans World Airlines, Inc. and Day v. Trans World Airlines, Inc. for the proposition that terrorist attacks are considered accidents. See id. (noting that terrorist attacks are Warsaw Convention accidents). For a discussion of these two cases, see infra notes 90-99, and accompanying text. The Supreme Court also cited to Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322 (C.D. Cal. 1975), to show that the lower courts had found hijacking to be an actionable Article 17 accident. See Saks, 470 U.S. at 405 (noting hijacking considered Article 17 accident). Finally, the Court noted that
eral courts have decided that airlines are liable only if the injury resulted from a risk characteristic of air travel or related to the airline’s operation of the aircraft. Courts have also held that an “unexpected event” within the meaning of the Saks decision includes torts committed by the airline or torts committed by co-passengers that were facilitated by the airline’s employees. In short, various federal courts have held that airlines should be liable for their own unexpected actions and the unexpected conduct of the flight crew.

D. Subsequent Judicial Interpretations of Article 17

Since the Saks decision in 1985, the Supreme Court has twice revisited Article 17 to determine whether a plaintiff may recover for mental or psychic injuries and whether state law claims are preempted under the

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45. See Wallace v. Korean Air, No. 98 CIV. 1039 RPP, 1999 WL 187213, at *3 (S.D.N.Y. Apr. 6, 1999) (noting that other courts have focused on whether cause was characteristic of air travel or bore relation to operation of aircraft); vacated, 214 F.3d 293 (2d Cir. 2000), cert. denied, 69 U.S.L.W. 3281 (U.S. Feb. 20, 2001) (No. 00-560); see also Curley v. Am. Airlines, Inc., 846 F. Supp. 280, 283 (S.D.N.Y. 1994) (finding captain’s incorrect accusation that plaintiff smoked marijuana in lavatory was not characteristic risk of air travel); Price v. British Airways, No. 91 CIV. 4947, 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992) (holding that fight between plaintiff and another passenger not related to operation of defendant’s aircraft).

46. See Wallace, 1999 WL 187213, at *4 (finding that sexual assault did not result from acts or omissions of aircraft or airline personnel); see also Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 142 (2d Cir. 1998) (finding that plaintiff’s injuries from flight attendant’s use of scalding water to cure earache was accident); Waxman v. C.I.S. Mexicana De Aviacion, S.A. de C.V., 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998) (holding that airline’s failure to remove hypodermic needle from seat cushion was accident because it constituted unusual departure from ordinary procedures); Tsevas v. Delta Air Lines, Inc., No. 97 C 0320, 1997 WL 767278, at *2 (N.D. Ill. Dec. 1, 1997) (holding accident occurred when flight attendants continued alcohol service to plaintiff’s visibly drunk assailant and refused to reseat plaintiff); Stone v. Cont’l Airlines, Inc., 905 F. Supp. 823, 827 (D. Haw. 1995) (holding fight between passengers was not accident because it had no correlation with operation of aircraft). But see Gezzi v. British Airways PLC, 991 F.2d 603, 604 (9th Cir. 1993) (finding that water on staircase used to reach tarmac was accident regardless of conduct of personnel); Barratt v. Trin. & Tobago Airways Corp., No. CV 88-3945, 1990 WL 127590, at *2-4 (E.D.N.Y. Aug. 28, 1990) (finding that trip and fall inside terminal was accident regardless of operation of aircraft or conduct of airline employees).

47. See Gezzi, 991 F.2d at 604 (finding that water on staircase used to reach tarmac was accident regardless of conduct of personnel); Barratt, 1990 WL 127590, at *2-4 (finding that trip and fall inside terminal was accident regardless of operation of aircraft or conduct of airline employees).
Convention. In *Eastern Airlines, Inc. v. Floyd*, the Court was asked to determine whether a passenger could recover for mental or psychic injuries that were unaccompanied by any sort of physical injury. Again looking to the French text of Article 17 of the Warsaw Convention, the Court determined that *lésion corporelle*, or bodily injury, did not permit recovery for purely psychic injuries. The Court held that an air carrier could not be held liable under Article 17 unless the accident had caused "death, physical injury, or physical manifestation of the injury."

In *Floyd*, Eastern Airlines asked the Court to determine whether the Warsaw Convention preempted state law claims. Because the Court had not granted certiorari on this issue, it refused to hold that the Convention preempted state claims. The Supreme Court subsequently addressed this issue in *El Al Israel Airlines, Ltd. v. Tseng*. *Tseng* arose when an El Al employee searched the plaintiff, Tsui Yuan Tseng, at John F. Kennedy International Airport before a flight to Israel. Alleging assault and false

48. For a discussion of the law surrounding the use of Article 17 to recover mental injuries, see infra notes 49-52 and accompanying text. For a discussion of the Warsaw Convention's preemption of state law claims, see infra notes 53-61 and accompanying text.


50. See *Floyd*, 499 U.S. at 533 (setting forth issue to be answered by Court). The plaintiff, Rose Marie Floyd, was on board an Eastern Airlines flight departing from Miami and heading to the Bahamas. See id. (noting origination and destination of Eastern Airlines flight). Just after take off, one of the plane's engines lost oil pressure and the crew shut down the failing engine. See id. (describing initial accident that resulted in plaintiff's claim). The plane turned around and headed back to Miami. See id. (describing actions of flight crew). On the return leg, two additional engines failed due to a lack of oil pressure and the aircraft started to lose altitude rapidly. See id. (noting that additional engine problems occurred during return). Although the passengers were told the plane would be ditched in the Atlantic Ocean, the crew was able to restart one engine and safely land in Miami. See id. (describing flight crew's announcements to passengers). The respondents, a group of passengers aboard this flight, sued the airline solely for mental anguish. See id. (noting plaintiffs had not suffered any physical injuries).

51. See id. at 536-37 (noting that translations of Article 17 clearly suggested that recovery for psychic injuries was not permitted).

52. Id. at 552.

53. See id. at 553 (stating that Eastern urged Court to hold that Warsaw Convention is "exclusive cause of action").

54. See id. (stating that United States Court of Appeals for the Eleventh Circuit did not address question and Supreme Court did not grant certiorari on issue).


56. See *Tseng*, 525 U.S. at 160 (noting that plaintiff was subjected to intrusive security search before boarding El Al flight to Israel). Prior to boarding the aircraft, Tseng was questioned by a security guard about her destination and travel plans. See id. at 163 (stating facts of case). This questioning was required as part of El Al's standard pre-boarding procedure. See id. (describing questioning as normal operating procedure of carrier). Tseng was classified as a "high-risk" passenger after questioning because the guard considered her responses to be "illogical." See id. (noting guard believed plaintiff was high-risk passenger and needed further questioning). As a result of this classification, Tseng was taken to a private security...
imprisonment, Tseng filed suit in New York state court and El Al removed the case to federal court. After looking to the drafting history and court decisions of other signatory states, the Supreme Court held that “the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention.” On September 28, 1998, the United States Senate ratified Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at the Hague on September 8, 1955 (hereinafter “Montreal Protocol No. 4”), updating the various cargo provisions of the Warsaw Convention. As the Tseng Court noted, the Montreal Protocol No. 4 also “clarifie[d], but [did] not change, the [Warsaw] Convention’s exclusivity domain.” Following the Court’s decision in Tseng and the ratification of the Montreal Protocol No. 4, individuals no longer have the ability to bring a personal injury action under the Warsaw Convention unless that action falls under the Convention’s requirements.

room where she was instructed to remove “her shoes, jacket and sweater, and to lower her blue jeans to midhip.” Id. at 163-64 (describing plaintiff’s search). A female security guard arrived and conducted a search outside of Ms. Tseng’s clothes with both her hand and an electronic security wand. See id. at 164 (stating details of search). Following the search, El Al’s security no longer considered Tseng a security risk and allowed her to board the plane. See id. (noting that plaintiff was permitted to board airplane following search and further questioning). Tseng alleged that the search made her uncomfortable during her month-long visit to Israel. See id. (describing plaintiff’s injuries as result of pre-boarding search). Tseng further alleged that she underwent medical and psychiatric treatment following her return to the United States as a result of El Al’s security search. See id. (describing required treatment for injuries received from search).

57. See id. at 164-66 (describing procedural history of case).
58. Id. at 176.
60. See Tseng, 525 U.S. at 161 (holding that if recovery is not allowed under Convention, then it is not available at all). In Tseng, both parties agreed that “[t]he treaty precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty.” Id. at 175. In support, the Court also notes that courts in British Columbia, Ontario, New Zealand, Singapore and the United Kingdom have also held that the Convention is the exclusive remedy for personal injury claims. See id. at 175, 176 n.1 (describing court decisions from other signatories concerning Warsaw Convention’s exclusivity).

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and lim-
In determining whether an airline is liable for attacks on a passenger by a co-passenger, courts frequently cite Professor Daniel Goedhuis. Professor Goedhuis suggested that holding an air carrier liable for a passenger’s injury resulting from a fight with another passenger would not be appropriate “because the accident which causes the damage had no relation with the operation of the aircraft.” The United States District Court for the Southern District of New York has used Professor Goedhuis’ statement when granting summary judgment to airlines for fights that have broken out on board airplanes.

Yet, an airline may be liable when a passenger attacks a co-passenger if the airline is partly responsible for the attack. For example, in *Tsevas v. Delta Air Lines, Inc.*, an intoxicated male passenger sexually assaulted a female co-passenger. The female passenger, Ms. Tsevas, complained to Delta’s flight attendants regarding the boisterous and inappropriate behavior set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Id. at art. 24; see also *Tseng*, 155 U.S. at 176 (holding Warsaw Convention is exclusive remedy for personal injury claims and individuals are precluded from bringing state action if claim fails to satisfy Convention’s liability conditions).


63. See *Price*, 1992 WL 170679, at *3 (citing Professor Goedhuis’s example that accident should bear no relation to operation of aircraft); Brief for Defendant-Appellee at 24, *Wallace v. Korean Air*, 214 F.3d 295 (2d Cir. 2000) (No. 99-7597) (arguing that Goedhuis’ flight example was similar to present situation); Kemper, supra note 11, at 552 n.19 (noting that courts cite to Professor Goedhuis as support for finding in favor of airlines when accident was result of co-passenger tort).

64. See, e.g., *Price*, 1992 WL 170679, at *3 (holding that fight on board aircraft did not constitute accident under Warsaw Convention); see also *Stone v. Cont'l Airlines, Inc.*, 905 F. Supp. 823, 827 (D. Haw. 1995) (holding that fight had no correlation with operation of aircraft and was therefore not Article 17 accident).


66. See *Tsevas*, 1997 WL 767278 at *1 (stating facts of case). Plaintiff, Stephanie Tsevas, and her husband, Dmitri, brought a six count action against Delta Air Lines under the Warsaw Convention and on the grounds of common law negligence. See id. (stating causes of action asserted by plaintiffs). Stephanie Tsevas was traveling alone on January 29, 1995, on a Delta flight from Frankfurt, Germany to Atlanta, Georgia. See id. She was seated next to a male passenger, known as “Bala,” who was continuously served “wine and/or other alcoholic beverages” during the course of the flight. See id. (stating male passenger was visibly drunk during flight). Bala was taken into custody at the Atlanta airport and was later deported. See id. (describing judicial proceedings resulting from male passenger’s assault on female passenger). The complaint was filed on January 15, 1997 alleging physical and emotional injuries; Delta later moved to dismiss the com-
behavior of the man seated next to her, but the flight attendants refused to assist Ms. Tsevas. Instead of helping her, Ms. Tsevas alleged that the flight crew continued to serve alcohol to the male passenger. Shortly after the initial complaint, the man made unsolicited sexual advances towards Ms. Tsevas. Ms. Tsevas again complained to a flight attendant and requested that her seat be changed, a request the flight attendants had initially refused. Eventually, the flight crew reseated Ms. Tsevas.

The United States District Court for the Northern District of Illinois held that Ms. Tsevas' injuries were caused, in part, by the actions of the flight crew. First, the court noted that the usual characteristics of air travel were skewed because the flight attendants continued to serve alcohol to a visibly drunk passenger. Second, the court noted that the flight crew did not attempt to help Ms. Tsevas out of the situation and ignored reports of sexual assault.

Similar to Tsevas, the United States Court of Appeals for the First Circuit held that an airline partly responsible for a passenger-on-passenger attack may be liable under Article 17. For example, in Langadinos v. American Airlines, Inc., the First Circuit vacated and remanded a lower court's dismissal for failure to state a cause of action when the plaintiff alleged his injuries were proximately caused by the actions of flight attendants. The plaintiff, Gregory Langadinos, alleged that he was assaulted by another male passenger while waiting to use the lavatory. The plaintiff informed

plaint. See id. (noting date complaint was filed and Delta's actions). This opinion resulted from Delta's motion to dismiss. See id. (providing reason for the opinion).

67. See id. (noting that despite initial unwanted advances, flight attendants refused to reassign female passenger to another seat).

68. See id. (stating that flight attendants continued alcohol service to male passenger despite female passenger's warnings of his intoxication).

69. See id. (noting that female passenger had to endure three separate assaults before flight attendants consented to move her).

70. See id. (noting that Ms. Tsevas was not moved until her third request).

71. See id. (stating that flight attendants reseated the female passenger after her third request).

72. See id. at *3-4 (holding that Delta's repeated failure to subdue male passenger, change plaintiff's seat or refrain from serving alcohol to male passenger caused plaintiff's injuries).

73. See id. at *3 (finding that flight attendants' continued alcohol service was not normal and expected operation of aircraft).

74. See id. at *4 (stating that flight attendants' refusal to intervene was unexpected and external to plaintiff and went beyond normal operations of aircraft).

75. 199 F.3d 68 (1st Cir. 2000).

76. See Langadinos, 199 F.3d at 74 (concluding that Langadinos stated valid claim under Warsaw Convention and vacating district court's dismissal).

77. See id. at 70 (stating facts of case). Gregory Langadinos was flying aboard an American Airlines flight from Boston, Massachusetts to Paris, France on June 13, 1996. See id. at 69 (noting plaintiff was on international flight from United States to France). A few hours into the flight, Mr. Langadinos asked a flight attendant for some aspirin. See id. (providing background for initial meeting of plaintiff and his assailant). Ignoring Mr. Langadinos, the flight attendant continued spoon-feeding passenger Christopher Debord. See id. (noting flight attend-
a flight attendant about the assault and was told that the other passenger was harmless.\textsuperscript{78} Although the plaintiff was promised that his attacker would be arrested in Paris, the passenger was not detained.\textsuperscript{79} The First Circuit noted that other courts have been reluctant to find an airline liable for co-passenger torts when airline personnel were not the proximate cause of the injury.\textsuperscript{80} In order to win the case on remand, the court required that Mr. Langadinos prove that he suffered a compensable injury and that the actions of the airline personnel were the proximate cause of that injury.\textsuperscript{81}

E. \textit{Risks Characteristic of Air Travel}

Courts have also found airlines liable under the Warsaw Convention for risks that are characteristic of air travel.\textsuperscript{82} Airlines are held liable for

ant's attention was focused on plaintiff's assailant). The plaintiff testified that when he asked for the aspirin, Mr. Debord had a strange look on his face and whispered something into the flight attendant's ear. \textit{See id.} at 70 (describing assailant's actions following plaintiff's aspirin request). Following this incident, Mr. Langadinos was waiting in line to use the restroom where Mr. Debord "forcefully grabbed" Mr. Langadinos' testicles causing him excruciating pain. \textit{See id.} (describing facts of assault). Mr. Debord also grabbed Mr. Langadinos' hand and forced him to place it on Mr. Debord's crotch. \textit{See id.} (noting that assault continued when assailant forced plaintiff to touch him). Mr. Langadinos filed a two count complaint against American Airlines in the United States District Court for the District of Massachusetts, alleging common law tort claims and that an Article 17 accident occurred during the flight. \textit{See id.} (describing plaintiff's cause of action against airline). Mr. Langadinos subsequently amended his complaint and alleged that American Airlines had served alcohol to Mr. Debord, an obviously intoxicated passenger, prior to the assault. \textit{See id.} (noting that plaintiff's amended complaint alleged airline personnel were proximate cause of assault because of continued alcohol service).

78. \textit{See id.} at 70 (noting that one flight attendant said "Chris is my friend; he is harmless" when plaintiff notified cabin crew of assault).

79. \textit{See id.} (noting that despite promises of other members of flight crew, assailant was not detained when plane landed in Paris).

80. \textit{See id.} at 71 (noting that Fifth Circuit and District of Hawaii would not find airline liable for passenger-on-passenger tort when air crew was not proximate cause of injury).

81. \textit{See id.} (noting that plaintiff needs to show there was injury and that airline personnel were proximate cause of injury in order to recover).

these accidents by modern tort law theories, such as efficient accident allocation.\footnote{83}{Using this method, courts have found airlines liable for hijackings and terrorist attacks subject to Article 17's requirement that they occur on board the aircraft or within the operations of embarking or disembarking.\footnote{84}{Nevertheless, the First Circuit, in \textit{Martinez Hernandez v. Air France},\footnote{85}{refused to hold airlines liable for terrorist attacks within the terminal, stating that such a holding would lead to an “anomalous result.”\footnote{86}{In \textit{Martinez Hernandez}, the plaintiff was injured in an act of terrorism while waiting in a baggage retrieval area.\footnote{87}{The court found that for a risk to be characteristic of Article 17 accident; Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1322-23 (C.D. Cal. 1975) (noting that hijacking of plane en route from Bombay to London was Article 17 accident); Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1153-54 (D.N.M. 1973) (noting that parties agreed hijacking was accident).}}}(stating that it is clear hijacking is Article 17 accident); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1322-23 (C.D. Cal. 1975) (noting that hijacking of plane en route from Bombay to London was Article 17 accident); Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1153-54 (D.N.M. 1973) (noting that parties agreed hijacking was accident).}}

83. \textit{See Martinez Hernandez}, 545 F.2d at 284 (stating that argument could be advanced holding airlines liable under modern tort theories); \textit{Day}, 528 F.2d at 54 (noting that plaintiff protection under Warsaw liability comports with modern theories of allocating accident costs).

84. \textit{See Pflug}, 961 F.2d at 29 (noting that hijacking “clearly” qualifies as Article 17 accident); \textit{Evangelinos}, 550 F.2d at 157 n.10a (discussing why terrorist attack is characteristic of air travel); \textit{Martinez Hernandez}, 545 F.2d at 284 (noting that terrorist attacks are characteristic risks but refusing to hold airline liable for senseless act committed outside airline’s control); \textit{Day}, 528 F.2d at 37-38 (finding terrorist attack is risk characteristic of air travel); \textit{Husser}, 351 F. Supp. at 706-07 (holding that hijacking was risk characteristic of air travel).

85. 545 F.2d 279 (1st Cir. 1976).

86. \textit{See id.} at 284 (observing that anomalous results would follow expansion of airline liability to encompass terrorist actions at airports). The plaintiffs in this case were victims of a terrorist attack at the baggage retrieval area of the Lod International Airport near Tel Aviv, Israel. \textit{See id.} at 280 (describing location of terrorist attack). The plaintiffs alleged that the airline was liable for damages regardless of fault. \textit{See id.} at 280-81 (noting that plaintiffs argued Montreal Agreement modified Warsaw Convention to hold airline liable regardless of fault). The court attempted to determine if the attack actually occurred in the process of disembarking from the aircraft. \textit{See id.} at 281-84 (applying \textit{Day-Evangelinos} test to determine whether attack occurred during disembarking procedures). The airplane that the victims arrived in had parked approximately one-half mile from the terminal, and passengers then decided to walk or ride a bus to the terminal. \textit{See id.} at 281 (noting location of plane in regard to place of attack). Once at the terminal, the plaintiffs presented their passports to Israeli immigration officials and proceeded to the baggage claim area. \textit{See id.} (noting airport customs and baggage claim procedures). While waiting for the remainder of the baggage, three Japanese terrorists in the service of a Palestinian terrorist organization opened fire on the remaining passengers in the area. \textit{See id.} (describing terrorists and their method of attack). The court noted that the passengers had not been engaged in disembarking from the aircraft because they had left the plane and had been through customs. \textit{See id.} at 282 (concluding that plaintiffs could not recover because attack did not satisfy \textit{Day-Evangelinos} location test). Because passengers that had carry-on luggage or no luggage at all were not required to stop at the baggage claim area, this could not be considered a requirement of disembarking. \textit{See id.} (stating that reason attack was not accident was because baggage claim could be avoided).

87. \textit{See id.} at 281 (describing terrorist attack that occurred while plaintiffs waited to claim baggage).
tic of air travel, it must be present exclusively in an aircraft or during air travel. 88 The court found that a plaintiff standing in a baggage retrieval area did not amount to the required "close logical nexus" between air travel and the injury. 89

The United States Courts of Appeals for the Second and Third Circuits developed a tripartite location test when determining whether terrorism occurring in an airport was a risk characteristic of air travel. 90 Two cases, Evangelinos v. Trans World Airlines, Inc. 91 and Day v. Trans World Airlines, Inc. 92 stemmed from the same event. 93 The plaintiffs in these cases were in or near a transit lounge at the Hellenikon Airport in Athens, Greece. 94 Only ticketed passengers were permitted in the transit lounge

88. See id. at 284-85 (stating that hijacking requires air travel and aircraft, and is unlike present fact situation). The court noted that the line between a terrorist activity and a senseless act of violence as found in the case before it is not always clear. See id. at 284 n.8 (highlighting issue). In order to differentiate this case from both Day and Evangelinos, the court noted that the attacks in Athens involved taking hostages, demanding a plane to escape and committing the attack in a transit lounge instead of in a baggage retrieval area. See id. (differentiating terrorist attacks in which air travel or aircraft are more central). For a discussion of the Day-Evangelinos location test, see infra notes 90-99 and accompanying text.

89. See Martinez Hernandez, 545 F.2d at 284 ("[I]f [the] application [of modern tort theories] is not to do violence to the history and language of the Warsaw Convention, there should, it seems to us, be a close logical nexus between the injury and air travel per se.").

90. See id. at 285 n.1 (McEntee, J., concurring) (noting that tripartite test, based on activity, control and location, should have been applied).

91. 550 F.2d 152 (3d Cir. 1977).

92. 528 F.2d 31 (2d Cir. 1975).

93. See Evangelinos, 550 F.2d at 153-54 (stating facts of case); Day, 528 F.2d at 32 (same). The attack in question occurred on August 5, 1973 at the Hellenikon Airport in Athens, Greece. See Evangelinos, 550 F.2d at 153 (noting date and location of attack); Day, 528 F.2d at 32 (same). Two Palestinian terrorists had thrown three hand grenades and fired small-arms fire into a group of passengers waiting to board TWA Flight 881 to New York City. See Evangelinos, 550 F.2d at 153-54 (describing attackers and their method of attack); Day, 528 F.2d at 32 (stating three passengers died and forty were wounded in attack). Upon entering the Hellenikon Airport terminals, passengers were required to check-in, drop off luggage and pay departure tax at the check-in counter. See Evangelinos, 550 F.2d at 153 (describing Greek customs and airport boarding procedures in Athens airport); Day, 528 F.2d at 32 (noting that description of procedures was necessary in order to resolve case). After going through passport control, the passenger then proceeded to the transit lounge which was reserved for passengers waiting to depart on international flights. See Evangelinos, 550 F.2d at 153-54 (noting that only ticketed passengers were permitted in transit lounge); Day, 528 F.2d at 32 (same). Once the flight was called, the passenger proceeded to the gate and he and his bags were searched by Greek police. See Evangelinos, 550 F.2d at 153-54, 154 n.6 (stating that passenger had entered customs and boarding line at time of attack); Day, 528 F.2d at 32 (noting that passengers had gone through several required procedures and seven passengers had boarded plane when terrorists attacked).

94. See Evangelinos, 550 F.2d at 154 n.6 (stating that plaintiffs were injured while being queued into line at gate four); Day, 528 F.2d at 32 n.5 (noting that plaintiffs Aristedes and Constantine Day were being escorted to gate by TWA passenger relations representative).
and TWA had already begun the boarding process. The attack was committed against passengers waiting in line as they were filing through a security checkpoint. The Second and Third Circuits both held that terrorist attacks are risks characteristic of air travel. The Second Circuit, however, continued the analysis and stated that its decision was in accordance with modern tort theories. Under the doctrine of absolute liability, the Second Circuit found that as mitigants of air travel risks, airlines were in a better position to adopt or force others to adopt stricter security standards, especially against terrorists.

III. FACTUAL BACKGROUND OF WALLACE v. KOREAN AIR

Brandi Wallace boarded Korean Air Lines Flight 61, a nonstop flight from Seoul, South Korea to Los Angeles, California, on the evening of August 17, 1997. Ms. Wallace was assigned to a window seat in economy class and was seated next to two men whom she did not know.

95. See Evangelinos, 550 F.2d at 154 n.6 (noting that transit lounge was restricted to ticketed passengers); Day, 528 F.2d at 32 (stating that passengers were allowed in transit lounge only after going through passport and currency control).

96. See Evangelinos, 550 F.2d at 154 n.6 (noting approximately eighty-nine scheduled passengers were located before security tables when attack occurred); Day, 528 F.2d at 32 (noting attack occurred after seven passengers had boarded and while most were still standing in line).

97. See Evangelinos, 550 F.2d at 157 (finding that terrorist activity was accident and noting that to reach any other result would ignore special risks of air travel); Day, 528 F.2d at 37-8 (stating that aviation risks have changed since 1929 and have "unhappily come to include" acts of terrorism).

98. See Day, 528 F.2d at 34 (noting that broad construction of convention comports with application of modern theories of tort to accident cost allocation).

99. See Day, 528 F.2d at 34 (comparing ability of individual passenger and airlines to "persuade, pressure . . . or compensate" airport managers to increase security).


101. See Wallace, 214 F.3d at 295 (stating that plaintiff was not traveling with anyone else during trip).
Kwang-Yong Park was seated next to Ms. Wallace in seat 43J. Another male passenger was seated in the aisle seat of row 43. After finishing the in-flight meal, Ms. Wallace fell asleep. The lights on board the plane had been dimmed to let some passengers watch an in-flight movie and to let others sleep. Ms. Wallace awoke suddenly and realized that Mr. Park had "unbuckled [her] belt, unbuttoned and unzipped her shorts, and placed his hand in [her] underwear to fondle her genitals." Ms. Wallace attempted to stop the attack by turning her body and facing toward the window. This move offered Ms. Wallace a brief respite, but Mr. Park's attack soon continued. Ms. Wallace, having no other alternatives, punched Mr. Park, then jumped over him and climbed over the aisle passenger's seat. After getting away from Mr. Park, Ms. Wallace moved to the rear of the plane and found a flight attendant. The flight attendant, upon being told of the attack, immediately reassigned Ms. Wallace to another seat. When the plane landed, Ms. Wallace notified airport police about the attack and Mr. Park was arrested.
IV. ANALYSIS

A. Narrative Analysis

In deciding Ms. Wallace's appeal, the United States Court of Appeals for the Second Circuit followed the Supreme Court's mandate to flexibly interpret the definition of an accident set forth in Saks. Applying this mandate, the court vacated the district court's decision and remanded the case for further proceedings. In the process, the court extended the definition of an accident to include torts committed by co-passengers even when the aircrew had not facilitated them.

1. The District Court's Holding

Following discovery, Ms. Wallace moved for summary judgment on her Warsaw Convention claim. The district court decided not to grant summary judgment to Ms. Wallace, finding that sexual molestation was not a "risk characteristic of air travel or related to the operation of an air-

113. See id. (describing charge against assailant). Mr. Park was charged with violating 18 U.S.C. § 2244(b) (1994), which provides: "Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both." 18 U.S.C. § 2244(b) (1994). Mr. Park was sentenced to two years probation for the attack. See Wallace, 1999 WL 187213, at *1 (describing sentence received by male passenger for committing assault on female passenger).

114. See Wallace, 1999 WL 187213, at *1 (stating procedural facts of case and noting that claim was filed within two year statute of limitations required by Warsaw Convention).

115. See Wallace, 214 F.3d at 295-96 (stating plaintiff's claim). Ms. Wallace also alleged that Korean Air was liable for the assault based on an independent negligence action. The district court dismissed the negligence action relying on the Supreme Court's decision in El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999). See id. at 295 n.2 (holding that personal injuries not allowed under the Convention were not allowed at all).

116. See id. at 299 (reaching conclusion "mindful of the 'virtual strict liability' imposed on air carriers by the Warsaw regime . . . and in deference to the Saks Court's admonition to interpret the term 'accident' both 'flexibly' and 'broadly'").

117. See id. at 300 (vacating dismissal and remanding case for further proceedings).

118. See id. at 300-01 (Pooler, J., concurring) (noting that majority did not decide case on issue briefed before court and failed to correctly define "accident"). For a discussion of the concurring opinion, see infra notes 132-37, and accompanying text.

119. See Wallace, 1999 WL 187213, at *1 (noting plaintiff filed summary judgment motion on her Warsaw Convention claim).
plane.” Because the sexual assault was not foreseeable, the court decided that Korean Air would not be held liable under the provisions of the Warsaw Convention as modified by the Montreal Agreement.

The court felt that the Supreme Court’s underlying theory in Saks was that airlines should be liable for torts that are the proximate cause of either “the abnormal or unexpected operation of the aircraft or the abnormal or unexpected conduct of airline personnel.” In reaching its decision, the court stated that none of the airline’s actions was the proximate cause of Mr. Park’s attack on Ms. Wallace. The court rejected Ms. Wallace’s argument that the Montreal Convention subjected airlines to absolute liability and granted Korean Air’s motion to dismiss the Warsaw Convention claim.

2. The Second Circuit Appeal: The Majority’s Holding

The Second Circuit noted that this case presented an issue of first impression for the court. The court had not yet chosen between the two camps created when the Supreme Court failed to clearly define whether proving the existence of risks inherent “in the operation of the aircraft” was required in order to sustain a claim. The Second Circuit’s holding rested on the “virtual strict liability” imposed on air carriers and the Supreme Court’s mandate to flexibly and broadly interpret the term accident.

120. See id. at *5 (holding that airlines are only liable under Warsaw Convention for risks characteristic of air travel).
121. See id. at *3, *5 (noting that similar injuries unrelated to foreseeable risks of air travel have been held to fall outside scope of Article 17).
122. Id. at *4.
123. See id. (“The record reveals no act or omission by defendant which had any connection to plaintiff’s injuries and which might lead to a finding that plaintiff’s injuries were the result of an ‘accident’ within the meaning of Article 17.”).
124. See id. at *5 (stating that adoption of absolute liability doctrine is inconsistent with Air France v. Saks and motion to dismiss granted because no genuine issues of material fact exist).
126. See id. (citing Gezzi v. British Airways PLC, 991 F.2d 603, 605 n.4 (9th Cir. 1993)). The Gezzi court stated that “the Saks opinion does not make it ‘clear whether an event’s relationship to the operation of an aircraft is relevant to whether the event is an accident.’” See Gezzi, 991 F.2d at 605 n.4 (noting that Saks Court did not specifically find whether Article 17 accident required operation of aircraft). The Wallace court also noted that the various district court cases cited in the Supreme Court’s Saks decision dealt with injuries that resulted from either inherent risks to air travel, such as hijacking, or out of the abnormal conduct of airline personnel. See Wallace, 214 F.3d at 299 (noting lower court interpretations of Saks decision).
127. See Wallace, 214 F.3d at 299 (stating that conclusion was based on the “virtual strict liability” imposed on airlines and “in deference to the . . . Court’s admonition to interpret the term ‘accident’ both ‘flexibly’ and ‘broadly’”).
In addition, the court stated that three characteristics of air travel were also factors in the decision-making process. First, the court noted that the confined space in economy class contributed to the attack by placing Ms. Wallace in a seat next to two male strangers. Second, the court noted that the lights had been dimmed, permitting Mr. Park to carry out his attack without other passengers noticing. Finally, the court believed that airline personnel were responsible for the attack because they had not noticed any of Mr. Park's actions.

3. The Second Circuit Appeal: The Concurring Opinion

The concurrence in Wallace stated that the case should be remanded because the district court's holding was contrary to that of Saks. A passenger-on-passenger tort satisfies the definition of an accident simply because it is an unexpected and unusual event. The concurring judge believed that because the Saks opinion failed to address the inherent risks of air travel, the district court inappropriately created additional criteria.

The concurrence additionally felt that the majority opinion incorrectly assumed that the district court applied the correct definition of an accident. The concurring judge stated that the court did not need to reach the "complicated, always fact laden, and irrelevant question" of de-
fining what risks were inherent to air travel. It was further noted that requiring a person to be seated next to a stranger was not a characteristic of air travel so much as it was a characteristic of modern public transportation.

B. Critical Analysis

The court’s decision in Wallace is a well-reasoned application of the literal meaning of a Saks accident. Nevertheless, the reasoning is flawed with regard to the practical application of both the Saks definition of an accident and the definition of a risk that is a characteristic of air travel. The Wallace decision further confuses the definition of an accident and its application to torts committed by one passenger upon another. The court’s failure to adopt a definition that incorporated a causal link between the airline and the tortious act has resulted in a strict liability scenario that could be carried over to other forms of public transportation.

1. Absolute Liability

Of primary concern in the court’s analysis is its adherence to a “virtual strict liability” standard in determining an airline’s culpability. In Saks, the Supreme Court noted that some scholars characterized the Warsaw Convention, as modified by the Montreal Agreement, as imposing a strict liability standard on airlines. The Court stated, however, that this

136. Id. (Pooler, J., concurring) (noting that it is irrelevant to question because Saks does not require courts to determine existence of risk characteristic of air travel).

137. See id. at 300 n.1 (Pooler, J., concurring) (“For example, one might argue that being strapped into one’s seat next to a stranger is not so much a characteristic of air travel as it is a characteristic of any form of public transportation.”).

138. See id. at 299 (holding that accident occurred, regardless of actions or inactions by aircrew, because of Saks admonition to interpret term “accident” broadly and flexibly).

139. See id. at 300-01 (Pooler, J., concurring) (discussing problems with analysis by majority opinion).

140. See id. at 299 (defining accident in view of virtual strict liability imposed on airlines and characteristics of economy class travel).

141. See id. at 300 n.1 (Pooler, J., concurring) (questioning district court’s and majority’s opinions concerning how closely tied to air travel risk or hazard must be before it is characteristic).

142. See id. at 299 (stating that court’s opinion was reached mindful of virtual strict liability imposed on airlines by Warsaw treaty system).

interpretation was "not entirely accurate." On the one hand, the Montreal Agreement did require international and domestic airlines to forego their Article 20(1) "due care" defense in exchange for continued limitations on liability. On the other hand, airlines were not subject to strict liability because they retained a number of defenses under other articles, including the accident requirement of Article 17. In Wallace, the majority found the airline liable regardless of the actions taken by the flight crew to prevent further assaults on Ms. Wallace.

144. Saks, 470 U.S. at 407 (stating that Montreal Agreement did not amend provision defining accident and therefore does not impose absolute liability on airlines).

145. See Waiver of Warsaw Convention Liability Limits and Defenses, 14 C.F.R. § 203 (2000) (striking due care defense in return for increased liability limitations). In exchange for the continued limitation, the airlines agreed to increase the liability limit to $75,000. See Montreal Agreement, supra note 29 (stating liability limit was increased in exchange for continued limitation). The Montreal Agreement provides that:

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees.... These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol.

Id.; see also Saks, 470 U.S. at 406-07 (stating that in most American cases, Montreal Agreement expands carrier liability by removing Article 20(1) defense); Defendant-Appellee's Petition for Rehearing and Rehearing En Banc at 13, Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000) (No. 99-7597) (stating that Montreal Agreement does not affect meaning of Article 17 accident).

146. See Saks, 470 U.S. at 407 (noting that airlines did not waive contributory negligence defense in Article 21 or accident requirement of Article 17 when signing Montreal Convention). The Supreme Court noted that the Montreal Agreement did not affect these provisions for two important reasons. See id. (explaining rationale). First, the contributory negligence and accident defenses are physically separated from the Article 20(1) Due Care defense. See id. (using construction of articles to support position). Second, Articles 17 and 21 require the courts to examine the cause of the event rather than the actions taken by the airline to prevent the event from happening. See id. (describing substantive provisions of convention articles). Since Articles 17 and 21 are not mentioned in the Montreal Agreement and they are separate from Article 20(1), they are not affected by the limitations of the agreement. See id. (arguing that agreement on its face does not alter Articles 17 or 21).

147. See Wallace, 214 F.3d at 295, 300 (concluding airline liable despite flight attendant's efforts to reassign female passenger's seat and subsequent arrest of assailant).
2. Drafters' Intent

Article 17 of the Warsaw Convention imposes liability on air carriers once a passenger shows a causal link between the "damage" complained of and the "accident." Unlike principles of French civil law that permitted carrier liability if the accident occurred during the carriage, the Warsaw Convention mandates that a passenger prove the cause. Permitting a passenger to show simply that the accident occurred would allow a passenger to claim an injury and allege carrier liability on insufficient grounds. Airlines were not seen as guarantors of passenger safety and were only required to take measures that similar air carriers would take to protect their passengers. According to the drafters, Article 17 should be construed to allow a passenger to recover only if the accident was related to the air travel and the passenger could "establish the connection between the accident and the operation of the aircraft."

3. Characteristics of Air Travel

The majority opinion justified the holding by claiming certain "characteristics of air travel" aided Mr. Park in his sexual assault. In finding Korean Air responsible for the assault, the majority holding further added to the confusion over an "accident" because the court relied on "factual issue[s] neither briefed nor argued by counsel." As noted in the concurring opinion, the majority created a problem by requiring courts to

148. See Goedhuis, supra note 62, at 199 (listing elements passenger must prove in order to hold carrier liable).

149. See Saks, 470 U.S. at 398 (stating that Article 17 requires passenger to show accident caused injury not that accident is injury); see also Price v. British Airways, No. 91 CIV. 4947, 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992) (holding that fight between co-passengers did not relate operation of aircraft); Brief for Defendant-Appellee at 13, Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000) (No. 99-7597) (listing three requirements for proving airline liability).

150. See Goedhuis, supra note 62, at 199 ("[i]t is the liability ex contractu of the carrier which is engaged in the event of an accident, and we certainly do not consider that it is sufficient for the passenger to say that he was injured, to establish the fact that the carrier failed in his obligation.").

151. See id. at 200 (noting that carriers are only obliged to take measures that other airlines would take to protect passengers).

152. Id. at 200 (stating that passenger needed to prove causal connection between accident and operation of aircraft).

153. See Wallace v. Korean Air, 214 F.3d 293, 299 (2d Cir. 2000) (concluding that Article 17 accident occurred under narrower characteristic risk of air travel approach), cert. denied, 69 U.S.L.W. 3281 (U.S. Feb. 20, 2001) (No. 00-560). In holding that an accident had occurred under this approach, the Second Circuit avoided the "Talmudic debate" of determining whether an event had to be related to air travel in order to become Article 17 accident. See id. (noting that present case did not require determination of whether every co-passenger tort qualifies as accident).

154. See id. at 300 (Pooler, J., concurring) (noting that court's determination that sexual assault constituted Article 17 accident relied on information that was neither briefed nor argued by counsel).
enter into a factual analysis over what is a characteristic of air travel. The majority asserted that the characteristics which increased Ms. Wallace’s vulnerability included a seat in economy class next to two men she did not know nor communicate with and the dimmed lights in the cabin of the airplane. The Second Circuit’s “characteristic risk of air travel” analysis contains a number of flaws.

At one time, risks characteristic of air travel were limited only to aerial disasters, such as plane crashes. Since the creation and implementation of the Warsaw Convention, risks characteristic of air travel have come to include hijackings and terrorist attacks. In Martinez Hernandez, however, the First Circuit stated that a risk of air travel must have a “close logical nexus between the injury and air travel per se.” In that case, the First Circuit refused to extend an airline’s liability to include risks of violent attacks at the hands of “zealots.” In addition, the First Circuit held

155. See id. at 300 n.1 (Pooler, J., concurring) (noting that majority’s opinion raises even more “‘Talmudic’ question” over how associated with air travel hazard needs to be before it is characteristic of air travel).

156. See id. at 299-300 (describing risks that were characteristic of air travel and contributed to Ms. Wallace’s vulnerability). First, the Second Circuit found that the cramped and confined conditions in economy class increased Ms. Wallace’s chances of being assaulted. See id. (describing characteristic risks of air travel). She was placed in a confined position seated next to two men whom she did not know and had not indicated that she would like to be touched. See id. (stating confined seating arrangement was risk characteristic of air travel). Second, the court noted that the dimmed lights in the cabin permitted a sexual predator to assault his victim without others seeing the attack. See id. (noting cabin conditions contributed to assault on plaintiff). Finally, the court noted that not a single flight attendant noticed the attack, an omission that increased Ms. Wallace’s vulnerability to the assault. See id. (stating airline personnel’s failure to routinely patrol cabin contributed to assault).

157. See id. at 300 (Pooler, J., concurring) (describing errors in majority opinion’s analysis). For a discussion of Judge Pooler’s concurring opinion, see supra notes 132-37, and accompanying text.

158. See, e.g., Day v. Trans World Airlines, Inc., 528 F.2d 31, 37-38 (2d Cir. 1975) (noting that air travel hazards were “once limited to aerial disasters”).

159. See Air Fr. v. Saks, 470 U.S. 392, 405 (1985) (listing jurisdictions that had found hijackings and terrorist attacks fall within Warsaw Convention definition of accident); Pflug v. Egyptair Corp., 961 F.2d 26, 29 (2d Cir. 1992) (noting that hijacking qualifies as Article 17 accident); Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 159 (3d Cir. 1977) (noting that risk of terrorist attack is characteristic of air travel); Martinez Hernandez v. Air Fr., 545 F.2d 279, 284 (1st Cir. 1976) (noting that terrorist attacks are characteristic risks but refusing to hold airline liable for senseless act committed while plaintiff’s waited for their baggage after leaving aircraft); Day v. Trans World Airlines, Inc., 528 F.2d 31, 38 (2d Cir. 1975) (finding that terrorist attack is characteristic of air travel); Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 706 (S.D.N.Y. 1972) (ruling that hijacking was risk characteristic of air travel), aff’d per curiam, 485 F.2d 1240 (2d Cir. 1973).

160. Martinez Hernandez v. Air Fr., 545 F.2d 279, 284 (1st Cir. 1976).

161. See id. (stating that “risk of violence at the hands of zealots is all too present in any public place”).

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that senseless acts of violence are not characteristic of air travel, but simply a characteristic of everyday life in our society.\textsuperscript{162}

The characteristics cited by the Second Circuit's \textit{Wallace} opinion do not meet the superior definition set forth by the First Circuit for a risk characteristic of air travel.\textsuperscript{163} The flaw in the Second Circuit's "characteristic of air travel" argument is highlighted by the concurring opinion.\textsuperscript{164} That opinion points out that sitting next to strangers in a confined space is commonplace in all forms of public transportation, not just air travel.\textsuperscript{165} In order to satisfy the definition of a risk characteristic of air travel, either the presence of an airplane or air travel itself must be prerequisites to the act.\textsuperscript{166} In Ms. Wallace's case, neither the presence of an airplane nor air travel was required for Mr. Park to be able to commit the assault.\textsuperscript{167}

\textsuperscript{162} See id. (noting that risk of random attack, such as incident in present case, is not risk characteristic of travel by aircraft, but is risk of living in "a world such as ours"); \textit{cf.} York v. Commodore Cruise Line, 863 F. Supp. 159, 162 (S.D.N.Y. 1994) (noting belief that sexual and verbal assaults are not peculiar to maritime travel and refusing to hold ship owner to enhanced standard of care simply because assault took place aboard ship rather than on land). According to the United States Department of Justice, Americans experienced 182,000 sexual assaults in 1999. \textit{See generally} CALLIE MARIE RENNISON, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION 1999, at 9 (Aug. 2000), \textit{available at} http://www.ojp.usdoj.gov/bjs/pub/pdf/cv99.pdf (last visited Mar. 6, 2001) (listing rates of criminal victimizations). This statistic represents a 33.3\% increase in sexual assaults over 1998. \textit{See id.} (noting increase in sexual assaults from 1998 to 1999). These statistics show that sexual assaults are not characteristic risks of air travel, but are instead characteristic risks of today's society in general. \textit{See id.} (showing, in graphical format, that sexual assaults occur in large numbers in the United States).

\textsuperscript{163} See, \textit{e.g.}, \textit{Martinez Hernandez}, 545 F.2d at 284 ("[I]f [the] application [of modern tort theories] is not to do violence to the history and language of the Warsaw Convention, there should, it seems to us, be a close logical nexus between the injury and air travel per se."). The First Circuit also noted that a risk characteristic of air travel, as opposed to a general risk of living in today's society, required both an aircraft and air travel to be pre-requisites for the tort on which the suit was based. \textit{See id.} (finding characteristic risk of air travel only where aircraft and air travel were prerequisites to tort's occurrence).

\textsuperscript{164} \textit{See Wallace v. Korean Air}, 214 F.3d 293, 300 n.1 (2d Cir. 2000) (Pooler, J., concurring) (noting possible argument that being seated next to strangers is characteristic of all modern public transportation), \textit{cert. denied}, 69 U.S.L.W 3281 (U.S. Feb. 20, 2001) (No. 00-560).

\textsuperscript{165} \textit{See id.} ("For example, one might argue that being strapped into one's seat next to a stranger is not so much a characteristic of air travel as it is a characteristic of any form of public transportation."; \textit{see also} Defendant-Appellee's Petition for Rehearing and Rehearing En Banc at 9, \textit{Wallace v. Korean Air}, 214 F.3d 293 (2d Cir. 2000) (No. 99-7597) (stating that characteristics of air travel found by majority are common in all forms of transportation and in social settings such as theaters).

\textsuperscript{166} \textit{See Martinez Hernandez}, 545 F.2d at 284 (noting that aircraft and air travel are necessary elements for risk to be considered characteristic of air travel).

\textsuperscript{167} \textit{See Wallace}, 214 F.3d at 293-99 (neglecting to find whether airplane was required for commission of assault). The court noted that the seating arrangements played a causal role, but did not determine whether there was anything
Finally, the Second Circuit did not state that there was anything abnormal or unusual about the seating in economy class. In Saks, the Supreme Court stated that airlines would not be liable for accidents that resulted from the normal operation of the aircraft. In the present case, neither the seating in the economy class section of the airplane nor the dimmed lights were abnormal or unusual. Addressing the dimmed light issue, the flight was an evening flight, departing Seoul, South Korea, at approximately seven o’clock in the evening. It could be assumed that a number of people on the airplane would be traveling to the United States after a full day and would like to sleep on the airplane. As a courtesy to the passengers who would like to sleep, it would be perfectly normal for the aircrew to dim the cabin lights. It is not abnormal that a
flight crew would dim a plane’s cabin lights for the comfort of the passengers, especially on an evening flight, and such darkness should not be seen as a characteristic risk of air travel.\footnote{Simpson Trial Transcript #110-13 (CNN television broadcast, July 12, 1995) (transcript available in LEXIS News Group File, All) (showing that American Airlines turns cabin lights down, particularly during night flights).}

4. Problems with Uniformity

The Warsaw Convention was written with the purpose of developing a uniform liability standard for the emerging airline industry.\footnote{See, e.g., \textit{Goldhirsch}, supra note 8, at 5 (noting that Warsaw Convention purpose was to unify standards of carrier liability under international law and supplant signatories’ differing domestic law); \textit{Speiser & Krause}, supra note 29, § 11:4 (noting that one purpose of Warsaw Convention was to develop uniform aviation liability system); \textit{Lowenfeld & Mendelsohn}, supra note 1, at 498 (stating that signatories desired uniformity for carrier liability); \textit{Lindauer}, supra note 29, at 333 (noting intent of Warsaw Convention was unification of recovery laws in international aviation).} In the United States, the Warsaw Convention is considered a self-executing treaty and does not require enabling legislation in order to bring its provisions into force.\footnote{See \textit{Trans World Airlines v. Franklin Mint Corp.}, 466 U.S. 243, 252 (1984) (stating that Warsaw Convention is self-executing in United States because it does not require enabling legislation); \textit{Goldhirsch}, supra note 8, at 4 (noting that no domestic legislation is needed to give treaty legal force); \textit{see also} 73 \textit{Cong. Rec.} 11,582 (1934) (passing Instrument of Ratification for Warsaw Convention with two-thirds majority and two reservations); \textit{Lowenfeld & Mendelsohn}, supra note 1, at 502 (noting that Warsaw Convention was ratified by Senate on June 15, 1934); \textit{Cahn}, supra note 51, at 540 (1985) (noting that Senate ratified Warsaw Convention in 1934).} In fact, the convention successfully passed through the Senate without deliberations and without any legislative history.\footnote{See \textit{73 Cong. Rec.} 11,582 (ratifying Convention by two-thirds majority without debate); \textit{Lowenfeld & Mendelsohn}, supra note 1, at 502 (noting that Warsaw Convention was ratified by Senate by voice vote without debate, committee hearing or report).} Other countries, such as the United Kingdom and the Netherlands, had to pass enabling legislation before any of the Warsaw Convention’s provisions entered into force in those countries.\footnote{See \textit{Goldhirsch}, supra note 8, at 4 (noting that domestic legislation was enacted in England, Canada, Australia, France and Israel to give treaty legal force); \textit{see also} Reply Brief for Plaintiff-Appellant at 5 n.4, \textit{Wallace v. Korean Air}, 214 F.3d 295 (2d Cir. 2000) (No. 99-7597) (noting addition). The Dutch law added the phrase “in connection with the carriage by air” to the text of Article 17 when passing enabling legislation; the reporters considered that a person could think of many accidents that might occur aboard an airplane that did not have any connection to air travel. \textit{See id.} (noting reasons for Dutch changes to text).}

In the United Kingdom, the Warsaw Convention entered into force with the passage of the Carriage by Air Act of 1932, while the Hague Proto-
Initially, an accident was defined as "any fortuitous or unexpected event by which the safety of an aircraft or any person is threatened."\textsuperscript{180} This definition was further clarified with the passage of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations of 1996.\textsuperscript{181} The new definition states that an accident is "an occurrence associated with the operation of [the] aircraft."\textsuperscript{182} This definition effectively eliminated a pas-
senger's cause of action for another passenger's tortious act, which was the basis of the cause of action in Wallace. 183

The Second Circuit's Wallace opinion differed from the First Circuit as well as with a number of district courts on the question of whether a passenger assault can be considered an accident. 184 The Supreme Court has decided that a passenger cannot recover for injuries caused by his or her own internal reactions when the aircraft operates in a "usual, normal and expected manner." 185 In Langadinos, the plaintiff asserted that American Airlines violated the Warsaw Convention when it continued to serve alcohol to the assailant. 186 In that case, the First Circuit noted that not all passenger-on-passerger torts could be considered Warsaw Convention ac-

(ii) damage limited to propellers, wing tips, antennas, tyres, brakes, fairings, small dents or puncture holes in the aircraft skin; or

(3) the aircraft is missing or is completely inaccessible.

*Id.* at reg. 2(1) (describing definition of accident).

183. See id. (noting that English regulation applies to injuries except those that are self-inflicted or resulting from another person). Ms. Wallace's claim was based on a co-passenger tort. See Wallace v. Korean Air, 214 F.3d 293, 298 (2d Cir. 2000) (stating that determining definition of accident is "difficult in cases like ours where the putative injuries are caused by torts committed by fellow passengers"), cert. denied, 69 U.S.L.W. 3281 (U.S. Feb. 20, 2001) (No. 00-560).


185. See Air Fr. v. Saks, 470 U.S. 392, 406 (1985) (finding that no accident occurs where injury is caused by plaintiff's internal reaction to usual, normal and expected operation of aircraft).

186. For a discussion of Langadinos v. American Airlines, see *supra* notes 75-81, and accompanying text.
cidents. As a guideline, the *Langadinos* opinion noted that accidents do not exist where airline personnel or the aircraft itself do not play a causal role in the commission of the tort. The plaintiff's claim in *Langadinos* survived a motion to dismiss because he had asserted that the assailant was intoxicated, that the flight attendants knew this, and that the airline continued to serve the assailant despite this knowledge. The court also stated that the plaintiff must prove that the airline's actions were a proximate cause of his injury.

The facts of *Tsevas* are similar to those found in *Langadinos*. In *Tsevas*, the Illinois district court noted that where a passenger alleged injuries, but failed to show that the plane or its aircrew operated in an abnormal or unusual manner, there was no accident under Article 17. The district court held that the aircrew had acted abnormally and unexpectedly when the flight attendants continued to serve alcohol to the assailant and refused to immediately assist the plaintiff when she complained about the assaults. Other district courts have also required the plaintiff to allege that the airline was a proximate cause of the accident.

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187. See *Langadinos*, 199 F.3d at 70-71 (noting that not every tort committed by fellow passenger is Article 17 accident).
188. See id. (stating that accidents occur when airline personnel play causal role in events leading up to tortious injury).
189. See id. at 71 (noting allegation that assailant appeared aggressive and erratic but airline personnel continued to serve assailant alcohol).
190. See id. (stating that plaintiff must establish that he suffered compensable injury and that airline's alcohol service was proximate cause of injury).
191. For a discussion of *Tsevas v. Delta Air Lines, Inc.*, see supra notes 65-74, and accompanying text.
192. See *Tsevas* v. Delta Air Lines, Inc., No. 97 C 0320, 1997 WL 767278, at *3 (N.D. Ill. Dec. 1, 1997) (quoting other courts that have held that injuries, alleged by passengers that have failed to show abnormal operation of aircraft, are not accidents).
193. See id. at *4 (holding that sexual advances, in combination with flight attendants' failure to respond to plaintiff's request for assistance was unexpected event).
Support for the position that an Article 17 accident requires a plaintiff to show the airline was a proximate cause of his or her injury can be found in the Supreme Court’s Saks opinion. The Supreme Court noted that the correct analysis of an accident was to look at the “nature of the event which caused the injury” rather than whether the injury itself was an accident. The Court limited its definition of accident by excluding instances when the passenger’s own internal reaction to the usual or normal operation of the aircraft resulted in an injury. In interpreting this statement, lower federal courts have held that the Supreme Court has not decided whether or not every passenger-on-passenger tort can be considered an accident. The Second Circuit noted this point in its Wallace opinion, but avoided deciding this issue when it stated that it did not have to decide whether all co-passenger torts are actionable.

V. Conclusion

The Second Circuit’s opinion in Wallace failed to address the issues briefed and argued before the court. Instead, the majority asserted that a sexual assault on one passenger by another passenger was an accident.

fight between plaintiff and another passenger bore no relation to operation of defendant’s aircraft.

195. See Air Fr. v. Saks, 470 U.S. 392, 405 (1985) (noting that lower courts have extended accident to include hijackings, terrorist attacks and drunken falls). It can be argued that implicit in the Supreme Court’s reference to Oliver v. Scandanavian Air Systems, the Court meant to imply support for use of a proximate cause analysis. See id. (citing Oliver, 1983 U.S. Dist. LEXIS 17951). The decision in Oliver found that the co-passenger’s drunken fall was caused by the continued service of alcohol aboard the aircraft. See Oliver, 1983 U.S. Dist LEXIS 17951, at *6 (alleging cause of accident was continued service of alcohol); see also Wallace v. Korean Air, 214 F.3d 293, 299 (2d Cir. 2000) (“To be sure, in the lower court cases cited with approval in Saks, all the passenger injuries seem to have arisen out of risks that are inherent to air travel, or out of the operation of the aircraft itself.”), cert. denied, 69 U.S.L.W 3281 (U.S. Feb. 20, 2001) (No. 00-560). But see Saks, 470 U.S. at 406 (“[W]e require only that the passenger . . . prove that some link in the chain [of causation] was an . . . unexpected event external to the passenger.”).

196. See Saks, 470 U.S. at 407 (stating that Article 17 refers to accident that caused injury and not accident that is injury).

197. See id. at 406 (holding that Warsaw Convention does not apply when injury results from internal reaction to usual, normal, and expected operation of aircraft).

198. See, e.g., Wallace, 214 F.3d at 299 n.4 (stating that Supreme Court did not determine whether all co-passenger torts are accidents).

199. See id. (concluding that court did not need to determine whether all co-passenger torts are accidents because case could be decided under narrower characteristic risk of air travel approach).

200. See id. at 300 (Pooler, J., concurring) (noting that majority opinion based holding on factual issue neither briefed nor argued before court); see also Defendant-Appellee’s Petition for Rehearing and Rehearing En Banc at 10, Wallace v. Korean Air, 214 F.3d 293 (2d Cir. 2000) (No. 99-7597) (arguing that factual findings by the majority were not based on evidence put forward in record).
for purposes of Article 17 of the Warsaw Convention. The court incorrectly focused on the question of whether an accident had occurred on board Korean Air Flight Sixty-One, instead of whether the injury was caused by an accident. The Second Circuit also incorrectly interpreted the Warsaw Convention, modified by the Montreal Agreement, as creating a system of strict liability. In the Second Circuit, an airline may no longer claim that it has done everything within its power to prevent the accident from occurring. The airline does have a defense, however, if the plaintiff is unable to show that there has been an accident and that the accident caused the complained of injury.

The Wallace decision also expands an airline’s liability to include events occurring on board the aircraft, imposing a liability regime that encompasses more than the accident required for a Warsaw Convention violation. A clearer definition of accident is needed to avoid confusion over Article 17’s application to co-passenger torts aboard aircraft. This is especially true in light of the split among the various courts of appeals and district courts that have dealt with this issue. As part of a revised

201. See Wallace, 214 F.3d at 300 (holding that Mr. Park’s assault constituted unexpected and unusual event, external to Ms. Wallace, and therefore defined as Article 17 accident).

202. See id. at 299 (finding that accident occurred without looking to whether aircraft or airline personnel were proximate cause of assault).

203. See id. ("Though a close question, we reach that conclusion mindful of the 'virtual strict liability' imposed on air carriers by the Warsaw regime."). But see Air Fr. v. Saks, 470 U.S. 392, 407 (1985) (stating that Montreal Agreement is not treaty amendment and therefore does not impose absolute liability on airlines).

204. See Saks, 470 U.S. at 407 (stating that signatories to Montreal Agreement relinquished right to use Article 20(1) "due care" defenses in exchange for continued limitation of liability).

205. See id. (commenting that signatories to Montreal Agreement did not relinquish liability limitation under Article 17 accident requirement).

206. See id. at 403 ("A passenger's injury must be caused by an accident, and an accident must mean something different than an 'occurrence' on the plane.").

207. See Wallace, 214 F.3d at 301 (Pooler, J., concurring) (advocating clearer definition of accident for Second Circuit).

208. See id. at 299 (holding that sexual assault by co-passenger was accident without explicitly finding fault on part of airline); see also Lahey v. Sing. Airlines, Ltd., 115 F. Supp. 2d 464, 467 (S.D.N.Y. 2000) (noting that aircrew’s actions and inactions were not relevant to holding that passenger struck by food tray thrown by co-passenger suffered Article 17 accident). Contra Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 71 (1st Cir. 2000) (remanding for determination of whether sexual assault by co-passenger was proximately caused by flight crew’s actions and inactions in order to decide whether there was Article 17 accident); Gezzi v. British Airways PLC, 991 F.2d 603, 604 (9th Cir. 1993) (finding Article 17 accident because passenger’s slip and fall resulted from aircrew’s inaction); Tsevas v. Delta Air Lines, Inc., No. 97 C 0320, 1997 WL 767278, at *3 (N.D. Ill. Dec. 1, 1997) (finding Article 17 accident where flight attendants’ continued alcohol service to plaintiff’s visibly drunk assailant and refused to reseat plaintiff); Stone v. Cont’l Airlines, 905 F. Supp. 823, 827 (D. Haw. 1995) (holding unprovoked punching of plaintiff by another passenger was not accident because it was unrelated to operation of aircraft); Levy v. Am. Airlines, No. 90 Civ. 7005, 1993 WL 205857, at *4 (S.D.N.Y. June 9, 1993) (holding that inmate’s injuries caused by escorting police officers were
standard, courts should redefine accident as an injury-causing occurrence during air travel that was proximately caused by the airline’s actions or inactions. 209 Developing and implementing such a definition will bring American Warsaw Convention law into uniformity with the law of other nations and with the intent behind the Convention. 210 Airline accident victims should not only be required to show that an accident occurred while on an airplane, but also that the airline or the aircrew was the proximate cause of the injury. 211 Adopting a standard that finds liability for “usual” and “daily” occurrences would only add to the current confusion. 212 Instead, accidents that have no relation to risks characteristic of air travel, or are not proximately caused by the actions or inactions of the airline or its aircrew, should not invoke Warsaw Convention liability for airlines. 213

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