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# The End of an Evolution: From Air France v. Saks to Olympic Airways v. Husain - The Term "Accident" under Article 17 of the Warsaw Convention Has Come Full Circle

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# COMMENTS

## THE END OF AN EVOLUTION: FROM AIR FRANCE V. SAKS TO OLYMPIC AIRWAYS V. HUSAIN — THE TERM “ACCIDENT” UNDER ARTICLE 17 OF THE WARSAW CONVENTION HAS COME FULL CIRCLE

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### I. INTRODUCTION

The Warsaw Convention, officially known as the Convention for Unification of Certain Rules Relating to International Transportation by Air,<sup>1</sup> was enacted to support the world's financially debilitated airline industry.<sup>2</sup> Before the Warsaw Con-

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 *state. 3000*, T.S. 876, 137 L.N.T.S. 11, reprinted in 449 U.S.C. 1502 (1998) [hereinafter Warsaw Convention].

<sup>2</sup> See Kelly Compton Grems, *Punitive Damages under the Warsaw Convention: Revisiting the Drafters' Intent*, 41 AM. U.L. REV. 141, 145 (Fall, 1991).

vention, airlines were potentially liable, without monetary limits, for all passenger claims arising from injury or baggage loss.<sup>3</sup> One goal of this Convention was to promote growth of the airlines by limiting their potential liability for passenger injuries or deaths.<sup>4</sup> The origin of airline liability is found in Article 17 of the Warsaw Convention, which holds an airline liable for damages resulting from the injury or death of a passenger.<sup>5</sup> Article 17 holds airlines only liable for accidents, meaning not all injuries occurring on a flight will result in a violation of the Convention.<sup>6</sup> However, the Convention did not define the term "accident."<sup>7</sup> Because the Warsaw Convention was originally drafted in French, "the French meaning of specific provisions frequently leaves Anglophone judges unsure of the drafter's intent."<sup>8</sup>

The paramount case in this area is *Air France v. Saks*.<sup>9</sup> There, the Supreme Court relied on the French meaning of "accident."<sup>10</sup> In French, the term "accident" when used to describe a cause of injury is defined as an "unexpected," "unusual," or "unintended" event.<sup>11</sup> The Supreme Court adopted this definition,<sup>12</sup> adding that the accident had to be external to the passenger.<sup>13</sup> Courts have struggled with the scope of the definition of "accident" since this leading case.<sup>14</sup> The U.S. Circuit courts

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<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* at 147.

<sup>6</sup> See Davis L. Wright, *Flying Over Friendly Skies: Expanding the Definition of an "Accident" under the Warsaw Convention to Include Co-passenger Sexual Assaults*, 46 VILL. L. REV. 453, 459 (2001).

<sup>7</sup> See Judith R. Karp, *Mile High Assaults: Air Carrier Liability under the Warsaw Convention*, 66 J. AIR L. & COM. 1551, 1557 (Fall, 2001).

<sup>8</sup> Robert Coleman, *I Saw Her Duck: Does Article 17 of the Warsaw Convention "Cover" Injuries or Accidents?*, 7 GEO. MASON L. REV. 191, 191-194 (Fall, 1998).

<sup>9</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

<sup>10</sup> See Karp, *supra* note 7.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Wright, *supra* note 6, at 460.

<sup>14</sup> See Ann Cornett, *Air Carrier Liability under Warsaw: The Ninth Circuit Holds That an Aircraft Personnel's Failure to Act in the Face of a Known Risk Is an "Accident" When Determining Warsaw Liability- Husain v. Olympic Airways*, 68 J. AIR L. & COM. 163, 163 (Winter 2003).

are currently split over the question of the scope of Article 17's coverage.<sup>15</sup>

The Supreme Court in *Saks* made it clear that "there was not an 'accident' if the injuries result from a passenger's own internal reaction to the usual, normal, and excepted operation of the aircraft."<sup>16</sup> There has been a definite trend in liberalizing the definition of the term "accident" under Article 17.<sup>17</sup> The courts have repeatedly allowed an expansion of the term "accident" to include, among other things, injuries due to co-passenger sexual assaults, assaults involving an intoxicated passenger,<sup>18</sup> and deaths due to Deep Vein Thrombophlebitis (DVT).<sup>19</sup>

However, there are still questions regarding an airline's potential liability resulting from the airline aggravating or causing an injury to a passenger through its action or inaction.<sup>20</sup> The Supreme Court now has an opportunity to answer this question,<sup>21</sup> as well as re-examine the scope of the term "accident" under Article 17, which it adopted in *Air France v. Saks*.<sup>22</sup> In *Husain v. Olympic Airways*,<sup>23</sup> a man died from a fatal asthma attack after repeated requests from his wife to the crew to move her husband out of the smoking section.<sup>24</sup> The District Court held that the flight crew's failure to move Husain's seat due to a known medical condition was an "accident" under Arti-

<sup>15</sup> See Coleman, *supra* note 8, at 193.

<sup>16</sup> Karp, *supra* note 7 (citing *Saks*, 470 U.S. at 406).

<sup>17</sup> See David E. Prewitt, *Cramped Planes and Passenger Medical Claims*, Andrews Aviation Litigation Reporter, May 28, 2002 at 3. Prewitt states that the turning point for the more liberal definition was the 1999 Supreme Court decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) in which the court held that the Warsaw Convention created the exclusive cause of action for personal injury claims stemming from an international flight. See *id.* After that decision, Prewitt suggests, there has been a trend in lower courts to apply the definition of the term "accident" more liberally in order to obtain recoveries for injured passengers. See *id.*

<sup>18</sup> *Stone v. Continental Airlines*, 905 F. Supp. 823 (D. Haw. 1995).

<sup>19</sup> See generally Staff, *Mixed Messages from DVT lawsuits*, Airline Business, August 1, 2003 at 1. DVT is also known as 'Economy Class Syndrome.'

<sup>20</sup> See Cornett, *supra* note 14.

<sup>21</sup> See *id.* at 164.

<sup>22</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

<sup>23</sup> *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2215 (2003).

<sup>24</sup> See *id.* at 831.

cle 17.<sup>25</sup> The Ninth Circuit affirmed the decision.<sup>26</sup> The Supreme Court has granted the writ of certiorari;<sup>27</sup> the question is, will their decision finally put this controversy to rest?

Part I of this article looks at the background of the Warsaw Convention and its purpose. Part II examines the hallmark case regarding Article 17 "accidents," *Air France v. Saks*. Part III considers various cases within the broad classifications of passenger-on-passenger assaults and medical claims that have followed the Supreme Court's definition of "accident," and those cases that have expanded the definition of the term "accident." Part IV examines, in depth, the Ninth Circuit case of *Husain v. Olympic Airways*, which has recently been granted certiorari by the Supreme Court. Part IV also considers the potential decision of the Supreme Court and what implications that decision will have on the Warsaw Convention and the airline industry.

## II. THE WARSAW CONVENTION

The planners of the Warsaw Convention decided that, "what engineers are doing for machines, we must do for the law."<sup>28</sup> It was drafted in 1929 and went into effect in 1933.<sup>29</sup> The Convention was ratified by the United States in 1934.<sup>30</sup> It is a multilateral treaty that governs "the international carriage of passengers, baggage, and cargo by air, and regulates the liability of international air carriers in over 120 nations."<sup>31</sup> The Convention emerged because of differences among countries re-

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<sup>25</sup> See *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1135 (N.D. Cal. 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002).

<sup>26</sup> See *Husain*, 316 F.3d at 840.

<sup>27</sup> *Husain v. Olympic Airways*, 123 S. Ct. 2215 (2003).

<sup>28</sup> Wright, *supra* note 6, at 455 (quoting from Andreas F. Lowenfeld & Allen I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967)).

<sup>29</sup> See Wright, *supra* note 6, at 455-456.

<sup>30</sup> See Loryn B. Zerner, *Tseng v. El Al Israel Airlines and Article 25 of the Warsaw Convention: A Cloud Left Uncharted*, 14 AM. U. INT'L L. REV. 1245, 1250 (1999).

<sup>31</sup> *Id.* As of June 1999, 147 countries were parties to the Convention. See Karp, *supra* note 7, at 1556. Berkley suggests that, with respect to the number of nations that have signed the Warsaw Convention, the Convention is the "world's most successful private law treaty." Blair J. Berkley, *Warsaw Convention Claims Arising From Airline-Passenger Violence*, 6 UCLA J. INT'L L. & FOR. AFF. 499, 535 n.7 (Fall, 2001/Winter 2002).

garding liability rules governing air transportation accidents.<sup>32</sup> It had two general purposes.<sup>33</sup> First, the drafters wanted to create a uniform set of rules for international travel.<sup>34</sup> Second, the drafters hoped to balance the interests of passengers in recovering for personal injuries, baggage loss or damage, and delay, with the airline's interest in limiting liability for potential loss.<sup>35</sup>

While the Warsaw Convention is very successful in some respects,<sup>36</sup> uniformity has been difficult to achieve in the area of airline liability for personal injury, as governed by Articles 17 through 30 of the Warsaw Convention.<sup>37</sup> This is because the original text of the Convention was written in French, and thus has left American courts "haunted" by interpretive difficulties.<sup>38</sup> Most common law countries have enacted legislation to clarify many of the Convention's ambiguous terms; however, the United States is not one of these countries.<sup>39</sup> Because of the United States' failure to enact such legislation, the courts have been left to interpret the gray areas of the Convention.<sup>40</sup>

Article 17 states:

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<sup>32</sup> See Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AM. U INT'L L. REV. 891, 892 (2001).

<sup>33</sup> See Coleman, *supra* note 8, at 195; see also Wright, *supra* note 6, at 456; Berkley, *supra* note 31, at 502.

<sup>34</sup> See Coleman, *supra* note 8, at 195.

<sup>35</sup> See *id.* Other objectives included: the need to avoid conflicts of law problems, protecting the infant international transportation business, and to facilitate transactions between countries around the world.

<sup>36</sup> See Gregory C. Walker, *Doing Business in Montreal: The Effects of the Addition of "Fifth Forum" Jurisdiction Under the Montreal Convention*, 23 PENNSILR 125, 136 (2004).

<sup>37</sup> See Coleman, *supra* note 8, at 196. The Supreme Court has said that any airline passenger seeking relief for personal injuries sustained during an international flight is limited to filing claims under the Warsaw Convention. See Karp, *supra* note 7, at 1556.

<sup>38</sup> See Zerner, *supra* note 30, at 1269. The original French text of Article 17 is as follows: "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 débarquement." *Air France v. Saks*, 470 U.S. 392, n.2 (1985).

<sup>39</sup> See Zerner, *supra* note 30, at 1270-1271. The Warsaw Convention is a self-executing treaty that does not require any legislation by the signatories to implement the treaty. See *id.* at n.141.

<sup>40</sup> See *id.* at 1271. The United States Constitution does not give much guidance to domestic courts applying international law. See *id.* at n.141.

The carrier shall be liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any operations of embarking or disembarking.<sup>41</sup>

Article 17 holds airlines only liable for accidents, indicating that not all injuries occurring aboard a plane will be considered a violation of the Convention.<sup>42</sup> However, the Convention did not define the term "accident."<sup>43</sup> U.S. courts are divided with regards to whether Article 17 covers all injuries or only those injuries that occur by accident.<sup>44</sup>

### III. AIR FRANCE V. SAKS

Courts have struggled with the term "accident" since the 1970's.<sup>45</sup> The Supreme Court in 1985 was first confronted with the question of interpretation in *Air France v. Saks*.<sup>46</sup> The Court cited in *Saks* that "the language of Article 17 is stark and undefined."<sup>47</sup> Because so many courts have struggled with the scope of Article 17, the Supreme Court found the intent of the drafters to be a critical factor in determining a definition of the term "accident."<sup>48</sup>

Ms. Saks was a passenger on an overseas flight from Paris, France to Los Angeles, California.<sup>49</sup> As the plane was landing,

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<sup>41</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 *state. 3000*, T.S. 876, 137 L.N.T.S. 11, reprinted in 449 U.S.C. 1502 (1998).

<sup>42</sup> See Wright, *supra* note 6.

<sup>43</sup> See Karp, *supra* note 7.

<sup>44</sup> See Coleman, *supra* note 8, at 234-235.

<sup>45</sup> See Jean-Paul Boulee, *Recovery for Mental Injuries That Are Accompanied by Physical Injuries under Article 17 of the Warsaw Convention: The Progeny of Eastern Airlines, Inc. v. Floyd*, 24 GA. J. INT'L & COMP. L. 501, 505 (1995). The dispute did not come about until this time because the American courts simply interpreted the Convention as limiting monetary damages. *Id.* at n.37. Courts viewed the treaty as creating a "presumption of liability;" it was not until the late 1970's that the courts began to view the Convention also as an "independent source of action." *Id.*

<sup>46</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

<sup>47</sup> *Saks*, 470 U.S. at 399 (citing Janice Cousins, *Warsaw Convention- Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 FORDHAM L. REV. 369, 388 (1976)).

<sup>48</sup> See Grems, *supra* note 2, at 156.

<sup>49</sup> See *Saks*, 470 U.S. at 394.

Ms. Saks experienced great pressure and pain in her left ear because of cabin pressurization changes.<sup>50</sup> As a result, she suffered permanent deafness.<sup>51</sup> She claimed the change in the cabin pressure during the descent caused her deafness, and thus, constituted an accident under Article 17.<sup>52</sup> The *Saks* Court suggested that the intent and expectations of the parties are of paramount importance when interpreting a treaty.<sup>53</sup> It stated: "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."<sup>54</sup> Since the original treaty was written in French, the Court relied on the French meaning of accident.<sup>55</sup> In the French language, the term "accident," when used to describe the cause of an injury, is defined as an "unusual," unexpected," or "unintended" event.<sup>56</sup> The Court cited French decisions and dictionaries to support its conclusion.<sup>57</sup> The

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<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 395.

<sup>53</sup> See *id.* at 396-400.

<sup>54</sup> *Saks*, 470 U.S. at 399.

<sup>55</sup> See Karp, *supra* note 7. The Court also looked to the French language in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) - the landmark case involving the issue of whether Article 17 applies solely to physical injuries or also to mental injuries unaccompanied by physical injuries or physical manifestations of an injury. See Boulee, *supra* note 45. The Court was unable to find the Convention's drafter's specific intent and concluded that there was probably no intention concerning mental injuries absent a clearly expressed intention. See *id.* at 508. The Court, lead by Justice Marshall, ruled that the term "lesion corporelle," the French phrase for bodily injury used by the drafters, referred only to physical injuries. See Kurtis A. Kemper, *What Constitutes an Accident under Warsaw Convention* (49 U.S.C.A. Note: ?§ 40105), 147 A.L.R. FED. 535, (Updated July 2003).

<sup>56</sup> Karp, *supra* note 7.

Courts which have grappled with the application of Article 17, both before and after *Saks*, have weighed several factors in determining whether particular events that allegedly caused passenger damages constituted accidents. These considerations focus on the relationship of the claimed accidents to (1) the normal operations of the aircraft or airline; (2) the knowledge and/or complicity of crew members in the events surrounding the alleged accident; (3) the acts of fellow passengers, whether intentional or not; (4) the acts of third persons who are not crew or passengers, e.g., hijackers and terrorists; (5) the location of the occurrence in the continuum of air travel; (6) the role, condition and reaction of the complainant in connection with the occurrence at issue; and (7) the kinds of risks inherent in air travel.

*Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 657 (S.D.N.Y. 2001).

<sup>57</sup> See Kemper, *supra* note 55.



Court adopted this definition and further stated that event, as stated above, had to be external to the passenger.<sup>58</sup> "An Article 17 'accident' is not the passenger's injury; rather it is an 'accident' which caused the passenger's injury."<sup>59</sup> The Court distinguished between cases of "accidents" and cases of "occurrences."<sup>60</sup> The Court found that Ms. Saks' deafness, caused by the depressurization of the plane, was not an "accident" within Article 17 because it was the passenger's internal reaction to the *usual* depressurization of the plane (emphasis added).<sup>61</sup>

A closer look at the *Saks* decision shows that the Supreme Court did not intend to expand the term "accident" beyond the drafters' intent, nor did they intend to eliminate the necessity of a nexus between the injury causing the accident and the operation of the aircraft.<sup>62</sup> The Court also did not intend to classify all passenger upon passenger torts to be a violation of Article 17.<sup>63</sup> *Saks* interpreted the term "accident" in a restrictive, rather than expansive manner.<sup>64</sup> Many lower (district) courts have followed *Saks* in strictly interpreting the term "accident" under Article 17.<sup>65</sup> However, the *Saks* definition has not been uniformly applied among circuit courts.<sup>66</sup>

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<sup>58</sup> See Wright, *supra* note 6, at 460.

<sup>59</sup> *Saks*, 470 U.S. at 398.

<sup>60</sup> See Kemper, *supra* note 55, at 538. Wright suggests that according to the drafters, Article 17 should be construed to allow a passenger to recover damages only if the accident was related to air travel and the passenger could show a connection between the accident and operation of the aircraft. See Wright, *supra* note 6, at 476.

<sup>61</sup> See *Saks*, 470 U.S. at 406.

<sup>62</sup> See Weigand, *supra* note 32, at 938.

<sup>63</sup> See *id.* at 838.

<sup>64</sup> See *id.* at 938.

<sup>65</sup> See *id.* at 940; see *Tsevas v. Delta Airlines*, 1997 WL 767278 (N.D. Ill. 1997); *Salerno v. Pan American World Airlines*, 606 F.Supp. 656 (S.D.N.Y. 1985); *Cush v. BWI Intern. Airways, Ltd.*, 175 F.Supp. 2d 483 (E.D.N.Y. 2001); *Waters v. Port Authority of New York & New Jersey*, 158 F.Supp. 2d (D.N.J. 2001); *Dillon v. United Air Lines, Inc.*, 162 F.Supp. 2d 380 (E.D. Pa. 2001); *Chukwu v. Air France*, 218 F.Supp. 2d 979 (N.D. Ill. 2002); *Blansett v. Continental Airlines*, 246 F.Supp. 2d 596 (S. D. Tex. 2002); *McCaskey v. Continental Airlines*, 159 F.Supp. 2d 562 (S.D. Tex. 2001); *Price v. KLM- Royal Dutch Airlines*, 107 F.Supp. 2d 1365 (N.D. GA 2000). These courts have all held that an accident is "an unusual or unexpected event or happening that is external to the passenger." See generally Kemper, *supra* note 55, at 538-539.

<sup>66</sup> See Weigand, *supra* note 32, at 938. Courts in other signatory countries have adopted a very similar definition as the *Saks* Court adopted and have not

## IV. CASELAW AFTER SAKS

A. *Passenger-on-Passenger Assault Cases*

Some courts have been hesitant to expand the definition of the term “accident” to include all intentional torts committed by a passenger.<sup>67</sup> Although the *Saks* court did not expressly state such an expansion, many courts have interpreted *Saks* to imply that the accident must result from “risks characteristic of air travel,” and the accident must have some “relationship to the operation of the airline.”<sup>68</sup> For example, in *Stone v. Continental Airlines*,<sup>69</sup> the plaintiff’s claim for an injury suffered from an unprovoked punch by an intoxicated fellow passenger was dismissed because the assault could not be an “accident” as it was not a “risk characteristic of air travel.”<sup>70</sup> In *Price v. British Airways*,<sup>71</sup> the court granted summary judgment for British Airways when a passenger claimed an injury after being punched in the face by a fellow passenger as the plane taxied to the gate upon landing.<sup>72</sup> The court also held that the occurrence was not an “accident” under Article 17 because it held no relation to the

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seemed to stray. *See Karp, supra* note 7, at 1558. For example, a British court in *Chaudhari v. British Airways, Plc.* decided that a passenger’s claim was not an “accident” under Article 17 because the injuries resulted from a pre-existing medical disability. *See id.* The court concluded “the injuries were not caused by any ‘unexpected or unusual event or happening external to the passenger;’ rather these injuries were caused by his own personal, particular, or peculiar reaction to the normal operation of the aircraft.” *Id.* (quoting *Times* 7 May 1997 (Apr. 16, 1997)). A Canadian Court followed a similar pattern in *Quinn v. Canadian Airlines International, Ltd.*, [1994] 18 O.R. 3d 226 when it held that turbulence was not unusual or unexpected, thus the resulting injuries did not constitute an “accident” under Article 17. *See id.*

<sup>67</sup> *See Karp, supra* note 7, at 1560.

<sup>68</sup> Kemper, *supra* note 55, at 539.

The suggestion that an “accident” must relate to the operation of aircraft appears to have its source in Professor Goedhuis, official Reporter at the Warsaw Convention. He reasoned that “the carrier does not guarantee safety; he is only obliged to take all the measures which a good carrier would take for the safety of his passengers.” However, Professor Goedhuis’s suggestion was never included in the text of the Warsaw Convention.

Berkley, *supra* note 31, at 517 (quoting D. GOEDHUIS, NATIONAL AIR LEGISLATIONS AND THE WARSAW CONVENTION 200 (1937)); *see also* Gezzi v. British Airways, 991 F.2d 603 (9th Cir. 1993).

<sup>69</sup> *Stone v. Continental Airlines*, 905 F. Supp. 823 (D. Haw. 1995).

<sup>70</sup> *Id.* at 827.

<sup>71</sup> *Price v. British Airways*, 1992 WL 170679 (S.D.N.Y.).

<sup>72</sup> *See generally, id.*

aircraft, and it would be "absurd to find that a fistfight between passengers was either a characteristic risk of air travel or a risk that air carriers could easily guard against through protective security measures."<sup>73</sup> Many courts have adopted a more liberal scope of the term "accident" under Article 17 when dealing with passenger torts.<sup>74</sup> The court in *Saks* said, although not all passenger torts are "accidents," the definition should be "flexibly applied after an assessment of all the circumstances [of the occurrence]."<sup>75</sup>

Courts have recently expanded airline liability in response to the rise in sexual assaults aboard commercial airlines.<sup>76</sup> *Wallace v. Korean Air*<sup>77</sup> is the leading case in a series of court liberalizations of airline liability for passenger tort actions.<sup>78</sup> In *Wallace*, Brandi Wallace boarded a nonstop flight from Seoul, Korea to Los Angeles, California.<sup>79</sup> Ms. Wallace sat in an economy seat next to two men whom she did not know.<sup>80</sup> After the meal, Ms. Wallace fell asleep.<sup>81</sup> The lights on the plane were dimmed to allow for passengers to watch a movie or sleep.<sup>82</sup> She awoke to find that one of the men, Mr. Parks, had unbut-

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<sup>73</sup> Karp, *supra* note 7, at 1560 (citing *Price*, 1992 WL 170679 at 3.)

<sup>74</sup> See Berkley, *supra* note 31, at 511. Berkley suggests that characterizing passenger-on-passenger assaults as "accidents" under Article 17, imposing liability on airlines, is a good policy for two reasons:

- (1) such characterization gives incentive to airlines to develop defense measures in promoting passenger safety;
- (2) airlines, as opposed to individual passengers, can better assess the probabilities of an assault, and balance the risk reduction, gained by the given preventative measures (such as on-board security personnel) against its costs.

*Id.*

<sup>75</sup> *Air France v. Saks*, 470 U.S. 392, 405 (1985). The court also noted that an accident may exist depending particularly on whether the airlines played a causal role, and the occurrence of an accident is not predicated on whether the tort was or was not intentional. See *id.*

<sup>76</sup> See Karp, *supra* note 7, at 1561.

<sup>77</sup> *Wallace v. Korean Air*, 214 F.3d 293 (2nd Cir. 2000), *cert. denied*, 2001 U.S. LEXIS 1113.

<sup>78</sup> See Karp, *supra* note 7, at 1561.

<sup>79</sup> See *Wallace*, 214 F.3d at 295.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* Prior to falling asleep, Wallace did not expressly or implicitly indicate that she wanted to have intimate relations with the men whom she was next to. See *id.*

<sup>82</sup> See *id.* at 299.

toned and unzipped her shorts, and was fondling her genitals.<sup>83</sup> Although Wallace turned her body towards the window to avoid the attack, Parks continued.<sup>84</sup> Wallace then jumped over Parks into the aisle and reported the attack to a flight attendant, who moved her seat.<sup>85</sup> Ms. Wallace brought an action in the United States District Court for the Southern District of New York in 1998 alleging that under Article 17 of the Warsaw Convention, Korean Air was liable for Mr. Parks' assault.<sup>86</sup>

This *Wallace* case involved an issue of first impression for the Second Circuit.<sup>87</sup> The Supreme Court in *Saks* failed to expressly define what the inherent risks of air travel were.<sup>88</sup> The *Wallace* court held that Mr. Parks' assault on Ms. Wallace was an "accident" under Article 17,<sup>89</sup> and thus Korean Air was liable.<sup>90</sup> The court found that, "an airline presumably would be liable for all passenger injuries, including those caused by co-passenger torts, regardless of whether they arose from a risk characteristic of air travel."<sup>91</sup> However, the court said that the very characteristics of air travel increased Wallace's vulnerability to assault, including the confined space in economy class, the lights being dimmed at the time of the assault, and the flight crew's failure to notice Mr. Parks' actions.<sup>92</sup>

Courts have also imposed liability on airlines where a link in the chain of causation was an act or omission on the part of

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<sup>83</sup> See *Wallace*, 214 F.3d at 295.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *Wright*, *supra* note 6, at 472.

<sup>88</sup> See *id.* at 473.

<sup>89</sup> Incidents of sexual assault have not been limited to female passengers. See *Karp*, *supra* note 7, at 1563; see *Langadinos v. American Airlines*, 199 F.3d 68 (1st Cir. 2000) (male passenger's injuries suffered from an intoxicated fellow male passenger grabbing his groin area while in line for the restroom was an "accident" within Article 17).

<sup>90</sup> See *Wallace*, 214 F.3d at 299.

<sup>91</sup> *Id.* The holding of the case was based on the "virtual strict liability" imposed on airlines and the Supreme Court's command to flexibly and broadly interpret the term "accident." See *id.*

<sup>92</sup> See *id.* Judge Pooler stated in his concurrence that a co-passenger tort satisfies the definition of the term "accident" simply because it is an "unexpected" and "unusual" event. See *id.* at 300.

the airline or its employees.<sup>93</sup> In *Tsevas v. Delta Air Lines, Inc.*,<sup>94</sup> a female passenger sued Delta Air Lines after she was physically and verbally assaulted by an intoxicated male passenger in the seat next to her.<sup>95</sup> During the flight, the flight crew was serving the man alcoholic beverages and the woman informed the flight attendant of his intoxication.<sup>96</sup> However, the flight attendant refused to move the woman to another seat until after the man "grabbed," "fondled," and "kissed" her.<sup>97</sup> The court held that the woman's injuries were an "accident" because the assault, service of alcohol, and the refusal of the flight crew to intervene constituted "unexpected" or "unusual" events external to the passenger that were beyond the normal operation of the aircraft.<sup>98</sup>

Similarly in *Langadinos v. American Airlines*,<sup>99</sup> an intoxicated male passenger grabbed a fellow passenger's groin, causing great pain, while on line for the restroom.<sup>100</sup> The flight crew did not respond to the man's plea for help, claiming the assailant was "harmless."<sup>101</sup> The flight crew continued to serve the assailant alcohol even after they knew him to be intoxicated and acting "erratically."<sup>102</sup> The court held that an Article 17 "accident" covered co-passenger torts where the airline employees had a causal role in the commission of the tort.<sup>103</sup>

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<sup>93</sup> See Karp, *supra* note 7, at 1564. Omissions will lead to Article 17 "accidents" because there is a common-law duty for airlines to protect passengers from foreseeable risks. See Berkley, *supra* note 31, at 509.

<sup>94</sup> *Tsevas v. Delta Air Lines, Inc.*, 1997 WL 767278 (N.D. Ill. 1997).

<sup>95</sup> See *id.* at 1.

<sup>96</sup> See *id.*

<sup>97</sup> *Id.* at 3.

<sup>98</sup> See *id.*

<sup>99</sup> *Langadinos v. American Airlines*, 199 F.3d 68 (1st Cir. 2000).

<sup>100</sup> See *id.* at 70.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *Langadinos*, 199 F.3d at 71; see also *Schneider v. Swiss Air Transport Company*, 686 F.Supp. 15 (D. Maine 1988) (the reclining of two seats in front of the plaintiff along with the refusal of the occupants of the seats to raise the seats when asked to do so, and the failure of the flight attendant to intervene when asked could be considered to be external to the plaintiff and outside the expected and normal operation of the air plane); *Fishman v. Delta Air Lines*, 132 F.3d 138 (2nd Cir. 1998) (scalding of a child by a flight attendant attempting to alleviate the child's earache was an "accident" within Article 17); *Carey v. United Airlines*, 77 F. Supp. 2d 1165 (D. Oregon 1999) (an "accident" occurred from a series of flight attendant actions including refusing to allow the claimant and his children to switch seats, engaging in a heated exchange with the claimant, informing him he would be ar-

## B. Medical Claim Cases

Medical Claims are another class of cases that have caused the courts confusion.<sup>104</sup> While it is recognized that a health condition is not an accident unless triggered by an unusual or unexpected event,<sup>105</sup> difficulty surfaces when the medical condition occurs during an “uneventful” flight, and the passenger claims that the actions or omissions of the flight crew aggravated the condition.<sup>106</sup> In *Abramson v. Japan Airlines*,<sup>107</sup> the plaintiff suffered a pre-existing hiatal hernia attack.<sup>108</sup> The attack could have been alleviated by a “self-help” remedy of lying down and massaging his stomach from side to side.<sup>109</sup> When his wife asked for an empty seat for her husband to lie down, she was told there were none available.<sup>110</sup> Plaintiff alleged that his condition worsened due to the lack of opportunity to employ “self-help.” Consequently, he was hospitalized after arriving in Tokyo.<sup>111</sup> The Circuit Court held that the injuries suffered by the plaintiff were not risks associated with or inherent in aircraft operation.<sup>112</sup> Thus, the alleged acts and omissions of the flight crew did not constitute an “accident” under Article 17.<sup>113</sup>

Similarly in *Krys v. Lufthansa German Airlines*,<sup>114</sup> the passenger suffered a heart attack during the flight, and he sued on the basis of the air carrier’s negligence in failing to make an unscheduled landing at an available airport in response to his

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rested, and publicly humiliating him on board the plane); *but see* *Lahey v. Singapore Airlines*, 115 F. Supp. 2d 464, 467 (S.D.N.Y. 2000) (“the actions of the crew are not relevant to the determination of whether [an] assault was an ‘accident’ because it is clear that nothing in the term ‘accident’ suggests a requirement of culpable conduct on the part of the airline crew.”)

<sup>104</sup> See Weigand, *supra* note 32, at 953.

<sup>105</sup> Such as a passenger suffering a heart attack due to an emergency landing.

See *id.*

<sup>106</sup> See *id.* at 953.

<sup>107</sup> *Abramson v. Japan Airlines*, 739 F.2d 130 (3rd Cir. 1984).

<sup>108</sup> See *id.* at 131.

<sup>109</sup> See *id.*

<sup>110</sup> However, discovery revealed that there were nine empty seats in first class.

See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> See *id.* at 133.

<sup>113</sup> See *Abramson*, 739 F.2d at 133.

<sup>114</sup> *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 916.

symptoms, thus aggravating the damage to his heart.<sup>115</sup> The court did not even look to the crew's negligence; it focused solely on the underlying event (the attack).<sup>116</sup> The court found no discernable distinction between the case at hand and *Abramson*, and found that an injury due to a unique internal condition of a passenger is not an "accident" for purposes of the Warsaw Convention.<sup>117</sup>

However, in at least a few instances, courts have held that it is not the heart attack, but rather the flight crew's negligence in giving medical assistance that constitutes an "accident" under Article 17.<sup>118</sup> In *Seguritan v. Northwest Airlines, Inc.*,<sup>119</sup> the court held that a fatal heart attack suffered by a passenger, allegedly as a result of the air crews' failure to provide medical assistance, was an "accident."<sup>120</sup> The court said, "[t]he 'acci-

<sup>115</sup> See *id.* at 1517.

<sup>116</sup> See *id.* at 1521-1522.

<sup>117</sup> See *id.* at 1522. See also *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) (a routine, although intrusive, security search is not an "unusual" or "unexpected" event and thus is not an "accident"); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064 (N.D. Ill. 1985) (the passenger's heart attack and subsequent death were not the result of an unexpected or unusual event, but rather the passenger's illness was a result of an internal disability); *Tandon v. United Airlines*, 926 F. Supp. 366 (S.D.N.Y. 1996) (failure to provide medical assistance to a heart attack victim is not the type of external, unusual event for which there can be liability under the Warsaw Convention); *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 2d 1313 (S.D. Fla. 1999) (airline crew's continuation of a flight to its scheduled destination after a passenger's heart attack was not an "accident" under the Warsaw Convention); *Hipolito v. Northwest Airlines*, 2001 WL 861984 (4th Cir. (V.A.)) (although the passenger suffering a fatal asthma attack could not get the requested oxygen mask to operate, there was no "accident" under Article 17 because the attack was not exacerbated by an external event, but was caused by the passenger's internal reaction to the usual, normal, and expected operation of the airplane). Weigand, in reaction to *Krys* and *Tseng*, has this to say:

It is simply incongruous to hold that a carrier is not liable for failing to take any actions to aid a passenger stricken with a medical condition, but is liable for passenger upon passenger torts. After all, it is certainly consistent with the Warsaw scheme to find 'after assessment of all the circumstances' that an 'accident' occurs when a flight crew does not make reasonable efforts to assist stricken passengers. Such action or inaction, if contrary to established airline procedures or standards, could be 'unusual and unexpected' in modern air travel, and is certainly an abnormal aircraft operation. . . .

Weigand, *supra* note 32, at 955.

<sup>118</sup> See *Kemper, supra* note 55, at 546.

<sup>119</sup> *Seguritan v. Northwest Airlines, Inc.*, 446 N.Y.S. 2d 397 (2d Dep't 1982). This case was later dismissed as untimely. See *id.* at 399.

<sup>120</sup> See *id.* at 398.

dent' is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of defendant's employees to render her medical assistance."<sup>121</sup> Likewise, *Kemelman v. Delta Air Lines, Inc.*<sup>122</sup> was a wrongful death action where the survivor's decedent suffered a heart attack on an international flight.<sup>123</sup> The court denied the airline's motion for summary judgment, finding that it could not be said as a matter of law that the procedures employed by the flight crew in response to the decedent's medical situation were not carried out in a reasonable manner.<sup>124</sup> The court stated, "[a]n injury resulting from routine procedures in the operation of an aircraft or airplane can be an 'accident' if those procedures or operations are carried out in an unreasonable manner."<sup>125</sup>

In recent years, there have been a number of personal injury claims against international aircraft carriers, for a condition known as Deep Vein Thrombophlebitis (DVT).<sup>126</sup> It is also

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<sup>121</sup> The court made an analogy comparing this case to a hijacking case, where the "accident" that caused the injury was not the act of the hijackers but rather the failure of the airlines to provide sufficient security. *See id.*

<sup>122</sup> *Kemelman v. Delta Air Lines, Inc.* 740 N.Y.S. 434 (App. Div. 2d Dep't 2002).

<sup>123</sup> *See id.* at 435.

<sup>124</sup> *See id.* at 436.

<sup>125</sup> *Id.* (quoting *Fishman v. Delta Air Lines*, 132 F.3d. 138, 143 (2nd Cir. 1998)); *see also Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001) (the airline's "alleged deviation from its own rules and standards that were in place to deal with passengers stricken by medical emergencies may be sufficient to support a determination that such an event - the relevant occurrence properly here at issue - was unusual or unexpected, and thus an accident within Saks's interpretation of the Convention's Article 17.").

<sup>126</sup> *See Prewitt, supra* note 17, at 1. "DVT refers to a blood clot embedded in one of the major deep veins in the lower legs, thighs, or pelvis. A clot blocks blood circulation through these veins, which carry blood from the feet to the heart." Available at <http://www.emedicine.com/aaem/topic148.htm>. This can often cause pain, swelling, or even death. *See id.* About 10% of air travelers develop DVT, but most clots dissolve naturally. *See Arianne Aryanpur, 'Economy class syndrome' lawsuits against airlines can move forward*, USA Today, July 29, 2003, at 1. But those that do not can travel to the lungs, causing a potentially fatal pulmonary embolism, or clots can also travel to the brain causing a stroke. *See id.* If the clot remains lodged in the leg, serious damage may occur and can result in tissue damage, ulcerations, skin lesions, or, in serious cases, removal of the leg. *See Association of Trial Lawyers of America, CURRENT DEVELOPMENTS IN AVIATION LAW*, Ann.2003 ATLA-CLE 1661 (July 2003).



called "Economy Class Syndrome"<sup>127</sup> because of the increased risk of clots due to leg inactivity and cramped seat space potentially causing poor circulation for a prolonged time period.<sup>128</sup> DVT is one of the most pressing issues in aviation law today.<sup>129</sup> The subject of lawsuits worldwide, the issue is whether DVT is deemed an "accident" under Article 17, and to what extent should airlines be liable to passengers who suffer from DVT.<sup>130</sup> There has been minimal case law on this issue.<sup>131</sup> Many airlines were granted summary judgment because courts thought there was no issue of material fact.<sup>132</sup> In an early case, *Scherer v. Pan American World Airways, Inc.*,<sup>133</sup> the court granted an airline summary judgment where the plaintiff had brought a DVT claim against it.<sup>134</sup> The court threw out the plaintiff's contention that he suffered DVT while merely "sitting" aboard an airplane and declared that there must be bodily injury in order to come within the purview of Article 17.<sup>135</sup>

However, "lawsuits filed by air travelers suing airlines for blood clots caused by 'deep-vein' thrombosis are beginning to see the light of day."<sup>136</sup> Two cases filed by passengers who developed DVT on international flights have been allowed to pro-

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<sup>127</sup> See Staff, *supra* note 19. Long distance air travelers are especially prone to DVT regardless of age, gender, or physical condition. See Association of Trial Lawyers of America, *supra* note 126.

<sup>128</sup> See Association of Trial Lawyers of America, *supra* note 126.

<sup>129</sup> See Association of Trial Lawyers of America, *supra* note 126.

<sup>130</sup> See *id.*; see also Prewitt, *supra* note 17, at 1.

<sup>131</sup> See Prewitt, *supra* note 17, at 1.

<sup>132</sup> See *id.*

<sup>133</sup> *Scherer v. Pan American World Airways, Inc.*, 387 N.Y.S. 2d 580 (1st Dep't 1976).

<sup>134</sup> See *id.* at 581.

<sup>135</sup> See *Scherer*, 387 N.Y.S. 2d at 581; see also *Toteja v. British Airways*, 1999 WL 1425399 (D. Md. July 20, 1999) (plaintiffs' claim of their economy seats providing insufficient leg room and thus causing leg swelling was dismissed on the grounds that there was no "accident" for purposes of Article 17); *Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986) ("extended sitting in an airplane, even an uncomfortable condition, cannot properly be characterized as the sort of 'accident' that triggers an airline's liability under the Warsaw Convention.")

<sup>136</sup> Allison Altman, *Blood clot suits against airlines clear early round, 'Deep-vein' thrombosis claims may go to Trial*, NAT'L L.J., 1 (2003). While DVT lawsuits in the United States have advanced, a United Kingdom court has thrown "a significant obstacle in their path." Staff, *supra* note 19. In early July 2003, UK lawyers representing 24 victims of DVT due to long flights lost their appeal against 18 airlines who they claim were responsible for the onset of the passengers' DVT. See *id.*

ceed past a motion to dismiss.<sup>137</sup> This is only the second and third time such suits have been allowed to proceed.<sup>138</sup> In *Miller v. Cont'l Airlines, Inc.*,<sup>139</sup> Debra Miller suffered a near-fatal heart attack and had open-heart surgery to remove a blood clot after traveling on a flight from Paris, France to San Francisco, California.<sup>140</sup> Judge Walker cited *Saks* and held that “negligence is not a required element for recovery. . . [o]ne states a claim under the convention merely by alleging damages resulting from an ‘accident’ that occurred during an international flight.”<sup>141</sup> The court defined “accident” as the airline’s failure to warn passengers about the risk of DVT, adding that there were “unexpected or unusual event[s] or happening[s] external to the passenger.”<sup>142</sup>

*Air France v. Saks*<sup>143</sup> set the precedent by defining an accident as an “unexpected or unusual event that is external to the pas-

<sup>137</sup> See Altman, *supra* note 136; see also Aryanpur, *supra* note 126.

<sup>138</sup> See Altman, *supra* note 136; see also Aryanpur, *supra* note 126.

<sup>139</sup> *Miller v. Cont'l Airlines, Inc.*, 260 F. Supp. 2d 931 (N.D. Cal. 2003). The second case, decided at the same time, is *Wylie v. American Airlines, Inc.*, 260 F. Supp. 2d 931 (N.D. Cal. 2003). In this case, Wylie was hospitalized for a week after he developed a blood clot in his leg after a trip from Paris to San Francisco. See *id.*

<sup>140</sup> See ‘Economy Class Syndrome’ Back in the News at: [http://my.webmd.com/content/article/30/1728\\_69829.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}](http://my.webmd.com/content/article/30/1728_69829.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}) (Jan 12, 2001).

<sup>141</sup> *Id.*

<sup>142</sup> *Miller*, 260 F. Supp. 2d at 933; see also *Blansett v. Continental Airlines*, 246 F. Supp. 2d 596 (S.D. Tex. 2002) (airline’s failure to warn a passenger of the risk of DVT was an “accident” which resulted in the passenger suffering a major stroke after developing DVT while on an international flight). It has been suggested that this liberal movement towards holding an airline liable for failing to warn passengers about DVT stems from the Ninth Circuit’s holding in *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2215 (2003), where the court found that the air crew’s failure to respond to a passenger’s known risk was “unusual and unexpected” and thus, constituted an “accident” under Article 17. See Association of Trial Lawyers of America, *supra* note 126.

A growing number of airlines, including Singapore Airlines, British Airways, and Australia’s two biggest airlines, will begin to warn passengers of the risks of developing potentially fatal blood clots while abroad long flights. See ‘Economy Class Syndrome’ Back in the News, *supra* note 140. According to Singapore Airlines, health tips will be displayed at check-in counters and on board the aircraft, printed on laminated cards placed in each seat pocket. These tips will advise passengers how to relieve stress, minimize jet lag, and reduce the risk of motion sickness, heart conditions, and DVT. See *id.*

<sup>143</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

senger.”<sup>144</sup> This interpretation was a restrictive rather than an expansive one.<sup>145</sup> However, the court also said that the definition should be “flexibly applied after an assessment of all the circumstances [of the occurrence].”<sup>146</sup> The court also noted that whether an accident may exist depends particularly on whether the airline played a causal role.<sup>147</sup> Many courts have used this dicta to justify an expansion of the term “accident.” For example, cases involving a medical emergency resulting from a passenger’s own internal reaction to the normal operation of the aircraft on an international flight have often been excluded as “accidents” because they have not met the *Saks* test.<sup>148</sup> However, before automatically excluding the “injury” as a non-accident, courts will now carefully examine whether the flight crew followed normal operating procedures.<sup>149</sup> If there is any deviation from the standard procedures, and if that deviation can be causally linked to the aggravation of the passenger’s medical condition, some courts have found that an Article 17 “accident” has occurred and have imposed liability on the airline.<sup>150</sup>

#### V. *HUSAIN V. OLYMPIC AIRWAYS*

The question of whether liability exists when air carriers aggravate or cause injuries to passengers through its actions or inactions has recently been answered by the Ninth Circuit<sup>151</sup> in *Husain v. Olympic Airways*.<sup>152</sup> *Husain* departs from stricter case law by finding that an air crew’s failure to respond to a known risk to a passenger was an “accident” under Article 17 because the crew could have minimized the risk by a simple action without disturbing the normal operation of the aircraft.<sup>153</sup> The court seems to heed this declaration made by the Southern District of Florida in *McDowell v. Continental Airlines, Inc.*<sup>154</sup>

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<sup>144</sup> *Id.* at 405.

<sup>145</sup> See Weigand, *supra* note 32, at 938.

<sup>146</sup> *Saks*, 470 U.S. at 405.

<sup>147</sup> See *id.*

<sup>148</sup> See Cornett, *supra* note 14.

<sup>149</sup> See Prewitt, *supra* note 17.

<sup>150</sup> See *id.*

<sup>151</sup> See Cornett, *supra* note 14.

<sup>152</sup> *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 2215 (2003).

<sup>153</sup> See Cornett, *supra* note 14.

<sup>154</sup> *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 1313 (S.D. Fla. 1999).

The result of the union of Krys and Tseng [155] is a dissolution of an airline's duty of care to its passengers so long as the cause of a passenger's initial injury is internal to the passenger himself. This holds true so long as the airline takes no affirmative action which aggravates the injury. Complete inaction is acceptable, even if in doing nothing the airline aggravates the passenger's injury.<sup>156</sup>

*Husain* was a wrongful death suit, filed under the liability provisions of the Warsaw Convention on December 24, 1998 by the decedent's wife, Mrs. Husain.<sup>157</sup> Dr. Hanson, along with his wife Mrs. Husain, and their children were on an Olympic Airways flight from Athens, Greece to New York City.<sup>158</sup> Dr. Hanson, 52 years old, was an asthmatic who was particularly sensitive to second hand smoke.<sup>159</sup> The family was seated in the plane's nonsmoking section.<sup>160</sup> However, the non-smoking section seats were only three rows in front of the smoking section, and there was no partition between the two sections.<sup>161</sup> As soon as the flight began, smoke from the smoking section enveloped the family.<sup>162</sup> Mrs. Husain had asked the flight crew multiple times to move Dr. Hanson to another seat away from the smoking section.<sup>163</sup> She explained the critical reasons why her husband had to be moved, and she made her concerns known about the possible consequences of allowing her husband to remain in his original seat.<sup>164</sup> The crew ignored Mrs. Husain.<sup>165</sup> Dr. Hanson's breathing deteriorated and after his

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<sup>155</sup> *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 916; *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

<sup>156</sup> *McDowell*, 54 F. Supp. at 1320.

<sup>157</sup> *See Cornett*, *supra* note 14, at 165. The suit was originally filed in state court, but Olympic Airways had the case removed to the United States District Court for the Northern District of California on March 23, 1999. *See id.*

<sup>158</sup> *See Hussain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1123 (N.D. Cal. 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002).

<sup>159</sup> *See id.*

<sup>160</sup> *Husain*, 316 F.3d at 831.

<sup>161</sup> *See id.* at 833.

<sup>162</sup> *See id.* at 834.

<sup>163</sup> *See id.* at 832.

<sup>164</sup> *See id.* at 832.

<sup>165</sup> *See Husain*, 316 F.3d at 831. The flight crew did tell Mrs. Husain that her husband could change seats with another passenger; however, Mrs. Husain would have to ask the passenger herself without the aid of the flight crew. *See Husain*,

meal, he got up from his seat to get away from the smoke.<sup>166</sup> He then suffered a fatal asthma attack caused by the exposure to smoke.<sup>167</sup>

The plaintiffs relied on the holding in *Saks*, in which the Supreme Court explained that while an "accident" must cause the passenger's injury, it need not be the sole cause; "the passenger must be able to prove that some link in the chain was an unusual or unexpected event external to the passenger."<sup>168</sup> The plaintiffs argued that three different occurrences during their flight constituted an "accident" under the Warsaw Convention: (1) the flight crew's refusal to move Dr. Hanson to another seat; (2) the flight crew's inability to provide oxygen in a timely manner; and (3) the captain's failure to engage the "no smoking sign" during Dr. Hanson's episode.<sup>169</sup> Olympic argued that Dr. Hanson's death resulted from "internal reactions to the usual, normal, and expected operation of the aircraft" and thus, was not an accident.<sup>170</sup>

The district court found that only the first occurrence constituted an "accident."<sup>171</sup> It specifically recognized that the flight crew (1) violated the recognized standard of care required of flight crew on international flights by refusing to assist; (2) violated Olympic's policy; and (3) failed to alert the chief flight crew member to help Dr. Hanson find another seat.<sup>172</sup> Accord-

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116 F. Supp. 2d at 1126. This flight, unknown to the family, contained eleven empty passenger seats. *See id.*

<sup>166</sup> *See Husain*, 316 F.3d at 834.

<sup>167</sup> *See id.* at 831. Although there was no autopsy to determine the direct cause of Dr. Hanson's death, due to the family's religious beliefs, the district court determined, by a preponderance of evidence, the primary cause of death was smoke exposure during the first two hours of the flight (this finding rested on the timing of the events aboard the plane). *See id.* at 834.

<sup>168</sup> *Saks*, 470 U.S. at 406.

<sup>169</sup> *See Husain*, 116 F. Supp. 2d at 1131. The plaintiffs contended that a flight crew who does nothing to deal with a known risk to a passenger's health-related travel problem is negligent. *See Husain*, 316 F.3d at 836. They further argued that because crew negligence is external to the passenger and not reasonably expected as a part of international travel, negligent conduct fits under the definition of "accident" under Article 17. *See id.*

<sup>170</sup> *Id.* A predicate to that argument is that the presence of smoke in the cabin is "an expected and normal aspect of international air travel." *Id.* Thus, Olympic had no duty to Dr. Hanson. *See id.*

<sup>171</sup> *See Husain* 116 F. Supp. 2d at 1131.

<sup>172</sup> *See id.* at 1132.

ingly, the judge, in a non-jury trial, awarded \$700,000 in damages and \$700,000 in non-pecuniary damages to the Plaintiff.<sup>173</sup>

Olympic Airways appealed the district court decision to the Ninth Circuit.<sup>174</sup> They argued that Dr. Hanson's death resulted from his own internal reactions, and thus was not an "accident" under the definition set forth by the Supreme Court in *Saks*.<sup>175</sup> In reviewing the district court's decisions of fact and law for clear error, the Ninth Circuit looked to *Saks* to determine whether an accident had occurred under Article 17.<sup>176</sup> The Court noted that in determining whether an accident occurred, the Supreme Court in *Saks* requires a flexible assessment of all the circumstances surrounding the injury.<sup>177</sup> Applying the Supreme Court's fact-specific mandate, the Ninth Circuit affirmed the district court's findings.<sup>178</sup> The Court determined that the flight crew's conduct went beyond a mere negligence standard, because the crew in charge knew of the potential danger to Dr. Hanson.<sup>179</sup> The Court assigned an important duty to the airline under Article 17: "where a crew can assist a passenger suffering from a pre-existing condition, it must or such an omission renders the carrier liable where it could have taken reasonable steps to prevent aggravation of the condition."<sup>180</sup>

The Court distinguished its holding in *Husain* from two similar aggravating injury cases,<sup>181</sup> *Abramson v. Japan Airlines*<sup>182</sup> and *Krys v. Lufthansa German Airlines*.<sup>183</sup> The courts in both of these cases held that the aggravation of the passen-

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<sup>173</sup> See *Husain*, 316 F.3d at 832. The original damages amounted to \$1,400,000 in total; however, each amount was reduced by 50% due to Dr. Hanson's comparative negligence. See *id.*

<sup>174</sup> See *Husain*, 316 F.3d at 831.

<sup>175</sup> See *id.* at 836.

<sup>176</sup> See *id.* at 835.

<sup>177</sup> See *Hussain* 316 F.3d at 835.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> Cornett, *supra* note 14, at 167. The initial burden of proof is on the plaintiff to show that the injury was caused by an "accident." See *Olympic Airways v. Husain*, 2004 LEXIS 1620 at n5. Once the plaintiff has proven a prima facie case of liability under Article 17 creating a presumption of air carrier liability, the burden shifts to the air carrier to rebut the presumption and prove lack of negligence under Article 20. See *id.* (citation omitted).

<sup>181</sup> See *Husain*, 316 F.3d at 836.

<sup>182</sup> *Abramson v. Japan Airlines*, 739 F.2d 130 (3rd Cir. 1984).

<sup>183</sup> *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 916.

gers' pre-existing medical conditions were not a result of "unusual" or "unexpected" external events.<sup>184</sup> The distinguishing factor, however, is the fact that neither crew was aware of a pre-existing medical condition nor of a need for urgent action.<sup>185</sup> The *Husain* court further noted, "[t]he failure to act in the face of a known, serious risk is an 'accident' under the Convention so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane."<sup>186</sup>

### A. *Petition for Certiorari*

On July 11, 2003, Olympic Airways filed a petition for certiorari asking if "an aggravation of the passenger's pre-existing internal condition can satisfy the 'accident' condition precedent to liability under Article 17 of the Warsaw Convention. . . ."<sup>187</sup> The Olympic arguments are based on the three tenets of Saks:

- (1) The presumption of liability under Article 17 cannot rest upon a mere 'occurrence' of an injury; rather, the passenger's injury must be 'caused by' an 'accident,' defined by the Court as an 'unexpected or unusual event or happening' that is external to the passenger.
- (2) While the definition should be flexibly applied, 'when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.'

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<sup>184</sup> See *id.* at 836-837

<sup>185</sup> See *id.* at 837.

<sup>186</sup> *Husain*, 316 F.3d at 837. Cornett states in her article that if the airline in *Husain* was not held liable for the international act committed by the flight crew members that resulted in a passenger's death, that would completely rid the airline of any duty to its passengers. See Cornett, *supra* note 14, at 168. She suggests that such a result could not have been the intention of the drafters of the Warsaw Convention. See *id.*

<sup>187</sup> Petitioner's Brief at 9, *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002) (No. 02-1348). The Air Transport Association of America, Inc. supports Olympic Airways as amicus curiae. For a summary of their arguments, see Brief for the United States as Amicus Curiae Supporting Respondents, *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002) (No. 02-1348).

- (3) The ‘accident’ requirement of Article 17 ‘involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert injury.’<sup>188</sup>

Olympic argues first that the “accident” standard created by the Ninth Circuit is contrary to the language, structure, and nature of airline liability created by the Convention.<sup>189</sup> An air carrier is presumed liable if there is a “happening of an accident.”<sup>190</sup> Olympic argues that, “considerations of air carrier and passenger fault are expressly regulated by Article 21(1) of the Convention.”<sup>191</sup> The Court in *Saks* said that, “the accident requirement of Article 17 is distinct from the defenses in Article 20(1).”<sup>192</sup> Article 17 involves an inquiry into the nature of the event that caused the injury, and Article 20 involves the care taken by the airline to avert the injury.<sup>193</sup> They argue that both the district court and the Ninth Circuit improperly shifted the focus of the “accident” requirement from the nature of the event (the smoke) to the care taken by the flight crew (failure of the crew to move Dr. Hanson away from the smoke), and this was contrary to the express language in Article 17.<sup>194</sup> Article 17 is not fault based; “the sole proper inquiry envisaged by the drafters is into ‘the nature of the event which caused the injury’” rather than the care taken by the airline to avert injury.<sup>195</sup>

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<sup>188</sup> Petitioner’s Brief at 9, *Husain* (No. 02-1348) (quoting *Saks*, 470 U.S. at 405-407).

<sup>189</sup> See Petitioner’s Brief at 9, *Husain* (No. 02-1348).

<sup>190</sup> *Id.* at 15.

<sup>191</sup> See Petitioner’s Brief at 10, *Husain* (No. 02-1348). The relevant provisions of the Warsaw Convention concerning liability are Article 17, 20, and 21(1). See *id.* at 12. Article 20 states: “[a] carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.” *Id.* at 12. Article 21 states: “[i]f the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.” *Id.* Article 25 is also a relevant article which deals with willful misconduct. See *id.* at 9.

<sup>192</sup> See *Saks*, 470 U.S. at 407.

<sup>193</sup> See *id.*

<sup>194</sup> See Petitioner’s Brief at 16, *Husain* (No. 02-1348).

<sup>195</sup> Petitioner’s Brief at 16, *Husain* (No. 02-1348) (quoting *Saks*, 470 U.S. at 407). Interestingly enough, the respondents note that in the next sentence, the *Saks* Court goes on to observe that “these inquiries may on occasion be similar. . . .” Respondent’s Brief at 36, *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002) (No. 02-1348) (quoting *Saks*, 470 U.S. at 407).



The Ninth Circuit created a new negligence-based “accident” standard that the petitioner claims improperly focuses on reasonableness, foreseeability, and the carrier’s mental state, which is contrary to the holding in *Saks*.<sup>196</sup>

Neither the Convention nor *Saks* makes the “accident” determination contingent on perception of a risk. . . [t]he structure of the Convention and Article 17 do not permit the courts to relieve the passenger from meeting the conditions precedent to recovery under Article 17 through an analysis of the negligence of a carrier’s employee.<sup>197</sup>

The Court in *Saks* recognized that the “accident” condition precedent to liability required that the passenger establish an event or happening.<sup>198</sup> Olympic argues that a failure to act or an omission is not an “event or happening,” and that Article 17 requires a discernable “event or happening” which causes the inquiry.<sup>199</sup> They support this argument by noting that all the cases cited in *Saks* to support the Supreme Court’s decision involved affirmative acts, *not* failure to act.<sup>200</sup> The cases cited by *Saks* in which the accident requirement was not met involved either an injury caused by the unique internal condition of a passenger or an airline’s failure to act.<sup>201</sup> Olympic argues that the courts that have properly followed the three tenets of *Saks* have concluded that if the cause of the injury resulted from the passenger’s own internal reaction to a normal flight, there was no accident even if the crew’s negligence contributed to the aggravation of the passenger’s pre-existing condition.<sup>202</sup>

Olympic also makes the argument that it is the function of Congress, not the courts, to decide that domestic law alone, or in combination with the Warsaw Convention, is inadequate.<sup>203</sup>

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<sup>196</sup> See Petitioner’s Brief at 25, *Husain* (No. 02-1348).

<sup>197</sup> *Id.* Olympic suggests that it is unlikely that the drafters of the Convention intended the accident determination be made through a reference to negligence. See *id.* at 27.

<sup>198</sup> See *id.* at 22.

<sup>199</sup> See *id.* at 18.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* at 19.

<sup>202</sup> See Petitioner’s Brief at 21, *Husain* (No. 02-1348); see also *Abramson v. Japan Airlines*, 739 F.2d 130 (3rd Cir. 1984); *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 916.

<sup>203</sup> See Petitioner’s Brief at 19, *Husain* (No. 02-1348) (citing *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1995)).

“Post-ratification adjustments. . . are appropriately made by the treaties signatories, not the courts.”<sup>204</sup> The Ninth Circuit also held in *Carey v. United Airlines*,<sup>205</sup> “[t]o the extent that such plaintiffs are left without a remedy, no matter how egregious the airline’s conduct, that is a result of the deal struck among the signatories to the Warsaw Convention.”<sup>206</sup> *Saks* holds that until the Convention is changed by the signatories, it cannot be expanded to hold carriers liable for injuries that are not caused by accidents.<sup>207</sup>

Olympic’s final argument concerns the post-ratification conduct of the contracting parties to the Warsaw Convention from 1949 to as recently as 1999.<sup>208</sup> This conduct confirms that the Convention does not expand liability to include injuries arising out of a passenger’s state of health.<sup>209</sup> In both 1949 and 1951, there were attempts to broaden the liability of the airlines by replacing the word “accident” with the word “occurrence.”<sup>210</sup> A delegate from the International Union of Aviation Insurers stated (in response to the 1951 proposal):

It was not logical to extend this system to the case of an occurrence. . . air sickness would be covered and passengers could bring action for damages if they suffered from air sickness. In such an event, the carrier would have to prove that he had taken all necessary measures to avoid the damage or that he was unable to take such measures. To take necessary measures in the case of air sickness would be not to have the aircraft fly if there were danger that a passenger would be air sick. That would be the result of the. . . proposal.<sup>211</sup>

Fifteen years later, in the Guatemala City Protocol of 1971, there had been an attempt to substitute the word “event” for the word “accident” under Article 17. However, the United States

<sup>204</sup> *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, n.12 (1999).

<sup>205</sup> *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001).

<sup>206</sup> *Id.* at 1053; *see also* *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991).

<sup>207</sup> *See Saks*, 470 U.S. at 406.

<sup>208</sup> *See* Petitioner’s Brief at 32, *Husain* (No. 02-1348).

<sup>209</sup> *See id.*

<sup>210</sup> *See* Petitioner’s Brief at 32-34, *Husain* (No. 02-1348).

<sup>211</sup> *Id.* at 33 (quoting ICAO Legal Committee, Minutes and Documents of the Eighth Session, Madrid, 11 September-28 September 1951, ICAO Doc. 7229-LC/133 at 137-138 (1951)). Several other delegates, including the chairman of the United States delegation also opposed the proposal. *See id.*

has not yet ratified the Guatemala Protocol.<sup>212</sup> The Legal Committee of International Civil Aviation Organization (ICAO)'s recent adoption of the Montreal Convention,<sup>213</sup> which is meant to modernize and consolidate the Warsaw Convention's system of liability, has retained the term "accident" as used in Article 17 of the Warsaw Convention of 1929.<sup>214</sup>

## B. Response from Respondents

The respondents assert that Olympic has contradicting arguments: while they argue that the *Saks* standard is controlling in this case, they simultaneously argue that the phrase "an unexpected or unusual event or happening" should be subject to a narrower construction.<sup>215</sup> The respondents assert that the *Saks* Court indicates just the opposite.<sup>216</sup> The district court and the Ninth Circuit acted in accordance with the *Saks* standard because the *Saks* Court gave the term "accident" a "full, comprehensive" definition.<sup>217</sup>

Not only does this language reach the kinds of incidental accidents that cause injury to individual passengers, but it naturally connects presumptive liability for accidents to the time that airlines exert control over their passengers. Moreover, Article 17 reaches accidents that involve willful misconduct, not just acci-

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<sup>212</sup> See Petitioner's Brief at 34, *Husain* (No. 02-1348). See also Kemper, *supra* note 55. The Guatemala City Protocol was desired to amend the Warsaw Convention and was signed in Guatemala City on March 8, 1971. Available at <http://www.forwarderlaw.com/archive/guad.htm>. The Protocol did qualify the revision by adding that the carrier would not be liable if the death or injury resulted solely from the health of the passenger. See Kemper, *supra* note 55, at 535.

<sup>213</sup> See Petitioner's Brief at 35, *Husain* (No. 02-1348), citing Convention for the Unification of Certain Rules for Carrier by Air, opened for signature May 28, 1999, DCW Doc. No. 57 (ICAO). The Montreal Convention requires 30 countries to ratify or accept the Convention before it can enter into force. See Brief for the United States as Amicus Curiae Supporting Respondents at 5, *Husain* (No. 02-1348). The United States Senate recently ratified the Convention on July 31, 2003. See Respondents' Brief at 43, *Husain* (No. 02-1348). The new Convention will apply to all roundtrip international travel beginning and ending in the United States or beginning or ending in the territory of another party. See Brief for the United States as Amicus Curiae Supporting Respondents at 5, *Husain* (No. 02-1348). The Convention will also apply to one-way travel between the parties to the Convention. See *id.*

<sup>214</sup> See Petitioner's Brief at 35, *Husain* (No. 02-1348).

<sup>215</sup> See Respondents' Brief at 19-20, *Husain* (No. 02-1348).

<sup>216</sup> See *id.* at 20.

<sup>217</sup> See *id.* at 9-10.

dents that involve inadvertence. The term “accident” thus appears to encompass . . . a wide range of unusual occurrences with respect to physical operation of the aircraft and the conduct of airline personnel.<sup>218</sup>

Although the *Saks* Court added the limitation that the injury cannot result from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft, the Court qualified that limitation by cautioning that the definition should be “flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.”<sup>219</sup> The respondents assert that Olympic ignores this admonition and instead takes a very narrow view of what, “all the circumstances” are.<sup>220</sup> For example, Olympic argued that the presence of smoke in the cabin was “normal.”<sup>221</sup> By isolating each individual circumstance, they fail to recognize that the combination of circumstances was not “normal.”<sup>222</sup> “The refusal of the flight crew to adhere to its usual policy and practices is a prime example of an ‘unusual’ occurrence. . . [u]nder no circumstances can the violation of industry standards be considered ‘the usual, normal, and expected operation of the aircraft.’”<sup>223</sup> Collectively, the events on the Olympic flight are quite different from the “usual, normal, and expected operation of the aircraft.”<sup>224</sup>

Respondents also rebut the Olympic argument that an omission, as opposed to an affirmative act, is never an “accident.”<sup>225</sup> Respondents contend that this “bright line” between

<sup>218</sup> *Id.* at 9.

<sup>219</sup> *Saks*, 470 U.S. at 405.

<sup>220</sup> See Respondents’ Brief at 28, *Husain* (No. 02-1348).

<sup>221</sup> See *id.* at 27.

<sup>222</sup> See *id.* at 28.

<sup>223</sup> Respondents’ Brief at 26, *Husain* (No. 02-1348) (citing *Saks*, 470 U.S. at 406). The United States in their brief supporting the respondents make a comparison, “a flight attendant’s response to a passenger’s illness, like a pilot’s response to severe weather or an equipment malfunction, is part of the ‘operation of the aircraft.’” Brief for the United States as Amicus Curiae Supporting Respondents at 15, *Husain* (No. 02-1348) (citing *Saks*, 470 U.S. at 406).

<sup>224</sup> See Respondents’ Brief at 21, *Husain* (No. 02-1348) (citing *Saks*, 470 U.S. at 406).

<sup>225</sup> See Respondents’ Brief at 30, *Husain* (No. 02-1348) (citing *Saks*, 470 U.S. at 406).

The fallacy of the position that an “accident” under the Warsaw Convention cannot take the form of inaction is demonstrated by a hypothetical situation posited by the court in *McCaskey v. Continental Airlines, Inc.*,

an accident and an omission makes little sense.<sup>226</sup> What happens on a flight can be characterized either as an act or an omission.<sup>227</sup> The respondents argue that these impractical distinctions also miss the basic point established in *Saks*.<sup>228</sup> The central inquiry to determine if there was an "accident" is whether something unusual happened, not the specific form it took.<sup>229</sup> Respondents also contend that even if the two can be distinguished, the flight crew's deviation from their normal policy is still "unusual."<sup>230</sup> The Court in *Saks* made it clear that an "accident" can contain both usual and unusual elements.<sup>231</sup> The Court stressed that "any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger."<sup>232</sup> It is enough that the unusual event was a contributing factor in the injury or death.<sup>233</sup>

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159 F. Supp. 2d 562 574 (S.D. Tex. 2001). Suppose, said the court, that "a passenger inexplicably collapsed and ceased breathing through no initial accident," and "a medical doctor informs the crew that the passenger's life could be saved, but only if the flight landed within one hour." If, the court continued, "the plane is within thirty minutes of a suitable airport, but the crew blithely elects to continue on a planned cross-country flight," the notion that this is not an unusual event is staggering.

Brief for the United States as Amicus Curiae Supporting Respondents at 18, *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002) (No. 02-1348) (quoting *McCaskey v. Continental Airlines*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001)).

<sup>226</sup> See Respondents' Brief at 30, *Husain* (No. 02-1348).

<sup>227</sup> See *id.* In *Husain*, depending on how the events are described, they can either be seen as a refusal to seat Dr. Hanson in a different seat (failure to act in accordance with standard policy), or an insistence that he remain where he was seated (affirmative act). See *id.*

<sup>228</sup> See *id.*

<sup>229</sup> See Respondents' Brief at 30, *Husain* (No. 02-1348). The respondents argue that such a distinction would lead to bizarre results. See *id.* at 31. For example, if a passenger took another seat without permission, and was ordered to return to his seat, despite an allergy to smoke, the order would be an affirmative act. See *id.* However, the effects of that affirmative act would be the same as there are in this case: Olympic would still be violating policy, and the passenger would still be forced to sit amidst dangerous smoke. See *id.* It is irrational to think that Olympic should be liable in the hypothetical case, but not in this case. See *id.*

<sup>230</sup> See Respondents' Brief at 11, *Husain* (No. 02-1348). "The definition [of accident] is plainly broad enough to encompass the exposure of a passenger to dangerous conditions as a result of repeated refusals by a flight attendant to follow the regular industry and company practice." *Id.* at 14.

<sup>231</sup> See *id.* at 20.

<sup>232</sup> *Saks*, 470 U.S. at 406.

<sup>233</sup> See Respondents' Brief at 20, *Husain* (No. 02-1348).

Olympic places great weight on the fact that Dr. Hanson had a pre-existing allergy to smoke, and they argue that one of the tenets in *Saks* precludes a passenger from using his internal reaction to the normal operation of the aircraft as a justification for claiming an accident.<sup>234</sup> However, the respondents argue that the decision in *Saks* makes it clear that a passenger's pre-existing medical condition does not automatically render a finding of an "accident" impossible.<sup>235</sup> There must be two separate determinations of whether there was: (1) "an internal reaction," and (2) "the usual, normal, and expected operation of the aircraft."<sup>236</sup> "Nothing in *Saks* says that an 'internal reaction,' by itself, precludes recovery, even when the reaction was directly caused by the unusual operation of the flight (an 'external' event)."<sup>237</sup>

The respondents rebuff the Olympic argument that Article 17 is not fault-based.<sup>238</sup> When interpreting a treaty, it must be interpreted as a whole.<sup>239</sup> The Warsaw Convention is a fault-based system.<sup>240</sup> "[I]t would be highly unnatural to adopt a definition of the term 'accident' that, as a practical matter, would allow carriers to escape liability for deaths and injuries caused by their own misconduct. Nothing in the Convention calls for that kind of illogical construction."<sup>241</sup> Although Article 17 does not require a showing of fault, its purpose is to introduce a wide

<sup>234</sup> See *id.* at 37.

<sup>235</sup> See *id.*

<sup>236</sup> *Id.*

<sup>237</sup> Respondents' Brief at 37, *Husain* (No. 02-1348). The respondents argue that the contrary would lead to absurd results. See *id.* at 37. For example, the contrary would allow Olympic to avoid liability for Dr. Hanson's death even if they had ordered Dr. Hanson to sit in the smoking section of the plane or had caused the asthma attack by setting off a fire in the plane. See *id.* at 38. Even though a passenger without a pre-existing medical condition might escape injury or death under these circumstances, something "unusual" and "unexpected" still occurred during flight to cause those injuries. See *id.* Once this has been established, Article 17 cannot be used as a barrier against passengers on the basis of their prior medical histories. See *id.*

<sup>238</sup> See Respondents' Brief at 22, *Husain* (No. 02-1348).

<sup>239</sup> See *Air France v. Saks*, 470 U.S. 392, 397 (1985).

<sup>240</sup> See Respondents' Brief at 22, *Husain* (No. 02-1348) (citing Lowenfeld & Mendelsohn, *supra* note 28, at 498-501.). The Convention "retained the principle of liability on the basis of negligence." *Id.* at 500; see also Weigand, *supra* note 32, at 920 ("[T]he Convention was originally based on fault concepts and set forth a system of liability.").

<sup>241</sup> Respondents' Brief at 22, *Husain* (No. 02-1348).

variety of passenger claims for "accidents" involving death or bodily injury.<sup>242</sup> It serves to screen out cases in which there is no question of fault because nothing unusual has occurred.<sup>243</sup> The ultimate questions of liability will be resolved under the standards of Article 20 (due care), Article 21 (contributory negligence) and Article 25 (willful misconduct).<sup>244</sup> Contrary to what the Convention appears to contemplate in Article 20, if Olympic prevailed the result would shield them from liability for a death caused by its failure to act with due care.<sup>245</sup>

Finally, respondents rebut the Olympic argument that the post-ratification history did not intend to expand liability to include injuries arising out of a passenger's state of health.<sup>246</sup> The Guatemala Protocol contends that carriers should not be liable for injuries or deaths resulting solely from the condition of health of the passenger.<sup>247</sup> However, the district court and Ninth Circuit did not find that Olympic is liable solely on the basis of Dr. Hanson's asthma; instead they are basing liability on the failure of the flight crew to conform to airline policy.<sup>248</sup> Post-ratification history indicates a trend towards increasing air carrier liability for deaths or injuries caused by fault.<sup>249</sup> There is a growing consensus that airlines should be held liable in the event of "unusual" occurrences.<sup>250</sup> "Because the Convention is a fault-based system, the reasonable working assump-

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<sup>242</sup> See *id.* at 23.

<sup>243</sup> See *id.* at 24.

<sup>244</sup> See Respondents' Brief at 24, *Husain* (No. 02-1348). Article 25 states:

The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to willful misconduct.

Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 *state. 3000, T.S. 876, 137 L.N.T.S. 11, reprinted in 449 U.S.C. 1502* (1998).

<sup>245</sup> See Respondents' Brief at 41, *Husain* (No. 02-1348).

<sup>246</sup> See *id.* at 44.

<sup>247</sup> See *id.* at 45.

<sup>248</sup> Had the flight crew moved Dr. Hanson, asthma would not have killed him. See *id.*

<sup>249</sup> See Respondents' Brief at 44, *Husain* (No. 02-1348). Many nations, including the United States have repeatedly pushed for modifications to the Convention that would impose some liability on the airlines without regard to fault. See *id.*

<sup>250</sup> See *id.*

tion is that carriers are liable, and should be liable, for deaths or bodily injuries that are their fault.”<sup>251</sup>

### C. *Husain* in the Hands of the Supreme Court

The drafters of the Warsaw Convention did not define the term accident,<sup>252</sup> and that was the start of the long dispute over what “accident” actually meant.<sup>253</sup> The Supreme Court adopted a definition in *Air France v. Saks*<sup>254</sup> based on what it believed to be the intent of the drafters. That was supposed to be the end of the debate. Ironically, that seemed to stir up the debate.<sup>255</sup> Different circuits interpreted the Supreme Court’s definition differently, and a circuit split ensued.<sup>256</sup> As the cases seeking a definition of the term “accident” under Article 17 increased, there seemed to emerge a more liberal trend when defining the term.<sup>257</sup> However, some circuits still held a more restrictive view of “accident.”<sup>258</sup>

The Supreme Court granted certiorari to decide for a second time this highly controversial issue.<sup>259</sup> In *Husain*, the three biggest points at issue are (1) what constitutes an “unusual and unexpected happening” that is external to the passenger; (2) does a failure to act constitute an “accident;” and (3) whether fault is relevant in determining whether an accident exists.<sup>260</sup> Both the petitioners and the respondents use *Saks* to bolster their arguments.<sup>261</sup> Their interpretations of *Saks* are not necessarily wrong; however, one of the two parties’ interpretations is contrary to that of the Supreme Court’s. Although the Supreme Court in *Saks* technically defined the term “accident,”

<sup>251</sup> Respondents’ Brief at 44-55, *Husain* (No. 02-1348).

<sup>252</sup> See Karp, *supra* note 7.

<sup>253</sup> See *Id.*

<sup>254</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

<sup>255</sup> See generally Weigand, *supra* note 32.

<sup>256</sup> See *id.*

<sup>257</sup> See Prewitt, *supra* note 17.

<sup>258</sup> See *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 916. The third circuit also follows a restrictive view of Article 17. See generally Weigand, *supra* note 32.

<sup>259</sup> See *Husain*, 123 S. Ct. at 2215.

<sup>260</sup> See generally Respondents’ Brief, *Husain* (No. 02-1348); see also generally Petitioner’s Brief, *Husain* (No. 02-1348).

<sup>261</sup> See generally Respondents’ Brief, *Husain* (No. 02-1348); see also generally Petitioner’s Brief, *Husain* (No. 02-1348).



they “fail[ed] to fully clarify the scope of ‘accident,’ especially as to whether there must be an unexpected or unusual aircraft operation.”<sup>262</sup>

Looking closely at the circumstances surrounding the *Husain* case, the decision of the district court and the Ninth Circuit squarely fit within the principles of the *Saks* decision. *Saks* calls for a two-step analysis in determining whether there was an “accident” under Article 17: (1) was there an internal reaction? and (2) were there any unusual and unexpected happenings that were outside the normal operation of the aircraft?<sup>263</sup> A finding that Dr. Hanson had a pre-existing medical condition does not preclude a finding that there was an “accident.”<sup>264</sup> The failure of the flight crew to follow routine practices was “unusual”<sup>265</sup> and thus was outside the normal operation of the aircraft. This deviation from standard practice was “external” to Dr. Hanson because, but for the conduct of the flight crew, he would not have suffered the fatal attack.<sup>266</sup> After “flexibly applying all the circumstances,” as the *Saks* Court requires,<sup>267</sup> there is not much doubt that they add up to an “accident” under Article 17.

The Supreme Court, in February 2004, in an unprecedented short decision affirmed the Ninth Circuit in holding that an Article 17 “accident” had occurred in the *Hussain* case.<sup>268</sup> The decision was concise and concrete. The Court upheld the ruling in *Air France v. Saks*<sup>269</sup> and disseminated the ruling to apply the analysis in *Saks* directly to the *Husain* case. The definition of the term “accident” was clearly defined in *Saks* as an “unexpected or unusual event that is external to the passenger.”<sup>270</sup> The parties in the *Husain* case do not dispute this defi-

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<sup>262</sup> Weigand, *supra* note 32, at 966.

<sup>263</sup> See Respondents' Brief at 37, *Husain* (No. 02-1348).

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> I suggest that a true “internal reaction” would occur solely because of the pre-existing condition regardless of the air crew's conduct.

<sup>267</sup> *Saks*, 470 U.S. at 392.

<sup>268</sup> See *Olympic Airways v. Husain*, 2004 U.S. LEXIS 1620 (2004). The Supreme Court heard oral arguments on November 12, 2003. For a transcript of the oral arguments, see [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-1348.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1348.pdf).

<sup>269</sup> *Air France v. Saks*, 470 U.S. 392 (1985).

<sup>270</sup> *Id.* at 405.

niton; however, they do disagree about which event should be the focus of the “accident” analysis.<sup>271</sup>

The Court quickly dismissed Olympic Airways’ contention that the flight attendant conduct was irrelevant because the ambient cigarette smoke was the only injury-producing event, which was a *normal* condition of the aircraft.<sup>272</sup> They relied on their *Saks* recognition that “any injury is the product of a chain of causes and thus, for purpose of the ‘accident’ inquiry, a plaintiff need only prove that ‘some link in the chain was an unusual or unexpected event external to the passenger.’”<sup>273</sup> The Court pointed out that Olympics focus on the smoke ignores the reality that many interrelated factors can combine to produce an injury, and any one of these events may be a link in the chain of causes and could constitute an Article 17 “accident” as long as it was unusual or unexpected.<sup>274</sup> They further opined that the district court and the Ninth Circuit were correct in holding that the refusal by the flight attendant after express requests for assistance and a seat change was an “unusual and unexpected” event that was external to the passenger.<sup>275</sup> Although the ambient smoke, which was a normal occurrence, was a link in the chain of causation, so was the flight attendant’s refusal, which was unexpected and external to the passenger, and thus, under *Saks* qualifies as an “accident.” The Court further strengthened their point by addressing the fact that although the Ninth Circuit focused on a negligence-based “accident” standard, neither party actually disputed that the flight attendant’s conduct was “unexpected and unusual,” which is the operative language and correct Article 17 analysis.<sup>276</sup>

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<sup>271</sup> See *Husain*, 2004 U.S. LEXIS at 1226, 1.

<sup>272</sup> See *id.* at 1227-1228.

<sup>273</sup> See *id.* (citation omitted) (1227).

<sup>274</sup> See *Husain*, 2004 U.S. LEXIS at 1 (1228).

<sup>275</sup> See *Husain*, 2004 U.S. LEXIS at 2 (1227).

<sup>276</sup> See *id.* Olympic Airways also argues that the flight attendant’s conduct was considered a non-action, and under *Saks* only affirmative acts are “events” for purposes of Article 17. See *id.* at. The Court quickly dismisses this argument, and states that the Warsaw Convention does not suggest a distinction between action and inaction on the ultimate issue of liability. See *id.* at 1229. However, the dissent by Justice Scalia and O’Connor focused on this point. See *Husain*, 2004 U.S. LEXIS at 1231. They insisted that inaction cannot be classified as an accident because inaction is the antithesis of an accident. See *id.* They further opined, “when interpreting a treaty, we accord the judgments of our sister signatories ‘considerable weight.’” *Id.* (citation omitted). The dissent firmly stated that the Court

## VI. CONCLUSION

It is reasonable that the drafters' intended the Convention to be flexible in its interpretation in order to keep with the changing times.<sup>277</sup> In the 1920's, civil aviation was still in its infancy.<sup>278</sup> "Traveling by air was an adventure"<sup>279</sup> In 1929, the fatality rate with regard to flying was drastically higher than it is today. The airplane was not generally recognized as a safe and competent way to travel. Article 17 was conceived as a balance between the development of the air industry and the protection of passengers who might suffer injuries during their travels.<sup>280</sup> Although there was a "balance" between interests, in 1929 the scale weighed heavily toward promoting the growth of the airline industry by limiting airline liability for death or injuries.<sup>281</sup> Without the limitation on liability, growth of the airline industry may have been greatly hindered.

Today the scales are heavily weighed in favor of the interest of protecting passengers from injuries. Air travel is now often the preferred way to travel. Armed with greater knowledge and with the advent of technology, airline deaths and injuries have greatly decreased. Many people spend a majority of their lives on an airplane. Airline passengers are dependent on their carrier for their safety, health, and comfort while on board, and they place their well-being in the hands of the airline.<sup>282</sup> The passengers depend on the air flight crew for a number of things including the pilot correctly flying the plane, the purity of oxygen they breathe, the acceptable behavior of the

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should look to decisions of other signatories when interpreting a treaty. *See id.* at 1232. While previous Warsaw Convention cases have carefully considered foreign case law, Justice Scalia was quick to point out that the majority's decision in this case is "squarely at odds" with appellate court holdings in England and Australia. *See id.* at 1231. Lastly, Scalia and O'Connor stated that if the flight attendant affirmatively misrepresented that the plane was full, a cause of action might lie because the misrepresentation, independent of the failure to reseat him, may have been an "unusual and unexpected" link in the chain of causes. *See Husain*, 2004 U.S. LEXIS at 1235.

<sup>277</sup> *See* Weigand, *supra* note 32, at 967.

<sup>278</sup> *See* Lowenfeld & Mendelsohn, *supra* note 28.

<sup>279</sup> Grems, *supra* note 2, at n.1.

<sup>280</sup> *See* Karp, *supra* note 7, at 1567.

<sup>281</sup> *See* Grems, *supra* note 2.

<sup>282</sup> *See* Brief for the United States as Amicus Curiae Supporting Respondents at 23, *Husain* (No. 02-1348).

other passengers, proper air pressure, etc.<sup>283</sup> The airlines exert control over our lives for the time period that passengers are on board their plane. It is essential that the flight crew follow policy to take care of their passengers.<sup>284</sup> A passenger who becomes sick during a flight has good reason to expect a flight crewmember to come to his/her assistance.<sup>285</sup> If the flight crew responds in an "unusual" or "unexpected" manner, and thus contributes to the injury or death of a passenger, the airline could be held accountable for an "accident" under the Warsaw Convention.<sup>286</sup>

Critics concerned with the *Husain* Court's expansion of the term "accident" contend that this decision will open the litigation floodgates.<sup>287</sup> Cornett suggests that these critics fail to recognize that *Husain* is limited to a small class of potential plaintiffs as it imposes strict limitations on recovery:

It is solely limited to cases where the aircraft personnel (1) are on notice of the pre-existing condition; (2) can reasonably do something to aid in the situation that will not interfere with the normal operations of the flight; and (3) do nothing. By meeting these elements, the carrier has become the "unexpected or unusual happening that is external to the passenger" that Saks contemplated.<sup>288</sup>

"The airline industry is unlikely to be burdened significantly by recognizing such occurrences to be "accidents."<sup>289</sup>

If the Supreme Court had found for Olympic, relieving them of liability despite their negligence, the danger to passengers would be limitless. Essentially, this would have been a

<sup>283</sup> See *id.* at 23-24.

<sup>284</sup> See *id.* at 24. The flight crew's traditional role has been related to the protection of their passengers safety and health aboard the aircraft. See *id.* When flight attendants were introduced in the 1930's, many airlines required that the flight attendants be nurses - a practice that was continued until World War II when the demand for nurses was great. See *id.*

<sup>285</sup> See Brief for the United States as Amicus Curiae Supporting Respondents at 24, *Husain* (No. 02-1348).

<sup>286</sup> See Brief for the United States as Amicus Curiae Supporting Respondents at 24, *Husain* (No. 02-1348).

<sup>287</sup> See Cornett, *supra* note 14, at 169.

<sup>288</sup> *Id.*

<sup>289</sup> See Brief for the United States as Amicus Curiae Supporting Respondents at 24, *Husain* (No. 02-1348).

"Get out of jail free card"<sup>290</sup> for the airlines. They would owe no duty of care to passengers, thus there would be no need for procedures or standards. The airline industry would turn chaotic. The passengers would have no recourse for suffering an injury or death due to an airline's negligence. This would also be contrary to the structure of the Warsaw Convention. The Convention is a fault-based system.<sup>291</sup> "The common law duty of carriers to protect passengers who are ill or incapacitated. . . was well established at the time that the Warsaw Convention was drafted."<sup>292</sup>

To find in *Husain* that the airline was not liable at all for an intentional act knowingly committed by its crew which resulted [in] a passenger's death would completely rid the airline of any duty of care to its passengers. Such a result could not have been the intention of the drafters of the Warsaw Convention.<sup>293</sup>

In affirming the Ninth Circuit's decision, the Supreme Court sent a message to the airlines that they have a duty to act with a reasonable level of care when dealing with the passengers. Although the Court focuses on the "unexpected and unusual" event analysis of *Saks* and avoids the Ninth Circuit's concept of negligence-based "accident" standard, both analyses are interrelated in a case such as this case, and yield the same message. For example, the failure of the flight attendant to assist passengers constitutes negligence, and this deviation from industry standards by a flight crew also constitutes an "unexpected and unusual event," which is external to the passenger. Thus, the "accident" based on a *Saks* analysis directly relates to the negligence of the flight crew. Furthermore, had the Court reinterpreted *Saks* and found in favor of Olympic Airways, the Court would have clearly been ignoring the evolution of the airline industry and the important role air travel plays in present society.

The Supreme Court's decision in *Husain* follows the basic *Saks* principles; the basic foundation in *Saks* is consistent with the intent of the drafters. However, the foundation needed to be

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<sup>290</sup> Reference to the board game 'Monopoly®,' by Parker Brothers.

<sup>291</sup> See Lowenfeld & Mendelsohn, *supra* note 28.

<sup>292</sup> Brief for the United States as Amicus Curiae Supporting Respondents at 23, *Husain* (No. 02-1348).

<sup>293</sup> Cornett, *supra* note 14, at 168.

clearly sculpted to be consistent not only with that intent, but also with the changing needs of society. It was time for the Supreme Court to bring closure to the dispute concerning what constitutes an "accident" under Article 17. This decision was the fair and correct decision - one that truly balances the interests of the airline industry with the interests of the passengers. This decision will have important, far-reaching effects. The airline industry will have to step forward and make some necessary changes. However, these changes, if instituted correctly, can lead to a more prosperous airline industry, protecting passengers, (especially those that spend a majority of time on aircrafts) from being injured without recourse. This was the only logically decision.