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INTERNATIONAL AVIATION LAW AND PANDEMIC

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ABSTRACT

Commercial airplanes are vectors of infectious disease, advancing, if not sparking, global epidemics and potentially pandemics by exporting pathogens from endemic areas of the world to non-endemic places. For example, according to the global scientific community, the Zika virus was introduced to the Americas by air travel. Researchers also believe that infected mosquitos on international flights contributed to the worldwide spread of malaria, Middle East Respiratory Syndrome, and the West Nile virus. Most recently, governmental authorities worldwide, in addition to issuing national or local shelter-in-place orders, closed their borders and grounded nearly all international air travel on account of the COVID-19 virus. Such state action raises interesting questions at the intersection of health care and mobility. The severity of recent world events and their specific relationship to international airline travel has generated substantial (albeit inconclusive) scientific literature about passenger-to-passenger and crew-to-passenger viral transmission in commercial aviation. However, analysis of the corresponding legal risks for air carriers, if any, associated with the transmission of infectious disease aboard aircraft are surprisingly understudied.

This Article examines whether air carriers are or should be liable under international law to passengers who contract infectious diseases aboard their aircraft. For example, in addition to the obvious scenario of a passenger contracting an illness from the air cabin environment, several other claims related to the transmission of communicable diseases like COVID-19 are plausible in this regard. Passengers could conceivably sue an air carrier for failing to take certain precautions, such as warning

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passengers of the risk of contracting a disease. Alternatively, an air carrier's alleged failure to pre-screen or deny boarding to passengers who exhibit symptoms of ill health may give rise to a lawsuit. Not having or employing contract tracing protocols to notify passengers of potential exposure might also support lawsuits against air carriers. Operational failures of high-efficiency particulate absorbing (HEPA) filters, for instance, also theoretically may expose air carriers to liability, as may the failure of an air carrier to comply with relevant international health regulations and guidance documents. Finally, passenger-plaintiffs might succeed in convincing courts to award money damages where the actions—or inactions—of an air carrier fail to safeguard the hygiene of aircraft cabins effectively.

The language, objectives, and drafting history of the Warsaw Convention of 1929 and Montreal Convention of 1999 (Conventions) appear to broadly support a finding of liability against an air carrier for the transmission of infectious disease in certain circumstances. Still, the adjudication of claims under the Conventions likely will produce highly variable textual interpretations unmoored to any controlling legal precedent—in contravention of the international aviation community's goal of uniformity. As such, this Article posits that even if the language, policy, and existing case law related to the Conventions arguably support a finding of liability, administrative and policy reasons mitigate in favor of exonerating air carriers from claims seeking damages arising from the transference of communicable diseases aboard aircraft in the international carriage.

In all, this Article's relevance is greatest for aviation practitioners and courts adjudicating claims under the Conventions in the context of COVID-19 or future global health care crises involving international aviation. That said, this Article may also hold interest for a broader audience seeking to understand legal and policy problems confronting global firms under private international law in post- and (perhaps) future-pandemic periods.

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I. INTRODUCTION

COMMERCIAL AIRPLANES ARE VECTORS of infectious disease, advancing, if not sparking, global epidemics, and potentially pandemics by exporting pathogens from endemic areas of the world to non-endemic places.[1] For example, according to the global scientific community, the Zika virus was introduced to the Americas by air travel.[2] Researchers also believe that infected mosquitos on international flights contributed to the worldwide spread of malaria, Middle East Respiratory Syndrome, and the West Nile virus.[3] Most recently, governmental authorities worldwide, in addition to issuing national or local shelter-in-place orders, closed their borders and grounded nearly all international air travel on account of the COVID-19 virus.[4] They did so to stop the movement of symptomatic or asymptomatic people all around the globe.[5] Such state action raises interesting questions at the intersection of health care and mobility. The severity of recent world events and their specific relationship to international airline travel has generated substantial (albeit inconclusive) scientific literature about pas-

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[1] Alexandra Mangili & Mark A. Gendreau, *Transmission of Infectious Diseases During Commercial Air Travel*, 365 LANCET 989, 992 (2005) ("The aircraft as a vector for global spread of influenza strains is a greater concern than is in-flight transmission.").

[2] *See* Nuno Rodrigues Faria et al., *Zika Virus in the Americas: Early Epidemiological and Genetic Findings*, 352 SCIENCE 345, 346 (2016), https://www.science.org/doi/epdf/10.1126/science.aaf5036 [https://perma.cc/93AS-DA3B].

[3] *See* Mangili & Gendreau, *supra* note 1, at 993.

[4] *See generally* INT'L AIR TRANS. ASS'N, AIR PASSENGER MARKET ANALYSIS 1 (Apr. 2020), https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis—-apr-20202/ [https://perma.cc/KCG7-BBCD].

[5] *See id.*

senger-to-passenger and crew-to-passenger viral transmission in commercial aviation.[6] However, analysis of the corresponding legal risks for air carriers, if any, associated with the transmission of infectious disease aboard aircraft are surprisingly understudied.[7]

This Article examines whether air carriers are or should be liable to passengers who contract infectious diseases aboard their aircraft under international law. In addition to the obvious scenario of a passenger contracting an illness from the air cabin environment, several other claims related to the transmission of communicable diseases like COVID-19 are plausible in this regard. For example, passengers could conceivably sue an air carrier for failing to take certain precautions, such as warning passengers of the risk of contracting a disease.[8] Alternatively, an air carrier's alleged failure to pre-screen or deny boarding to passengers who exhibit symptoms of ill health may give rise to a lawsuit.[9] Not having or employing contract tracing protocols to notify passengers of potential exposure might also support lawsuits against air carriers.[10] Operational failures of high-efficiency particulate absorbing (HEPA) filters, for example, also theoretically may expose air carriers to liability, as may the failure of an air carrier to comply with relevant international health regulations and guidance documents.[11] Finally, passenger-plaintiffs might succeed in convincing courts to award money damages where the actions—or inactions—of an air carrier fail to safeguard the hygiene of aircraft cabins effectively.[12]

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[6] *See* Vicki Stover Hertzberg, Howard Weiss, Lisa Elon, Wenpei Si, Sharon L. Norris & The FlyHealthy Research Team, *Behaviors, Movements, and Transmission of Droplet-Mediated Respiratory Diseases During Transcontinental Airline Flights*, 115 PROC. NAT'L ACAD. SCIS. U.S. 3623, 3623 (2018), https://www.pnas.org/content/pnas/115/14/3623.full.pdf [https://perma.cc/PS6E-F68M].

[7] *See, e.g.*, Kathryn Brown, Comment, *Please Expect Turbulence: Liability for Communicable Disease Transmission During Air Travel*, 66 DEPAUL L. REV. 1081 (2017); Allison M. Surcouf & Marissa N. Lefland, *An Overview of Federal Law Governing the Carriage of Passengers Who May Have a Communicable Disease on International Flights*, CONDON FORSYTH (Mar. 16, 2020), https://condonlaw.com/2020/03/an-overview-of-federal-law-governing-the-carriage-of-passengers-who-may-have-a-communicable-disease-on-international-flights/ [https://perma.cc/P9EC-92RM].

[8] *See* Elaine D. Solomon & Christopher Cody Wilcoxson, *Potential COVID-19 Liability Facing Air Carriers*, BLANK ROME (Apr. 9, 2020), https://www.blankrome.com/publications/potential-covid-19-liability-facing-air-carriers [https://perma.cc/UH7X-LRKG].

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

However, proving any or all of these claims as a matter of law is an altogether different exercise than conjuring up potential causes of action in the abstract. Litigation arising from international air carriage is resolved pursuant to multilateral treaties: the Warsaw Convention of 1929[13] and the Montreal Convention of 1999 (collectively the Conventions).[14] Though ostensibly supportive of a passenger's right to obtain an appropriate monetary award relative to damages provably sustained and caused by an air carrier, the Conventions present significant evidentiary and practical problems.[15] Moreover, no court has applied the Conventions in the specific context of the transmission of infectious disease aboard aircraft.[16] While the language, objectives, and drafting history of the Conventions broadly appear to support a finding of liability against an air carrier for the transmission of infectious disease in certain circumstances,[17] the adjudication of claims under the Conventions likely will produce highly variable exercises of textual interpretation unmoored to any controlling legal precedent. As such, this Article posits that even if the language, policy, and existing case law related to the Conventions arguably support a finding of liability, administrative and policy reasons mitigate in favor of exonerating air carriers from claims seeking damages arising from the transference of communicable diseases aboard aircraft in the international carriage.

First, evaluating liability of an air carrier centers on the language in Article 17 of the Conventions: "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."[18]

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[13] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]; *see infra* Part II.

[14] Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. TREATY DOC. No. 106-45, 2422 U.N.T.S. 350 [hereinafter Montreal Convention]; *see infra* Part II.

[15] *See* Solomon & Wilcoxson, *supra* note 8.

[16] *See id.*

[17] *See id.*

[18] Warsaw Convention art. 17; Montreal Convention art. 17(1). The language of the Warsaw Convention and the Montreal Convention are nearly the same word-for-word, but where differences do exist (as they do in Article 17 of each instrument), evidence suggests that the drafters intended similar treatment. *See* Explanatory Note to Montreal Convention, art. 17, S. TREATY DOC. No. 106-45, 1999 WL 33292734, at *16 (2000); *see also* Best v. BWIA W. Indies Airways Ltd., 581 F. Supp. 2d 359, 362 n.1 (E.D.N.Y. 2008) ("Because many of the provisions of

Somewhat relative to national negligence regimes generally applicable to passenger related aircraft accidents, Article 17 establishes a "presumption" of air carrier liability for death or injuries sustained on the aircraft.[19] *A fortiori*, Article 17 provides an "essentially strict liability" regime for death or injury to international air passengers.[20] As detailed in Part II of this Article, this reflects a core policy of the drafters of the Conventions—to guarantee passengers the prospect of relatively quick and inexpensive settlement.[21]

The burden of proof under the Conventions is not insignificant, notwithstanding their provisions in favor of airline passengers and their allowance for the recovery of damages in warranted circumstances. Not only must passenger-plaintiffs establish a recognized loss ("damage sustained") like death "or any other bodily injury," but they also must demonstrate that an "accident" happened, where it occurred ("on board the aircraft or in the course of any of the operations of embarking or disembarking"), and whether its occurrence was the cause of the damages alleged.[22] Though seemingly uncomplicated matters on their face, these details are elusive and often vigorously contested by litigants. Strikingly, for instance, neither Convention defines the word "accident."[23] In the absence of a uniform or controlling definition, courts have offered fluid and sometimes irreconcilable interpretations of the term as applied to claims arising under the Conventions. The critical phrase "embarking or disembarking" is also indefinite.[24] Consequently, applying the Conventions to traditional claims arising out of the operation of an aircraft is a litigious process from the perspective of courts, air carriers (and their insurers), aviation counsel, and clients—a fact that portends interpretative and evidentiary complications in unprecedented matters relating to the question of whether

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the Montreal Convention are taken directly from the Warsaw Convention and the many amendments thereto, the case law regarding a particular provision of the Warsaw treaty applies with equal force regarding its counterpart in the Montreal treaty.").

[19] *In re* Air Crash Disaster at Warsaw, Pol., on Mar. 14, 1980, 705 F.2d 85, 87 (2d Cir. 1983).

[20] *Id.* at 88.

[21] *See* Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AM. UNIV. INT'L L. REV. 891, 899–902, 963–64 (2001).

[22] *Id.* at 902, 912.

[23] *Id.* at 920.

[24] *Cf. id.* at 932–33.

the transmission of infectious disease falls within the scope of Article 17.

Nevertheless, defining critical terms under the Conventions and understanding the contours of liability of air carriers in the "new normal" of post-COVID-19 pandemic international travel is imperative given the heightened possibility that health crises impact the global aviation industry with greater frequency than has historically occurred. Therefore, this Article evaluates key terms under Article 17 of the Conventions respecting air carrier liability for death and injury to passengers arising from the transmission of infectious disease and explains why the passenger-to-passenger or crew-to-passenger spread of communicable disease like the novel coronavirus may (but perhaps should not) constitute an "accident" to sustain a finding of air carrier liability.

This Article proceeds in four parts to support this claim. Part II briefly sets out the Conventions' history to establish the purposes and policies underlying their text, especially Article 17. Part III then analyzes how and whether the Conventions apply to claims arising from the alleged transmission of communicable diseases aboard aircraft. In doing so, Part III presents and examines the current framework for assessing the Conventions' language to support air carrier liability. An appraisal of the defenses available to carriers is also offered, along with an evaluation of an especially controversial aspect of air carrier liability under the Conventions: whether psychic injuries associated with the risk of infection aboard an aircraft are compensable. Part IV then applies existing precedent to demonstrate how courts may find air carriers liable for infectious disease transmission, but why they should not. Finally, Part V offers concluding remarks in defense of a legal regime that affords passengers no remedy in the specific context of disease aboard aircraft.

In all, this Article's relevance is greatest for aviation practitioners and courts adjudicating claims under the Conventions in the context of COVID-19 or future global health care crises involving international aviation. That said, this Article may also hold interest for a broader audience seeking to understand legal and policy problems confronting global firms under private international law in post- and (perhaps) future-pandemic periods.

II. LIABILITY UNDER THE WARSAW AND MONTREAL CONVENTIONS

Before assessing the relevant language of the Conventions, this Part contextualizes each treaty by tracing it back to its origins a century ago. Doing so establishes the specific key concepts undergirding the larger concept of air carrier liability in international air carriage. Furthermore, identifying the policy objectives of the Conventions brings into focus the unique features of each instrument relative to traditional national tort law schemes that may apply to other mass transportation modalities. Indeed, the precise question of whether air carriers should (or should not, as this Article claims) be liable for the transmission of infectious disease is influenced and informed by the historical purpose that gave rise to each of the Conventions.

The history of the Conventions dates back to the 1920s.[25] Charles Lindbergh's famous solo flight in 1927 of his "Spirit of St. Louis" from New York to Paris hailed the inevitability of mass international air travel.[26] But "substantial perils of all kinds were envisioned" and "capital was difficult to secure for this infant industry, because of the risks of loss attendant upon unlimited tort liability."[27] Therefore, just two years after Lindbergh's pioneering accomplishment, a French-led diplomatic effort concluded a formal treaty—the Warsaw Convention—to establish a legal regime relating to the issue of liability in the international carriage by air.[28]

A central challenge for Warsaw Convention delegates was meeting an emerging global need for a uniform set of rules that spurred the early commercial aviation industry without leaving remediless passengers killed or injured in airplane accidents.[29] An early draft of the Warsaw Convention included a vast liability provision holding carriers "liable for accidents, losses, breakdowns, and delays" whether or not death or bodily injury resulted.[30] This formulation reflected the attitude of many early twentieth-century national laws that regarded manned flight as an insufficiently safe or proven mode of transportation—an "ul-

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[25] Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 220 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975).

[26] *See id.*

[27] *Id.*

[28] *See generally* William B. Wright, *The Warsaw Convention's Damages Limitations*, 6 CLEV.-MARSHALL L. REV. 290, 290 (1957).

[29] *See id.* at 292.

[30] Air Fr. v. Saks, 470 U.S. 392, 401 (1985).

trahazardous activity" that involved risks of serious harm to persons that could not be eliminated by the exercise of the utmost care.[31]

The authors of the Warsaw Convention ultimately prioritized industry growth, or as the U.S. Supreme Court noted, the parties to the Warsaw Convention had the "primary purpose of . . . limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry."[32] Stated otherwise, "[i]n 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing a full recovery to injured passengers . . . ."[33] Thus, while the final text of the Warsaw Convention countenanced air carrier liability without proof of fault, it did so only to a finite point, by establishing a ceiling on damages—a cap—of a mere 125,000 gold Francs per passengers (equivalent to approximately U.S. $8,300 in 1929).[34] In addition, an air carrier could exonerate itself of any liability under the Warsaw Convention upon a showing of due care and that "all necessary measures to avoid the damage [were taken] or that it was impossible" to do so.[35] Passenger-plaintiffs, meanwhile, would not be subject to the liability cap under the Warsaw Convention if the damages resulted from an air carrier's "wilful misconduct," a very high hurdle to overcome as airlines were not (and still are not) in the business of injuring or killing their customers or crew (or damaging their airplanes) on purpose.[36]

The Warsaw Convention was controversial from its inception, given the low maximum amount of damages available to passengers under its terms.[37] In fact, just a year after the Warsaw Convention entered into force in 1933, the United States advocated for its modernization and recalculation of what some described as the "unconscionably low" liability limits of the Warsaw Convention.[38] Initial U.S. efforts to increase the damages limit to

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[31] RESTATEMENT (FIRST) OF TORTS § 520 (AM. L. INST. 1938); *see id.* cmt. f.

[32] E. Airlines, Inc. v. Floyd, 499 U.S. 530, 546 (1991).

[33] *Id.*

[34] *Id.* (citing Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498–99 (1967)).

[35] Warsaw Convention, *supra* note 13, art. 20(1).

[36] *Id.* art. 25(1). *But see In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988, 37 F.3d 804, 811–12 (2d Cir. 1994) (appeal from special verdict finding airline liable for willful misconduct as "a substantial factor in causing" the bombing of one its aircraft by terrorists).

[37] *See* Wright, *supra* note 28, at 296.

[38] *See id.*; S. EXEC. REP. 108-8, at 14 (2003).

approximately $25,000 were not successful. However, during the 1950s, when the United States began to threaten denunciation of the Warsaw Convention, an agreement was reached to increase the personal liability limits—but only to double what the treaty originally allowed ($16,600).[39]

In 1999, member states of the International Civil Aviation Organization (ICAO) adopted the Montreal Convention to replace the Warsaw Convention.[40] Despite its status among practitioners as a comprehensive attempt to modernize and consolidate its predecessor, the Montreal Convention is nearly identical, word-for-word, to the Warsaw Convention, and in fact, court decisions interpreting the Warsaw Convention apply to and have precedential value to lawsuits based on the Montreal Convention.[41]

But, with respect to liability, the Montreal Convention diverges from the Warsaw Convention in material and consequential ways. Among the most important differences between the Conventions was the establishment of a two-tier liability system under the Montreal Convention.[42] More specifically, in contrast to the distinguishing features of the Warsaw Convention (i.e., presumed fault and a liability cap undone by proof of "wilful misconduct"), the Montreal Convention presented a strict liability scheme in two dimensions.[43] In the first tier of liability under the Montreal Convention, air carriers are strictly, or absolutely, liable to passengers for death and injury up to "100,000 Special Drawing Rights," which was equal to approximately $134,484 on May 28, 1999, the date the Montreal Convention was signed.[44] Beyond that amount, under a second tier of liability under the Montreal Convention, air carriers are presumptively liable to an unlimited amount (i.e., no cap) unless the defendant-carrier can prove either that "such damage was not due to the negligence or other wrongful act of omission of the

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[39] Lee S. Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 291, 295 (1965).

[40] *Milestones in International Civil Aviation*, INT'L CIV. AVIATION ORG., https://www.icao.int/about-icao/History/Pages/Milestones-in-International-Civil-Aviation.aspx [https://perma.cc/B3PP-WBTV].

[41] *See* Explanatory Note to Montreal Convention, art. 17, S. TREATY DOC. No. 106-45, 1999 WL 33292734, at *16 (2000); *see also* Best v. BWIA W. Indies Airways Ltd., 581 F. Supp. 2d 359, 362 n.1 (E.D.N.Y. 2008).

[42] Montreal Convention, *supra* note 14, arts. 17(1), 21.

[43] *Id.*

[44] *Id.* arts. 17(1), 21, 23(1); *SDR Valuation*, INT'L MONETARY FUND, https://www.imf.org/external/np/fin/data/rms_sdrv.aspx [https://perma.cc/5MFK-JM8W] (choose "May," "28," and "1999"; then click "go").

carrier or its servants or agents," or that "such damage was solely due to the negligence or other wrongful act or omission of a third party."[45]

Thus, where the Warsaw Convention minimized air carrier liability for the putative purpose of fostering the growth of the nascent international airline industry,[46] the Montreal Convention is comparatively more favorable to passengers, reflecting the maturity of the international commercial aviation industry and representing a sort of quid pro quo whereby passengers could recover damages irrespective of negligence in exchange for a limitation on carrier liability.[47] As detailed in Part III, however, the path to recovery is not only challenging for Warsaw Convention and Montreal Convention claimants as a general matter, but is also likely to present unique problems of proof and persuasion for litigants asserting (or defending against) claims that the transmission or contraction of infectious disease is compensable under either of the Conventions.

III. DEFINING "ACCIDENT"

Pursuant to the 1950s-era Convention on International Civil Aviation (Chicago Convention), coordination of certain operational aspects of international travel, including airspace, aircraft registration, safety, and even health, fall under the jurisdiction of the ICAO, a specialized agency of the United Nations.[48] Notably, Article 14 of the Chicago Convention provides specific guidance for infectious disease mitigation efforts in international aviation:

> Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with

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[45] Montreal Convention, *supra* note 14, arts. 21(2); *see also id.* art. 29 ("[P]unitive, exemplary or any other non-compensatory damages" are not recoverable).

[46] *See* Paul Stephen Dempsey, *International Air Carrier Liability for Death & Personal Injury: To Infinity and Beyond* 7 (2017), https://www.mcgill.ca/iasl/files/iasl/intl_air_carrier_liability_-_long_version_1.pdf [https://perma.cc/L42Y-35NY].

[47] *See* Montreal Convention, *supra* note 14, arts. 17(1), 21.

[48] Int'l Civil Aviation Org. [ICAO], *Convention on International Civil Aviation*, at 6, 17, ICAO Doc. 7300/7 (7th ed. 1997), https://www.icao.int/publications/Documents/7300_7ed.pdf [https://perma.cc/3DTT-FZNS].

> international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties.[49]

Under the authority of this provision, ICAO frequently collaborates with the International Air Transport Association (IATA), the trade association for the world's airlines responsible for setting industry technical standards.[50] For example, IATA and ICAO work with the World Health Organization (WHO) to provide health-related recommendations for air carriers.[51]

However, this work often runs into significant headwinds in national laws and policies that allow for the discretionary adoption of international controls.[52] Consequently, infectious disease control measures are often diluted, as exemplified by the fact that International Health Regulations express only one provision relating to air travel, requiring a pilot in command to merely provide a brief aircraft general declaration of passenger health to ground staff before disembarkation.[53]

What is more, by its terms, the Chicago Convention applies to "contracting States," not explicitly to private entities, like air carriers.[54] Therefore, while the health objectives of the Chicago Convention could protect passengers from certain risks, the Chicago Convention creates no rights for passengers with claims against air carriers emanating from the transmission of infectious or communicable diseases.[55] For that matter, the absence of controlling or cohesive international rules or legally binding regulations respecting the transmission of infectious disease

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[49] *Id.* at 6.

[50] *About Us*, IATA, https://www.iata.org/en/about/ [https://perma.cc/ZX7Z-JZ79].

[51] *See generally* Courtney Clegg, Comment, *The Aviation Industry and the Transmission of Communicable Disease: The Case of H1N1 Swine Influenza*, 75 J. AIR L. & COM. 437 (2010).

[52] For example, national laws in Australia and New Zealand require usage of insecticides in commercial aviation operations whereas the United States does not. Andrea Grout, Natasha Howard, Richard Coker & Elizabeth M. Speakman, *Guidelines, Law, and Governance: Disconnects in the Global Control of Airline-Associated Infectious Diseases*, 17 LANCET INFECTIOUS DISEASES e118, e119 (2017) ("National guidance and legislation are uncoordinated across countries, and—with no strong evidence underpinning control measures—they are often inconsistent.").

[53] *Id.*

[54] *See, e.g.*, Int'l Civil Aviation Org. [ICAO], *supra* note 48, at 2 ("The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.").

[55] Grout, Howard, Coker & Speakman, *supra* note 52, at e120.

aboard aircraft means that passengers cannot present a court with evidence of a per se violation by an air carrier that may translate into liability under the Conventions. Even if such evidence existed, the Conventions do not explicitly require a finding of liability if an air carrier deviates from or violates regulations or policies issued be national or international aviation or health care authorities (though they likely would be interpreted as doing so).[56]

In any case, the Conventions require that private claimants assert their claims on a case-by-case basis for each accident.[57] Complicating this process is the fact that the Conventions lack explicit or uniform definitions of key terms and phrases.[58] Consequently, many issues arising under the Conventions—and the specific question here of whether a passenger's contraction of COVID-19 or any other infectious disease aboard an aircraft supports a finding of liability under the Conventions—involve "line drawing" exercises that produce variable conclusions rather than fixed principles about legal matters that are very often matters of first impression. Nevertheless, as detailed below, the existing body of precedent broadly suggests that lawsuits against air carriers under the relevant international treaties connected to the transmission of communicable diseases could be successful on average—and perhaps more successful than they should be as a normative matter or would be under traditional negligence schema.

A. Externalities and Causation Under *Air France v. Saks*

Article 17 of the Conventions imposes strict liability on an air carrier "for damage sustained in the event of death," "wounding of a passenger," or "any other bodily injury suffered by a passenger."[59] This liability is imposed only on the condition that the alleged damage takes place either "on board the aircraft or in the course of any of the operations of embarking or disembarking."[60] No court has held that an infectious disease constitutes "wounding" or "bodily injury" under the Conventions.[61] There-

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[56] *See infra* Part III.A, Part III.B.

[57] *See generally* Solomon & Wilcoxson, *supra* note 8.

[58] *See id.*

[59] Warsaw Convention, *supra* note 13, art. 17; *see also* Montreal Convention, *supra* note 14, art. 17(1).

[60] Warsaw Convention, *supra* note 13, art. 17; Montreal Convention, *supra* note 14, art. 17(1).

[61] *See* Solomon & Wilcoxson, *supra* note 8.

fore, as with nearly every other personal injury claim arising under the Conventions, litigation arising from the transmission of infectious disease aboard aircraft in the international carriage will center on competing constructions of the word "accident."[62] That is particularly problematic for claimants asserting personal injury claims related to the transmission of infectious diseases under the Conventions because neither treaty defines the word "accident" or other key terms around which adjudication of liability strictly depends.[63] This is remarkably unhelpful as the occurrence of an "accident" is the "essential predicate of carrier liability . . . ."[64] Nevertheless, what is known is that courts that have construed the word "accident" in Article 17 have done so by focusing on causation.[65]

According to the seminal case of *Air France v. Saks*, a unanimous decision of the Supreme Court authored by Justice Sandra Day O'Connor, liability under the terms of Article 17 of the Warsaw Convention "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[66] To reach this conclusion, the *Saks* Court looked to the text of the convention, along with the negotiation history of the convention, the conduct of the parties to the convention, and the weight of precedent in foreign and American courts.[67]

First, the *Saks* court reasoned that "the text of Article 17 refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury."[68] The Court drew this conclusion by noting an intentional distinction in the Warsaw Convention between liability for injuries to passengers caused by an "accident" (under Article 17) and liability imposed for destruction or loss of baggage caused by an "occurrence" (under Article 18).[69] The difference in the parallel language of Articles 17 and 18 "implies that the drafters of the [Warsaw] Convention understood the word 'accident' to mean something different than the word 'occurrence.'"[70]

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[62] *See id.*

[63] *Id.*

[64] Wallace v. Korean Air, 214 F.3d 293, 297 (2d Cir. 2000).

[65] *See, e.g., id.* at 297–300.

[66] 470 U.S. 392, 405 (1985).

[67] *Id.* at 396–97.

[68] *Id.* at 398.

[69] *Id.*

[70] *Id.*

The *Saks* Court also reasoned that the drafters of the Warsaw Convention distinguished "the cause and the effect" by specifying that "air carriers would be liable if an accident *caused* the passenger's injury."[71] In this regard, the *Saks* Court read the text of the treaty to imply that it is "the *cause* of the injury that must satisfy the definition [of accident] rather than the occurrence of the injury alone."[72] Citing an English tort law case, moreover, the *Saks* Court highlighted that this interpretation harmonized with American jurisprudence, which had long recognized a distinction between an accident that is the cause of an injury and injury that is the accident itself:

> The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.[73]

Next, in the absence of a formal definition of the word "accident," the *Saks* Court looked to the French legal meaning of the word "accident."[74] As the Court explained, examination of the French legal meaning was important "not because 'we are forever chained to French law' by the Convention, . . . but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties [who were continental jurists]."[75] In this context, the *Saks* Court observed "[a] survey of French cases and dictionaries indicates that the French legal meaning of the term 'accident' differs little from the meaning of the term in Great Britain, Germany, or the United States."[76] Thus: "While the word "accident" is often used to refer to the *event* of a person's injury, it is also sometimes used to describe a *cause* of injury, and

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[71] *Id.* at 398–99.

[72] *Id.* at 399 ("American jurisprudence has long recognized this distinction between an accident that is the *cause* of an injury and an injury that is itself an accident.").

[73] *Id.* at 398 (quoting Fenton v. J. Thorley & Co., [1903] A.C. 443, 453).

[74] *Id.* at 398–400.

[75] *Id.* at 399 (citation omitted) ("We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists.").

[76] *Id.* at 399.

when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event."[77] Therefore, the Court reasoned that the language of Article 17 "suggests that the passenger's injury must be caused by an unexpected or unusual event."[78]

The *Saks* Court also went beyond the text of Article 17 to divine the meaning of "accident," exploring the records of negotiation of the Warsaw Convention.[79] While those materials also offered no precise definition of "accident," they further evidenced an understanding of the word "accident" as meaning something different than an occurrence on the plane, according to the Court.[80] For example, representatives of many of the Warsaw Convention signatories at an International Conference on Air Law in Guatemala City in 1971 worked to approve an amendment to Article 17 that would have imposed liability on an air "carrier for an 'event which caused the death or injury' rather than for an 'accident which caused' the passenger's injury."[81] This proposed provision would have exempted an air carrier from liability if the death or injury resulted "solely from the state of health of the passenger."[82]

Finally, the *Saks* Court found that the weight of precedent in foreign and American courts supported the conclusion that an unexpected or unusual event must cause a passenger's injury.[83] For example, "in *Air France v. Haddad, Judgment of June 19, 1979* . . . a French court observed that the term 'accident' in Article 17 of the Warsaw Convention embraces causes of injuries that are fortuitous or unpredictable."[84] Moreover, the Court took notice of the fact that "European legal scholars have generally construed the word 'accident' in Article 17 to require that the passenger's injury be caused by a sudden or unexpected

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[77] *Id.* at 399–400 (footnote omitted); *see also* Lowenfeld & Mendelsohn, *supra* note 34, at 500.

[78] *Saks*, 470 U.S. at 400.

[79] *Id.* ("In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation.") (citing Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943)).

[80] *Id.* at 403.

[81] *Id.*

[82] *Id.* (citing Int'l Civil Aviation Org. [ICAO], 2 *Documents of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040-LC/167-2, at 189 (1972)).

[83] *Id.* at 404–05.

[84] *Id.* at 404 (citing Cour d'appel de Paris, Première Chambre Civile, 1979 Revue Francaise de Droit Aerien, at 328).

event other than the normal operation of the plane."[85] Similarly, American judges construing the word "accident" had "refuse[d] to extend the term to cover routine travel procedures that produce[d] an injury due to the peculiar internal condition of a passenger."[86]

In all, *Saks* stands for the proposition that liability under Article 17 "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."[87] Stated otherwise, "when [an] injury indisputably results from [a] 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 . . . cannot apply."[88] In application, this judicially crafted definition of "accident" under *Saks*, standing alone, has proved to be both complicated and insufficient to resolve liability questions under the Conventions. This is because, among other reasons detailed in Part III.B, determining which "event" should be the focus of the "accident" frequently is an issue unto itself.

B. *Olympic Airways v. Husain*: Inaction as "Accident"

In *Olympic Airways v. Husain*, the Supreme Court relied on *Saks* to decide whether an air carrier's conduct was unusual and unexpected, and thus a link in the causal chain leading to an "accident."[89] There, a passenger, Dr. Abid Hanson (who had asthma), asked three separate times to be reseated away from the smoking section of the aircraft.[90] A flight attendant twice declined.[91] Once the plane was in the air and other passengers had started smoking, the flight attendant invited him to walk around the cabin in search of someone willing to switch seats.[92] However, as the smoking noticeably increased in the rows be-

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[85] *Id.* (citing O. Riese & J. Lacour, Precis de Droit Aerien 264 (1951) (noting that Swiss and German law require that the damage be caused by an accident, and arguing that an accident should be construed as an event which is sudden and independent of the will of the carrier); 1 C. Shawcross & K. Beaumont, Air Law ¶ VII (148) (4th ed. 1984) (noting that the Court of Appeals for the Third Circuit's definition of accident accords with some English definitions and "might well commend itself to an English court").).

[86] *Id.* at 405.

[87] *Id.*

[88] *Id.* at 406.

[89] 540 U.S. 644, 655–56 (2004).

[90] *Id.* at 647.

[91] *Id.*

[92] *Id.*

hind him, Dr. Hanson became ill, required CPR and oxygen, and ultimately died.[93] His widow, Rubina Husain, sued the air carrier for wrongful death, averring that the "unexpected or unusual event or happening" that constituted an "accident" within the meaning of Article 17 was *not* Dr. Hanson's death but the airline's refusal to reseat him.[94] She prevailed at the trial court level and again on the air carrier's appeal to the Ninth Circuit Court of Appeals.[95] The Supreme Court granted certiorari.[96]

In an opinion written by Justice Clarence Thomas, the Supreme Court affirmed, holding that "the 'accident' condition precedent to air carrier liability under Article 17" as set forth in *Saks* was "satisfied when the carrier's unusual and unexpected refusal to assist a passenger [was] a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin."[97] Notably, in reaching this conclusion, the *Husain* majority reasoned that an airline's mere inaction could constitute an "accident" and would suffice as a basis of liability even among other potential "injury producing events."[98] Framing the issue before it in this way, the Court rejected the contention that a flight attendant's conduct could only constitute an "accident" if it were an affirmative act.[99] The *Husain* court disagreed, reasoning that the distinction between action and inaction would perhaps be relevant in a tort law negligence case but that a negligence regime does not apply under Article 17 of the Convention.[100] "The relevant 'accident' inquiry under *Saks* is whether there is 'an unexpected or unusual *event or happening*.'"[101]

In a dissent joined by Justice O'Connor (author of the unanimous *Saks* decision), Justice Antonin Scalia rejected the majority's view that the word "accident" under the Warsaw Convention could encompass inaction (i.e., the flight attendant's failure to reseat Dr. Hanson).[102] First and foremost, according to the dissenting opinion, the majority's conclusion

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[93] *Id.* at 648.
[94] *Id.* at 648, 651.
[95] *Id.* at 648.
[96] *Id.* at 649.
[97] *Id.* at 646.
[98] *Id.* at 653–54.
[99] *Id.* at 654.
[100] *Id.* at 654–55.
[101] *Id.*
[102] *Id.* at 658–59 (Scalia, J., dissenting).

placed U.S. law in conflict with the view of other signatories to the treaty.[103] For example, after analyzing more than a half-dozen non-English decisions, England's Court of Appeal held that inaction could not be described as an accident because it "is not an event; it is a non-event. Inaction is the antithesis of an accident."[104] The Supreme Court of Victoria, Australia, likewise considered American and other foreign decisions to conclude that "it is not the failure to take the step which is properly to be characterised as an accident but rather its immediate and disastrous consequence."[105]

The dissent further criticized the majority's opinion as outcome-determinative, fashioning a remedy to a terrible tragedy instead of applying the convention by its terms, regardless of the potentially harsh result that might obtain.[106] As Justice Scalia wrote:

> The Convention denies a remedy, even when outrageous conduct and grievous injury have occurred, unless there has been an "accident." Whatever that term means, it certainly does not equate to "outrageous conduct that causes grievous injury." It is a mistake to assume that the Convention must provide relief whenever traditional tort law would do so. To the contrary, a principal object of the Convention was to promote the growth of the fledgling airline industry by limiting the circumstances under which passengers could sue. . . . Unless there has been an accident, there is no liability, whether the claim is trivial . . . or cries out for redress.[107]

Finally, the dissent highlighted a factual dispute that recommended remanding rather than affirming the appellate court's decision that a flight attendant's unexpected and unusual conduct in refusing three times to move an asthmatic passenger to another seat away from the smoking section of the airplane constituted an "accident" within the meaning of the Warsaw Convention.[108] Specifically, the flight attendant invited Dr. Hanson to find another passenger willing to switch seats with him; she

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[103] *Id.* at 660 ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.").

[104] *Id.* 659–60 (citing Deep Vein Thrombosis and Air Travel Group Litigation, [2004], Q.B. 234).

[105] *Id.* at 660 (quoting Qantas Ltd. v. Povey, [2003] VSCA 227, ¶ 17, 2003 WL 23000692 (Dec. 23, 2003) (Ormiston, J. A.)).

[106] *See id.* at 664.

[107] *Id.* (citations omitted).

[108] *Id.* at 666–67.

did not invite him to find an *empty* seat.[109] To the contrary, she affirmatively represented that the airplane was full—which was not the case.[110] In this context, Justice Scalia reasoned that a cause of action might lie if such a misrepresentation was unusual and unexpected and if it can be reasonably said that it caused Dr. Hanson's death.[111]

Taking *Saks* and *Husain* together, the Conventions theoretically could encompass claims arising from the transmission of infectious diseases. To be successful, claimants must demonstrate an unusual or unexpected externality and apparently also can prosecute air carriers for inaction, including by failing to take preventative action to mitigate the risk of infection. As detailed in Part IV, however, the evidentiary burdens and administrative costs involved in such litigation, together with the text, purpose, and policy of the Conventions, suggests that air carriers should not be liable to international passengers for the transmission of infectious diseases, the risks of which passengers themselves are well positioned (or best positioned related to air carriers) to avoid or eliminate.

C. Fear of Contagion

Not to be lost in the enduring debate about what constitutes an "accident" is a relatively new controversy—whether psychic damages are recoverable under the Conventions. In *Eastern Airlines, Inc. v. Floyd*, a case arising under the Warsaw Convention, the Supreme Court addressed "the question whether Article 17 allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury."[112] The Court determined that Article 17 did not so provide, stating: "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."[113] This left unresolved the question of whether a mental injury standing alone was recoverable under the Warsaw Convention, an inquiry left unanswered by the *Floyd* court, which expressed "no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries."[114]

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[109] *Id.* at 666.
[110] *Id.*
[111] *Id.* at 666–67.
[112] *See* 499 U.S. 530, 532–33 (1991).
[113] *Id.* at 552.
[114] *Id.*

However, in 2017, in *Doe v. Etihad Airways, P.J.S.C.*, a case arising under the Montreal Convention, the Sixth Circuit Court of Appeals departed from nearly a century of jurisprudence on this issue, opening the door to the recovery of damages in cases arising from the transmission and contraction of infectious aboard international aircraft.[115]

The facts of *Etihad Airways* are cringeworthy, perhaps explaining the court's willingness to find a remedy in the same way the Supreme Court in *Husain* labored to explain the existence of a remedy in the aftermath of a terrible tragedy. In *Etihad Airways*, a passenger traveling from the Middle East to the United States had a tray table open in her lap because the knob that was meant to hold it in place had fallen to the floor.[116] On the descent, a flight attendant reminded the passenger to place her tray table in the upright and locked position for landing, but, of course, she could not comply.[117] To help explain the problem to the flight attendant, the passenger "reached into the seatback pocket to retrieve the fallen knob" and was "unexpectedly pricked by a hypodermic needle that lay hidden within."[118] "She gasped, and the needle drew blood from her finger."[119] Ultimately, she "claim[ed] damages from Etihad for both her physical injury and her 'mental distress, shock, mortification, sickness and illness, outrage and embarrassment from natural sequela of possible exposure to' various diseases."[120] "Her husband claim[ed] loss of consortium."[121]

In defense, the air carrier argued that a passenger seeking to recover damages for mental anguish would first have to prove that an accident caused bodily injury, which in turn caused the mental anguish.[122] Finding no support for this understanding in either the history and purpose of the Montreal Convention or the relevant decisions of courts of the United States or sister signatories, the court reasoned that air carriers are liable if passengers prove "fear of contagion or other mental anguish" and that this was so "regardless of whether the anguish was directly

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[115] 870 F.3d 406, 436 (6th Cir. 2017); *see* David M. Krueger, *Mental Distress for Airline Lawyers: The Sixth Circuit's Decision in* Doe v. Etihad, 31 AIR & SPACE LAW 4, 4 (2018).

[116] *Etihad Airways*, 870 F.3d at 409.

[117] *Id.*

[118] *Id.*

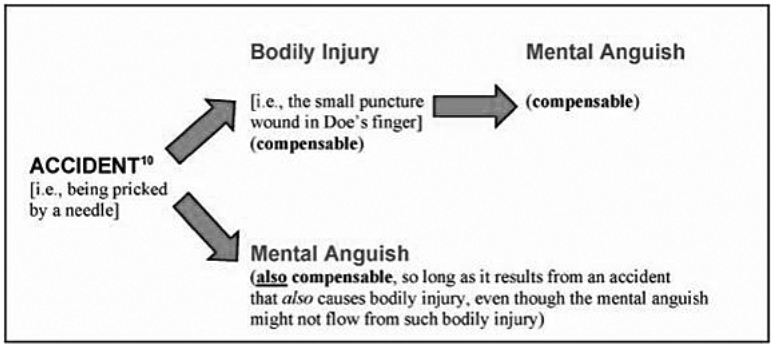
[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

caused by the physical hole in [the passenger's] finger or by the fact that [the passenger] was pricked by a needle."[123] The court illustrated its understanding of the word "accident" in the Montreal Convention in terms of parallel tracks of liability flowing from a single "accident," as follows:



[124]

Additionally, the court offered a hypothetical example in support of its conclusion:

> Consider a case in which an overhead bin unexpectedly opens in flight, causing a suitcase to fall out and strike a passenger in the eye. The passenger might sustain bodily injury—bruises, broken or fractured bones, a concussion, etc.—and the passenger might sustain mental anguish such as the fear of losing sight in the injured eye or a fear of being struck by flying objects. The "accident" would be the suitcase striking the passenger (The faulty overhead bin or latch, like the airline's failure to clean out the seatback pocket in Doe's case, might be underlying negligence that precipitated the accident.) The accident happened on board the aircraft. And the accident caused bodily injury. Thus, the carrier would be liable for the passenger's damage sustained as the result of being struck by the suitcase—including such mental anguish as fear of losing sight, even if the passenger ultimately did not suffer a loss of vision, and even if the fear of losing sight was not caused directly by a bodily injury.[125]

Whether this example supplied by the court and the broader holding of *Etihad Airways* will persuade courts outside of the Sixth Circuit to allow hard-to-verify claims of mental anguish is both unclear and concerning.

In the context of a public health crisis such as the COVID-19 pandemic, *Etihad Airways* has, to an extraordinary extent, low-

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[123] *Id.* at 430–34.
[124] *Id.* at 434.
[125] *Id.* at 433–34.

ered the burden of proof for passengers and widened the scope of potential liability for air carriers under the Montreal Convention.[126] For starters, imaginative plaintiffs' lawyers seemingly can pursue worked-up mental anguish claims "even if the passenger ultimately did not suffer a loss,"[127] begging the question of whether every airline passenger that ever flies is a potential claimant. After all, what passenger would *not* be concerned that an infection contracted aboard an aircraft is not something more serious and potentially fatal? In all, the rationale of *Etihad Airways* seems to breathe life into psychic injury claims by passengers who experience bodily injury by contracting an illness—even if they contract something less serious than COVID-19 type illnesses.[128] Apparently, all a passenger-plaintiff must do is come forward with evidence that they were worried and consequently limited their regular personal and professional activities out of a subjective (and not altogether unreasonable) fear.

While no court has (yet) confronted this issue of psychic damages relative to the transmission of infectious diseases aboard aircraft, real-world examples are not hard to imagine. For example, a passenger died due to COVID-19 on a domestic United Airlines flight in 2020.[129] Could an international passenger onboard successfully have sued for psychological or emotional damages under the precedent of *Etihad Airways* claiming that the airline was negligent in its pre-flight screening? The answer, of course, turns on judicial construction and interpretation of the international treaties applicable to the international carriage—an activity that itself depends on and will vary by jurisdiction. The likelihood that different appellate courts will arrive at different results risks contravening the goal of uniformity under both Conventions. What is more, in deciding cases averring psychic injury associated with an infectious disease on aircraft,

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[126] While questions under the Montreal Convention are unsettled, the issue of whether a passenger may recover for purely emotions injuries under the Warsaw Convention appears closed, including with respect to claims arising from fear of contagion. *See, e.g.*, Rothschild v. Tower Air, Inc., No. CIV. A. 94-2656, 1995 WL 71053, at *3 (E.D. Pa. Feb. 22, 1995) ("The law is clear that a plaintiff must show exposure to a disease in order to recover for fear of contracting the disease.") (case with similar facts to *Etihad Airways* where a passenger on an international flight was stabbed by a hypodermic needle in a seatback pouch).

[127] *Etihad Airways*, 870 F.3d at 434.

[128] *See id.* at 433–34.

[129] Azi Paybarah, *Passenger Who Had Medical Emergency on Flight Died of Covid-19, Coroner Says*, N.Y. TIMES (Dec. 22, 2020), https://www.nytimes.com/2020/12/22/us/united-airlines-covid-death-lax.html [https://perma.cc/95KM-N23E].

courts may be forced into a policy-making role even as they strive only to strictly interpret the law.

In fairness, reasonable arguments exist in both directions for allowing mental anguish claims arising from international flights to proceed. These sorts of debates and tradeoffs are not themselves unusual or unexpected. In addition, passengers like those in *Saks*, *Husain*, and *Etihad Airways* are sympathetic claimants. The carriers involved in those suits almost certainly should have and could have responded differently and better. However, as detailed below, assessing liability in the context of infectious diseases lacks a cohesive approach. The time may be at hand to reform the Conventions to spare courts and litigants of line drawing exercises that run afoul of the goal of unification rules for the international carriage by air.

IV. DISCUSSION

Having explained the interpretative framework established by *Saks* and *Husain* for generally assessing air carrier liability for an "accident" under the Conventions, this Part explores whether a claim arising from the alleged transmission or contraction of an infectious disease like COVID-19 would (or should) fall within the requirements of the Conventions as the sort of external, unexpected, or unusual happening or event that gives rise to strict liability of an air carrier engaged in international commercial air carriage. One troubling pattern becomes apparent in this analysis: courts inclined and disinclined to find an "accident" under either the Warsaw Convention or Montreal Convention seem on equal footing, and the seminal cases command no obviously correct result on air carrier liability in the international carriage. Avoiding a case-by-case determination of cases under the Conventions may be unavoidable, but the need for revision is also patent if uniform and predictable results are to happen.

A. Infection as an Expected, Unexpected, Usual, and Unusual Event

In the absence of controlling authority or specific legal guidance on the matter, the question of air carrier liability for the transmission of an infectious disease like COVID-19 turns on the judicially constructed definition of "accident" under *Saks*.[130] But how exactly *Saks* might apply to litigation based on the spread of

[130] *See generally* Air Fr. v. Saks, 470 U.S. 392 (1985).

COVID-19 or any other infectious disease whose transmission dynamics are still being studied is unclear. On the one hand, courts could read *Saks* narrowly to mean that the risk of contracting an infectious disease is not caused by "an unexpected or unusual event or happening that is external to the passenger."[131] Under this view, injuries associated with communicable diseases would represent a passenger's internal reaction to an aircraft's usual, normal, and expected operation. However, courts could just as easily read disease transmission as falling within Article 17 by focusing not on an "injury producing event" like contraction but on "multiple interrelated factual events that combine to cause any given injury."[132]

First, the analytical framework established in *Saks* for adjudicating an "accident" suggests that, presuming normal operation of an aircraft, claims closely tied to a passenger's physiology or health almost always will fall (and should fall) outside of the ambit of Article 17 of the Conventions. The particular facts of *Saks* demonstrate why. There, the passenger-plaintiff flew from Paris to Los Angeles without incident.[133] As the airplane descended, however, Valerie Saks felt severe pressure and pain in her left ear—pain that continued after the airplane landed.[134] Saks did not inform any crewmember or carrier employer of her ailment.[135] Five days after the flight, a doctor confirmed that Saks had become permanently deaf in that ear.[136] She sued (under the Warsaw Convention), "alleging that her hearing loss was caused by negligent maintenance and operation of the jetliner's pressurization system."[137] However, according to the Supreme Court, she was entitled to no relief because her condition represented her internal reaction to the normal and expected operation of the aircraft (i.e., normal cabin pressure change).[138] This result is stunning for its denial of a remedy to a passenger whose injury indisputably related to her experiences on board an aircraft in international carriage, and by extension, lends support to the general idea that allegations of either contraction or transmission of an illness, no matter the severity, fail to meet the

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131 *Id.* at 392.

132 Olympic Airways v. Husain, 540 U.S. 644, 653 (2004).

133 *Saks*, 470 U.S. at 394.

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.* at 406.

definition of an "accident" under the Conventions because they involve a passenger's internal reaction to the usual, normal, or expected operation of an aircraft.

On the transmission side of the ledger, for example, scientific literature details how using HEPA filters by air carriers offers exceptional, hospital-grade protection against the transmission of viruses.[139] So much so that, according to major airlines, the transmission of viral particles aboard modern aircraft is unexpected and unusual (assuming their normal operation).[140] In fact, since the late 1970s, only three studies of in-flight transmission of the flu have been reported, and there have been no reported influenza outbreaks aboard commercial aircraft since 1999.[141] Given existing and historic controls on the transmission of viruses aboard aircraft, *Saks* encourages the conclusion that a passenger's contraction of an illness would be unexpected and unusual in the routine operation of modern aircraft, and consequently, fall outside the definition of "accident" under the Conventions.

Alternatively, even with fully functioning HEPA filters, the cabins of modern jetliners are regarded by many as "veritable incubator[s] of potential disease."[142] Indeed, anecdotal evidence has long correlated catching cold- or flu-like symptoms with the cabin air quality and ventilation in commercial aircraft, and data-driven research has suggested that the risk of contracting an upper respiratory tract infection while aboard an aircraft is as high as 20% or 113 times greater than the normal

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[139] *E.g.*, Michael Laris, *Scientists Know Ways to Help Stop Viruses from Spreading on Airplanes. They're Too Late for this Pandemic*, WASH. POST (Apr. 29, 2020), https://www.washingtonpost.com/local/trafficandcommuting/scientists-think-they-know-ways-to-combat-viruses-on-airplanes-theyre-too-late-for-this-pandemic/2020/04/20/83279318-76ab-11ea-87da-77a8136c1a6d_story.html [https://perma.cc/AE2N-MKS5].

[140] *See id.*

[141] *See, e.g.*, K. Leder & D. Newman, *Respiratory Infections During Air Travel*, 35 INTERNAL MED. J. 50, 52, 54 (2005). The first occurred in 1979, when 72% of all passengers aboard an airliner contracted the influenza A/Texas strain within 72 hours—a transmission rate attributed to a three-hour period during which passengers were kept aboard an aircraft with an inoperative ventilation system while repair work was being done. The second study involved the transmission of influenza A/Tawan/1/86 (H1N1) infections at a naval station and aboard two aircraft transporting a squadron from Puerto Rico to a Florida naval station. The third outbreak happened in 1999 on a 75-seat aircraft carrying mine workers. *See id.*; Scott McCartney, *Where Germs Lurk on Planes*, WALL ST. J. (Dec. 20, 2011), https://www.wsj.com/articles/SB10001424052970204058404577108420985863872 [https://perma.cc/WJJ9-NZ8N].

[142] Clegg, *supra* note 51, at 450 (alteration in original).

daily ground-level transmission rate.[143] Notwithstanding this heightened risk—a risk factor that seems to be well known by the traveling public—consumers do not avoid flying.[144] Instead, they utilize commercial air transportation in record numbers.[145] Moreover, not all aircraft have HEPA filters, and the fact that ventilation systems do not function on the ground without engine or auxiliary power or function more slowly than when an aircraft is airborne is no secret.[146] Arguably, then, the potential transmission and contraction of an illness in this context is somewhat expected and usual compared to other transportation modalities or ground-based settings—a fact mitigating against a finding of an "accident" or air carrier liability under the Conventions relative to disease transmission aboard aircraft.

Finally, the COVID-19 pandemic has generated acute public awareness of the potential (however probable or improbable) transmission or contraction of viruses aboard aircraft.[147] Therefore, courts may regard disease transmission aboard aircraft not as an unexpected or unusual event or happening but rather as part of a new normal associated with the operation of aircraft in an ever-increasingly interconnected world. In either case—whether a disease is regarded as an expected or usual risk associated with international flight or not—finding that passenger lawsuits arising from the contraction of communicable disease constitute an "accident" that gives rise to air carrier liability is not compelled by the text or purposes of the Conventions as construed by the Supreme Court in *Saks*.

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[143] Martin B. Hocking & Harold D. Foster, *Common Cold Transmission in Commercial Aircraft: Industry and Passenger Implications*, 3 J. ENV'T HEALTH RSCH. 7, 8–9 (2004).

[144] *See, e.g.*, *TSA Checkpoint Travel Numbers (Current Year Versus Prior Year(s)/Same Weekday)*, TRANSP. SEC. ADMIN., https://www.tsa.gov/coronavirus/passenger-throughput [https://perma.cc/447L-D272].

[145] *See, e.g.*, *id.*

[146] *See, e.g.*, Scott McCartney, *The Key to Safe Airflow for Planes Before Takeoff*, WALL ST. J. (Apr. 7, 2021, 8:56 AM), https://www.wsj.com/articles/the-key-to-safe-airflow-for-planes-before-takeoff-11617800215 [https://perma.cc/HRL5-QHQ3].

[147] *See, e.g.*, Sophie Bushwick, Tanya Lewis & Amanda Montañez, *Evaluating COVID Risk on Planes, Trains and Automobiles*, SCI. AM. (Nov. 19, 2020), https://www.scientificamerican.com/article/evaluating-covid-risk-on-planes-trains-and-automobiles2/ [https://perma.cc/K5VD-X6DC].

B. Illness as a "Product of a Chain of Causes"

Concluding that the transmission of an infectious disease does not by itself constitute an "accident" does not end the liability analysis under the Conventions.[148] Indeed, as *Husain* highlighted, the relevant question for assessing liability under the Conventions may not be whether or not the possibility of catching COVID-19 or some other infectious disease is an expected or usual event or happening, but rather whether or not some unexpected and unusual action or inaction constitutes a link in the chain of causes to constitute an "accident."[149]

Framing the issue of "accident" in this way, the potential liability for air carriers relative to the transmission of infectious disease is vast. Although a plaintiff-passenger avoids becoming enmeshed in establishing the precise factual producing event that caused the injury, they do so at the cost of exposing an air carrier to liability for *any* one of multiple interrelated factual events or happenings that may be a link in the chain of causes that is unusual or unexpected.[150] In other words, passengers need only come forward with "any injury" and proof of "a link in the chain" that constitutes an unusual or unexpected event external to the passenger.[151] To be sure, this approach originated in *Saks*, which explained:

> 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. Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents.[152]

From this language, within the context of the specific factual scenario of an asthmatic who died following a flight attendant's apparent refusal to reseat him away from smoking passengers, the *Husain* court reasoned:

> [F]ocus on the ambient cigarette smoke as the injury producing event is misplaced. We do not doubt that the presence of ambient cigarette smoke in the aircraft's cabin during an international flight might have been "normal" at the time of the flight in question. But petitioner's "injury producing event" inquiry—

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[148] *See generally* Olympic Airways v. Husain, 540 U.S. 644, 650–52 (2004).
[149] *Id.* at 651–52.
[150] *See id.* at 653.
[151] *Id.*
[152] Air Fr. v. Saks, 470 U.S. 392, 406 (1985) (emphasis added).

> which looks to "the precise factual 'event' that caused the injury"—neglects the reality that there are *often multiple interrelated factual events that combine to cause any given injury*. In *Saks*, the Court recognized that any one of these factual events or happenings may be a link in the chain of causes and—so long as it is unusual or unexpected—could constitute an "accident" under Article 17. Indeed, the very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event as *the* "injury producing event."[153]

Taken together, *Saks* and *Husain* open the possibility that air carriers could be liable for a broad range of potential claims centered not only on their affirmative actions but also on their failures to take certain action(s)—"inaction" in the parlance of *Husain*.[154]

Applying *Saks* and *Husain* to the specific scenario of an infectious disease aboard an aircraft, liability may lie in the circumstance that an air carrier fails to implement (or defectively implements) precautionary measures such as pre-flight testing or other procedures during the embarking and disembarkation phases of flight. Strict liability may also lie where an air carrier fails to decline boarding an ill passenger, refuses to reseat an apparently healthy (or asymptomatic) passenger away from another passenger exhibiting symptoms, or neglects to properly administer tests designed to distinguish sick passengers from healthy ones. In addition, the *Saks-Husain* framework establishes an important predicate for imposing legal fault if a passenger contracts a communicable disease due to an air carrier's failure to comply with industry regulations or standards or failure to conform with industry practices and customs.[155] In addition, courts may characterize the failure of an air carrier (or its agents or subcontractors) to sanitize its aircraft to be an unusual and unexpected act or omission that forms a link in the causative chain.[156] Poor air cabin quality caused by an improperly functioning aircraft air filtration system also may give rise to liability notwithstanding the observations in Part III.A, that the spread of

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[153] *Husain*, 540 U.S. at 653 (emphasis added) (citation omitted).

[154] *See id.* at 654–56.

[155] *E.g.*, Aziz v. Air India Ltd., 658 F. Supp. 2d 1144, 1155 (C.D. Cal. 2009); Watts v. Am. Airlines, Inc., No. 1:07-cv-0434, 2007 WL 3019344, at *1, *4 (S.D. Ind. Oct. 10, 2007).

[156] *See* Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V., 13 F. Supp. 2d 508, 510, 512 (S.D.N.Y. 1988).

infectious disease aboard aircraft is sometimes both an unexpected and unusual event.

In all, according to the language of the Conventions and the relevant decisional law interpreting Article 17, what drives the definition of "accident" is "the cause of the infection, not the infection itself."[157] While the law in this regard gives passengers and creative aviation practitioners great latitude in devising claims, along with a low pleading threshold (e.g., "any injury . . . some link in the chain"), it also begs the question of where courts should draw the proverbial line and limit airline liability along a nearly endless continuum of possible times, places, and events that are unexpected or unusual.[158]

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[157] Eman Naboush & Raed Alnimer, *Air Carrier's Liability for the Safety of Passengers During COVID-19 Pandemic*, 89 J. AIR TRANSP. MGMT. 1, 2 (2020). Notably, courts have held that injuries that aggravate pre-existing conditions are not considered "accidents" absent proof of abnormal external factors. *E.g.*, Abramson v. Japan Airlines Co., 739 F.2d 130, 135 (3d Cir. 1984) (hernia and thrombophlebitis condition aggravated by sitting in an airline seat during normal flight not an accident); MacDonald v. Air Can., 439 F.2d 1402, 1404–05 (5th Cir. 1971).

[158] Article 17 differentiates between injuries that "took place on board the aircraft" as opposed to "in the course of any of the operations of embarking or disembarking." Warsaw Convention, *supra* note 13, art. 17. While "on board the aircraft" is self-explanatory, neither of the Conventions defines the phrase "embarking or disembarking," leaving courts and litigants to fill the analytical void just as they must with respect to the word "accident." In construing the phrase "embarking or disembarking," some courts have held that the text of the Conventions imagines that air carrier liability extends to areas outside the aircraft. *See* Naboush & Alnimer, *supra* note 157, at 3. How far beyond "on board the aircraft" an unusual or unexpected event or happening that is external to the passenger must occur to constitute an "accident" is unclear, however. But, at a minimum, the language of Article 17 theoretically supports the view that embarkation may start as far away as the ticket counter in an airport.

One of the leading cases to interpret Article 17 in terms of embarkation is *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 221 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975), which centered on personal injury claims by international passengers who were injured during a terrorist attack in the lounge of an airport in Greece. The air carrier argued that when the attack occurred the plaintiff-passengers were not in the course of any of the operations of embarking as that phrase is understood under the Warsaw Convention. *Id.* at 220. The court disagreed, concluding that the terrorist activities in the circumstances of the case indisputably constituted an "accident" as a matter of law. *Id.* In addition, the court found that the condition of embarkation was satisfied. *Id.* at 223.

More specifically, the *Day* court employed a flexible, tripartite test in holding that passengers were engaged in the operations of embarking, rejecting a narrow, location-based test and instead focusing on three factors: (1) activity (what the plaintiffs were doing); (2) control (at whose direction); and (3) location. *Id.* at 222; Naboush & Alnimer, *supra* note 157, at 3. In this context, the court set out 11 distinct steps that constituted embarkation, including presenting their tickets at the checking desk; obtaining boarding passes and baggage checks from the

Indeed, as Parts III.C and III.D explain, in the COVID-19 era, the *Saks-Husain* framework risks imposing duties on air carriers that they have never been expected to manage until now and may be unqualified to meet (e.g., monitoring or policing passenger health). Stated otherwise, and as explored in Part IV.C, holding air carriers accountable for the transmission of infectious disease may be consistent with the philosophy of the Conventions to obtain equitable compensation and restitution for passengers for injuries sustained during international air travel, but it also might stretch the Conventions beyond their purpose of harmonizing private international air law and into the realm of public health and safety.

C. Is Disease an Inherent Characteristic of Air Travel?

Apart from the fundamental and persistent problem of how to define "accident" under the Conventions is the vexing question of whether the transmission of infection from an asymptomatic passenger (or crewmember) to a fellow passenger constitutes an "accident" for which air carriers are liable. The issue is not an easy one because *Saks* did not make "clear whether an event's relationship to the operation of an aircraft is relevant to whether the event is an 'accident.'"[159] As such, courts

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airline; obtaining a seat number from the airline; passing through passport and currency control imposed by governmental authorities, as well as submitting to a search for explosives and weapons; submitting carry-on baggage to security officials; and walking through the designated gate to the aircraft. *Day*, 393 F. Supp. at 221.

Problematically, and as the *Day* court itself recognized, the tripartite test invites inconsistent line drawing. *Id.* at 222. Courts that view embarkation as beginning as early at the airport risk imposing an outsized burden on carriers to avoid liability in locations operated by third parties and over which the carrier has no control—essentially holding an air carrier responsible is a passenger contracts a disease at innumerable points between the check-in counter and the aircraft. Naboush & Alnimer, *supra* note 157, at 3. Consequently, several authors have suggested that the control and location test be applied in tandem:

> Applying these tests together will eliminate air carrier's liability if the accident takes place in locations which are operated by a third party and the carrier have no control over. For example, inside the aircraft, boarding gate, the check in point one may expect the carrier to have the ability to control and disinfect. On the other hand, escalators, and the area between the checking in zone and the boarding gate are used by other carriers and other users, therefore, the carrier will not have control over them.

Id.

[159] Gezzi v. Brit. Airways PLC, 991 F.2d 603, 605 n.4 (9th Cir. 1993) (per curiam).

have struggled to apply the *Saks* definition of "accident" where the alleged injuries are caused by torts committed by fellow passengers—the likeliest path for the transmission of infectious disease aboard aircraft.

In one camp, courts have construed "accident" under Article 17 narrowly to mean an event that must arise from "such risks that are characteristic of air travel."[160] For example, courts have ruled that terrorist attacks[161] and hijackings[162] are "accidents," whereas physical fighting between passengers is not.[163] Moreover, in the lower court decisions cited with approval in *Saks*, all of the passenger injuries arose out of risks inherent to air travel or the operation of the aircraft. In fact, only after extensive discovery established that the aircraft's pressurization system had operated in the usual manner did the district court in *Saks* hold that no "accident" had occurred.[164] In this context, courts may be unlikely to characterize the transmission of an infectious disease aboard an aircraft (or in the course of embarking or disembarking an aircraft) as an "accident" absent some abnormal operation of the aircraft itself (e.g., failure to operate an air filtration system or carrying out procedures or operations in an unreasonable manner).

Other courts have read "accident" broadly.[165] For example, in *Barratt v. Trinidad & Tobago Airways Corp.*, a New York federal district court reasoned that:

> In *Air France v. Saks*, . . . the Supreme Court held that an "accident," for purposes of Article 17, is an injury caused by "an unexpected or unusual event or happening that is external to the

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[160] Stone v. Cont'l Airlines, Inc., 905 F. Supp. 823, 824, 827 (D. Haw. 1995) (airline passenger who was punched without provocation by another passenger had averred no accident because it was not "derived from air travel"); Price v. Brit. Airways, No. 91 Civ. 4947, 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992) (an injury caused by a fistfight between two passengers was not an "accident" because "a fracas is not a characteristic risk of air travel nor may carriers easily guard against such a risk through the employment of protective security measures"); *see also* Curley v. Am. Airlines, Inc., 846 F. Supp. 280, 283 (S.D.N.Y. 1994).

[161] *E.g.*, Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152, 154 (3d Cir. 1977) (en banc).

[162] Krystal v. Brit. Overseas Airways Corp., 403 F. Supp. 1322, 1323–24 (C.D. Cal. 1975).

[163] *E.g.*, *Stone*, 905 F. Supp. at 824, 827; *see also Price*, 1992 WL 170679, at *3 ("a fracas is not a characteristic risk of air travel nor may carriers easily guard against such a risk through . . . protective security measures.").

[164] *See* Saks v. Air Fr., 724 F.2d 1383, 1384 (9th Cir. 1984).

[165] Barratt v. Trin. & Tabago (BWIA Int'l) Airways Corp., No. CV 88-3945, 1990 WL 127590, at *2 (E.D.N.Y. Aug. 28, 1990).

> passenger." *This definition is in no way limited to those injuries resulting from dangers exclusive to aviation.* [Article 17] itself limits liability for accidents, not by reference to risks inherent in aviation, but by whether they occur "on board the aircraft or in the course of any of the operations of embarking or disembarking."[166]

Under this sweeping reading of *Saks* and Article 17, liability could attach to an air carrier for injuries caused by co-passenger torts, regardless of whether they arose from a characteristic risk of air travel or not.[167] To the extent that disease transmission *is* a characteristic risk of air travel, then claims by infected passengers would fit within this line of precedent.

Wallace v. Korean Air may be the most influential decision in this regard. There, the Second Circuit Court of Appeals decided that an air carrier was liable after one of its passengers sexually assaulted another passenger in an adjacent seat.[168] Noting the language in *Saks* that the "definition [of accident] should be flexibly applied" after assessment of all the circumstances surrounding a passenger's injuries,[169] the *Wallace* court found that "the characteristics of air travel increased [the passenger's] vulnerability to [ ] assault."[170] "When Ms. Wallace took her seat in economy class on the KAL flight, she was cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator."[171] Therefore, the assault she experienced was, "in the language of *Saks*, 'an unexpected or unusual event or happening that [was] external to the passenger.'"[172]

Wallace arguably offers an analogy for holding air carriers liable for passenger-to-passenger (and perhaps crew-to-passenger) disease transmission. After all, social distancing is not an option in an airplane. Some scientific research suggests that international flights pose a greater risk of spreading infectious disease than flights of shorter distance and duration (e.g., less than 1.25 hours).[173] As such, courts may be persuaded that *those* "characteristics of [international] air travel" increase a passenger's vul-

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166 *Id.* at *2.

167 Wallace v. Korean Air, 214 F.3d 293, 299 (2d Cir. 2000).

168 *Id.* at 295, 300.

169 *Id.* at 298.

170 *Id.* at 299.

171 *Id.*

172 *Id.* at 300 (alteration in original).

173 *See* Marisa Moore, Karen S. Fleming & Lawrence Sands, *A Passenger with Pulmonary/Laryngeal Tuberculosis: No Evidence of Transmission on Two Short Flights*, 67 AVIATION, SPACE, & ENV'T MED. 1097, 1100 (1996).

nerability to infection just as the cramped nature of the economy class on an international flight heightened the risk of a passenger to an assault by sexual predators.[174]

That said, the reasoning of *Wallace*, and the analogy it potentially offers between its facts and the hypothetical scenarios of virus transmission aboard aircraft at the center of this Article, is not a perfect fit. First, as the concurring opinion in *Wallace* noted, "[i]mposing an 'inherent in air travel' requirement [into the *Saks* formulation] does not comport with the plain meaning of" *Saks* as a co-passenger's tort is an "accident" to the extent it is "an unexpected or unusual event or happening that is external to the passenger."[175] Additionally, as a practical matter, unlike the passenger in *Wallace*, passengers can anticipate and reduce (if not eliminate) the risk of infectious disease either by not flying at all or complying with air carrier rules such as wearing a face mask and following boarding procedures. Moreover, the *Wallace* majority found "equally important" in its calculation that "not a single flight attendant noticed a problem" during the extended time over which the sexual assault took place.[176] Air carriers are comparatively more sensitized to the health risk aboard flights today, such that an airline's inattention to aircraft hygiene would be unusual or unexpected.[177]

D. Damages and Defenses

Even if the transmission or contraction of an infectious disease like COVID-19 is somehow linked to a causative event and otherwise satisfies all the foregoing predicates to liability (i.e., an "accident" taking place "on board the aircraft or in the course of any of the operations of embarking or disembarking"), damages may be limited under the terms of both Conventions.

First, in the case of the Warsaw Convention, an air carrier need only demonstrate that it took "all necessary measures to avoid the damage or that it was impossible" to do so.[178] Any or all of the initial responses taken by carriers to stem the COVID-19 pandemic—from requiring passengers to wear masks, to leav-

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[174] *See Wallace*, 214 F.3d at 299.

[175] *Id.* at 300 (Pooler, J., concurring).

[176] *Id.* (majority opinion).

[177] This presents its own problems. *See, e.g.*, Hugo Martín, *Ruckus in the Skies: What Happens when Airline Passengers Refuse to Wear Masks*, L.A. Times (May 5, 2021, 3:10 PM), https://www.latimes.com/business/story/2021-05-05/airline-passengers-mask-rules-faa-fine-zero-tolerance [https://perma.cc/2V6U-GYTT].

[178] Warsaw Convention, *supra* note 13, art. 20(1).

ing middle seats open during the reservation process, to discontinuing in-flight service[179]—likely would satisfy this "necessary measures" test.

Moreover, breaking the liability cap under the Warsaw Convention is especially difficult for claimants in general, and it would be that and more in the context of infectious disease transmission. After all, passenger-plaintiffs would need to establish an air carrier's "wilful misconduct" to break the liability cap.[180] Such self-defeating behavior is difficult to imagine, given the economic devastation that COVID-19 virus policies inflicted on global airline travel. Of course, economic considerations may always exist to deter carriers from taking costly steps to fortify onboard health, and an air carrier's decision *not* to invest or deploy antiviral technologies or procedures may well serve as the foundation for a *Husain*-like claim. But, in the abstract, the concept that an air carrier would intentionally or willfully harm passengers who are already tentative about returning to international travel that the COVID-19 virus decimated makes little sense.

Finally, under the two-tier liability regime of the Montreal Convention, claims for damages will confront air carriers' powerful evidentiary headwinds and weighty defenses. First, there is a strict liability tier under Article 21(1) up to 100,000 Special Drawing Rights, which provides: "For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability."[181] Next, Article 21(2) establishes:

> The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.[182]

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[179] *See, e.g.*, Laurie A. Garrow, *The First 100 Days: How Airlines Responded to the COVID-19 Crisis*, AVIONICS INT'L (Aug./Sept. 2020), http://interactive.aviationtoday.com/avionicsmagazine/august-september-2020/the-first-100-days-how-airlines-responded-to-the-covid-19-crisis/ [https://perma.cc/3ZYG-HV2Y].

[180] Warsaw Convention, *supra* note 13, art. 25(1).

[181] Montreal Convention, *supra* note 14, art. 21(1).

[182] *Id.* art. 21(2).

While these provisions ostensibly advance the policy goal of speeding settlement and facilitating recovery, both primarily serve to qualify air carrier liability, and neither obviates the requirement that a passenger establish that an "accident" occurred. Moreover, Article 20 of the Montreal Convention provides air carriers with a route toward exoneration even for tier-one strict liability:

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation . . . the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.[183]

As such, air carriers can reduce or eliminate liability by establishing contributory negligence, for example, by establishing that a passenger-plaintiff concealed an illness in order to fly or refused or failed to follow the requirements of the carrier or international health authorities like WHO (e.g., wearing a face mask during the flight). Indeed, passengers are best positioned and ultimately responsible for their own welfare. They can decide whether to conceal or deny illness or comply with air-carrier face mask requirements.

V. CONCLUSION

Among the core aims of the Montreal Convention is the "need to modernize and consolidate" earlier international liability schemes and to promote the "orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives"[184] of the Chicago Convention of 1944, itself a landmark post-war agreement drafted a dark time in human history that "laid the foundation for the standards and procedures for peaceful global air navigation."[185] Given the existential crises that the spread of the COVID-19 virus presented to the global airline industry, the "smooth flow of passengers" is at risk. Consequently, the time may once again be at hand to revise the main instruments of private international air law to clarify pas-

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[183] *Id.* art. 20.

[184] *Id.* pmbl.

[185] *The History of ICAO and the Chicago Convention*, INT'L CIV. AVIATION ORG., https://www.icao.int/about-icao/history/pages/default.aspx [https://perma.cc/TSW7-E6XV].

sengers' rights and the obligations of air carriers in the new normal that emerges after global travel restrictions are lifted. As one federal district court judge wrote more than four decades ago:

> Of course, when the Convention was drafted, we lived in a simpler day. Many airlines required nothing more than to weigh the passenger and his luggage, take his ticket and allow him to place his foot on the boarding ladder. The plain meaning of the treaty must be adaptable to the practical exigencies of air travel in these parlous times.[186]

Presently, however, the Conventions, as construed by the *Saks-Husain* line of cases, seem maladapted to the risk of infectious disease aboard aircraft in the international carriage.

Unhelpfully, under a present reading of Article 17 and the precedent established by *Saks*, the judicially crafted definition of "accident" is dizzying. A disease can constitute an expected, unexpected, usual, unusual, external, and internal event or happening on an airplane, in an airport, and at incalculable points in between all at the same time.[187] Despite the multivariate causes of disease transmission, air carriers can be strictly liable for "[a]ny injury [that] is the product of a chain of causes" and passengers need only "be able to prove that some link in the chain was an unusual or unexpected event external to the passenger."[188] Article 17 can be read to include and exclude co-passenger torts from the definition of "accident."[189] A circuit split now exists given the Sixth Circuit's decision to recognize mental anguish claims asserting merely a "fear of contagion."[190] Meanwhile, *Husain* places U.S. law at odds with the interpretation of sister signatories essentially by making non-events actionable events.[191]

In all, courts are persistently confronted with "close question[s]"[192] and line drawing exercises about which reasonable people may differ widely.[193] Such uncertainty and variability in

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[186] Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 221 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975).

[187] *See generally* Air Fr. v. Saks, 470 U.S. 392, 395 (1985).

[188] *See id.* at 406.

[189] *See id.* at 405.

[190] *See* Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 434 (6th Cir. 2017).

[191] *See* Olympic Airways v. Husain, 540 U.S. 644, 667 (2004) (Scalia, J., dissenting).

[192] *See* Wallace v. Korean Air, 214 F.3d 293, 299 (2d Cir. 2000).

[193] *Compare, e.g.*, *Husain*, 540 U.S. at 653–54, *with id.* at 663 (Scalia, J., dissenting).

result is at odds with the goal of uniformity undergirding the Conventions. As such, while liability can and should lie against air carriers pursuant to the Warsaw Convention and Montreal Convention for the transmission of infectious disease where the operation of an airplane is not "normal" (e.g., the failure of an air filtration system), courts, as a normative matter, should construe Article 17 to exonerate air carriers where passengers are contributorily negligent. *A fortiori*, courts should resist the invitation to engraft new requirements of air carriers within the phrase "operations of embarking and disembarking" that are attenuated from the inherent risks characteristic of air travel. Indeed, requiring air carriers to police the health of passengers, undertake costly cabin reconfigurations, or deploy antiviral technologies as part of their "normal" operations as a matter of law is not supported by the Conventions. In other words, onboard health may be at the same level as flight safety for liability purposes under the international rules for the international carriage by air. However, in the absence of textual clarity to the contrary, courts should be reticent to hold airlines accountable for the spread of infectious diseases in the international carriage.