Navigating Through Cloudy Skies: The Montreal Convention & Article 17 “Accidents” Post-Moore

Elan Wilson

Southern Methodist University, Dedman School of Law

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NAVIGATING THROUGH CLOUDY SKIES: 
THE MONTREAL CONVENTION & ARTICLE 17 
“ACCIDENTS” POST-MOORE

ELAN WILSON*

ABSTRACT

The Montreal Convention is a multilateral treaty that comprehensively regulates international air carriers. Specifically, Article 17 of the treaty allows passengers to recover against air carriers for injuries or deaths on international flights, so long as certain requirements are met. In Air France v. Saks, the Supreme Court held that “accident”—a controlling term in Article 17—describes an event that is external to the passenger and “unexpected or unusual.” Last year, in Moore v. British Airways PLC, the First Circuit purported to identify a split over what this language means. According to Moore, there are courts who (correctly) gauge whether an event is unexpected or unusual from the perspective of an airline passenger with ordinary experience in commercial air travel (an objective standard that I will call the Reasonable Passenger Approach). On the other hand, there are courts who (incorrectly) determine whether an event is unexpected or unusual from the perspective of the airline industry, using industry norms and customs as guides (a standard I will call the Industry Approach).

In this Comment, I will explain why the standard endorsed by the First Circuit in Moore muddies the waters and how a more holistic, totality-of-the-circumstances approach (the Holistic Approach) offers a better rubric for Article 17 “accident” analyses. Given the recency of the Moore case, my goal in this Comment is to provide timely insight on its blind spots while offering an approach that might rescue Moore from a legacy of confusion.

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* J.D. Candidate, SMU Dedman School of Law, May 2024. B.A., Political Science, Baylor University, 2021. I’d like to thank my cat Earl for serving as an excellent sounding board throughout the writing process.
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## I. INTRODUCTION

Many of us have likely had the generic flight experience. We walk up to an electronic kiosk to print out a ticket. With a quick flash of our ID, we check in our bags and watch them slide away from us on the conveyor belt. After inching our way through a
that is far too long, we remove our shoes, empty our pockets, and fish any electronics out of our bags. We push our bins through the scanner and walk through the metal detector, hoping that a pat down does not meet us at the other side. After gathering our belongings, we find our terminals and plop down in a seat, counting down the minutes until boarding time. Once on the plane, we scope out an inviting window seat, pop in our earbuds, and snooze until we arrive at our destination a couple of hours later.

Though this experience is common, it is not universal. Many airline passengers are not graced with such a smooth, uneventful experience. Some of them are unexpectedly struck by items tumbling out of overhead bins, jolted out of their seats by extreme turbulence, injured from the mishaps of airline personnel, put in critical condition from in-flight medical emergencies, or harmed in passenger-on-passenger altercations. When these situations occur on international flights, the Montreal Convention offers legal recourse for passengers against airline carriers. But like most legal remedies, this comes with a catch.

Though the Montreal Convention allows passengers on international flights to sue air carriers for death and bodily injury, the Convention's coverage is limited. One of the most important limits is found in Article 17(1), which provides both a causal and a temporal limitation for passenger claims: “The 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.” Article 17(1) contains a causal limitation because the passenger’s death or injury must be caused by an “accident” and the provision has a temporal limitation since that “accident” must have occurred at one of three times (while the passenger was onboard, embark-

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2. See Moore v. Brit. Airways PLC, 32 F.4th 110, 114 (1st Cir. 2022) (describing the Montreal Convention as “a multilateral treaty governing the liability of air carriers for certain injuries and damages that occur during international air carriage,” to which the US is a signatory).

The causal limitation in Article 17(1) is particularly thorny. Though the term “accident” is used frequently in common parlance, it carries a unique meaning for the purposes of the Montreal Convention; the Supreme Court explained, with deceptive simplicity, that an “accident” denotes “an unexpected or unusual event or happening that is external to the passenger.”

Though the Supreme Court has supplied guidance that the Montreal Convention could not (since the treaty did not actually define “accident”), it has nevertheless opened up a new can of worms: what exactly does it mean for an event to be “unexpected or unusual”? As of this year, the First Circuit sketched out a purported “split” regarding this question. On one side lie courts that believe that the “unexpected or unusual” language from Saks “should be judged from the perspective of a reasonable passenger with ordinary experience in commercial air travel” (the Reasonable Passenger Approach). On the other side lie courts that “giv[e] primacy to the perspective of either the air carrier or the airline industry as a whole” when analyzing the Saks language (the Industry Approach).

As it stands, courts tasked with applying the language from Saks must fly through a dense patch of clouds. This Comment will attempt to guide courts into clearer skies by arguing that the line drawn by Moore is artificial and confusing; it should be reframed through a holistic, totality-of-the-circumstances approach (the Holistic Approach) that is loyal to the instructions from Saks and the design of the Montreal Convention. As a brief roadmap, Part I of this Comment will provide stage setting for the Montreal Convention and its history. Part II will then offer a general outline of the Montreal Convention’s language and history leading up to the Saks decision.

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4 See id. Though this is apparent, there is also a geographic limitation that applies for the treaty writ large: it only provides coverage for international flights "where the places of departure and destination are within the territories of one of the 135 signatory countries." See Erin Applebaum, How a 2022 Case Modernized the Protection of Airline Passenger Rights, Reuters (Feb. 8, 2023, 10:04 AM), https://www.reuters.com/legal/legalindustry/how-2022-case-modernized-protection-airline-passenger-rights-2023-02-08/ [https://perma.cc/3GEV-82BG].


7 See, e.g., Moore, 32 F.4th at 117.

8 See, e.g., id. at 119 & n.7 (citing Blansett v. Cont’l Airlines, Inc., 379 F.3d 177, 182 (5th Cir. 2004)).
Convention by tracing its historical development, analyzing its purposes, and taking a preliminary look at Article 17(1). Part II will provide a detailed analysis of the term “accident” along with the “accident” discussed by the Moore case. Although the Montreal Convention is a multi-lateral treaty and courts in other countries have analyzed it, I will primarily focus on American caselaw when analyzing the Moore split. Part III will attempt to capture why the Holistic Approach is a helpful toolkit for determining when an event is “unexpected or unusual.”

II. “PREPARING FOR TAKEOFF” – A GLANCE AT THE MONTREAL CONVENTION’S HISTORY, PURPOSES, AND TEXT

A. History of the Montreal Convention

The Montreal Convention was formally signed in Montreal on May 28, 1999, and went into effect in the United States on November 4, 2003, as the Convention for the Unification of Certain Rules for International Carriage by Air. The Montreal Convention sat atop an accretion of prior treaties and agreements. To obtain a sharper understanding of the Convention and its mechanics, it is worthwhile to discuss its predecessors. The most logical starting point is the Warsaw Convention of 1929, since the preamble of the Montreal Convention explicitly states the Convention was designed to “modernize and consolidate” it. From there, I will discuss the significant agreements and protocols that emerged in the interlude between the Warsaw Convention and the Montreal Convention.

Created in 1929, the Warsaw Convention was designed to provide a regulatory framework for a fledgling airline industry. Paul S. Dempsey and Michael Milde capture the raw and untested state of the airline industry at the time:

At the time [1929], commercial aviation was in its infancy and international aviation was no more than embryonic. Aviation was a relatively primitive endeavor, with aircraft made of wood, fiber,
and some metal, powered by piston-driven gasoline-fired engines, flown with stick and rudder by daring pilots who took off and landed from dirt strips, navigating with visual landmarks and a compass. With the limited technology available, the safety margin for international air travel was thin. Many pilots and passengers died in the trial-and-error process of aviation development. Carriers faced a major problem in securing adequate capital in the face of what then appeared to be an enormous risk.\textsuperscript{12}

The U.S. became a party to the Warsaw Convention in 1934.\textsuperscript{13} The Warsaw Convention broke fresh ground by creating a private law regime that applied directly to “human and corporate persons rather than nations.”\textsuperscript{14} The Convention’s regulations were wide-reaching, encompassing death or bodily injury to passengers (Article 17), damage to luggage (Article 18), the detailing of passenger tickets (Article 3), transportation delays (Article 19), and other important aspects of international air travel.\textsuperscript{15} Though the following provision would precipitate controversy in the coming years, Article 22 of the Warsaw Convention set a liability ceiling of 125,000 gold francs ($8,300 USD), which would apply unless a ticket was not delivered to a passenger or the air carrier engaged in willful misconduct.\textsuperscript{16} To this day, the Warsaw Convention stands as one of the most widely ratified multilateral treaties of all time with 152 signatories in total.\textsuperscript{17}

The period between the Warsaw Convention and the Montreal Convention was characterized by a sharper focus on consumer protection and modernizing the clunky provisions of the Warsaw Convention to keep pace with the ballooning airline industry. Though the following chronology is by no means exhaustive,\textsuperscript{18} it touches on the major agreements that set the table for the Montreal Convention. In particular, the responses of the United States to these agreements are noteworthy since it was “the singularly most important state in terms of volume of traffic [for


\textsuperscript{14} DEMPSEY & MILDE, supra note 12, at 13.

\textsuperscript{15} See Warsaw Convention, supra note 13, at 3015, 3018–19.

\textsuperscript{16} DEMPSEY & MILDE, supra note 12, at 15; see Warsaw Convention, supra note 13, at 3019.

\textsuperscript{17} PABLO MENDES DE LEON, INTRODUCTION TO AIR LAW 149 (10th ed. 2017).

\textsuperscript{18} See DEMPSEY & MILDE, supra note 12, at 16–36 (providing a more detailed chronology).
international flights]. As such, whenever the United States quibbled with an agreement, other countries took note.

The first significant amendment to the Warsaw Convention came in the form of the Hague Protocol of 1955, which entered into force in August of 1963. Gesturing toward a newfound consumer focus, the Hague Protocol doubled the liability ceiling created by Article 22 of the Warsaw Convention from $8,300 to $16,600 USD. Unfortunately, the United States never signed on to the Hague Protocol since the adjustment to the liability ceiling was unsatisfactory.

As one would expect considering its frustration with the Hague Protocol, the United States officially denounced the Warsaw Convention in 1965. However, before the denunciation formally went into effect, the United States entered into a private agreement instead: the Montreal Inter-carrier Agreement of 1966. Aligning with the United States’ interests in consumer protection, “[t]he [agreement] ensured that accident victims on flights to or from the United States [were] compensated for up to $75,000 of proven damages, whether or not the negligence of the carrier was the cause of the accident.” In other words, the Montreal Inter-carrier Agreement of 1966 both increased the liability limit set by the Warsaw Convention and ventured into new territory by “creating a regime of absolute liability,” at least for the parties covered by the agreement. The Montreal Inter-carrier Agreement, as a private agreement, “did not possess any formal status in international public law but in practice [it] was regarded as if it were a limited agreement to the Warsaw Convention.”

Though it never actually came into force, the Guatemala City Protocol of 1971 added to the consumer protection wave.

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20 See id.
21 *See De Leon, supra note 17, at 150.
23 *See De Leon, supra note 17, at 150.
24 *See Montreal Convention Letter of Submittal, supra note 22, at VI.*
25 See id.
26 See id.
27 *See De Leon, supra note 17, at 151 (explaining that the agreement was “between International Air Transport Association (IATA) carriers flying from, via[,] or into the United States and the US Civil Aeronautics Board (CAB) . . . .”).*
28 *See Chrystal, supra note 19, at 248.*
by “[holding] carriers strictly liable for up to 1,500,000 francs ($100,000 USD) of proven damages in the event of passenger death or injury” and “expressly recogniz[ing] the right of States to supplement passenger recoveries through State legislated insurance plans.” Shortly thereafter, a batch of four amending protocols, known as the Montreal Protocols of 1975, made revisions to the currency underlying the Warsaw system’s liability scheme, since the gold standard upon which it was originally based became unworkable.

The last noteworthy agreements that were reached before the Montreal Convention were the International Air Transport Association (IATA) and Air Transport Association (ATA) Inter-carrier Agreements of 1997. These private agreements executed between the United States and foreign carriers went a step further than the Montreal Inter-carrier Agreement of 1966 by “waiv[ing] the passenger liability limits of the Warsaw Convention and its related instruments . . . in their entirety.” These private agreements were heavily inspired by the Japanese Initiative in 1992, which involved Japanese airlines “fil[ing] applications with the Japanese Ministry of Transport amending their conditions of carriage [and] more specifically waiving” the Warsaw Convention’s liability limits in the aftermath of the Mount Osutaka tragedy. The private IATA and ATA agreements only have current relevance for countries who have not ratified the Montreal Convention.

This patchwork of protocols and private agreements eventually led the International Civil Aviation Organization (ICAO) to adopt a new framework at the International Conference on Air Law in Montreal in 1999; there were simply too many amending agreements with differing parties to sustain a coherent system of international regulation. Instead of overriding these prior

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29 See Montreal Convention Letter of Submittal, supra note 22, at VI–VII.
30 See STA Law Firm, supra note 9 (explaining that “[t]hese protocols were developed to ‘. . . alter the currency united used in Warsaw, Warsaw-Hague and . . . Warsaw-Hague-Guatemala City Convention from gold francs to IMF Special Drawing Rights [SDRs] . . .’); De León, supra note 17, at 150–51; Chrystal, supra note 19, at 249 (explaining that the abolition of the gold standard in 1978 made it cumbersome for courts to determine currency equivalents).
31 See Montreal Convention Letter of Submittal, supra note 22, at VIII (emphasis added).
32 See Chrystal, supra note 19, at 252–53.
33 See De León, supra note 17, at 151.
34 See Montreal Convention Letter of Submittal, supra note 22, at IX; see also Andrew Field, Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated, 28 Dalhousie L.J. 69, 71 (2005); Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 371 n.4 (2d Cir. 2004).
agreements altogether, the Montreal Convention would instead incorporate bits and pieces of these agreements into a comprehensive scheme.35

B. PURPOSES UNDERLYING THE MONTREAL CONVENTION

Treaties, like statutes, should be read in light of their stated purposes.36 In general, they both reveal the intent of the treaty drafters and offer a tiebreaker that can smooth out ambiguities that appear in the treaty. As explained above, the Warsaw Convention had a clear, industry-nurturing focus.37 This made sense considering the infantile state of the international airline industry at the time; a regulative framework was needed to ensure smooth transactions and prevent anemic air carriers from being crushed by liability.38 However, seventy years after the Warsaw Convention, the Montreal Convention shifted the foci of international airline regulation from the industry to the consumer.39

The Montreal Convention had two stated goals. The first was to move beyond the post-Warsaw “patchwork” by establishing a uniform liability regime.40 Though there was not a patchwork of international regulations predating the Warsaw Convention that called for unification, this goal of uniformity was similarly mentioned in its preamble;41 whereas the Warsaw Convention provided international unity in the face of a vacuum, the Montreal Convention unified in the face of existing international discord.42 The second objective of the Montreal Convention was to provide a safety net for consumers. This goal leaps out from the preamble and distinguishes the Montreal Convention from the Warsaw Convention.43 There is other evidence aside from the preamble that conveys consumer protection was a priority of the Montreal

35 See Dempsey & Milde, supra note 12, at 17.
38 See Warsaw Convention, supra note 13, at 3014.
39 See Moore, 32 F.4th at 120.
40 See Montreal Convention, supra note 3, at 350 (stating in the preamble that the treaty was created for the “harmonization of private international air law” and that it sought “to modernize and consolidate the Warsaw Convention and related instruments.”).
41 See Warsaw Convention, supra note 13, at 3014 (“Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier . . . .”).
42 See Montreal Convention, supra note 3, at 350.
43 See id. (“Recognizing the importance of ensuring protection of the interests of consumers in international carriage by air . . . .”).
Convention. This evidence can be grouped into three “bins”: official, chronological, and textual.

Regarding official evidence, the consumer protection interest was emphasized by a press release statement from the ICAO’s president in September 2003, shortly before the Convention went into force: “Victims of international air accidents and their families will be better protected and compensated under the new Montreal Convention, which modernizes and consolidates a seventy-five year old system of international instruments of private international law into one instrument.” Further, during the diplomatic conference to establish the Montreal Convention, states like Brazil and several groups pushed the ICAO to institute a protective system for consumer interests; evidently, their requests were answered.

The point at which the Montreal Convention sits in the post-Warsaw timeline also provides strong chronological evidence of its consumer focus. Discussions of consumer interest crescendoed up to the point of the Montreal Convention’s introduction; the Montreal Convention is the most recent act in the post-Warsaw timeline and there has not been chatter about formally addressing consumer interests since. As such, without even consulting its preamble and text, the Montreal Convention is clearly a crystallization of the main concerns hashed out by the post-Warsaw agreements (restrictive liability limits that burden consumers).

Lastly, there is ample textual evidence outside the preamble that demonstrates the Montreal Convention’s commitment to consumer interests. To illustrate, Article 28 mandates air carriers to make advance payments to anyone entitled to recover for death or injury to “meet [their] immediate economic needs.” Article 50 imposes an obligation on air carriers to maintain liability insurance (to ensure payouts to consumers are economically feasible). Article 33(2) makes life easier for plaintiffs by expanding jurisdiction, allowing them to file a claim in the jurisdiction of their “principal and permanent residence ... to or from which the carrier operates services.” Article 21 lays out a plaintiff-friendly, two-tiered liability system: for Article 17 claims under 128,821 Special Drawing Rights ($178,183 USD), the air carrier

44 See id. at 359, 361, 365.
45 See Field, supra note 34, at 70 (footnote omitted).
46 See De Leon, supra note 17, at 153 n.10.
47 Montreal Convention, supra note 3, at 359.
48 See id. at 365.
49 Id. at 361.
is held strictly liable.\textsuperscript{50} Air carrier defendants are only allowed to present defenses about the negligence or wrongful acts of third parties or the lack of negligent or wrongful acts committed by their staff members if the claim exceeds 128,821 SDRs, but even then, there is no cap to a defendant’s liability if such defenses flounder (which they often do).\textsuperscript{51}

Though there is a plethora of evidence demonstrating the Montreal Convention’s focus on consumer protection, the Convention is not a battering ram for plaintiffs. The Convention is far more measured than that; it acknowledges consumer protection interests, but not to the extent of obliterating industry interests.\textsuperscript{52} If anything, the Convention is designed to correct an old imbalance in favor of the airline industry instead of creating a new imbalance against the airline industry.\textsuperscript{53} There is both official and textual evidence supporting this view.

With respect to official evidence, a delegate “who was closely involved in [the] passage and conclusion” of the Montreal Convention stated, shortly after the Convention was signed, that “being fair to all was the best and, perhaps, the only compromise possible.”\textsuperscript{54} Textually, the Montreal Convention’s preamble, in the same clause that references consumer interests, states that the Convention acknowledges “the need for equitable compensation based on the principle of restitution.”\textsuperscript{55} Building on this point, the last clause of the preamble states the Convention is a “means of achieving an equitable balance of interests.”\textsuperscript{56} Several provisions of the Montreal Convention provide additional textual evidence


\textsuperscript{51} See Field, supra note 34, at 77; De Leon, supra note 17, at 182.

\textsuperscript{52} Moore v. Brit. Airways PLC, 32 F.4th 110, 120 (1st Cir. 2022) ("[T]he Montreal Convention is not one-sided").

\textsuperscript{53} See id.; Kelsey Roberts, Expecting the Unexpected: Moore v. British Airways and Defining an Accident Under the Montreal Convention, U. Cin. L. Rev. Online (Feb. 6, 2023), https://lawreviewblog.uchicago.edu/2023/02/06/roberts-accident-montreal-convention/ [https://perma.cc/6SVY-EZLE] ("The Montreal Convention largely aimed to elevate the interests of passengers to match, not eclipse, the importance afforded to the airlines’ interests in the Warsaw Convention.") (emphasis added).


\textsuperscript{55} Montreal Convention, supra note 3, at 350 (emphasis added).

\textsuperscript{56} Id. (emphasis added).
that it was not intended to silence industry interests. Article 29 limits the *type* of damages a plaintiff can recover, even though the Convention provides no limit on the *amount*: “In any such action [brought under the Convention], punitive, exemplary or any other non-compensatory damages shall not be recoverable.”

The same article establishes the exclusivity of the Montreal Convention system: if a claim falls within the scope of the Convention, the Convention offers the *sole remedy* and a plaintiff cannot milk the pockets of air carriers by seeking a windfall under local laws. Similarly, Article 35 limits the time in which an action can be brought against an airline carrier, shielding them from perpetual exposure.

In sum, instead of being lopsided, the Montreal Convention is an even-handed treaty that recognizes an interest that was previously ignored.

**C. Text of Article 17**

Article 17(1) of the Montreal Convention outlines the requirements for a passenger to recover against an international air carrier for personal injury or death: “The 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.” This provision is actually a carryover from the Warsaw Convention; it substantially resembles the original Article 17 language. Because of this resemblance, courts have used Warsaw Convention precedents when construing the language of Article 17(1) in the Montreal Convention.

As the language clearly indicates, the existence of an “accident” is the *sin qua non* of an Article 17(1) claim. The term is by

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57 See *id.* at 360.
60 *Id.* at 355.
61 Warsaw Convention, *supra* note 13, at 3018 (“The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”); *see* Field, *supra* note 34, at 78–79.
63 *See* Dempsey & Milde, *supra* note 12, at 122.
no means unfamiliar to the layperson, and it comes with several intuitive definitions. One is “an unforeseen and unplanned event or circumstance.”\textsuperscript{64} Other definitions include “an unfortunate event resulting especially from carelessness or ignorance” or “a nonessential property or quality of an entity or circumstance.”\textsuperscript{65} Black’s Law Dictionary provides a more focused, law-specific definition: “an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated; any unwanted or harmful event occurring suddenly . . . irrespective of cause or blame . . .”\textsuperscript{66} Unfortunately, none of these definitions hit the bullseye when it comes to construing Article 17(1); as the next Section will illustrate, “accident” is more elusive than it appears.

III. “WITHSTANDING THE TURBULENCE” – UNPACKING ARTICLE 17 “ACCIDENTS”

Since the Montreal Convention does not use “accident” in its common sense, the term requires deconstruction. Though courts have done a good amount of deconstruction work already, that work has left lingering questions. This Section will review the deconstruction that courts have already accomplished, using the \textit{Saks} and \textit{Moore} cases as guides. Then, this Section will illuminate where the deconstruction work has stalled by explaining the dueling interpretations of Article 17 “accidents.” This Section will conclude by discussing the cases that provide the best illustrations of the split.

Overall, the process of deconstructing the term “accident” can be analogized to playing with Russian dolls: after one doll is opened, another is revealed inside. Similarly, as it pertains to the meaning of “accident” in the Montreal Convention, the answering of one question reveals another. For our purposes, the first Russian doll poses the following question: What does the term “accident” mean? The \textit{Saks} case provides the authoritative answer.

A. THE FIRST RUSSIAN DOLL: AIR FRANCE V. SAKS

In 1980, Saks boarded a flight from Paris to Los Angeles.\textsuperscript{67} The only oddity in an otherwise uneventful trip was that Saks “felt

\textsuperscript{64} \textit{Accident}, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/accident [https://perma.cc/BFB8-ATMH].
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Accident}, BLACK’S LAW DICTIONARY (11th ed. 2019).
severe pressure and pain in her left ear” during the descent.\textsuperscript{68} Though Saks did not tell anyone of her condition at the time, she was informed five days later that she had become permanently deaf in her left ear and subsequently sued the air carrier for negligence (specifically alleging “negligent maintenance and operation of the jetliner’s pressurization system”).\textsuperscript{69}

In \textit{Saks}, the Supreme Court lasered in on the definition of “accident.”\textsuperscript{70} There were several noteworthy points in Justice O’Connor’s analysis. First, the Court found textual evidence that “accident” carries a unique meaning. The Court shrewdly compared the language of Article 17(1) and a generic term used in a parallel provision (Article 18), concluding that there was intentionality behind the use of the term “accident”; according to the Court, it was more than a fungible synonym thoughtlessly pulled from a thesaurus:

Article 17 imposes liability for injuries to passengers caused by an ‘\textit{accident},’ whereas Article 18 imposes liability for destruction or loss of baggage caused by an ‘\textit{occurrence}.’ This difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention understood the word ‘\textit{accident}’ to mean something different than the word ‘\textit{occurrence},’ for they otherwise logically would have used the same word in each article.\textsuperscript{71}

Second, the Supreme Court clarified that “accident” describes a cause (an event that contributes to an injury or death) rather than an effect (the injury or death itself).\textsuperscript{72} Though granular, the Court was prudent in carving out this distinction; it rightfully strived for clarity to avoid compounding the confusion that already surrounds the word “accident.”\textsuperscript{73} Lastly, after consulting French legal meaning (since French is the mother language of the Montreal Convention), the drafting committee history, agreements post-dating the Warsaw Convention and pre-dating the Montreal Convention, and sampling caselaw from signatory states, the Court provided the governing definition for “accident”: “We conclude that liability under Article 17 of the Warsaw Convention arises only if a passenger’s injury is caused by an \textit{unexpected or unusual event or happening that is external to the passenger}.”\textsuperscript{74}

\textsuperscript{68} See id.
\textsuperscript{69} See id.
\textsuperscript{70} See id. at 396.
\textsuperscript{71} See id. at 398 (citation omitted) (emphasis added).
\textsuperscript{72} Id. at 398–99.
\textsuperscript{73} See id.
\textsuperscript{74} See id. at 399–405 (emphasis added).
The Supreme Court unpacked this language further, presumably to assist courts in applying it. First, “external to the passenger” meant that “routine travel procedures that produce an injury due to the peculiar internal condition of a passenger” would not be considered “accidents.” For instance, if a passenger sustains eardrum damage from cabin pressure changes that usually occur when a plane descends, that would not constitute an “accident.” Similarly, “an individual nauseated by a bumpy ride or . . . a person squeamish about a pre-flight search[ ] cannot allege an injury resulting from an accident under Article 17.”

Second, the Court emphasized that the definition is not mechanical, rather “[it] should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.” Third, the Court acknowledged that causation issues are inherently messy; though injuries and deaths are usually the result of a constellation of different causes, all a plaintiff has to do is prove that “some link in the chain was an unusual or unexpected event external to the passenger.” Lastly, the Court outlined when judges should defer to the judgement of the jury: whenever there is contradictory or conflicting evidence about whether an “accident” occurred. By providing a definition for “accident” with some additional scaffolding, the Saks court finally filled in the void that plagued the Montreal Convention.

Since the definition proffered by the Saks case has been widely accepted as authoritative, the first Russian doll presents little difficulty. However, inside the first Russian doll (what is an “accident”?) lies another: How does one determine if an event is “unexpected or unusual”? This question lies at the heart of the Moore case and is where the real head scratching begins.

B. The Second Russian Doll: Moore v. British Airways PLC

The Moore case sought to add meat to the bones of the Saks definition and provide a birds-eye view of how courts have

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75 See id. at 405 (citation omitted).
76 See id. at 405–06.
79 Id. at 406.
80 Id. at 405–06 (citation omitted).
81 See Lawson, supra note 54, at 270 n.41 (collecting foreign cases adopting the Saks definition as authoritative); Qantas Ltd. v. Povey (Unreported, Supreme Court of Victoria, Ormiston JA, 23 December 2003) ¶ 6; DiGiacomo, supra note 6, at 416–17 n.66 (citing a British and Canadian case).
diverged in their treatment of its “unexpected or unusual” language. Moore involved a passenger, Jennifer Moore, who went on a flight from Boston to London.82 Because of a dysfunctional jet bridge, the passengers onboard had to disembark using a mobile staircase.83 Although the disembarking process was otherwise uneventful and the staircase had no hazards, the distance between the last step and the ground took Moore by surprise, causing her to fall.84 Moore sustained serious injuries from the fall and subsequently asserted an Article 17 claim against the defendant, British Airways.85 During pre-trial discovery, Moore obtained an expert report which argued that the last step of the defendant’s staircase did not comply with industry standards (concerning the proper distance between the ground and the last step on mobile staircases).86 The district court granted summary judgment to British Airways, concluding that Moore’s injuries were not the result of an Article 17 “accident”;87 Moore subsequently appealed.88

The First Circuit reviewed, and eventually reversed, the district court’s determination that Moore’s injuries were not the result of an “accident”,89 in doing so, it emphasized several points. For one, the First Circuit noted that the Saks definition introduced a problem of perspective:

In mounting [the Saks] inquiry, the problem of perspective looms large: what is or is not expected often lies in the eye of the beholder. An occurrence long foreseen by one person may blindside another. Or — framed in the context of the Montreal Convention — what an airline expects to happen in the course of a flight may not perfectly match a passenger’s expectations. The Saks formulation tells us that an unexpected event, external to the passenger, is an accident — but it says nothing about the relevant coign of vantage, leaving open the question: ‘unexpected by whom?’90

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83 See id. at 112–13.
84 See id. at 113.
85 See id.
86 See id. (the report stated the gap between the defendant’s staircase and the ground was 13 inches, which exceeded the maximum gaps mentioned by two industry sources).
87 Moore v. Brit. Airways PLC, 511 F. Supp. 3d 1, 6–7 (D. Mass. 2020) (finding no “accident” since, inter alia, there was nothing abnormal with the operation of the staircase, there was no evidence that the staircase was atypical compared to other disembarking staircases, and the industry standards Moore’s expert referenced were voluntary).
89 See id. at 114, 123 (1st Cir. 2022).
90 See id. at 117 (emphasis added).
After raising this issue, the court held that “the perspective of a reasonable passenger with ordinary experience in commercial air travel” (as opposed to a perspective that “giv[es] primacy to . . . either the air carrier or the airline industry as a whole”) should control the Article 17 analysis and that such a vantage point was supported by “the text of the Montreal Convention, its elucidation by both American and foreign courts, and its objects and purposes.” As the court proceeded through these points, it added some fencing to its Reasonable Passenger Approach by stating that the analysis requires an objective lens, not a subjective one that is shaped by “the plaintiff’s personal expectations.”

This is not the only hedging the First Circuit did. In a footnote, the court specifically conceded that there are unresolved issues when it came to how this objective Reasonable Passenger Approach would be applied in cases with challenging facts (such as those involving a person with specialized knowledge).

C. The Moore “Split”

The Moore case shed light on a split in interpreting the definition of “accident” from Saks. On the one side lie cases like Moore, which, in analyzing whether an “accident” occurred (i.e., whether an event was “unexpected or unusual”), filter the facts through the lens of an objective, reasonable airline passenger. On the other side lie cases that instead “giv[e] primacy to the perspective of either the air carrier or the airline industry as a whole” when conducting the “accident” inquiry. In this Section, I will analyze this purported split in three ways. First, I will highlight some of the clearest demonstrations of the Reasonable Passenger approach (all of which were mentioned by Moore). From there, I will run through cases that Moore identifies as congruent with its

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91 Though the First Circuit did not explicitly unpack what this means, footnote 7 provides a helpful clue. See id. at 119 n.7. The court seems to disapprove of filtering the “unexpected or unusual” determination through the lens of industry standards, norms, and airline policies since, at least in its view, those are unmoored from the passenger’s vantage point. See id.

92 See Moore, 32 F.4th at 117, 119.

93 See id. at 118.

94 See id. at 121 n.8 (“We need not—and do not—decide today whether a passenger’s subjective expectations might be relevant . . . in the case of a passenger with exceptional experience in and knowledge about commercial air travel, such that she actually foresaw an event that would have been unexpected by an ordinary passenger. By the same token, we do not decide whether or how the objective inquiry should take account of passengers with special cognitive facilities (such as children).”).

95 See id. at 119.
approach that actually present “mixed bags,” awkwardly toeing the line between the Reasonable Passenger Approach and the Industry Approach. Finally, I will unpack some helpful Industry Approach cases. While doing so, I will touch on the important subcamps that exist within the Industry Approach itself, since this can provide more clarity to the First Circuit’s reasoning in Moore.

1. Reasonable Passenger Cases

Garcia Ramos v. Transmeridian Airlines, Inc. provides a clear illustration of the Reasonable Passenger Approach at work. In the case, Garcia Ramos boarded a flight in Puerto Rico bound for the Dominican Republic and sat in her assigned seat. At one point, the passenger in the window seat in Garcia Ramos’ row was asked to switch seats with another passenger. Unfortunately, when the replacement passenger tried to cross in front of Garcia Ramos to reach the window seat, he fell on her, fracturing her arm. The district court granted summary judgment to Transmeridian on Garcia Ramos’ Article 17 claim. As I will unpack further in III.C.3.a, the court employed a standard for Article 17 “accidents” that has come under fire: “In order to characterize the injury-causing event as a Warsaw accident, then Plaintiff must proffer evidence demonstrating that (1) an unusual or unexpected event that was external to the Plaintiff occurred, and (2) the event was a malfunction or abnormality in the aircraft’s operation.” Though the court sided with Garcia Ramos on the first prong, it aligned with Transmeridian on the second. The court provided noteworthy language when it held that an “unusual and unexpected” event had occurred under the first prong: “While a reasonable passenger would expect some jostling or other physical contact when other passengers are attempting to reach their seats, a reasonable passenger would not expect a fellow passenger to fall on top of him.”

96 Garcia Ramos, 385 F. Supp. 2d at 139.
97 Id.
98 Id.
99 Id. at 143.
101 See Garcia Ramos v. Transmeridian Airlines, Inc., 385 F. Supp. 2d 137, 143 (D.P.R. 2005) (explaining that “[b]ecause the assistance of the flight crew was never sought and because there was nothing about the circumstances that would naturally require the assistance of the crew, there was no malfunction or abnormality in the aircraft’s operation.”).
102 See id. at 141 (emphasis added).
Thus, even though Garcia Ramos applied a fringe standard (the Gotz standard) which went unrecognized in Moore, the seedlings of Moore are visible in its first prong analysis. Several cases published after Garcia Ramos, but before Moore, applied the “reasonable passenger” language used in Garcia Ramos.103

Maxwell v. Aer Lingus Ltd. provides another clear snapshot of the Reasonable Passenger Approach.104 While disembarking from an international flight, Maxwell was struck in the head by liquor bottles that tumbled out of an overhead luggage bin.105 The bin was not hers and was opened by a fellow passenger.106 The airline actually warned passengers to be cautious with the overhead bins as a matter of practice.107 Nevertheless, the district court granted Maxwell partial summary judgment on her Article 17 claim against Aer Lingus.108 Similar to Garcia Ramos, the Maxwell court used an idiosyncratic approach that constricts the universe of viable Article 17 claims: “[The Warsaw Convention] reaches only those injurious happenings that result from risks that are ‘characteristic of air travel’ in the sense of having some relationship to the operation of the airplane.”109 Notwithstanding this caged approach, the court still acknowledged the “reasonable passenger”:

While a reasonable passenger would expect some shifting of the contents of an overhead bin, particularly during a turbulent flight, she would not expect, as an ordinary incident of the operation of the aircraft, to be struck on the head by a falling object when the bin above her seat is opened by a fellow passenger.110

103 See Arellano v. Am. Airlines, Inc., 69 F. Supp. 3d 1345, 1350–51 (S.D. Fla. 2014) (“While a limited amount of ‘jostling’ or physical contact with other passengers may be expected in air travel [by an ordinary passenger], being ‘trampled,’ . . . describes an out-of-the-ordinary and unexpected event.”); Goodwin v. British Airways PLC, No. 09-10463-MBB, 2011 U.S. Dist. LEXIS 87390, at *12 (D. Mass. 2011) (“[P]laintiff may reasonably expect some jostling or other physical contact during deplaning but a reasonable passenger does not expect to be struck so severely to be caused to lose his or her balance.”).

106 Id.
107 Id.
108 Id. at 213.
109 See id. at 212 (illustrating that a clear demonstration of this “relationship” is when “airline personnel have either facilitated a passenger’s tort or have themselves committed a tort in connection with the operation of the flight.”) (emphasis added).
Qantas Ltd. v. Povey rounds out the trifecta of Reasonable Passenger Approach cases.\(^\text{111}\) In Qantas, the plaintiff claimed he suffered from a condition called deep vein thrombosis (DVT) during and following a flight.\(^\text{112}\) He alleged there were certain flight conditions, such as cramped space, that increased the risk of experiencing DVT and he was not given a pre-flight DVT warning.\(^\text{113}\) During its analysis, the court took a brief but important aside:

Parenthetically . . . the “unexpected or unusual” character of the event or happening should be determined from the viewpoint of the passenger. It must be accidental from the viewpoint of a passenger by reason of the fact that to him or her the event or happening is unexpected or unusual, whatever may be in the mind of the carrier or anybody else who perpetrates the act or event which is said to amount to an accident. That is an aspect of what is intended by the word “accident” . . . for there would be little point in giving a remedy if the carrier could avoid liability by saying that to it the matter was usual, commonplace or merely within its expectations . . . . [T]he test as to what is “unusual or unexpected” . . . should be ascertained from the viewpoint of an ordinary, reasonable passenger.\(^\text{114}\)

Though Judge Ormiston did not support this argument with precedent, it is nevertheless a close cousin to the analysis that would surface in Moore.\(^\text{115}\)

2. “Mixed Bag” Cases

Moore earmarked several other cases as illustrations of the Reasonable Passenger Approach. However, these cases problematize the line-drawing done in Moore, revealing that it might have glossed over some nuances. One of these cases is Campbell v. Air Jamaica, Ltd., 760 F.3d 1165 (11th Cir. 2014). In this case, Campbell’s flight was delayed for four hours (a practice commonly known as

\(^{111}\) (Unreported, Supreme Court of Victoria, Ormiston JA, 23 December 2003).

\(^{112}\) See Qantas Ltd. v. Povey (Unreported, Supreme Court of Victoria, Ormiston JA, 23 December 2003) ¶ 3.

\(^{113}\) See id.

\(^{114}\) Id. at ¶ 22 (emphasis added). Similar language appeared in another foreign case, also cited by Moore, that involved similar facts. See Deep Vein Thrombosis and Air Travel Group Litigation, Re [2005] UKHL 72, [14] (HL) (appeal taken from Eng.) (“[I]t is important to bear in mind that the ‘unintended and unexpected’ quality of the happening in question must mean ‘unintended and unexpected’ from the viewpoint of the victim of the accident . . . . It is the injured passenger who must suffer the ‘accident’ and it is from his perspective that the quality of the happening must be considered.”) (emphasis added).

\(^{115}\) See Qantas Ltd. v. Povey (Unreported, Supreme Court of Victoria, Ormiston JA, 23 December 2003) ¶ 22.
“bumping”).\textsuperscript{116} Campbell had to reschedule for a departure on the next day; he was charged a fee to change his departure, was given no hotel options, and had to spend the night outside because of terminal repairs.\textsuperscript{117} Campbell was also hospitalized for a heart attack resulting from this situation.\textsuperscript{118} However, the Eleventh Circuit found that Campbell failed to state a viable Article 17 claim.\textsuperscript{119} At several points in the opinion, the court invoked Reasonable Passenger Approach language:

Campbell had been given a boarding pass with a seat number; he was required to pay a change fee; and two years later airline records indicated he had flown on September 8, not the next day when he actually traveled. These alleged irregularities [in the bumping procedure] are irrelevant to Article 17 analysis, however, which measures only whether the event was unusual from the viewpoint of the passenger, not the carrier.\textsuperscript{120}

However, in addition to this Reasonable Passenger Approach language, the Eleventh Circuit recognized flight bumping as a routine “airline industry practice.”\textsuperscript{\textsuperscript{112}1\textsuperscript{12}} As such, instead of being a pure representation of the Reasonable Passenger Approach, \textit{Campbell} presented a curious fusion of industry custom and the Reasonable Passenger Approach.

Whereas \textit{Campbell} presented a blend of industry custom and ordinary-passenger focus that is only noticeable upon a close reading, \textit{Fulop v. Malev Hungarian Airlines} features a blend that leaps off the page.\textsuperscript{122} Fulop experienced heart attack symptoms while onboard a Malev flight.\textsuperscript{123} He was fortunate enough to receive assistance from flight attendants and a physician who was on the plane, but the plane was not diverted so that Fulop could receive on-ground treatment.\textsuperscript{124} Fulop sustained permanent heart damage that he claimed was avoidable if Malev had diverted the

\begin{itemize}
\item \textsuperscript{116} Campbell, F.3d at 1167.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 1171.
\item \textsuperscript{120} Id. at 1173 (emphasis added); see also id. at 1172 (when explaining why “bumping” does not give rise to an Article 17 “accident,” the court stated “rare[ly] is the passenger unacquainted with the ubiquity of air travel delay,” which appears to reference the expectations of the \textit{ordinary} passenger).
\item \textsuperscript{121} See Campbell v. Air Jam., Ltd., 760 F.3d 1165, 1172 (11th Cir. 2014) (citation omitted).
\item \textsuperscript{122} 175 F. Supp. 2d 651 (S.D.N.Y. 2001).
\item \textsuperscript{123} Fulop, 175 F. Supp 2d at 652.
\item \textsuperscript{124} See id.
\end{itemize}
The crux of Fulop’s claim was that the failure to divert the flight was a breach of standard airline procedure and thus constituted an “unexpected or unusual event.” Fulop’s Article 17 claim survived summary judgment since the court determined Malev’s alleged deviation from its own procedures for medical emergencies could support an Article 17 claim.

The court strongly emphasized the central role that industry practices and standards play in the “unexpected or unusual” inquiry: “[A] measure of normal is adherence to norms; conversely, what is aberrant reflects departure from the norm at issue. Any major deviation from a standard articulated in recognized practices and procedures represents the exceptional case -- the unusual or unexpected happening.” Subsequently, the court folded this into an “omelette” with some Reasonable Passenger Approach language: “[T]he ordinary traveler reasonably would expect that - as the normal, usual and expected response to such urgencies . . . airlines rendering services as common carriers would be particularly scrupulous and exacting in complying with their own industry norms, internal policies and procedures, and general standards of care.” This language smears the boundary that Moore attempts to establish; Fulop suggests that, instead of being rivals, the Reasonable Passenger Approach and the Industry Approach can work in tandem with one another. In fact, the latter appears nested within the former.

The “mixed bag” conundrum has also appeared in cases from other signatory states. Take Deep Vein Thrombosis and Air Travel Group Litigation [2005] UKHL 72, ¶ 9 (appeal taken from Eng.) for example, where multiple plaintiffs “allege[d] that they, or their deceased relatives, . . . suffered DVT caused by their flying on an aircraft operated by . . . the respondents,” and that this constituted an “accident” within the scope of Article 17. At one point, Lord Scott mentioned that the question of whether an

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125 Id.
126 Id. at 664.
127 See id. at 663, 665.
129 Id. (emphasis added); see also id. at 672 (“Objectively, a passenger aboard an airplane is entitled to harbor the expectation that . . . the flight crew would comply with established rules and procedures . . .”).
130 As a note, I think it is acceptable to agree with Fulop’s “omelette” description (pointing out the overlap between ordinary passenger expectations and industry norms) without standing by its per se rule regarding industry standards. See Fulop v. Malev Hungarian Airlines, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001). It is possible to separate the wheat from the chaff.
event is “unexpected” should be gauged “from the viewpoint of the victim of the accident” since “[i]t is the injured passenger who must suffer the ‘accident.’”\textsuperscript{131} However, this language that rings of the Reasonable Passenger Approach was followed by a reference to industry norms just a few paragraphs later:

The failure by an airline to warn its passengers of the danger of DVT and of the precautions that might be taken to guard against that danger does not, in my opinion, improve the case, \textit{at least where there is no established practice} of airlines generally or of a defendant airline in particular to issue such warnings.\textsuperscript{132}

Together, these three cases demonstrate that the “mixed bag” phenomenon is not simply a random misfire: It is a legitimate quandary that the Reasonable Passenger Approach, and its advocates, must grapple with.

3. \textit{Industry Approach Cases}

In many Article 17 cases, courts have leaned on industry standards, customs, and policies as analytical tools without even gesturing toward the Reasonable Passenger Approach. One of the clearest and most important illustrations of this issued from the Fifth Circuit in \textit{Blansett v. Continental Airlines, Inc.}\textsuperscript{133} Blansett experienced a DVT episode while onboard a flight, which caused him to suffer a debilitating stroke.\textsuperscript{134} The airline did not give a pre-flight DVT risk warning even though the International Air Transport Association recommended it.\textsuperscript{135} The Fifth Circuit ultimately sided with Continental Airlines, holding that the failure to provide a DVT warning was not an “accident” since there was not a universal practice of carriers providing DVT warnings, and the warnings the airline \textit{did} give were in compliance with the FAA.\textsuperscript{136} \textit{Blansett} provided a nuanced perspective on how courts should generally treat industry standards in Article 17 cases:

Again, we assume, for purposes of this appeal, that a failure to warn of DVT is a departure from ‘an industry standard of care.’ But, we will not depart from the demonstrated will of the Supreme Court by \textit{creating a per se rule} that any departure from an industry

\textsuperscript{131} See Deep Vein Thrombosis and Air Travel Group Litigation [2005] UKHL 72, ¶ 14.
\textsuperscript{132} See id. ¶ 24 (emphasis added).
\textsuperscript{133} 379 F.3d 177 (5th Cir. 2004).
\textsuperscript{134} \textit{Blansett}, 379 F.3d at 178.
\textsuperscript{135} Id. at 179.
\textsuperscript{136} Id. at 182.
standard of care must be an ‘accident.’ . . . Some departures from an ‘industry standard’ might be qualifying accidents under Article 17, and some may not.\textsuperscript{137}

In other words, though industry standards should be consulted, departures from airline industry standards should not be given dispositive weight as that would warp the Article 17 analysis.\textsuperscript{138} This acknowledges that a departure from an industry standard may not actually be “unexpected or unusual” when additional facts are considered.\textsuperscript{139} Importantly, this marks the Fifth Circuit’s departure from the sweeping language in \textit{Fulop}, where the court stated that any departure from industry standards gives rise to an “accident.”\textsuperscript{140} The measured reasoning from \textit{Blansett} has found purchase in the Second, Third, Fifth, and Ninth Circuits, suggesting that it has (rightfully) edged out the \textit{per se} approach from \textit{Fulop}.\textsuperscript{141}

Industry standards also informed the Ninth Circuit’s holding in \textit{Husain v. Olympic Airways}.\textsuperscript{142} The case centered on Dr. Hanson, who died from an asthma attack after inhaling second-hand smoke from a nearby smoking section.\textsuperscript{143} Dr. Hanson’s wife informed a flight attendant of Dr. Hanson’s asthma and asked three times if he could be moved to another seat—no accommodations were made.\textsuperscript{144} The Ninth Circuit affirmed the district court’s holding that this refusal to accommodate rose to the level of an “accident.”\textsuperscript{145} In doing so, the Ninth Circuit echoed the district court’s industry standard analysis: “[The flight attendant’s] conduct was clearly external to Dr. Hanson, and it was unexpected

\textsuperscript{137} See id. at 181–82 (emphasis added).
\textsuperscript{138} See id.
\textsuperscript{139} See \textit{Blansett} v. Cont’l Airlines, Inc., 379 F.3d 177, 181–82 (5th Cir. 2004).
\textsuperscript{140} Compare id. with \textit{Fulop} v. Malev Hungarian Airlines, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001) and \textit{Blansett} v. Cont’l Airlines, Inc., 246 F. Supp. 2d 596, 600–01 (S.D. Tex. 2002) (tracking the \textit{per se} language from \textit{Fulop}).
\textsuperscript{142} 316 F.3d 829 (9th Cir. 2002), aff’d, \textit{Olympic Airways v. Husain}, 540 U.S. 644, 648–49 (2004).
\textsuperscript{143} \textit{Husain}, 316 F.3d at 831.
\textsuperscript{144} See id. at 832, 836.
\textsuperscript{145} See id. at 837.
and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson’s requested accommodation.”

In sum, though they are rarely given dispositive weight, many courts use industry standards, customs, and airline policies as touchstones for Article 17 analysis. They are common reference points when courts in the Fifth, Ninth, and Eleventh Circuits have grappled with whether an event was “unexpected or unusual.” This suggests that the Moore court got it wrong when it stated only a sliver of cases took industry standards into account when conducting Article 17 analysis.

a. Consulting Industry Standards vs. Structurally Favoring the Industry

Before moving on, it is important to differentiate between Article 17 analysis that uses industry standards and customs as guideposts and analysis that structurally favors the airline industry from the get-go. While the former has achieved widespread approval, the latter has invited justified criticism. One example of a structurally biased approach (which I mentioned above) is the Gotz standard:

Saks therefore teaches that, in order to characterize the aisle-seat passenger’s sudden rise as a Warsaw accident, Gotz must proffer evidence tending to show that (1) an unusual or unexpected event that was external to him occurred, and (2) this event was a malfunction or abnormality in the aircraft’s operation.

The Gotz court broke down the second prong further: “An event cannot fall within the operation of the aircraft if that event

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146 See id.


is not within the airline’s purview or control.”150 This drastically narrows the coverage of Article 17; under the Gotz standard, there (functionally) must be an identifiable nexus between the crewmembers and the relevant event (i.e., some form of facilitation or participation), otherwise, there is no “accident.”151 Other courts and legal scholars have employed close analogues to the Gotz approach.152 Combined with the courts that opt out of these strained approaches, this has contributed to a dizzying patchwork of district court cases trying to make sense of Saks.153

There are several issues raised by the Gotz approach (and its analogues). First, it clearly exceeds the language from Saks. The Ninth Circuit emphasized this in Gezzi v. British Airways PLC:

When the Supreme Court defined ‘accident’ in Air France v. Saks, . . . it did not state that an ‘accident’ must relate to the operation of an aircraft. Article 17 requires only that the ‘accident’ take place ‘on board the aircraft or in the course of any of the operations of embarking or disembarking.’154

In this light, Gotz commits the cardinal sin of adding an additional hurdle for plaintiffs seeking to recover under Article 17—without clear Supreme Court authorization.155 Second, the Gotz approach does not derive from mandatory authority. It is the brainchild of Professor Goedhuis, who himself conceded his idea was idiosyncratic.156 Further, many of the events that the Gotz standard seeks to guard against becoming “accidents” (i.e., events “not within the airline’s purview or control”) are arguably already foreclosed by the language from Saks, rendering the Gotz stand-

150 See id. at 204 (emphasis added).
151 See id.
152 See, e.g., Maxwell v. Aer Lingus Ltd., 122 F. Supp. 2d 210, 212 (D. Mass. 2000); see also Andrei Ciobanu, Saving the Airlines: Saving the Airlines: A Narrower Interpretation of the Term Accident in the Montreal Convention’s Article 17, 31 ANNALS AIR & SPACE L. 1, 30 (2006) (“The courts could concentrate on events that arise out of the carrier’s unique areas of expertise, such as aircraft operation, and other uses of assets owned or operated by the carrier.”) (citing cases).
153 See Lee v. Air Can., 228 F. Supp. 3d 302, 307–308 (S.D.N.Y 2017) (breaking down how district courts have applied the Gotz approach, a close analogue of it that focuses on “risks peculiar to or characteristic of air travel,” or a more expansive approach).
154 991 F.2d 603, 604 n.4 (9th Cir. 1993) (emphasis added).
155 See Wallace v. Korean Air, 214 F.3d 293, 300 (2d Cir. 2000) (Pooler, J., concurring) (“Although the [Saks] Court stated that its definition should ‘be flexibly applied,’ [...] the Court did not thereby authorize courts to add more hurdles for a plaintiff to overcome.”).
156 See Gezzi, 991 F.2d at 605 n.4 (citing D. Goedhuis, NATIONAL AIR LEGISLATIONS AND THE WARSAW CONVENTION 199–200 (1937)).
ard overprotective. For these reasons, multiple courts have flat out rejected the Gotz approach as a distortion of Saks.

The existence of the Gotz standard and its offshoots actually sheds light on Moore; perhaps the Moore court’s full-throated disavowal of the airline industry was a result of it trying to distance itself from Gotz and its analogues (which clearly load the dice in favor of air carrier defendants). This is especially plausible considering British Airways recited an analog of the Gotz standard in its appellate brief before the First Circuit.

IV. “TOUCHING DOWN ON THE TARMAC” – THE PROPER POST-MOORE APPROACH FOR ARTICLE 17 “ACCIDENTS”

Both the Industry Approach cases (excluding the discredited line of Gotz cases) and the “mixed bag” cases raise issues for the Reasonable Passenger Approach. The cluster of Industry Approach cases suggests that the Moore court downplayed the amount of courts that consult industry standards and customs when conducting Article 17 analysis. Similarly, the “mixed bag” cases illustrate that the impervious barrier between the ordinary passenger’s perspective and the industry’s perspective (informed by industry norms and standards) might actually be porous. These issues, combined with the confusing reasoning of Moore, are clarion calls for a more refined approach.

The artificial line drawn in Moore between the Reasonable Passenger Approach and the Industry Approach should be replaced with a holistic, totality-of-the-circumstances approach (Holistic Approach) that both preserves the result in Moore and honors the instructions from the Supreme Court in Saks. This Holistic Approach would look to the following non-exhaustive reference points to determine if an event causing an injury or death was “unexpected or unusual,” thus constituting an “accident”: (1) statements or actions

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157 For instance, passengers are not allowed to recover under Article 17 for “routine travel procedures that produce an injury due to the peculiar internal condition of a passenger.” Air Fr. v. Saks, 470 U.S. 392, 405 (1985).


of other passengers, (2) airline staff member statements, (3) relevant industry standards and internal policies (and conformity or non-conformity thereto), and (4) expert testimony. This Holistic Approach would retain the objective ordinary passenger as the fulcrum of analysis. However, through these enumerated reference points, it would explicitly provide courts with a toolkit they can use to “construct” said passenger. Further, this approach would curb judicial freewheeling and would ensure that Article 17 analysis is not corrupted by rigid brightlines.

In this Part, I will first explain the need for the Holistic Approach by highlighting the inadequacies of the Moore framework. Then, I will unpack the Holistic Approach outlined above, focusing on the instances where it has been seen, its consistency with Saks, and its congruity with the purposes of the Montreal Convention. Lastly, I will run the Holistic Approach through the gauntlet, assessing how it stands up against reasonable counterarguments.

A. Inadequacies of the Moore Framework

1. Confusion

The Moore case is not bereft of value. It was a valiant attempt to make sense of the difficult language from Saks in light of the purposes of the Montreal Convention and the body of Article 17 caselaw, both domestic and foreign. Unfortunately, crucial parts of the opinion create confusion. For instance, the Moore court clearly indicated that the airline industry’s perspective should not carry weight in the “accident” inquiry: “In conducting [the accident inquiry], there is no principled basis for giving primacy to the perspective of either the air carrier or the airline industry as a whole. Few, if any, cases take such an approach.”160 The case clues us in that by “perspective . . . of the airline industry,” the Moore court was aiming at a perspective informed by industry norms, customs, and standards.161 This is problematic since industry standards and customs were strewn throughout Moore. In the case, Moore forwarded expert testimony about how British Airways failed to comply with industry standards such as European Standard EN

161 See id. at 117 (“British Airways, in contrast, submits that the proper perspective is that of the airline industry. According to British Airways, the height difference of the staircase’s bottom step cannot be a ground for finding the existence of an ‘accident’ under Article 17(1) for the simple reason that such a difference is ‘normal and routine’ across the industry.”); see id. at 119 n.7.
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12312-1:2001+A1:2009, British Standard 5395-1:2000, and IATA standards, which outlined height requirements for steps on mobile staircases. Further, when explaining why partial summary judgment for Moore was unjustified, the court mentioned crew-member statements about industry norms:

Of course, the evidence is not exclusively on the plaintiff’s side. For instance, it is undisputed that mobile staircases of the kind employed here are commonly used in the airline industry. The flight crew’s first officer described the use of such mobile staircases to disembark passengers from an aircraft . . . as ‘incredibly normal’ and ‘very frequent.’ Similarly, the director of the cabin crew described the use of such mobile staircases . . . as ‘quite an acceptable way to disembark the aircraft.’

The Moore court appeared to speak out of both corners of its mouth. On the one hand, it shunned the industry perspective and stated that it should (functionally) be excised from the “accident” inquiry. Yet the court, after combing through industry standards evidence, concluded that summary judgement for either party on the “accident” issue was inappropriate. This Janus-faced reasoning does not bode well for future cases.

Moore presents another tripping point in its citation to Blansett in footnote 7. The footnote used painfully unclear, roundabout language: “To the extent—if at all—that Blansett spurns a passenger-focused perspective as to whether an event is unexpected, we reject its reasoning.” This is not inconsequential; this footnote was part and parcel of the First Circuit’s effort to sketch out the split and illustrate what lies across the aisle from the Reasonable Passenger Approach. Unfortunately, this attempt fell flat. The Moore court failed to identify Blansett (or any other significant case for that matter) as a firm point of contrast with the Reasonable Passenger Approach. This wishy-washy treatment of Blansett will likely cause a lot of head scratching for courts down the road since they will be unsure of how to treat the principles from Blansett and industry standards in general.

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162 See Moore, 32 F.4th at 113, 122; see also Brief of Plaintiff-Appellant at 12, 15–16, Moore v. British Airways PLC, 32 F.4th 110 (1st Cir. 2022) (No. 21-1037), 2021 WL 1856721 (C.A.1), *12, 15–16 (mentioning IATA standards specifically).
163 See Moore, 32 F.4th at 122 (emphasis added).
164 See id. at 119.
165 See id. at 121–23.
166 Id. at 119 n.7.
167 Id. (emphasis added).
168 Id.
Instead of citing Blansett, I think the Moore court could have fleshed out the other side of the split better by citing to Fulop v. Malev Hungarian Airlines\(^{170}\) or Gotz v. Delta Air Lines,\(^{171}\) since the former said industry standards (and departures from them) were dispositive for the “accident” inquiry and the latter proposed a two-pronged test that loads the dice for the airline industry. On face, these cases seem like better illustrations of the airline “industry perspective” that the Moore court was so adamant about de-prioritizing.\(^{172}\) The fact that these cases were not used, and we were left with a murky reference to Blansett instead, shrouds the Moore split in obscurity at a point where clarity was desperately needed.

The cases discussed above also display the confusing nature of the Moore case. In Campbell, the Eleventh Circuit indicated that routine industry practices (such as “bumping” flights) can actually inform the general expectations of passengers; this suggests that there is a point of overlap between the Reasonable Passenger Approach and the Industry Approach that Moore did not address.\(^{173}\) Fulop made this point explicitly.\(^{174}\) Though these two cases are far from authoritative (especially considering Fulop’s overzealous stance on industry norms), they do shed light on a problem embedded in Moore: the Moore court tried to draw a line in the sand (between the passenger’s perspective and the industry’s perspective) when it appears that a Venn Diagram is more appropriate.\(^{175}\)

2. Totalizing Treatment of the Airline Industry

The Moore court also erred in treating industry standards in a sweeping fashion. Though not stated explicitly, the Moore court implied that whenever industry standards and norms are consulted during the “accident” analysis, that will inevitably churn out a result that favors the airline industry, which would run contrary to the design of the Montreal Convention.\(^{176}\) This assump-

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\(^{172}\) See id.

\(^{173}\) See Campbell v. Air Jam., Ltd., 760 F.3d 1165, 1172 (11th Cir. 2014).


\(^{175}\) See DiGiacomo, supra note 6, at 443 (“It is essential that the flight crew follow policy to take care of their passengers. A passenger who becomes sick during a flight has good reason to expect a flight crewmember to come to his/her assistance,”) (emphasis added); see Roberts, supra note 53 (“[I]n many cases, airline policies and the expectations of the average traveler will be nearly one and the same.”).

\(^{176}\) See Moore v. Brit. Airways PLC, 32 F.4th 110, 120 (1st Cir. 2022).
tion overlooks nuances and is undermined by the caselaw. In fact, Moore itself is an illustration of how looking to industry standards and norms does not lock in an industry-favoring result! Ironically, British Airways was the one arguing that industry standards should be brushed aside since the relevant standards did not cast them in the best light. 177 Husain v. Olympic Airways 178 provides another illustration. In Husain, the Ninth Circuit concluded that the flight attendant’s conduct gave rise to an “accident” after noting the attendant’s departure from industry custom. 179 In other cases, plaintiffs could have exploited departures from industry standards to prevail against defendants, but they failed to take advantage of that opportunity. 180 As such, instead of being a cheat code that favors air carrier defendants, industry standards are tools that plaintiffs can (and do) use to buttress their Article 17 claims.

3. Capacious Legal Jargon Without Clear Guidance

The Moore court also made a misstep when it explained its standard for Article 17 “accidents.” According to Moore, when determining whether an event is unexpected or unusual, courts must assume the objective vantage point of “an ordinary, reasonable passenger.” 181 Unfortunately, the First Circuit did not outline clear instructions for “constructing” this objective, reasonable passenger, aside from saying that subjective expectations should not be factored in. 182 When posed with the question, “how can I get to my destination?,” the Moore court offers an unsatisfying response: “simple, just don’t take this road.” 183

The move the Moore court made here (adopting an abstract, objective “person” as a rubric for analysis) is not a novelty in the legal world; this type of standard has left its fingerprints on nearly

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177 See id. at 122 (mentioning that British Airways sought to discount the industry standards referenced by Moore—which were unfavorable to them—by emphasizing that they were voluntary and inapplicable to the specific staircase at issue).
178 See id. at 829 (9th Cir. 2002).
179 See id. at 837.
181 See Moore, 32 F.4th at 117–118.
182 See id. at 119.
183 See id.
every area of the law.\textsuperscript{184} However, a widely acknowledged problem with these abstract standards is that the line between the objective and subjective is incredibly blurry; it is easy to parse in theory but grueling to work through in practice:

[T]he case law should inspire skepticism as to the value—and indeed the sheer coherence—of distinctions between supposedly objective and subjective legal tests. What is thought by the law to be subjective actually pervades and informs, in multiple ways, what is thought to be objective, and vice versa. The objective and the subjective, in effect, unavoidably help define and comprise each other. The law’s attempts, in various contexts, to differentiate or combine objective and subjective tests are thus inevitably fruitless.\textsuperscript{185}

The Moore court confirmed this difficulty when it explained that it was unsure whether things like special experience and knowledge about air travel (things that lie in the subjective realm) would be considered under the Reasonable Passenger Approach.\textsuperscript{186}

A further difficulty with objective legal tests is that judges with certain proclivities can smuggle \textit{their own} preferences into the objective analysis, especially in cases that “cry out for redress.”\textsuperscript{187} As such, objective legal tests present problems both at the level of \textit{application} and for the agent \textit{doing the applying} (i.e., the judge). These are persuasive reasons why objective legal tests should be approached with caution.\textsuperscript{188} Whereas the Moore case announces an objective legal test and lets judges “have at it,” the Holistic Approach explicitly breaks down how the objective ordinary


\textsuperscript{185} \textit{Id.} at 122–24 (footnote omitted).

\textsuperscript{186} See Moore v. Brit. Airways PLC, 32 F.4th 110, 121 n.8 (1st Cir. 2022).

\textsuperscript{187} See Olympic Airways v. Husain, 540 U.S. 644, 664 (2004) (Scalia, J., dissenting); Ciobanu, \textit{supra} note 143, at 12 (“[Saks] attaches liability based on what the passenger . . . should expect. The answer to such a question is [often] whatever the courts desire it to be.”); Timothy M. Ravich, \textit{International Aviation Law and Pandemic}, 86 J. Air L. & Com. 585, 621 (2021) (”[C]ourts are persistently confronted with ‘close question[s]’ and line drawing exercises about which reasonable people may differ widely.”).

\textsuperscript{188} See Wright, \textit{supra} note 184, at 124–25 (“Ultimately, the law should seek to avoid relying on these incoherent categories. Instead, the law should strive to devise tests that ask precisely \textit{what to take into account}, and \textit{precisely how to do so}, in adopting rules and adjudicating cases . . . . The focus of legal tests should thus be on substance and procedure, as opposed to the hopelessly distracting labels of subjectivity and objectivity.”) (emphasis added).
passenger should be constructed, which resolves some of the difficulties with using objective legal tests in general.\textsuperscript{189}

B. The Holistic Approach: A Potential Corrective to \textit{Moore}

The Holistic Approach would theoretically preserve the result in \textit{Moore}, honor the instructions from \textit{Saks} and the purposes of the Montreal Convention, and offer a clear rubric for Article 17 cases going forward. This approach could be distilled into the following “rule statement”:

Whether an event is “unexpected or unusual,” so as to give rise to an “accident” under Article 17, should be objectively evaluated from the perspective of a reasonable passenger with ordinary experience in commercial air travel. In constructing this “reasonable passenger,” judges should be wary of importing their own views about desirable outcomes and should consult the following as guideposts, if available: (1) statements or actions of other passengers, (2) statements from airline personnel and crewmembers, (3) relevant industry standards and internal policies (assessing conformity or non-conformity thereto), and (4) expert testimony. This list is not exhaustive, as other relevant evidence and material facts may be consulted.

Ironically enough, the ghost of this approach can be drawn out of \textit{Moore}. Although the \textit{Moore} case did not instruct judges to reign in their own subjective judgements, it did look to expert testimony about walking down stairs, the testimony of Moore’s travel companion (who said she was “surprised” when dismounting the final step of the staircase), expert testimony about industry standards British Airways departed from, and statements from crewmembers about the frequency at which mobile staircases were used to disembark passengers.\textsuperscript{190} The \textit{Moore} court also considered material, scenario-specific facts, such as the lack of a warning given to passengers proceeding down the mobile staircase.\textsuperscript{191} For these reasons, the application of the above rule statement to the facts of \textit{Moore} likely would have churned out the same result.

The Ninth Circuit also provided an approximation of the Holistic Approach in \textit{Baillie v. Medaire, Inc.}\textsuperscript{192} In the case, Baillie brought an Article 17 claim on behalf of her husband for a

\begin{footnotesize}
\begin{enumerate}
\item[189] See id.
\item[190] See Moore v. British Airways PLC, 32 F.4th 110, 121–22 (1st Cir. 2022).
\item[191] See id. at 121.
\item[192] 764 F. App’x 597, 598–99 (9th Cir. 2019).
\end{enumerate}
\end{footnotesize}
heart attack he suffered while onboard a flight from London to Phoenix.\textsuperscript{193} Baillie’s claim centered on MedAire’s refusal to divert the flight so that Mr. Baillie could receive on-ground treatment.\textsuperscript{194} While explaining why summary judgment was inappropriate, the court noted that “[t]o determine whether MedAire’s actions were expected or usual, the jury would consider industry standards, best practices, expert medical testimony, and any other relevant evidence.”\textsuperscript{195}

Another Ninth Circuit case, \textit{Prescod v. AMR, Inc.}, similarly illustrates the Holistic Approach in action.\textsuperscript{196} Neischer, an elderly woman, died from respiratory failure after her bags with her breathing device and medication were delivered to her after days of delay.\textsuperscript{197} Neischer was originally promised that her bags would be with her at all times during her flights because of her health condition.\textsuperscript{198} However, before her connecting flight, her bags were confiscated, though the employee who did so promised that the bags would meet her upon arrival with no delay.\textsuperscript{199} The Ninth Circuit fused these material, case-specific facts with industry standards when it analyzed whether the event that occurred constituted an “accident”:

\begin{quote}
[T]he event was “unusual or unexpected.” While baggage removal and delivery delays are routine in air travel, the atypical aspect of this case was the promises made by defendants’ employees that the bag would not be taken from Neischer and would not be delayed. In light of defendants’ employees’ knowledge of Neischer’s need for the bag and the ensuing promises regarding it, removing the bag from Neischer’s possession was “unusual or unexpected.” Airlines do not usually take steps that could endanger a passenger’s life after having been warned of the person’s special, reasonable needs and agreeing to accommodate them.\textsuperscript{200}
\end{quote}

\textit{Prescod}, though not a perfect illustration (for instance, it did not contain any reasonable passenger language), conducted its analysis in a way a court employing the Holistic Approach would; it took two available resources (specific facts and industry standards), and used them as tools to reach its conclusion about

\begin{footnotesize}
\begin{enumerate}
\item[193] \textit{Id.} at 598.
\item[194] \textit{See id.}
\item[195] \textit{See id.} (citations omitted).
\item[196] \textit{See 383 F.3d 861, 868 (9th Cir. 2004)}.
\item[197] \textit{See id.} at 863–65.
\item[198] \textit{See id.} at 864.
\item[199] \textit{See id.}
\item[200] \textit{See id.} at 868 (emphasis added).
\end{enumerate}
\end{footnotesize}
whether an event was “unexpected or unusual.” Overall, these cases demonstrate that the Holistic Approach simply distills and refines the raw materials found in current caselaw.

The Holistic Approach is also consistent with the instructions from Saks. The Supreme Court emphasized that Article 17 “accident” analyses are supposed to be flexible and fact-intensive: “This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.” The Holistic Approach heeds this instruction since it aggregates a variety of focal points to create an objective “big picture” of an event. In contrast, the approach adopted in Moore would promote inflexibility and rigidity. Its warning to not give airtime to airline industry standards and norms would likely inspire courts to take the widest route around the pit by cropping out industry standards from their analysis altogether (since it, presumably, “favors” the industry’s perspective). Other courts have forewarned of this style of analysis: “[T]he definition delineated in Saks will not always be susceptible to easy application . . . [but] [t]runctating the definition, or ignoring portions that complicate the analysis of a particular set of facts, is no solution.”

In addition to being consistent with the authoritative Supreme Court case for Article 17 “accidents,” the Holistic Approach also harmonizes with the design of the Montreal Convention itself. Approaches like the Gotz standard clearly chafe against the consumer-interest focus of the Montreal Convention since it structurally favors the airline industry (by arbitrarily limiting the universe of claims passengers can bring against air carriers). But there would be no such friction with the Holistic Approach. Since the objective, reasonable passenger would be the fulcrum for Holistic Approach analysis (i.e., that is what the “tools” are ultimately being used to “construct”), it follows lockstep with the Montreal Convention’s focus on consumer interests. Further, the fact that the Holistic Approach consults a variety of “data points” means

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201 See id.; see also Fishman by Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 143 (2d Cir. 1998) (explaining that though “[t]he application of a hot compress . . . [is] a routine measure for relieving the pain suffered by passengers incident to the descent of an aircraft[,] . . . the measure was carried out in a way (using excessive, scalding water) that was not expected, usual, normal, or routine.”).


203 See Magan v. Lufthansa German Airlines, 339 F.3d 158, 163 (2d Cir. 2003).


205 See Montreal Convention, supra note 3, at 350.
that it promotes thorough, fact-intensive analysis (in contrast to analysis infected with pro- or anti-industry bias). This contributes to another stated purpose of the Montreal Convention, namely “achieving an equitable balance of interests.” Such a focus on balance also means that the Holistic Approach avoids issues that would arise from, for example, overpowering industry standards in the Article 17 analysis:

The First Circuit contemplated whether, under the airline’s perspective, a sudden change in stair riser height to twenty feet could create an unexpected event if twenty feet became the industry standard among airlines. If the airline perspective controlled, the sudden change in riser height would not constitute an accident because the airline could argue that their practice adhered to industry standards created by the industry itself.

The Holistic Approach dodges this issue since industry standards, though a part of the analysis, are never the “end all be all.”

In sum, the Holistic Approach “fills in the gaps” left by Moore and provides future courts with much-needed clarity. It instructs courts on exactly how to treat industry standards in the “accident” analysis: as pieces in a larger puzzle. Furthermore, it provides an affirmative guide that lays out what should be considered within the “accident” inquiry instead of a negative guide that simply outlines what should not be considered.

C. THE HOLISTIC APPROACH: ADDRESSING COUNTER-ARGUMENTS

There are reasonable counterarguments that can be raised against the Holistic Approach. There are two categories of counterarguments I will address. The first involve the practical

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206 See id.
207 Ryan Mulligan, Comment, It Was an Accident! Determining the Appropriate Perspective to Assess Montreal Convention Personal Injury Claims, 64 B.C. L. Rev. 102, 115 (2023).
208 This treatment of industry standards resembles “us[ing] airline policy and industry standards as rebuttable proof, rather than conclusive evidence, of what is unexpected when determining if an accident occurred.” See Roberts, supra note 53 (emphasis added).
209 I believe Moore provides a negative guide since it states the “accident” analysis should focus on how an (objective) reasonable passenger with ordinary experience would perceive an event, but instead of providing explicit instructions on how that reasonable passenger should be “constructed,” it simply mentions what should be excluded from the analysis (for example, a passenger’s subjective expectations). See Moore v. Brit. Airways PLC, 92 F.4th 110, 117–19 (1st Cir. 2022).
consequences of the Holistic Approach, while the second involves the necessity of the approach.

1. **Practical Counterarguments**

The first practical counterargument is that the Holistic Approach may make it cumbersome for courts to determine “winners” at the summary judgment stage. For instance, if Party A comes forward with a grab bag of evidence (industry standards, crewmember statements, statements from other passengers on board, and credible expert testimony) supporting their position (an objective, reasonable passenger with ordinary experience would deem the event “unexpected or unusual”) and Party B comes forward with an almost identical grab bag supporting their position (an objective, reasonable passenger with ordinary experience would *not* deem the event “unexpected or unusual”), the Holistic Approach makes it incredibly difficult for a court to determine which party should prevail. Unlike an approach that just looks to industry standards, for example, the Holistic Approach does not allow courts to make quick-and-easy determinations:

> For the sake of efficiency and clarity, it might be best for courts to analyze “unexpected” from the perspective of the airline. It is easier to discern airline and industry practices, which are usually documented in writing or widely communicated, than to weigh various pieces of evidence establishing who the ordinary passenger is and what that passenger would reasonably expect.

Though true, this misses the point. Perhaps the value of the Holistic Approach lies in its ability to shed light on factual tensions (which make the matter appropriate for a jury) instead of how it makes the matter a cakewalk for judges; this certainly appears to be the message from *Saks*. A closely related counterargument is that the complexity of the Holistic Approach prevents parties from forming pre-suit expectations about the likelihood of victory. This argument incorrectly assumes that simpler standards almost always translate into clear pre-suit expectations. For example, even under a simpler standard where the Article 17 inquiry is conducted solely by looking to industry standards, it would still

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210 See Roberts, supra note 53.

211 See Air Fr. v. Saks, 470 U.S. 392, 405 (1985) (“In cases where there is contradictory evidence, it is for the trier of fact to decide whether an ‘accident’ as here defined caused the passenger’s injury.”).

212 See Roberts, supra note 53 (mentioning how an approach focused solely on industry standards would helpfully inform these expectations).
be difficult to form pre-suit expectations when there are overlapping standards, standards that a good portion of air carriers follow but not a majority, etc.

A second practical counterargument to the Holistic Approach could be that it forces plaintiffs to exert themselves more in pre-summary-judgment discovery, which is improper because the Montreal Convention was designed to help plaintiff-consumers. There are several responses to this. First, the Montreal Convention was designed to emphasize consumer interests within an international liability scheme for air carriers; there is no textual evidence that it was designed to make discovery a breeze for plaintiffs. Second, it would be difficult to prove that the discovery burden imposed by the Holistic Approach would materially differ from the burden in an average case. And third, nothing about the Holistic Approach requires plaintiffs to “nail” every possible data point. They can invest their discovery resources towards an optimal combination of data points (such as industry standards and material, case-specific facts) that best suits their situation.

2. “Necessity” Counterarguments

The next set of objections attack the necessity of the Holistic Approach. One of these objections reasons as follows: If it is true the ghost of the Holistic Approach can be summoned out of Moore, then that arguably discounts its uniqueness. What is the purpose of engineering a whole new approach here? Why not just stick with Moore since it came really close anyway? There are several reasons why the Holistic Approach is both unique and necessary in light of Moore. First, Moore creates a genuine risk of downstream confusion. It strongly criticized the use of industry standards in “accident” analysis (since they are wed to the “industry perspective”), yet industry standards informed several parts of its analysis. Additionally, the cases Moore cited that actually presented “mixed bags” (especially Fulop) problematize the clean boundary it sought to create between the ordinary passenger’s perspective and the airline industry, suggesting that the two might actually be interconnected. The Holistic Approach is

213 See Montreal Convention, supra note 3, at 350.
214 See, e.g., Prescod v. AMR, Inc., 383 F.3d 861, 868 (9th Cir. 2004).
216 See id. at 122–23.
designed to resolve these points of confusion. Second, the Holistic Approach includes certain principles that Moore does not. Importantly, it instructs judges not to corrupt the objective analysis with their own preferences, an issue that was not even mentioned in Moore. Though admittedly this is a commonsense principle, it is important to mention since this issue arises when courts use objective tests generally and when courts have conducted Article 17 analysis specifically.218 In sum, the Holistic Approach is valuable because it clears up the confusion created by Moore and brings unique principles to the table. Even if some shrewd judges may be perceptive enough to unearth the logic of the Holistic Approach in Moore, a shift to the Holistic Approach is still worthwhile because every extra ounce of clarity counts, especially in the murky waters of Article 17 jurisprudence.

Another “necessity” objection to the Holistic Approach is that it does not sound all that different from Saks. In Saks, the Supreme Court said that the “accident” definition “should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries.”219 One could argue that, substantively, this is the Holistic Approach, so there is no use in adopting it. There are three answers to this objection. First, the Holistic Approach contains ideas and principles that the Saks case failed to mention (namely, objective reasonable passenger language). Second, even if there is a lot of overlap between the Holistic Approach and Saks, that is evidence of its value, not its irrelevance. Approaches should inch as close to Saks’s language as possible since that is the only guidance we have from the Supreme Court regarding Article 17 “accidents”; if an approach was light-years away from the principles in Saks, that would surely raise eyebrows. Third, there is a difference between repeating a principle verbatim (which has little value) and unpacking a principle (which has great value). The Holistic Approach, relative to Saks, accomplishes the latter.

A final “necessity” objection to the Holistic Approach is that it is unneeded since a storm has not whipped up yet; so far, (1) hardly any courts have even cited Moore, and (2) those cases that have cited Moore are not clinging to its reasoning in a problematic way.220 Though this is one of the strongest objections, there are

218 See Ciobanu, supra note 147, at 12.
several counterarguments that diffuse it. First, the Moore case is still relatively new, and litigation is notoriously sluggish; for all we know, the absence of citations we see now may just be temporary. Second, since there are a slew of other articles in the Montreal Convention that serve as litigation magnets, it is understandable that there has yet to be another case citing the substance of Moore; since Article 17 is but a sliver of the Montreal Convention, and Moore’s reasoning zooms in incredibly close on that sliver, it is not surprising that a case where Moore would be directly applicable has yet to emerge. Third, even if the lack of cites proves the Holistic Approach may have little value as a band-aid, it still has value as a prophylactic. Anticipating and preparing for chaos beforehand is preferable to allowing it to rear its head and picking up the pieces after the fact.

V. CONCLUSION

In Moore, the First Circuit has threatened to bend courts off the flight path. Moore shed light on the issue of perspective that Saks left unaddressed and sought to resolve said issue with the Reasonable Passenger Approach. Montreal Convention jurisprudence is already confusing as-is, and unfortunately, Moore aggravated this issue. The split that Moore illuminated is deceptively simple and its reasoning has tripping hazards which, if left unaddressed, could lead courts astray when it comes to Article 17 analysis. For this reason, I believe the Holistic Approach is the best option for Article 17 “accident” analyses going forward. Though imperfect, it strikes an ideal balance between Moore’s intention (creating a standard attuned to the position of the consumer) and the instructions from Saks (that the totality of the relevant circumstances surrounding an injury or death must be consulted). Instead of downplaying industry standards, customs, and policies out of fear that they will bleach out consumer interests, the Holistic Approach recognizes that these are just tools in a larger toolbox that will help courts in gauging whether an event was “unexpected or unusual.” In doing so, it adjusts the trajectory of Moore in a way that puts future courts on a more hopeful course.