SHOULD LIABILITY BE ALLOWED UNDER THE WARSAW/MONTREAL REGIMES WHEN THE ACCIDENT WAS NOT CAUSED BY AN EVENT OR OCCURRENCE NOT CAUSED BY AIRLINE PERSONNEL OR RELATED TO AVIATION OPERATIONS?

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NO!
CLAIMS AT ISSUE

- CLAIMS BY THE OFFENDING PASSENGER AGAINST THE CARRIER FOR ACTIONS TAKEN IN RESPONSE TO UNRULY/DISRUPTIVE PASSENGERS
  - Restraint
  - Removal
  - Arrest
  - Search
  - Physical Contact

- CLAIMS BY A PASSENGER EFFECTED BY THE CONDUCT OF THE UNRULY/DISRUPTIVE BEHAVIOR
  - Assaults
  - Physical Contact
1. Physical Aircraft Operations (piloting, seating, food and beverage and other services, security, luggage and storage, aircraft structures-lights, seats, trays, etc.)

2. Industry Standards and Carrier Policies and Procedures

3. Conduct of Employees and Agents in Provision of Aircraft/Flight Operation Services
ARGUMENTS FOR LIABILITY WITHOUT CAUSAL CONNECTION:

POLICY

- IN KEEPING WITH PRESUMED/STRICT LIABILITY UNDER CONVENTION SCHEME

- CARRIERS IN BEST POSITION AS IT CONTROLS ACCESS, ENVIRONMENT AND CAN DEVELOP DEFENSIVE MEASURES

- MONTREAL CONVENTION (MC) EXPRESSLY REPRESENTS SHIFTING OF PROTECTION TO CONSUMERS AND PASSENGERS

- PREAMBLE

  RECOGNIZING the importance of ensuring protection of the interests of consumers and international carriage by air and the need for equitable compensation based in the principle of restitution
ARGUMENTS FOR LIABILITY WITHOUT CAUSAL CONNECTION: TEXT

- THE MC OF 1999 MADE NO SIGNIFICANT CHANGE TO ARTICLE 17 OF WARSAW CONVENTION (WC)

- "THE CARRIER IS LIABLE FOR DAMAGE SUSTAINED IN CASE OF DEATH OR BODILY INJURY OF A PASSENGER UPON CONDITION ONLY THAT THE ACCIDENT CAUSED THE DEATH OR INJURY TOOK PLACE ON BOARD THE AIRCRAFT AND IN THE COURSE OF ANY OF THE OPERATION OF EMBARKING OR DISEMBARKING." (ARTICLE 17.1)
ARTICLE 17 LIABILITY

(1) AN ACCIDENT

(2) CAUSED

(3) DEATH OR BODILY INJURY

(4) WHILE THE PASSENGER WAS ON BOARD THE AIRCRAFT OR WAS IN THE COURSE OF EMBARKING OR DISEMBARKING
ARTICLE 17 LIABILITY (CON'T)

- Plain text includes no causal element other than accident must cause injury or death.
- Plain text does not include any reference to airline operations, services, standards, personnel or aviation risks.
- No such inclusion in 1929 (WC) or in 1999 (MC).
- Not judicial role to engraft or add elements not expressly included in plain text of Article 17.

"Post-Ratification adjustments...are appropriately made by the treaties signatories not the courts."

MC establishes two-tier liability system with strict liability for death and bodily injury up to SDR limits and presumptive liability in an unlimited amount.

Clear no negligence or act or omission required...need only prove the injury resulted from an "accident".

Due diligence and all reasonable measures exoneration and willful misconduct eliminated.

Negligence of carrier only relevant where seeking damages above the SDR limit with burden on carrier.
ARGUMENTS FOR LIABILITY WITHOUT CAUSAL CONNECTION: CONTEXT (CON’T)

- ARTICLE 20 IN FACT REFERENCES "WRONGFUL ACT OR OMISSION": THIS IS NOT PART OF ACCIDENT INQUIRY

- MC EXPRESSLY LIMITS ANY "DEFENSE" OR "SET-OFF" FOR CLAIMS UNDER SDR LIMITS TO CONTRIBUTORY NEGLIGENCE OF CLAIMANT

- MC EXPRESSLY PROVIDES RIGHT IN CARRIER TO BRING ACTION AGAINST THIRD PARTY FOR LOSS OR DAMAGES

- ACCIDENT ALL INCLUSIVE PARTICULARLY AS UNDER TSENG CLAIMANT MAY OTHERWISE BE WITHOUT A REMEDY
ARGUMENTS FOR LIABILITY WITHOUT CAUSAL CONNECTION: SAKS

- AIR FRANCE V. SAKS DOES NOT SUPPORT ANY CAUSAL CONNECTION TO AIRLINE OPERATIONS FOR LIABILITY

- FACTS: A PASSENGER LOST HER HEARING IN ONE EAR AFTER A ROUTINE PRESSURIZATION OF AN AIR FRANCE AIRCRAFT LANDING NORMAL AT LOS ANGELES

- HOLDING: ARTICLE 17 LIABILITY FOR "ACCIDENT" EXTENDS "ONLY IF A PASSENGER’S INJURY IS CAUSED BY AN UNEXPECTED OR UNUSUAL EVENT OR HAPPENING THAT IS EXTERNAL TO THE PASSENGER"
ARGUMENTS FOR LIABILITY WITHOUT CAUSAL CONNECTION: SAKS (CON'T)

- This definition of accident must be applied "flexibly" after assessing all of the circumstances surrounding the passenger's injuries.

- The "event or happening" that caused injury must be abnormal, unexpected or unusual.

- The event must be "external to the passenger," and not the passenger's own "internal reaction" to normal flight operations.

- Where the evidence is contradictory, the trier of fact must determine whether an accident, so defined, has occurred.
ARGUMENTS FOR LIABILITY WITHOUT CAUSAL CONNECTION: SAKS (CON'T)

- The only causal connection required by Saks is between accident and injury and/or death not airline operations or air travel risks.

- Court did not adopt the risk of travel argument made by Ms. Saks.

- Saks makes clear that accident encompasses more than unintentional conduct.

- Only obligation upon passenger to prove is some link in the chain of causation is a cause that is an unusual or unexpected event external to the passenger.

- Passenger behavior and actions aboard aircraft including assaults meet Saks definition of unexpected or unusual event external to the passenger.
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: POLICY

- WC AND MC NOT INTENDED TO RENDER CARRIERS GUARANTOR OF PASSENGER SAFETY

- TO NOT REQUIRE CAUSAL CONNECTION TO AIRLINE OPERATIONS IS TO IMPOSE GUARANTORS-LIKE LIABILITY FOR VIRTUALLY EVERY HAPPENSTANCE

- WHILE MC CONCERNED WITH INCREASING PROTECTION FOR PASSENGERS, IT REMAINS AS WELL AN ATTEMPT TO BALANCE THE INTERESTS OF PASSENGERS AND CARRIERS WITH AN INTENT TO LIMIT LIABILITY
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: POLICY (CON’T)

- GOAL OF LIMITING CARRIER LIABILITY WAS UNDERSTANDING THAT LIABILITY OF AIR CARRIER WOULD BE "LES RIGOROUS" THAN OTHER COMMON CARRIERS

- RESTRAINT SHOULD BE IMPOSED IN CONSTRUING ARTICLE 17 AS IT IMPOSES PRESUMED/STRICT LIABILITY; UNDERCUTTING MORAL RESPONSIBILITY OR IMPOSING LIABILITY REGARDLESS OF ABILITY TO PREVENT OR FORESEE
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: POLICY (CON’T)

- REQUIRING A CAUSAL CONNECTION TO AIRLINE OPERATIONS PERMITS BROAD AND FLEXIBLE RECOVERY FOR INJURED PASSENGERS YET LIMITS LIABILITY TO THOSE RISKS OR CIRCUMSTANCES THAT AIRLINES ARE IN THE BEST POSITION TO PREVENT OR INSURE AGAINST

“This approach to defining the boundaries of compensable accidents under the Convention is consistent with the underlying principles advocated by each camp in the post-Saks “accident” debate. It allows broad and flexible recovery for injured passengers yet limits liability to those risks or circumstances the airlines are in the best position to prevent or insure against.”

ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION:
TEXT AND CONTEXT

- Treaty interpretation requires ordinary meaning be given to terms "in their context" and "in light of object and purpose".

- Original concern and focus was aviation aircraft accidents and large scale incidents in aircraft operations.

- "Accident" was used as part of overall scheme and amidst original purpose to establish uniform rules and limit liability of air carriers.
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION:
TEXT AND CONTEXT (CON’T)

- NOTABLE HISTORY:

- Delegate at 1929 Convention noted that accident was meant to be one of three things: (1) errors in piloting; (2) defect in functioning of the aircraft; and (3) acts of God

- Proposal was made to add 'in connexe avec le transport' but was not included with commentary that such a connection was deemed obvious

- 1949 ICAO Subcommittee on the Revision of WC references the specific instance of a passenger “attack” upon another as an example which term “occurrence” would cover but “accident” would not

- 1951 and 1954 ICAO Legal Committee noting the opposition to changing accident to occurrence referencing passenger attacks and air sickness as not being responsibility of carrier

- Guatemala Protocol-1971, changed "accident" to "event". It was noted that change expanded carrier liability. Referenced debate including certain delegates wanting accident retained in order to make clear that carrier liability was tied to malfunction or service or abnormal event directly connected to transport operations
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: TEXT AND CONTEXT (CON'T)

- The context of Article 17 accident supports that it was intended to be concerned with aircraft or airline operations.

- The term accident is itself defined only by context (i.e. car accident; train accident; aviation accident).

- Omission of aircraft operations modifying accident does not detract from its context or its limited meaning as causal connection to aircraft operations was the unequivocal context in which it was used.

- At time accident adopted there was overall scheme and the all reasonable measures exoneration available where carrier showed that event was unrelated to aircraft operation.
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: SAKS

Under Saks required to assess all of the circumstances; inherent in such circumstances and assessment of whether injury resulted from unexpected or unusual event or happening is the relationship to aircraft operations.

Considerations courts consider:

1. The normal operations of the aircraft; 
2. The knowledge or complicity of the crew members in the events surrounding the alleged accident; 
3. The acts of fellow passengers whether intentional or not; 
4. The acts of third persons who are not crew or passengers, e.g., hijackers and terrorists; 
5. The location of the occurrence in the continuum of the air travel; 
6. The role, condition and reaction of the complainant in connection with the occurrence at issue and; 
7. The kinds of risks inherent in air travel.

ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: SAKS (CON’T)

- SAKS states that not all in-flight incidents causing injuries are Article 17 accidents.

- All cases cited by SAKS arose out of risks that are inherent in air travel or out of the operation of the aircraft itself.

- SAKS itself excluded from accident a passenger’s internal reaction to the normal and expected operation of the aircraft.

- By implication, it is some operation of the aircraft that the injury should relate and it is only the unusual, abnormal or unexpected operation of the aircraft that would constitute an Article 17 accident.
ARGUMENTS AGAINST LIABILITY ABSENT CAUSAL CONNECTION: (CON’T)

“Courts have theorized that one of the guiding principles that pervades, and arguably explains, the original Convention, the subsequent modifications, and even the Court's decision in Saks, is an apportionment of risk to the party best able to control it, which provides some degree of certainty and predictability to passengers and air carriers, and which encourages them to take steps to minimize that risk to the degree that it is within their control.”

Girard, 2003 WL 21989978

“Occurrences outside of the airline’s control or ability to prevent or that are not related to hazards inherently associated with aviation but rather are risks incident to “living in a world such as ours” are not accidents.”

Fulop, 175 F. Supp. 2d 651
LEADING CASES:
FEDERAL CIRCUIT COURTS OF APPEAL

A. SUPPORTING CAUSAL CONNECTION:

Langadinos v. American Airlines, Inc., 199 F. 3d 68 (1st Cir. 2000)
Potter v. Delta Airlines, Inc., 98 F. 3d 881 (5th Cir. 1996)

B. SUPPORTING NO CAUSAL CONNECTION REQUIRED:

Gezzi v. British Airways, Inc., 991 F. 2d 603 (9th Cir. 1993)
A. SUPPORTING CAUSAL CONNECTION:

B. SUPPORTING NO CAUSAL CONNECTION REQUIRED: