

IT WAS AN ACCIDENT! DETERMINING THE APPROPRIATE PERSPECTIVE TO ASSESS MONTREAL CONVENTION PERSONAL INJURY CLAIMS

Abstract: On April 29, 2022, the U.S. Court of Appeals for the First Circuit in *Moore v. British Airways PLC* held that an ordinary passenger’s expectations determine whether the cause of a personal injury during international flight constitutes an “accident” under Article 17(1) of the Montreal Convention. In so doing, the First Circuit created a majority approach to the issue—adopting the standard previously put forth by the Eleventh Circuit and rejecting the Fifth Circuit’s reliance on industry standards. This Comment argues that the First Circuit correctly adopted the Eleventh Circuit’s approach because it more closely aligns with the primary goal of the Montreal Convention—protection of consumers’ economic interests over that of international air carriers.

INTRODUCTION

In the wake of the COVID-19 pandemic, the airline industry continues to recover from the decline in commercial air travel.¹ Despite financial losses during the pandemic, international air travel has reached nearly pre-pandemic rates.² The recovery of international travel increases the risk of personal injuries aboard aircraft.³ Those injuries arising out of international travel heighten

¹ See Jaap Bouwer, Vik Krishnan, Steve Saxon & Caroline Tufft, *Taking Stock of the Pandemic’s Impact on Global Aviation*, MCKINSEY & CO. (Mar. 31, 2022), <https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/taking-stock-of-the-pandemics-impact-on-global-aviation> [https://perma.cc/4EHA-YBE9] (finding that the collective value of American airlines dropped \$63 billion because of the pandemic). American airlines continue to grapple with the effects of the pandemic. See Scott Neuman & Jennifer Ludden, *The Blizzard Is Just One Reason Behind the Operational Meltdown at Southwest Airlines*, NPR (Dec. 27, 2022), <https://www.npr.org/2022/12/27/1145616523/southwest-airlines-flight-cancellations-2022> [https://perma.cc/X69C-G48Q] (explaining that staff shortages from the pandemic contributed to the cancellation of over five thousand Southwest Airline flights over the busy holiday travel season).

² See Monica Pitrelli, *For the First Time Since the Pandemic, Leisure and Business Flights Surpass 2019 Levels*, CNBC (May 19, 2022), <https://www.cnbc.com/2022/05/19/flight-bookings-for-leisure-and-business-travel-top-2019-levels.html> [https://perma.cc/Z9SM-LEQW] (reporting on a global trend that flights for leisure surpassed reported pre-pandemic numbers); Press Release, Int’l Air Transp. Ass’n, *International Travel Drives May Air Traffic Recovery* (July 7, 2022), <https://www.iata.org/en/pressroom/2022-releases/2022-07-07-02/> [https://perma.cc/NKV8-9KZF] (determining that international air travel increased by over three hundred percent from May of 2021 to May of 2022).

³ See Paulo M. Alves, Neil Nerwich & Alexandre T. Rotta, *In-Flight Injuries Involving Children on Commercial Airline Flights*, 35 PEDIATRIC EMERGENCY CARE 687, 688 (2019) (noting that international travel poses a greater risk of airline injuries for children compared to domestic flights); see

the risk of subsequent personal injury litigation.⁴ The unification of liability rules for injuries during international travel prevents confusion over what country's laws govern a passenger's claim.⁵ To prevent disputes over what local laws apply, countries drafted and adopted the Warsaw Convention, as well as its successor, the Montreal Convention.⁶ These international treaties form a uniform liability system for all claims brought against international airlines.⁷

The Montreal Convention provides a remedy under Article 17(1) for injuries suffered by passengers while aboard an international flight.⁸ The First Circuit recently adopted the Eleventh Circuit's approach for determining whether a passenger's injuries satisfy the elements of an Article 17(1) claim.⁹ The First Circuit rejected the Fifth Circuit's approach by relying on the expectations of

also Philip A. Kemp, Bruce R. Burnham, G. Bruce Copley, Matthew J. Shim, *Injuries to Air Force Personnel Associated with Lifting, Handling, and Carrying Objects*, AM. J. PREVENTIVE MED. S148, S149 (2010) (highlighting that among civilian personnel on military aircraft, slip and fall incidents cause the most on-site injuries). A pilot's failure to carefully manage fuel reserves remains one of the leading causes of aviation accidents during long flights. See NAT'L TRANSP. SAFETY BD., SAFETY ALERT 067, FLYING ON EMPTY, 1–2 (2017) (explaining that pilot error causes the majority of fuel-related accidents).

⁴ See Joe Sutton, Jamiel Lynch & Gregory Wallace, *Commercial Airplane Catches Fire After Landing Gear Collapses at Miami International Airport*, CNN, <https://www.cnn.com/2022/06/21/us/miami-plane-fire/index.html> [<https://perma.cc/5LBK-8D98>] (June 22, 2022) (reporting that a fire began on a commercial airplane during landing, which resulted in injuries to passengers on board); see also Lee Brown, *NYC-Bound Plane's Engine Caught Fire, Shed Debris on Same Day as United 328*, N.Y. POST (Feb. 22, 2021), <https://nypost.com/2021/02/22/jfk-bound-planes-engine-caught-fire-dropped-debris-over-netherlands/> [<https://perma.cc/8AKZ-DTGL>] (reporting that an international cargo flight in-bound to New York caught fire and dropped debris on residents of a Dutch town).

⁵ See M. Veronica Pastor, *Absolute Liability Under Article 17 of the Warsaw Convention: Where Does It Stop?*, 26 GEO. WASH. J. INT'L L. & ECON. 575, 576 (1993) (highlighting the confusion and potential for inequitable results from multinational disputes over which country's law governs a claim for relief).

⁶ See Tory A. Weigand, *Recent Developments Under the Montreal Convention*, 77 DEF. COUNS. J. 443, 443 (2010) (noting that the Montreal Convention replaced the uniform liability scheme developed under the original international treaty regarding airline liability, the Warsaw Convention). See generally Convention for the Unification of Certain Rules for International Carriage by Air, Aug. 25, 2000, T.I.A.S. No. 13,038 [hereinafter Montreal Convention]; Convention for the Unification of Certain Rules Regarding International Transportation by Air, with Additional Protocol, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention] (establishing the international uniform liability scheme).

⁷ See Weigand, *supra* note 6, at 443 (noting that the Warsaw Convention and the Montreal Convention created uniformity in international airline liability). Uniformity in the applicable law prevents different outcomes for injuries suffered by passengers based on the destination of the flight. See Pastor, *supra* note 5, at 576 (acknowledging that, without uniform liability rules, verdicts for similarly situated plaintiffs may vary depending on various factors like nationality and the destination of the aircraft).

⁸ See Montreal Convention, *supra* note 6, art. 17(1) (creating a remedy for passengers that suffer personal injuries as the result of an "accident" related to either boarding the aircraft or during the flight).

⁹ See *Moore v. British Airways PLC*, 32 F.4th 110, 117–18 (1st Cir. 2022) (explaining that the court's new standard matches that of the United Kingdom and the Eleventh Circuit).

an ordinary passenger rather than airline policies and industry standards to assess liability.¹⁰

Part I of this Comment gives an overview of the history of the Montreal Convention, the elements of an Article 17(1) claim for personal injuries arising from an accident during the course of international travel, and the factual and procedural history of the U.S. Court of Appeals for the First Circuit's 2022 decision in *Moore v. British Airways PLC*.¹¹ Part II examines and discusses the tests used to assess an Article 17(1) claim according to the U.S. Courts of Appeals for the First, Fifth, and Eleventh Circuits.¹² Finally, Part III argues that the First Circuit correctly adopted the Eleventh Circuit's approach because it aligns with the primary purpose of the Montreal Convention—to expand greater protections to airline passengers.¹³

I. THE EVOLUTION OF PERSONAL INJURY CLAIMS UNDER ARTICLE 17(1) OF THE MONTREAL CONVENTION

In 2022, in *Moore v. British Airways PLC*, the U.S. Court of Appeals for the First Circuit formed the majority approach by adopting the Eleventh Circuit's standard that the viewpoint of an ordinary passenger must be used to assess whether an accident occurred during international travel under Article 17(1) of the Montreal Convention.¹⁴ Section A of this Part discusses Article 17(1) and the scope of liability for international air carriers.¹⁵ Section B discusses the factual and procedural history of *Moore*.¹⁶

A. Article 17 of the Montreal Convention and the Meaning of "Accident"

In 1929, the Warsaw Convention established a uniform set of rules governing international airline liability, and it was the first international treaty to

¹⁰ See *id.* at 119 n.7 (rejecting the Fifth Circuit's reasoning where it departs from a passenger-based perspective); see also *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177, 181–82 (5th Cir. 2004) (holding that the failure to follow industry standards does not by itself establish liability under Article 17(1)).

¹¹ See *infra* notes 14–46 and accompanying text.

¹² See *infra* notes 47–71 and accompanying text.

¹³ See *infra* notes 72–86 and accompanying text.

¹⁴ See *Moore*, 32 F.4th at 117, 118 (utilizing the "reasonable passenger" standard, which relies upon an ordinary passenger's expectations to determine whether an accident occurred); Montreal Convention, *supra* note 6, art. 17(1). The minority approach of the Fifth Circuit assesses whether an accident occurs through the viewpoint of the airline rather than that of the passenger. See *White v. Emirates Airlines, Inc.*, 493 F. App'x 526, 533–34 (5th Cir. 2012) (holding that failure to adhere to the airline's internal policies for providing medical aid does not constitute an accident when the crew's actions could be considered reasonable under the circumstances); *Blansett*, 379 F.3d at 181–82 (holding that a failure to provide a deep vein thrombosis warning to a passenger did not cause an accident under Article 17(1) because federal regulations do not expect airlines to provide such warnings).

¹⁵ See *infra* notes 17–37 and accompanying text.

¹⁶ See *infra* notes 38–46 and accompanying text.

do so.¹⁷ The drafters of the Warsaw Convention intended to create a uniform liability scheme that passengers from any member country could use to sue international airlines.¹⁸ To promote the growth of the burgeoning aviation industry, the drafters limited airline liability through a cap on damages and a preemption provision.¹⁹ In response to perceived limitations of the Warsaw Convention, signatory countries adopted amendments to the treaty.²⁰ The amendments to the Warsaw Convention, however, undermined the primary goal of consistency in international liability by creating confusion over how to interpret the treaty.²¹

The Montreal Convention of 1999 streamlined the Warsaw Convention by consolidating various amendments into one treaty and creating clearer liability rules.²² The Montreal Convention governs all claims for relief available to passengers against international air carriers.²³ The drafters carried over numerous provisions of the Warsaw Convention to the Montreal Convention with the

¹⁷ See Andrei Ciobanu, *Saving the Airlines: A Narrower Interpretation of the Term “Accident” in the Montreal Convention Article 17*, 31 ANNALS AIR & SPACE L. 1, 2 (2006) (observing that the Warsaw Convention developed in response to the pressing need for uniformity in aviation liability); Warsaw Convention, *supra* note 6, ch. III.

¹⁸ See Ciobanu, *supra* note 17, at 3 (explaining that the global scope of the airline industry called for the consolidation of rules to govern airline liability); Alexa West, Note, *Defining Accidents in the Air: Why Tort Law Principles Are Essential to Interpret the Montreal Convention’s “Accident” Requirement*, 85 FORDHAM L. REV. 1465, 1471 (2016) (noting that uniformity in the legal claims that could be brought against airlines would limit confusion over what obligations airlines owed to their passengers).

¹⁹ See West, *supra* note 18, at 1471–72 (stating that imposing limitations on airline liability reduced insurance costs and protected airlines from bankruptcy in personal injury litigation); Warsaw Convention, *supra* note 6, art. 22(1) (placing a damages cap on airline liability); *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 160–61 (1999) (holding that personal injury claims against airlines may only be brought subject to the remedies available under the Warsaw Convention); see also Julia Lauria-Blum, *Travel by Air, the Golden Years: 1920s–1960s*, METRO. AIRPORT NEWS (Nov. 9, 2021), <https://metroairportnews.com/travel-by-air-the-golden-years-1920s-1960s/> [<https://perma.cc/5UDB-XMGL>] (highlighting that commercial aviation started as a smaller industry limited to affluent individuals and businessmen).

²⁰ See West, *supra* note 18, at 1474 (explaining that the increasing number of amendments to the Warsaw Convention created legal uncertainty and confusion over the requirements of the treaty).

²¹ See *id.* (describing the amendments as “convoluted and far from uniform” (citing Ruwantissa Abeyratne, *The Economy Class System and Air Carrier Liability*, 28 TRANSP. L.J. 251, 273 (2001)); Abeyratne, *supra*, 273 (noting disagreement over how to interpret provisions of the Warsaw Convention). Courts will typically enforce interpretations of a treaty consistent with the drafter’s intent. See Elad D. Gil, *Rethinking Foreign Affairs Deference*, 63 B.C. L. REV. 1603, 1644–45 & n.232 (2022) (explaining that the executive branch’s interpretation of a treaty receives greater deference because the executive plays a large role in drafting international agreements).

²² See Montreal Convention, *supra* note 6, pmb. (recognizing, as one of its central tenets, “the need to modernize and consolidate the Warsaw Convention”); Weigand, *supra* note 6, at 443 (observing that the Montreal Convention condensed six international agreements into one treaty).

²³ See Montreal Convention, *supra* note 6, art. 29 (preempting damages claims brought under legal authority other than the Montreal Convention); Weigand, *supra* note 6, at 444 (explaining that the Montreal Convention provides the only avenue of relief for passengers injured on international flights).

intent to preserve legal precedent.²⁴ For example, in 1999, in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, the U.S. Supreme Court held that plaintiffs injured aboard aircraft could only bring a personal injury claim under the Warsaw Convention.²⁵ Courts have applied Article 29 of the Montreal Convention consistently with the Supreme Court's interpretation of preemption under the Warsaw Convention—thus, the Montreal Convention preempts all causes of action, including local claims that are non-cognizable under the treaty.²⁶

Article 17(1) of the Montreal Convention establishes a cause of action for passengers to sue international airlines for personal injuries.²⁷ The Montreal Convention only permits recovery for accidents that occur while embarking, disembarking, or flying aboard an aircraft.²⁸ The definition of “accident” comes from the Supreme Court's interpretation of the term as used in Article

²⁴ See West, *supra* note 18, at 1476 (noting that courts “‘routinely rel[y] upon Warsaw Convention precedent where the equivalent provision in the Montreal Convention is substantively the same’” (quoting *Narayanan v. British Airways*, 747 F.3d 1125, 1127 n.2 (9th Cir. 2014))).

²⁵ See *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 160–61 (1999) (explaining that the Warsaw Convention offered the only remedy for personal injuries suffered during international flights); *Dagi v. Delta Airlines, Inc.*, 961 F.3d 22, 27–28, 27 n.4 (1st Cir. 2020) (recognizing that the Montreal Convention preempts claims in the same manner as the Warsaw Convention); see also *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406, 419 (6th Cir. 2017) (acknowledging that the drafters intended for caselaw developed under the Warsaw Convention to guide interpretation of Article 17 of the Montreal Convention).

²⁶ See Montreal Convention, *supra* note 6, art. 29 (stating that all legal claims must be brought under the Montreal Convention); *Dagi*, 961 F.3d at 27–28 (explaining that “the Montreal Convention preempts all local claims” for personal injuries during international flights (citing *El Al Isr. Airlines*, 525 U.S. at 160–61)). Some courts dispute whether the Montreal Convention preempts all local state claims. See, e.g., *Weigand*, *supra* note 6, at 444 (highlighting dispute over whether the preemptive scope of the treaty includes all state law claims); *Gamson v. British Airways, PLC*, 46 F. Supp. 3d 86, 88 (D.D.C. 2014) (acknowledging the lack of consensus on complete preemption); *Narkiewicz-Laine v. Scandinavian Airlines Sys.*, 587 F. Supp. 2d 888, 890 (N.D. Ill. 2008) (holding that the plaintiff's contract claim under state law may be brought outside the Montreal Convention). But see *Cohen v. Am. Airlines, Inc.*, 13 F.4th 240, 246 (2d. Cir. 2021) (holding that the Montreal Convention preempts the plaintiff's local claims of recklessness and willful misconduct); *Dagi*, 961 F.3d at 33 (preempting false imprisonment claims). Complete preemption ensures uniformity in the legal claims available to passengers of signatory countries. See *Weigand*, *supra* note 6, at 444 (explaining that complete preemption flows from the intent to create a uniform liability scheme).

²⁷ See Montreal Convention, *supra* note 6, art. 17(1) (holding airline carriers liable for personal injuries that result from accidents either while aboard the aircraft or during the process of “embarking or disembarking” from the aircraft).

²⁸ See *id.* (limiting liability to events that result from an “accident”). Courts use several factors to determine whether an accident occurs while “embarking and disembarking” an aircraft, including the physical location of the passenger at the time of the injury, what actions the passenger took, and the degree of control the airline held over the passenger when the injury occurred. See *Campbell v. Air. Jam. Ltd.*, 760 F.3d 1165, 1173 (11th Cir. 2014) (requiring that the accident occur with some connection to the actual boarding or disembarking process of the aircraft). Activities within the terminal building of the airport may constitute accidents while boarding the aircraft. See *Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255, 1260–61 (11th Cir. 2002) (holding that a cognizable claim under Article 17(1) existed where an assault took place in the terminal building).

17 of the Warsaw Convention.²⁹ According to the Supreme Court, the occurrence of “an unusual or unexpected event” constitutes an “accident,” which does not include a passenger’s reaction to the normal operation of the aircraft.³⁰ An “event,” for purposes of determining the existence of an accident, includes inaction by the airline, such as a flight crew’s failure to respond to a passenger’s request for medical aid.³¹ The Montreal Convention holds carriers strictly liable for personal injuries up to a damages cap of approximately 175,000 U.S. dollars.³²

Although the drafters intended for the Warsaw Convention to limit airline liability, courts broadly construed the term accident to apply to a variety of claims.³³ For example, the term accident encompasses intentional as well as

²⁹ See Ciobanu, *supra* note 17, at 27 (noting that the drafters intended to avoid disturbing prior precedent under the Warsaw Convention, and that the definition of “accident” is subject to the signatories’ interpretations); Labbadia v. Alitalia, [2019] EWHC 2103, [23] (appeal taken from Eng.) (noting that the modern definition of accident came from the Supreme Court’s interpretation of the Warsaw Convention).

³⁰ See *Air Fr. v. Saks*, 470 U.S. 392, 405–06 (1985) (defining the term “accident” as used in the Warsaw Convention). The Court interpreted the Warsaw Convention using French definitions of accident because the drafters wrote the document in French. See *id.* at 399 (examining French legal definitions of to interpret Article 17). The French definition comports with the generally recognized definition of accident in the English language, besides the requirement that conduct be unintentional. See Ciobanu, *supra* note 17, at 12 (highlighting the lack of an intent requirement in the French definition compared to the English definition); *accord Accident*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining accidents as unforeseen or unexpected events).

³¹ See *Olympic Airways v. Husain*, 540 U.S. 644, 656 (2004) (recognizing that numerous causes of injury may be considered events for purposes of liability under Article 17(1)). An accident may be predicated on an airline’s failure to act, such as deviation from standard industry practices. See Weigand, *supra* note 6, at 456 (observing that inaction may be the cause of an injury); *Waxman v. C.I.S. Mexicana de Aviacion, S.A. de C.V.*, 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998) (holding that an accident occurred where the crew failed to identify and dispose of the hypodermic needle protruding from the passenger’s seat). But see *White v. Emirates Airlines, Inc.*, 493 F. App’x 526, 533–34 (5th Cir. 2012) (noting that failure to adhere to industry standards does not by itself prove the occurrence of an accident).

³² See *Montreal Convention*, *supra* note 6, art. 21(2) (limiting compensation to a damages cap for personal injuries if the carrier can prove a lack of negligence or that a third party caused the injury); *Saks*, 470 U.S. at 407 (noting that the focus of liability shifts to the source of the injury rather than the preventative steps taken by the airline carrier). The Montreal Convention calculates damages using “Special Drawing Rights,” or assets from an international reserve that may be converted to the currency of a signatory of the treaty. See *Furuta v. Hawaiian Airlines Inc.*, No. 19-00617, 2022 WL 3645764, at *5 n.2 (D. Haw. Aug. 24, 2022) (explaining that the damages cap converts to approximately \$175,000).

³³ See *Saks*, 470 U.S. at 405 (endorsing the application of Article 17 of the Warsaw Convention to tort actions for terrorist activities); *Fishman v. Delta Air Lines*, 132 F.3d 138, 143 (2d. Cir. 1998) (holding that scalding a child with a hot compress in-flight falls within the definition of an accident); *Adler v. WestJet Airlines, Ltd.*, 31 F. Supp. 3d 1381, 1389 (S.D. Fla. 2014) (finding that ejecting a passenger for bringing a service animal onboard fell within the scope of Article 17(1) of the Montreal Convention). Injuries that arise from a passenger’s own preexisting medical condition do not constitute external events, but failure to adequately respond to injuries may cause an accident. Compare *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1517, 1522 (11th Cir. 1997) (holding that the failure to divert the flight when a passenger suffered a heart attack could not be considered an accident

unintentional actions by the airline.³⁴ Despite expanding the scope of Article 17(1), courts refrained from imposing liability on airlines when the injury arose from a passenger's preexisting medical condition.³⁵ The use of the phrase "unusual or unexpected" to define an accident forced the question of whether the event should be viewed from the perspective of the passenger or the airline.³⁶ Courts have attempted to address this issue by applying legal principles from tort cases to assess what circumstances create accidents.³⁷

B. Factual History of Moore v. British Airways PLC

In 2018, while disembarking from a mobile staircase at London Heathrow Airport, Jennifer Moore lost her balance and fell at the final step.³⁸ Moore brought a claim under the Montreal Convention, arguing that the mobile stair-

where the passenger's personal medical condition caused the injury), with *Husain*, 540 U.S. at 656 (holding that courts may expect the flight crew to attempt to mitigate a passenger's injuries).

³⁴ See *Husain*, 540 U.S. at 651–52 (explaining that the scope of liability includes intentional and unintentional conduct).

³⁵ See *Saks*, 470 U.S. at 406 (explaining that a passenger's "internal reaction to the . . . expected operation" of the aircraft cannot be an accident); *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177, 182 (5th Cir. 2004) (holding that the failure to provide special medical warnings during the flight did not cause an accident where the airline otherwise complied with federal regulatory standards for providing medical warnings).

³⁶ See *Saks*, 470 U.S. at 406 (acknowledging the difficulty in separating injuries resulting from accidents and injuries resulting from happenstance); West, *supra* note 18, at 1479 (explaining that the expectations of passengers differ from that of the airline). The mere occurrence of an injury does not establish unexpected circumstances surrounding the injury. See *Craig v. Compagnie Nationale Air Fr.*, No. 93-55263, 1994 WL 711916, at *3 (9th Cir. Dec. 21, 1994) (holding that no accident occurred because although tripping over a shoe may be unexpected, passengers regularly remove their shoes and leave them on the floor during a flight).

³⁷ See West, *supra* note 18, at 1479 (noting the reliance on classic tort factors such as risks associated with aircraft, the knowledge of the parties, and intervening acts by other passengers to assess when an unexpected or unusual event occurred); see also *Moore v. British Airways PLC*, 32 F.4th 110, 117 (1st Cir. 2022) (determining that whether an accident occurred depends on the expectations of an ordinary passenger); *Baillie v. MedAire, Inc.*, 764 F. App'x 597, 599 n.2 (9th Cir. 2019) (using evidence of negligence to assess the existence of an accident because the Montreal Convention considers airline fault in determining damages); *Fishman*, 132 F.3d at 143 (analyzing the reasonableness of the airline's actions when assessing the existence of an accident). But see *Baillie*, 764 F. App'x at 600–01 (Ikuta J., dissenting) (rejecting inquiry into the airline's negligence when assessing the unexpected quality of an event); *Blansett*, 379 F.3d at 180–81 (rejecting any reliance on a reasonableness approach to assess the existence of an accident); *Saks*, 470 U.S. at 407 (noting that the primary inquiry does not involve the steps taken by an airline to avoid an injury, but solely "the nature of the event which caused the injury").

³⁸ *Moore v. British Airways PLC*, 511 F. Supp. 3d 1, 2, 3 (D. Mass. 2020), *aff'd in part, vacated in part*, 32 F.4th 110 (1st Cir. 2022). Riser height consists of the vertical distance between the back tread of one step and the front tread of the following step. 29 C.F.R. § 1910.21(b) (2022). The final step of the staircase had a riser height nearly double that of the preceding steps. *Moore*, 511 F. Supp. 3d at 3. The recommended riser height between each step must be at most 8.7 inches for safe traversal. See *id.* (noting that the recommended practice in the United Kingdom limits riser height to 8.7 inches for staircases); see also 29 C.F.R. § 1910.25(c)(2) (requiring, under the U.S. standards, that the riser height of staircases be no greater than 9.5 inches).

case used by the airline caused the accident that led to her injuries.³⁹ Moore argued that the airline unexpectedly deviated from recommended standards because the final step of the staircase doubled in height compared to the preceding steps.⁴⁰ In response, the airline argued that the final step's height often differs in mobile staircases, and that Moore's expectations about staircase height do not establish that the staircase caused an accident.⁴¹

The district court granted summary judgment for British Airways, holding that Moore failed to establish that the event of disembarking from the mobile staircase satisfied the definition of an accident under Article 17(1).⁴² On appeal, Moore failed to identify any evidence that the design of the mobile staircase diverged from that of mobile staircases used at other airports.⁴³ Moore nonetheless contended that the design of the staircase caused an accident because the difference in riser height deviated from the expectations of a typical airline passenger.⁴⁴ The First Circuit reversed the lower court's ruling and remanded the case, noting that the fact-finder must determine whether the use of the staircase itself created an accident.⁴⁵ The First Circuit explicitly rejected reliance on the policies and expectations of the airline to assess the existence

³⁹ *Moore*, 511 F. Supp. 3d at 2. Moore also brought a common-law negligence claim, which the court summarily dismissed. *Id.* at 6 (explaining that the Montreal Convention preempts local claims, like negligence).

⁴⁰ *Id.* at 3. The plaintiff's expert only cited to recommended practices because no regulation establishes a required riser height for mobile staircases. *Id.*

⁴¹ See Memorandum of Law of Defendant British Airways in Support of Its Motion for Summary Judgment at 13–14, *Moore v. British Airways PLC*, 511 F. Supp. 3d 1 (D. Mass. 2020) (No. 19-30007) (arguing that the passenger's subjective belief does not control). Several courts have considered and rejected reliance on a plaintiff's subjective view of what constitutes an unexpected event. See *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 202 (D. Mass. 1998) (holding that an injury resulting from luggage dropping out of a stowaway bin could not be considered objectively unexpected); see also *Armstrong v. Hawaiian Airlines, Inc.*, 416 F. Supp. 3d 1030, 1045 (D. Haw. 2019) (denying defendant's motion for summary judgment because the plaintiff offered evidence, arguably sufficient to show the refusal of assistance created an objectively unexpected event).

⁴² See *Moore*, 511 F. Supp. 3d at 6, 7 (holding that the implementation of a mobile staircase does not create an unexpected event). The failure to provide an objective metric to show a defect in the final step led the court to grant summary judgment for the airline. See *id.* at 6–7 (noting that the standards cited to only applied to stationary staircases); accord *Blansett*, 379 F.3d at 182 (holding that a deviation from industry standards does not mean an accident took place where the airline nonetheless complied with federal regulations).

⁴³ *Moore v. British Airways PLC*, 32 F.4th 110, 116 (1st Cir. 2022).

⁴⁴ *Id.* at 117 (proposing an “average traveler” standard). Changes in riser height can lead people to misjudge the height of the next step because people expect all stairs to be of uniform height. See Kristin Bigda, *Basics of Egress Stair Design*, NAT'L FIRE PROT. ASS'N (Sept. 17, 2021), <https://www.nfpa.org/News-and-Research/Publications-and-media/Blogs-Landing-Page/NFPA-Today/Blog-Posts/2021/09/17/Basic-of-Egress-Stair-Design> [https://perma.cc/99SC-JCZ7] (explaining that irregular riser heights carry an increased risk of slip-and-fall injuries).

⁴⁵ *Moore*, 32 F.4th at 123. Although the First Circuit rejected the lower court's holding, the court noted that British Airways presented evidence tending to show that the final step of the staircase did not cause an unexpected event. See *id.* (denying Moore's motion for summary judgment in part due to the existence of contradictory evidence).

of an unusual event and instead adopted a standard based on the expectations of an ordinary airline passenger.⁴⁶

II. CIRCUIT SPLIT ON WHETHER THE PERSPECTIVE OF THE PASSENGER OR OF THE AIRLINE CONTROLS

The U.S. Courts of Appeals for the First, Fifth, and Eleventh Circuits have considered whether, under Article 17(1) of the Montreal Convention, the existence of an accident should be determined from the passenger's perspective or the airline's perspective.⁴⁷ Section A of this part summarizes the Eleventh Circuit's approach of considering accidents from the perspective of the passenger.⁴⁸ Section B examines the Fifth Circuit's approach and use of industry standards to assess Article 17(1).⁴⁹ Section C summarizes the First Circuit's holding in *Moore v. British Airways PLC* and its endorsement of the Eleventh Circuit's approach.⁵⁰

A. The Eleventh Circuit Relies on a Passenger-Focused Perspective

The Eleventh Circuit endorsed the use of the passenger's expectations to assess Article 17(1) claims.⁵¹ In 2014, in *Campbell v. Air Jamaica Ltd.*, the Eleventh Circuit determined that the practice of involuntarily bumping passengers from their flight does not qualify as an accident under Article 17(1).⁵² Involuntary bumping occurs when airlines remove passengers from a flight because the airline sells more tickets than the amount of seats available on the plane.⁵³ Here, the passenger claimed that the practice of bumping created an unexpected event, and thus an accident, because the airline deviated from their

⁴⁶ See *id.* at 119 n.7 (rejecting the Fifth Circuit's reliance on federal regulations to differentiate expected and unexpected events). The First Circuit adopted the Eleventh Circuit's standard and viewed the events through the lens of an objective passenger. *Id.* at 118.

⁴⁷ See *id.* at 122–23 (reversing summary judgment for the airline); *Campbell v. Air. Jam. Ltd.*, 760 F.3d 1165, 1167, 1173 (11th Cir. 2014) (affirming dismissal of the plaintiff's Article 17(1) claim based on the expectations of the passenger); *Blansett*, 379 F.3d at 181–82 (reversing the district court's denial of the airline's motion to dismiss).

⁴⁸ See *infra* notes 51–56 and accompanying text.

⁴⁹ See *infra* notes 57–62 and accompanying text.

⁵⁰ See *infra* notes 63–71 and accompanying text.

⁵¹ See *Campbell*, 760 F.3d at 1173 (noting that internal airline policies do not answer the question of whether bumping the plaintiff from his flight can be an unexpected event). Relying on the passenger's expectations to determine what constitutes an accident potentially expands the scope of airline liability. See Ciobanu, *supra* note 17, at 13 (observing that a reliance on the consumer's expectations may expose airlines to liability for injuries that airlines do not cause).

⁵² See *Campbell*, 760 F.3d at 1172–73 (holding that delays in flights, such as from involuntary bumping, occur routinely).

⁵³ See *Bumping & Oversales*, U.S. DEP'T TRANSP. (Apr. 15, 2021), <https://www.transportation.gov/individuals/aviation-consumer-protection/bumping-oversales> [<https://perma.cc/LNL5-LT3K>] (noting that airlines routinely overbook flights to account for passengers who fail to appear).

internal bumping policy when they removed the passenger from his flight.⁵⁴ The court noted that the average passenger should anticipate flight delays, including removal from a flight, regardless of internal airline policies because delays occur regularly in air travel.⁵⁵ The Eleventh Circuit did not justify why events must be judged from the perspective of the passenger as opposed to the perspective of the airline.⁵⁶

B. The Fifth Circuit Frames the “Accident” Requirement from the Perspective of the Airline

In 2004, in *Blansett v. Continental Airlines, Inc.*, the Fifth Circuit considered whether the lack of deep vein thrombosis (DVT) warnings constituted an unexpected or unusual event under Article 17(1) when industry standards required DVT warnings.⁵⁷ The Fifth Circuit reasoned that “accidents” do not automatically arise from the failure to follow an industry standard unless the airline lacked a valid reason for the deviation.⁵⁸ The court explained that DVT warnings that require passengers to stand up periodically contradict other federally mandated warnings that passengers must remain seated on the flight, and thus the airline cannot be expected to follow the industry standard.⁵⁹

⁵⁴ See *Campbell*, 760 F.3d at 1173 (summarizing the plaintiff’s argument that the airline acted unexpectedly by deviating from their routine bumping practices).

⁵⁵ See *id.* (explaining that whether an airline followed their standard procedure failed to answer the question of whether a passenger would consider bumping unexpected).

⁵⁶ See *id.* (citing *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1522 (11th Cir. 1997)) (explaining that only the passenger’s perspective controls). In *Krys v. Lufthansa German Airlines*, the Eleventh Circuit held that no accident took place where the flight crew landed at their scheduled time instead of diverting the flight when a passenger fell ill. See 119 F.3d at 1517, 1522 (explaining that the flight continuing as scheduled does not mean the injury resulted from an unexpected event).

⁵⁷ See *Blansett v. Cont’l Airlines, Inc.*, 379 F.3d 177, 177–81 (5th Cir. 2004) (posing the question of whether DVT warnings should be expected aboard flights). The court assumed that the lack of DVT warnings deviated from standard industry practices. See *id.* at 181 (accepting the proposition that industry standards require DVT warnings). Sitting for extended periods of time, such as for long distance flights, increases the risk of blood clots developing in a passenger’s veins. *Blood Clots and Travel: What You Need to Know*, CDC, <https://www.cdc.gov/ncbddd/dvt/travel.html> [<https://perma.cc/RYL8-R8AP>]. DVT causes blood clots that develop in the leg, enter the bloodstream, and travel into a person’s lungs, resulting in further medical complications. Adam Felman, *What to Know About Deep Vein Thrombosis*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/153704> [<https://perma.cc/T7JJ-S3F9>] (Apr. 21, 2023).

⁵⁸ See *Blansett*, 379 F.3d at 182 (refusing to adopt a “*per se* rule that any departure from an industry standard of care must be an ‘accident’”).

⁵⁹ See *id.* (holding that no accident occurred where the airline adhered to federal regulations requiring passengers to remain seated); see also *White v. Emirates Airlines, Inc.*, 493 F. App’x 526, 533–34 (5th Cir. 2012) (holding that the failure to abide by internal policies does not cause an accident within the meaning of Article 17(1)); *Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914, 919 (9th Cir. 2004) (affirming summary judgment for the airline where the plaintiff failed to provide evidence that the airline deviated from industry standards). But cf. *Prescod v. AMR, Inc.*, 383 F.3d 861, 868 & n.9 (9th Cir. 2004) (holding that an accident took place where the crew failed to accommodate the passenger after a specific request).

The Fifth Circuit explained that whether an accident occurred does not require asking whether an airline acted negligently or reasonably.⁶⁰ Although the Fifth Circuit did not explicitly adopt an airline-based perspective to judge accidents, their focus on the airline's decision-making process reframed the inquiry into whether the airline acted in accordance with expectations set by the industry.⁶¹ An initial step that the accident be the result of an unexpected deviation from an industry standard shifted the viewpoint of the accident analysis away from that of the passenger and towards the thought process of the airline.⁶²

C. The First Circuit Forms the Majority Approach by Adopting the Eleventh Circuit's Standard

The First Circuit joined the Eleventh Circuit and thus created the majority approach to assessing what events constitute Article 17(1) accidents by adopting an objective passenger standard.⁶³ The court asserted that several factors supported the use of an ordinary passenger standard to assess the occurrence of accidents rather than reliance on the airline's expectations.⁶⁴ The court explained that because the passenger endured the injury, incidents should be judged from their perspective because the injured party can best assess the un-

⁶⁰ See *Blansett*, 379 F.3d at 180–81 (noting that whether an airline acted reasonably does not establish the unexpected nature of the injury); see also *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004) (disapproving of the use of negligence standards to assess the occurrence of an accident).

⁶¹ See *Blansett*, 379 F.3d at 182 (reframing the question of unexpectedness by looking to Federal regulations and the actions of other airlines to establish what behavior airlines should be expected to follow); see also *West*, *supra* note 18, at 1490 (arguing that the Montreal Convention should only hold airlines liable for injuries that the airline could reasonably be expected to avoid); *Ciobanu*, *supra* note 17, at 13 (promoting a less expansive interpretation of accident limited to unusual events within the operation of the aircraft and requiring a showing of fault by the airline); *Gotz v. Delta Air Lines, Inc.*, 12 F. Supp. 2d 199, 203 (D. Mass. 1998) (requiring that the cause of an injury relate to the operation of the aircraft and subsequent deviation from its expected operation in order to succeed in an Article 17 claim).

⁶² See *Blansett*, 379 F.3d at 182 (framing the accident inquiry as to whether deviation from an industry standard would be unexpected of the airline); see also *Moore v. British Airways PLC*, 32 F.4th 110, 119 n.7 (1st Cir. 2022) (acknowledging that the Fifth Circuit's approach appears to reject the ordinary passenger standard). The Fifth Circuit used the rationale in *Blansett* to hold that deviations from internal policy do not automatically cause accidents when the airline possessed a justifiable reason for doing so. See *White*, 493 F. App'x at 534 (holding that no accident occurred because although internal policy required diverting a flight when a medical emergency occurs, the fact that the plane began descent meant the flight crew had no opportunity to divert the flight).

⁶³ See *Moore*, 32 F.4th at 117–18 (adopting the expectations of an ordinary passenger to assess Article 17(1) accidents).

⁶⁴ See *id.* (relying on a plain reading of the Montreal Convention, the stated goals of the treaty, and precedent developed under the courts of signatory nations). The First Circuit looked to opinions from foreign jurisdictions when considering what perspective to judge an accident from. See *id.* (noting that the passenger's expectations control in the United Kingdom); see also *Air Fr. v. Saks*, 470 U.S. 392, 404 (1985) (looking to French courts to interpret the Warsaw Convention).

expected nature of the event.⁶⁵ The court further reasoned that the use of the passenger's perspective to judge events protected consumer interests in a manner consistent with the stated goals of the Montreal Convention.⁶⁶

Foreign jurisdictions such as the United Kingdom also derived an objective passenger standard from the U.S. Supreme Court's definition of "accident."⁶⁷ The First Circuit explained that the opinions of signatory countries must be considered because their understanding of the treaty, as co-parties, reflects the intent behind the meaning of treaty provisions.⁶⁸ The First Circuit noted that the use of the passenger's perspective in several foreign jurisdictions suggested that this perspective should control.⁶⁹ The First Circuit also noted, however, that an individual's personal expectations of what actions airlines should take does not control, as such a subjective perspective could lead to the same incident being treated as an accident with respect to one passenger but not another.⁷⁰ The court concluded that the change in riser height, when

⁶⁵ See *Moore*, 32 F.4th at 117 (deciding that the unexpected nature of an event should be judged from the injured party's perspective). The First Circuit reasoned that because intentional torts fall within the scope of the Montreal Convention, and intentional torts can only be unexpected from the passenger's perspective, then the passenger's perspective must be controlling. See *id.* (explaining that for intentional conduct to occur unexpectedly, the actions must be unexpected "by the person to whom it happens" (emphasis omitted) (quoting *Hussain*, 540 U.S. at 651 & n.6)).

⁶⁶ See *Moore*, 32 F.4th at 120 (explaining that the Montreal Convention favors the protection of passengers over the interests of airlines). Changes to the available defenses between the Warsaw Convention and the Montreal Convention also suggest an intent to allocate economic risk to the airline. Compare Warsaw Convention, *supra* note 6, art. 20 (permitting airlines to defend against Article 17 claims by showing that the airline took "all necessary measures to avoid the damage"), with Montreal Convention, *supra* note 6, art. 21(1) (prohibiting airlines from limiting the scope of their liability for personal injuries when the damages do not exceed the lower damages cap). The Montreal Convention imposes a form of strict liability on airlines regardless of whether the airline caused the injury. See *Moore*, 32 F.4th at 120 (determining that the airline should bear the economic burden of injuries to passengers aboard the aircraft).

⁶⁷ See *Deep Vein Thrombosis & Air Travel Grp. Litig.*, [2005] UKHL 72, [14] (appeal taken from Eng.) (arguing that the passenger's perspective should control because the passenger suffers the injury and has a better perspective than the perpetrator to judge the unexpected quality of the injury). Foreign jurisdictions regularly rely upon the Supreme Court's interpretation of the Warsaw Convention to assess Article 17(1) claims. See *id.* at [18] (acknowledging the importance of interpreting the Montreal Convention similarly to signatory states); see also *Labbadia v. Alitalia*, [2019] EWHC 2103, [23] (appeal taken from Eng.) (noting that the Supreme Court's judgment in *Air France v. Saks* remains "the leading modern authority" on the scope of Article 17(1) of the Montreal Convention).

⁶⁸ See *Moore*, 32 F.4th at 117 n.5 (highlighting the Supreme Court's reliance on decisions by signatory states to an international treaty when interpreting specific provisions); *Husain*, 540 U.S. at 658 (Scalia, J., dissenting) (criticizing the majority for rendering a decision that conflicted with interpretations of other signatory nations).

⁶⁹ See *Moore*, 32 F.4th at 118–19 (citing opinions from the United Kingdom and Australia that analyze the events from the passenger's perspective). The court noted several district court opinions that also concluded that the appropriate standard should be what an ordinary passenger expects. *Id.* at 119.

⁷⁰ See *id.* at 118 (refusing to allow "a paradoxical result" to occur where one policy can be considered an accident with respect to one passenger but not another (quoting Case C-70/20, *YL v. Altenrhein Luftfahrt GmbH*, ECLI:EU:C:2021:379, ¶ 35 (May 12, 2021))). Although the court rejected

viewed from the lens of an ordinary passenger, could cause an unexpected event because the uniformity of the preceding steps leads a passenger to instinctively believe the final step will match the previous height.⁷¹

III. THE PASSENGER-FRIENDLY GOALS OF THE MONTREAL CONVENTION JUSTIFY THE FIRST CIRCUIT'S HOLDING

This Comment argues that the majority approach of the First Circuit correctly assessed what events cause Article 17(1) accidents because the objective passenger standard adheres to both precedent and the stated goals of the Montreal Convention.⁷² Since the adoption of the Warsaw Convention, courts have taken an expansive view of Article 17 to ensure that passengers have adequate recourse against airlines.⁷³ The drafters of the Montreal Convention, aware of this expansive reading of Article 17, subsequently eliminated possible defenses to personal injury claims and continued to expand protections for passengers.⁷⁴ The ordinary passenger standard more closely aligns with these attempts to provide passengers adequate avenues for relief than does the Fifth Circuit's minority approach.⁷⁵

the subjective test, the First Circuit questioned but did not answer whether the expectations of an ordinary passenger should be heightened or reduced when the injured party has "special cognitive facilities." See *id.* at 118, 121 n.8 (considering whether the objective standard should reflect a passenger's experience with airlines or the weaker cognitive functions of children).

⁷¹ See *id.* at 121 (noting that people develop a stepping pattern when using a staircase that can lead to a fall if the height of steps suddenly changed). The court denied Moore's summary judgment motion, noting that the jury may find that an ordinary passenger does not expect airlines to adopt voluntary standards for staircase heights. See *id.* at 122, 123 (acknowledging that the jury may give greater weight to voluntary nature of the recommended practices); see also *Saks*, 470 U.S. at 405 (holding that the fact-finder has the duty to determine the cause of an accident where contradictory evidence exists); cf. *Blansett v. Cont'l Airlines, Inc.* 379 F.3d 177, 182 (5th Cir. 2004) (holding that no accident took place where the airline did not adopt voluntary practices).

⁷² See *Saks*, 470 U.S. at 405 (emphasizing that accidents must be flexibly construed when considering the passenger's injuries); *Moore*, 32 F.4th at 118–19 (citing both foreign and district court opinions that adopt an ordinary passenger standard); Montreal Convention, *supra* note 6, pmbl. (explaining that the treaty aims to protect the rights of passengers in international air travel).

⁷³ See *Saks*, 470 U.S. at 405 (promoting flexible application of the term accident and endorsing Article 17 claims against more tenuous events like terrorist attacks); *Fishman v. Delta Air Lines*, 132 F.3d 138, 143 (2d. Cir. 1998) (dropping a hot compress on a child constituted an accident); *Parnass v. Brit. Airways, PLC*, No. 1:19-cv-04555, 2021 WL 4311342, at *2, *5 (S.D.N.Y. Sept. 21, 2021) (denying summary judgment for the airline because a refusal to accommodate a passenger's foot injury may constitute an accident).

⁷⁴ See *Ciobanu*, *supra* note 17, at 10–11 (noting the intent of the drafters of the Montreal Convention to retain the case law under the Warsaw Convention when interpreting Article 17(1)); West, *supra* note 18, at 1475 (explaining that the Montreal Convention eliminates defenses from air carriers for personal injury claims below a damages threshold); Montreal Convention, *supra* note 6, pmbl. (stating that the Convention seeks to protect consumer interests).

⁷⁵ See *Moore*, 32 F.4th at 120 (recognizing that Montreal Convention acted as a response to the prioritization of airlines over passengers in the Warsaw Convention). The imposition of strict liability upon airline carriers while also imposing a damages cap suggests that the drafters intended to push the

Opinions from foreign jurisdictions carry significant weight when interpreting the Montreal Convention because this promotes a uniform liability system for international airlines.⁷⁶ Many foreign jurisdictions recognized the Supreme Court's definition of "accident" in *Air France v. Saks* as the predominantly accepted definition of the term as used in Article 17(1).⁷⁷ The plain reading of the Supreme Court's definition of accident suggested that the appropriate perspective should be that of the passenger because it logically follows that the person who causes an injury cannot avoid liability by arguing that he did not foresee the consequences of those actions.⁷⁸ 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.⁷⁹ 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.⁸⁰ The airline perspective could eliminate traditional negligence claims where no regulations or clear expectations exist.⁸¹

economic burden of personal injuries away from the passenger and onto the airline even in the absence of a clear showing of fault. *See id.* (observing that airlines can better account for accidents "into their actuarial calculus").

⁷⁶ *See* Montreal Convention, *supra* note 6, pmbl. (recognizing that the Warsaw Convention contributed to the uniformity of liability rules for international airlines); *see also Saks*, 470 U.S. at 404 (noting that foreign interpretations of the Warsaw Convention should be afforded "considerable weight"). The drafters of the Montreal Convention fully intended for the case law interpreting the Warsaw Convention to carry over to the new treaty with respect to Article 17(1). Ciobanu, *supra* note 17, at 27.

⁷⁷ *See* Labbadia v. Alitalia, [2019] EWHC 2103, [23] (appeal taken from Eng.) (acknowledging that the Supreme Court created "the leading modern authority on the interpretation" of the word accident under the Montreal Convention).

⁷⁸ *See* Deep Vein Thrombosis & Air Travel Grp. Litig., [2005] UKHL 72, [14] (appeal taken from Eng.) (noting the absurdity of considering whether an unexpected event occurred from the perspective of the person who set the events into motion rather than from the perspective of the injured party); *Olympic Airways v. Husain*, 540 U.S. 644, 651 n.6 (2004) (determining that a plausible definition of the term accident includes events "unexpected by the person to whom it happens" (quoting *Accident*, BLACK'S LAW DICTIONARY (6th ed. 1990))).

⁷⁹ *See* Oral Argument at 16:44, *Moore*, 32 F.4th 110 (No. 21-1037), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/21-1037_20220404.mp3 [<https://perma.cc/U2WP-5NC8>] (questioning whether an airline should be shielded from liability for having a twenty-foot riser height if such a height became the industry standard).

⁸⁰ *See* *Moore v. British Airways PLC*, 511 F. Supp. 3d 1, 6–7 (D. Mass. 2020) (holding that a change in riser height to thirteen inches did not cause an unexpected event because the voluntary standards need not be followed), *aff'd in part, vacated in part*, 32 F.4th 110 (1st Cir. 2022); *see also* *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177, 182 (5th Cir. 2004) (holding that the failure to provide DVT warnings did not create an accident where the airline's practice "was fully in accord with the expectations" of the Federal Aviation Administration).

⁸¹ *See* *Moore*, 511 F. Supp. 3d at 6–7 (holding that no cognizable Article 17(1) claim existed where the airline carried no expectation to follow voluntary standards); *Blansett*, 379 F.3d at 182 (holding that the lack of DVT warnings does not create an unexpected event unless the failure to adhere to industry standards creates an unexpected event); *White v. Emirates Airlines, Inc.*, 493 F.

The majority approach does create the concern that the scope of liability may broaden to include injuries beyond the control of the airline.⁸² The Montreal Convention addressed this concern—airlines already enjoy the advantage of an expansive preemption provision that limits potential claims passengers may bring.⁸³ Article 29, which preempts all local claims, excludes even claims the Montreal Convention does not recognize as cognizable.⁸⁴ If courts adopt the airline-centric perspective, then many traditional negligence claims could be preempted and leave plaintiffs without adequate recourse for their injuries.⁸⁵ The ordinary passenger standard prevents passengers from losing remedies for injuries merely because the injury occurred during the course of an international flight.⁸⁶

CONCLUSION

In 2022, in *Moore v. British Airways PLC*, the U.S. Court of Appeals for the First Circuit formed the majority approach for assessing an accident under Article 17(1) of the Montreal Convention by adopting the Eleventh Circuit's ordinary passenger standard. By relying on the ordinary passenger standard, the First Circuit elected to use a standard consistent with the stated goals of the Montreal Convention to afford passengers more opportunities for remedies. This approach offsets the preemptive force of the Montreal Convention by al-

App'x 526, 534 (2012) (determining that when an airline has an internal policy, the court must consider whether the airline possessed a valid reason for deviating from that policy).

⁸² See West, *supra* note 18, at 1482 (noting that a broad interpretation of the term accident exposes airlines to liability for the torts of other passengers). Similarly, airlines must contend with personal injury claims for attacks by terrorist groups. See *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 154 (3d Cir. 1977) (en banc) (holding that terrorist attacks may constitute Article 17 accidents).

⁸³ See Montreal Convention, *supra* note 6, art. 29 (limiting claims against international airlines to those within the Montreal Convention).

⁸⁴ See *El Al. Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (precluding claims under local law even when a plaintiff has no remedy under the Warsaw Convention). The Montreal Convention adopted the expansive preemption provision of the Warsaw Convention. See *Dagi v. Delta Airlines, Inc.*, 961 F.3d 22, 27–28 (1st Cir. 2020) (holding that preemption under the Warsaw Convention carried over to the Montreal Convention).

⁸⁵ See *Moore*, 511 F. Supp. 3d at 6–7 (arguing that the Montreal Convention did not recognize Moore's cause of action over the change in riser height); *Moore*, 32 F.4th at 114 n.1 (noting that Article 17(1) preempted Moore's negligence claim); see also *Dagi*, 961 F.3d at 28 (preempting a false imprisonment claim against the airline). Preemption of local claims further unifies law under signatory countries. See Weigand, *supra* note 6, at 445 (explaining that uniform liability creates total preemptions).

⁸⁶ Compare *Moore*, 32 F.4th at 121 (holding that a sudden change in stair riser height may create an Article 17(1) accident), with *Nasser v. Port Imperial Ferry Corp.*, 578 F. Supp. 3d 354, 359–60 (E.D.N.Y. 2022) (denying summary judgment to the ferry operator in a negligence suit where the staircase had a two-inch increase in riser height at the top step). The damages cap also limits airline liability, thus offsetting the imposition of liability airline carriers face for personal injuries. See *Furuta v. Hawaiian Airlines Inc.*, No. 19-00617, 2022 WL 3645764, at *5 & n.2 (D. Haw. Aug. 24, 2022) (limiting damages to \$175,000).

lowing passengers to bring a wider variety of claims against airlines for personal injuries during international flights. The First Circuit's approach takes necessary steps to protect consumer interests in air travel consistent with the purpose of the Montreal Convention.

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