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**THE WARSAW CONVENTION:
POINTS OF CONTROVERSY**

BY

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January, 1996

**A thesis submitted to the Faculty of
Graduate Studies and Research
in partial fulfilment of the requirements
of the degree of Masters of Law**

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**To my parents,
for their unfailing support.**

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ABSTRACT

The Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 is a multilateral treaty that seeks to unify the legal regime governing the international carriage of passengers, baggage and cargo by air. One aspect of this regime is the regime of liability imposed on air carriers, which is characterised by a presumption of fault and liability on the carrier, thereby reversing the burden of proof, while at the same time imposing monetary limits to the damages for which the carrier is liable.

In the sixty-one years that the Convention has been in force, several points of controversy have arisen in the interpretation of the Convention. Of these, the main controversies are whether carriers are liable for mental injury under Article 17, whether punitive damages may be awarded to victims, and what is meant by wilful misconduct under Article 25.

Since there are 126 States party to the Convention, the investigation of the above issues is necessarily multi-jurisdictional. The conclusion of the investigation is that in the course of judicial interpretation by the various courts, applying various approaches and guided by different policy considerations, the Convention has unfortunately become disunified.

RESUMÉ

La Convention pour l'unification de certaines règles relatives au transport aérien international de 1929 est un traité multilatéral visant à unifier le régime juridique gouvernant le transport aérien international des passagers, bagages et marchandises. Un des aspects de ce régime est la responsabilité imposée au transporteur aérien, caractérisée par la présomption de faute et de responsabilité de celui-ci, renversant le fardeau de preuve tout en imposant une limite financière à la responsabilité du transporteur.

Depuis son entrée en vigueur il y a soixante et un ans, plusieurs points controversés ont influencé l'interprétation de la Convention. Ces controverses ont dégagé quelques questions importantes, notamment celles de déterminer si les transporteurs sont responsables des dommages mentaux sous l'article 17, si des dommages punitifs peuvent être accordés aux victimes, et quelle interprétation il y a lieu de donner aux termes "wilful misconduct" de l'article 25.

Considérant que 126 États sont parties à la Convention, l'étude de ces questions fut nécessairement multi-juridictionnelle. Cette Étude montre que l'interprétation juridique des tribunaux, de par leurs approches variées et leurs influences politiques différentes, mena au résultat malheureux de la désunification de la Convention.

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INTRODUCTION

The Convention for the Unification of Certain Rules Relating to International Carriage by Air¹ signed at Warsaw on 12 October 1929² is a multilateral treaty that created a uniform regime to govern the international carriage of passengers, baggage, and cargo by air, and to regulate the liability of international air carriers. The Convention was the product of two international conferences on private aviation law, the first held in Paris in 1925³, and the second held in Warsaw in 1929⁴. In between these two conferences, a group of air law experts⁵ was assembled to review the first draft produced in Paris, and their work was placed before the second conference at Warsaw, where the treaty was eventually signed.⁶ The participants of the Convention attempted to fulfill three distinct objectives:

1. to protect and encourage the growth of the infant airline industry by limiting the potential liability of air carriers resulting from accidents;
2. to establish uniform rules to govern the rights and liabilities of air carriers, since air travel transversed national boundaries and necessarily involved varying legal systems, commercial practices and languages;
3. to ensure that passengers, who would naturally have difficulty proving that the air carrier failed to use all the necessary precautions to avoid accidents, would nonetheless be able to recover damages from the air carriers.⁷

¹ Hereinafter the Warsaw Convention. Source of the authentic French text : II. *Conférence Internationale de Droit Privé Aérien*, 4-12 Octobre 1929, Varsovie [Warszawa 1930] pp. 220-233; English translation : Schedule to the United Kingdom Carriage by Air Act, 1932; 22 & 23 Geo.5, ch. 36. In the United States the convention is known as *the Convention for the Unification of Certain rules relating to International Transportation by Air*, 49 Stat.3000, T.S. No. 876, 137 L.N.T.S. 11 (1936), reprinted in note following (1976) 49 U.S.C.A. ss 1502.

² Entered into force on 13 February 1933.

³ The First International Conference on Private Air Law convened in Paris on 27 October 1925.

⁴ The Second International Conference on Private Air Law convened in Warsaw on 4 October 1929.

⁵ The Comité International Technique d'Experts Juridiques Aériens [hereinafter *CITEJA*] met three times, in May 1929, April 1927 and 1928. The final meeting in Madrid, Spain resulted in the Madrid Draft which formed the basis for the Warsaw Convention.

⁶ As at June 1995 there are 126 parties to the Convention. The Government of Poland is the depository of the Warsaw Convention.

⁷ A.F. Lowenfeld & A.I. Mendelsohn, "The United States and the Warsaw Convention" (1967) 80 Harv. L. Rev. 497 at 498. N. M. Matte, "The Warsaw System and the Hesitations of the U.S. Senate" (1983) VIII Ann. Air & Sp. L. 151, at 152 has set out the four purposes of the Warsaw Convention as:

a. to establish uniform rules as to the rights and obligations of air carriers and of users of international air transportation;

As time went by and aviation began expanding on a large scale, the Warsaw Convention had to be amended or supplemented on a number of occasions in order to be kept up to date.⁸ In addition, with regards international air carriage that, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination or agreed stopping place, special provisions applied to such carriage⁹.

This thesis examines three areas of controversy that have emerged from the interpretation of the provisions of the Convention by various national courts. Chapter one

-
- b.to establish uniform rules relating to liability, including the maximum limit of liability of air carriers towards passengers in cases of death or injury from an accident or delay;
 - c.to establish a reliable and consistent basis for recovery of damages for injury to person or property; and
 - d.to create uniformity with respect to the transportation documentation, i.e. passenger tickets, baggage checks, and air waybills.

⁸The Warsaw family :

- a.Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 [hereinafter the *Hague Protocol*]. 112 parties as at June 1995; in force 1 August 1963.
- b.Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed in Guadalajara, on 18 September 1961 [hereinafter the *Guadalajara Convention*]. 70 parties as at June 1995; in force 1 May 1964.
- c.Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City, on 8 March 1971 [hereinafter the *Guatemala City Protocol*]. 11 ratifications as at June 1995; not in force : 30 ratifications required.
- d.Additional Protocol No.1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, signed at Montreal, on 25 September 1975 [hereinafter *Montreal Protocol No.1*]. 28 ratifications as at June 1995; not in force : 30 ratifications required.
- e.Additional Protocol No.2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal, on 25 September 1975 [hereinafter *Montreal Protocol No. 2*]. 28 ratifications, 1 accession as at June 1995; not in force : 30 ratifications required.
- f.Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, signed at Montreal, on 25 September 1975 [hereinafter *Montreal Protocol No. 3*]. 21 ratifications as at June 1995; not in force : 30 ratifications required.
- g.Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal, on 25 September 1975 [hereinafter *Montreal Protocol No. 4*]. 25 ratifications, 1 accession as at June 1995; not in force : 30 ratifications required.

⁹See Chapter One part II.E.ii.b. for a discussion of the *Montreal Agreement*.

examines the question of mental injury and whether damages may be recovered for such injury under Article 17. This involves the interpretation of the term "*lésion corporelle*", and the approaches taken mainly by American courts. Mental injury claims have been divided into claims for pure mental injury, and claims for mental injury accompanied by physical injury, either preceding or following the physical injury. Chapter two looks at Article 25 of the Convention, and covers the interpretation of *dol* and wilful misconduct given by Civil law and Common law jurisdictions. Other issues arising under Article 25, namely the inferring of knowledge, the sufficiency of evidence, a series of acts, acts of agents and the effect of the breach of duty, rules and regulations are also examined. Chapter two also covers the *Hague Protocol* amendment of Article 25 to the test of intent, recklessly and with knowledge, and its application to various jurisdictions such as France, Belgium, England, Canada, Switzerland and Italy. Finally, chapter two considers the proposed changes to Article 25 under the *Guatemala City Protocol*, and considers briefly the effect of the new Intercarrier Agreement on Passenger Liability adopted at the Annual General Meeting of the International Air Transport Association on October 31, 1995. Chapter three examines the question of punitive damages and whether such damages can be recovered under the Convention. As the Convention itself is silent on this issue, numerous arguments have been invented by lawyers, jurists and courts either supporting or opposing an award of punitive damages under the Convention. The full spectrum of arguments are considered in chapter three, with the conclusion that currently punitive damages are not recoverable in an action covered by the Warsaw Convention.

These three points of controversy are by no means the only points of controversy that have plagued the Convention, a treaty that attempts to unify certain laws governing international carriage by air for Contracting states around the world. However, these three points of controversy are of great practical importance in aviation litigation today.

Chapter One: Mental Injury

I. Introduction

For many years there has been a debate over the applicability of Article 17¹ of the Warsaw Convention to mental injury² suffered by passengers in international air carriage. This debate has two aspects :

1. whether pure mental injury, unaccompanied by physical injury, falls within Article 17; and
2. whether mental injury, either resulting in physical injury or suffered as a consequence of physical injury, falls within Article 17.

It is interesting to note that all but two of the reported cases on claims by passengers for mental injury as a result of international air carriage come from the United States, the two cases being *Air France v. Teichner*³ and *Georgopolous and Anor v. American Airlines Inc*⁴. No doubt several reasons for this apparent imbalance may be proffered, such as the large size of the flying population to and from the United States, as well as the fact that claims brought within American jurisdiction are much more likely to

¹ In the original French, Article 17 reads :

Le transporteur est responsable du dommage survenu en cas de *mort, de blessure ou de toute autre lésion corporelle* subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. [emphasis added].

The English translation reads :

The carrier is liable for damage sustained in the event of *death or wounding of a passenger or any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. [emphasis added].

² "Mental injury" is used generally to cover nervous shock, mental anguish, emotional distress, psychic trauma, mental discomfort, anxiety, fear and other psychological conditions.

³ 38 (III) P.D. 785 (Isr. 1984), (1985) 39 RFDA 232, (1988) 23 Eur Tr L 87. This Supreme Court of Israel case is a consolidation of two district court cases - *Dadon v. Air France* and *Air France v. Teichner*. [Hereinafter the *Teichner* cite will refer to the Supreme Court resolution of both of these cases].

⁴ NSW Supreme Court, Common Law Division, 10 December 1993 per Ireland J. Officially unreported, but discussed in M. Davis, Case Comment on *Georgopolous and Anor. v. American Airlines* (1994) XIX Air & Sp. 332 and in N. Francey, "Damages Recoverable For Nervous Shock" [1994] 4 Aust. Prod. Liab. Rep. 1. Hereinafter page cites to the *Georgopolous* decision refer to the unreported Judgement as found in the court records.

succeed since the air carriers have contractually by the *Montreal Agreement*⁵ agreed to waive their defence of due care, imposing absolute liability in cases such as hijackings where the carriers may not have been at any fault.

II. The claim for "pure" mental injuries

A writer has suggested that the basic question to ask is whether the term "bodily injury" is an accurate translation of the French phrase "*lésion corporelle*", and that the issue of the scope of Article 17 with respect to mental injuries may be resolved by answering this question.⁶ It is submitted that this does not quite focus on the problem,⁷ but is only the first step of a three-step process: first, deciding whether "*lésion corporelle*" is accurately translated into bodily injury;⁸ second, deciding whether the relevant language text to interpret is the French or English text; and third, searching for the true meaning of that text. It is in interpreting one of these two phrases that the real arguments arise, as illustrated by the cases.

A. The Proper Approach : French or English?

There is only one authentic text of the Warsaw Convention, and that is the French text. All other versions of the Warsaw Convention, in whatever language they may be

⁵ See part II.E.i.b. below.

⁶ D. Yoran, "Recovery of Emotional Distress Damages under Article 17 of the Warsaw Convention: The American versus The Israeli Approach", (1992) XVIII:3 Brooklyn J. Int'l L. 811 [hereinafter *Yoran*] at 819. His emphasis seemed to be whether "*lésion corporelle*" is to be properly translated into "bodily injury" or "personal injury". Nevertheless, the discussion therein of the arguments raised by the various courts are relevant in determining the meaning of "*lésion corporelle*".

⁷ R.H. Mankiewicz, "The Application of Article 17 of the Warsaw Convention to Mental Suffering Not Related To Physical Injury" (1979) IV Ann. Air & Sp. L. 187 [hereinafter *Mankiewicz article*] at 189 put forward the same question whether "bodily injury" is the proper translation of "*lésion corporelle*", but goes on to recognise that this issue is quite apart from the debate as to the French legal meaning of "*lésion corporelle*". Two years later, in 1981, Mankiewicz authored a book that illustrates his change in approach.

⁸ It is noted that "bodily injury" is a widely used translation of "*lésion corporelle*". This translation has the force of law in the United Kingdom by virtue of the *Carriage By Air Acts* (U.K.) 1932 and 1961, and has been retained in like Acts of other Commonwealth countries, for instance the Canadian *Carriage by Air Act*, R.S.C. 1970, c. C-14 and the Singapore *Carriage by Air Act* 1988 (No. 20 of 1988). This wording is also used in the translation of the Convention made by the United States Department of State, that was attached to the request for advice and consent by the United States Senate, and has been characterised as the "official American translation" in *Saks, infra* note 16 at 397. Moreover, the term "bodily injury" has been held to be a proper translation of "*lésion corporelle*" in most of the cases.

found in national legislation, are but translations of the original⁹. The question arises, as was the case in many of the decisions of the Courts, whether it would be proper to interpret the French or English version of Article 17 for the purposes of determining whether mental injury is covered by the Warsaw Convention¹⁰. Pursuant to Article 33 of the *Vienna Convention*¹¹, text of treaties in two different languages are equally authoritative only if the treaty has been authenticated in two languages¹², or if so provided by the treaty¹³. On this authority, courts ought primarily to consider the French text of the Warsaw Convention, and indeed the majority of the cases have taken this view.¹⁴ In the United States, following *Block v. Compagnie Nationale Air France*¹⁵ and *Compagnie Nationale Air France v. Saks*¹⁶, courts are required to interpret the French text of the Convention because the French text is the only official text and the one officially adopted and ratified by the Senate; this view has been followed in *Burnett v.*

⁹According to D. Stanculescu, "Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of *Lésion Corporelle*" (1985) 8 *Hast. Int'l & Comp. L. Rev.* 339 [hereinafter *Stanculescu*] at 343-344, there are three types of treaty text: the authentic version, official texts, and official translations. These represent three progressively decreasing levels of authoritativeness. Official translations are unilaterally prepared documents, often made some time after a treaty is signed, and which have not been negotiated by the parties to the treaty. Therefore an official translation should only be used as a supplementary tool of interpretation, the rationale being that at least one party to the treaty understood the meaning as it appeared in the official translation. The writer also recognised that some authors are of the opinion official translations are of no interpretative value where the official translation, not agreed upon by the parties, is in conflict with the authentic text in the original language (citing Hardy, "The Interpretation of Plurilingual Treaties by International Courts and Tribunals" 37 *Brit. Y.B. of Int'l L.* 72, 127 and M. Hilf, *Auslegung Mehrsprachiger Verträge* 22 (1973)).

¹⁰In Singapore legislation, the *Carriage by Air Act 1988* (No 20 of 1988) was passed by Parliament on 11 August 1988 and it received the Presidential assent on 16 August 1988. (Prior to the enactment of this Act, Singapore was nevertheless party to the Warsaw Convention by virtue of the *Carriage by Air (Colonies, Protectorates and Mandated Territories) Orders* (U.K.) of 1934 and 1953 (pre-independence Singapore) and subsequently by formal accession to the *Hague Protocol* on 6 November 1967 and the Warsaw Convention on 4 September 1971). Section 3(2) of the Act provides that in any case of inconsistency between the English texts set out in the Schedules and the authentic French texts of the Warsaw Convention and Hague Protocol, the French text shall prevail. See generally C. Lim, "The Warsaw System and the Carriage By Air Act 1988-A Guide and Short Commentary" [1988] 3 *MLJ* lxxxv.

¹¹*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

¹²*Ibid.*, article 33(1).

¹³*Ibid.*, article 33(2).

¹⁴G.C. Sisk, "Recovery for Emotional Distress Under The Warsaw Convention: The Elusive Search for the French Legal Meaning of *Lésion Corporelle*" [1990] 2 *Tex. Int'l L. J.* 127 [hereinafter *Sisk*] at 128: "[t]he debate...has focused primarily on the proper French legal meaning of the phrase *lésion corporelle*."

¹⁵386 F. 2d 323 at 330 (5th Cir. 1967), cert. den. 392 U.S. 905, 88 S.Ct. 2053 [hereinafter *Block* cited to F.2d].

*Trans World Airlines, Inc*¹⁷, *Palagonia v Trans World Airlines, Inc*¹⁸, *Floyd v Eastern Airlines*¹⁹ and *Eastern Airlines, Inc v. Floyd*²⁰, and it is submitted that this is the correct approach²¹. This approach was also followed in the Supreme Court of Israel in *Teichner*. As has been put simply by writers, if different countries rely on the translation of the treaty into their own languages, the uniformity of the interpretation might be compromised.²²

A contrary approach was adopted in *Rosman v. Trans World Airlines, Inc*²³ where the Court found that French legal usage must be considered in arriving at an accurate English translation of the French, but once an accurate English translation is made, and agreed upon, the inquiry into meaning does not then revert to a quest for past or present

¹⁶ 470 U.S. 392, 18 Avi. 18, 538 [hereinafter *Saks* cited to U.S.].

¹⁷ 12 Avi. 18, 405, 368 F. Supp 1152 (1973). Decision of the United States District Court, District of New Mexico [hereinafter *Burnett* cited to Avi.]. Per Bratton, District Judge : "In interpreting the meaning of the terms employed in the Convention, the French legal meaning must govern...the court must at the outset ascertain the meaning of the Warsaw Convention drawn in French in order to determine what that domestic law is." It was also recognised by the court that to interpret the French text would achieve the goal of uniformity, one of the objectives of the Convention.

¹⁸ 442 N.Y.S. 2d 670, 16 Avi. 18, 152, 110 Misc.2d 478. Decision of the New York Supreme Court, Westchester County per John C Marbach, Justice [hereinafter *Palagonia* cited to Avi.].

¹⁹ 21 Avi. 18, 401, 872 F. 2d 1462 [hereinafter *Floyd* cited to Avi.]. Decision of the United States Court of Appeals for the Eleventh Circuit, per Anderson, Circuit Judge : the French language controls "not because we are forever chained to French law by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. We look to French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists."

²⁰ 23 Avi. 17, 367, 111 S. Ct. 1489 (1991), 499 U.S. 530 (1991) [hereinafter *Eastern* cited to Avi.] Decision of the Supreme Court of the United States, per Justice Marshall : "We must consider the "French legal meaning" of "lésion corporelle" for guidance as to the shared expectations of the parties to the Convention because the Convention was drafted in French by continental jurists."

²¹ R.H. Mankiewicz, *The Liability Regime of the International Air Carrier : A Commentary on the Present Warsaw System* (Deventer, Netherlands: Kluwer Law and Taxation Publishers, 1981) [hereinafter *Mankiewicz book*] at 178.4 supports this contention, submitting that the correct approach is taken by the courts which consider that since the Warsaw Convention was done only in the French language and reflects a civil law liability regime, any term used by it should be construed according to its civil law. See also *Stanculescu* at 352, where the author states that at least in the United States, the French text was the authentic version submitted to the Senate for ratification, and therefore has become the law of the land.

²² *Yoran* at 823. See also *Stanculescu* at 351, citing Mankiewicz, "Diversification of Uniform Private Law Conventions" (1972) 21 Int'l & Comp. L. Q. 718.

²³ 13 Avi. 17, 231, 358 N.Y.S. 2d 97 (1974), 34 N.Y. 2d 385, 314 N.E. 2d 848. A consolidated decision of the New York Court of Appeals with *Miriam Herman v. Same*, per Rabin Judge. [Hereinafter the cite *Rosman* will refer to both these cases].

French law to be "applied"²⁴ for revelation of the proper scope of the terms. This approach was followed in *Karfunkel v. Compagnie Nationale Air France and Singapore Airlines, Ltd.*²⁵ and *Husserl v Swiss Air Transport Company*²⁶, but has been criticised as "undoubtedly incorrect"²⁷ and "flawed"²⁸. For the purposes of this paper, however, cases adopting both approaches will be examined below.

B. The "English text" approach : "bodily injury"

The Courts in *Rosman* and *Husserl*, after concluding that since the phrase "*mort, de blessure, ou de toutes autres lésion corporelle*" was accurately translated into "death

²⁴*Ibid.* at 233, where the court decided:

It does not follow from the fact that the treaty is written in French that in interpreting it we are forever chained to French law, either as it existed when the treaty was written or in its present state of development. There is no suggestion in the treaty that French law was intended to govern the meaning of the Warsaw's terms, nor have we found any indication to this effect in its legislative history or from our study of its application and interpretation by other courts...We are of the opinion that informed consideration of the legal questions presented would not be aided by additional testimonial and documentary evidence on the French language, French law or the legislative history of the Convention. The only issue is the legal significance of the terms used and further inquiry into their "precise meaning" is unnecessary.

By this the court presumably meant that it did not have to apply French law whenever it considered the Convention. However, it is submitted that there is a distinction between applying French law to the case before the court (which rightly is rejected), and interpreting the French text of the Convention (which the court failed to do).

²⁵ 14 Avi. 17, 614 at 617, 427 F. Supp 971 (1977) [hereinafter *Karfunkel* cited to Avi.]. Decision of the United States District Court, Southern District of New York per Wyatt, District Judge. It appears from the Judgment that the court did not even consider the question of the French text, and simply looked to the English text.

²⁶ 13 Avi. 17, 603, 351 F. Supp 702 (1972), aff'd 485 F. 2d 1240 (1973), 388 F. Supp 1238 [hereinafter *Husserl* cited to Avi.]. Decision of the United States District Court, Southern District of New York per Tyler, District Judge :

It is true that this country adhered to the French text of the Convention, as did all of the signatories (although the Senate heard and voted on the English translation); but, as I now view the matter, that fact does not mean that the French legal meaning of the words or the French legal interpretation of the treaty is binding : *Rosman v. Trans World Airlines, Inc.* The nuances of interpretation of the Convention were not analyzed in terms of the French or any other legal system. The language was merely intended to express the common understanding of the drafters in a common international language so that confusion would be limited and could be resolved to some extent by reference to the common meaning of one international language. The Convention is now part of the federal law of this country. Absent some explicit provision to the contrary, therefore, it should be interpreted in light and according to that law.

²⁷ *Stanculescu* at 357.

²⁸ *Floyd* at 412.

or wounding...or any other bodily injury", and that the parties to the dispute did not contend that the English translation of the phrase was at all misleading or inaccurate with respect to the common French meaning, proceeded to interpret the English translation.²⁹ It is universally accepted that mental injury does not fall within the meaning of "death or wounding",³⁰ and therefore the question is whether such injury falls within the scope of "bodily injury". In holding that pure mental injury was not within the scope "bodily injury", the Court in *Rosman* reasoned :

The inclusion of the term "bodily" to modify "injury" cannot be ignored, and in its ordinary usage, the term "bodily" suggests opposition to "mental". This traditional dualism may or may not reflect the actual physiological structure of the human organism; it may be that fright and emotional distress are as much "bodily", in the sense of "physiological", as a broken leg. But the relationship between "mind" and "body" - a stubborn problem in human thought - is not the question before us nor one we would presume to decide. Rather, in seeking to apply the treaty's terms to the facts before us, we ask whether the treaty's use of the word "bodily", in its ordinary meaning, can fairly be said to include "mental". We deal with the term as used in an international agreement written almost 50 years ago, a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental". In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily", as distinguished from "behavioral", manifestations...This reading of "bodily injury" defeats as well plaintiff's suggested interpretation of "wounding"("blessure") as comprehending "hurt", emotional or physical. Read in context, as it must be, "wounding" is limited by the subsequent phrase "or any other

²⁹The issue in these courts was therefore not one of translation: G. Miller, *Liability in International Air Transport : The Warsaw System In Municipal Courts* (Deventer, Netherlands: Kluwer, 1977) [hereinafter *Miller*] at 119.

³⁰D.M. Eaton, "Recovery for Purely Emotional Distress Under the Warsaw Convention: Narrow Construction of *Lésion Corporelle* in *Eastern Airlines, Inc. v. Floyd*" [1993] Wiscon. L. R. 563 at 572 [hereinafter *Eaton*]. It is submitted that there can be no dispute over this.

bodily injury" and in its ordinary meaning does not, we believe, connote more than solely physical wounds.³¹

The Court concluded by stating that an abandonment of the ordinary and natural meaning of Article 17 would little serve the interests of promoting uniformity in the treaty's interpretation and application, interests which it must observe and further.

The *Husserl* Court reached an opposing result,³² but on a totally different ground.³³ Nevertheless, the Court's reasoning in its interpretation of the English text of Article 17 is, in this writer's opinion, laudable. Essentially, the Court found that the *edjusedem generis* and *noscitur a sociis* arguments put forward by respective counsel could be constructed to cut either way: whilst "death", "wounding" and "bodily injury" initially and commonly do evoke thoughts of broken bones, cut and gashes, concussions, internal and external hemorrhaging, if they are construed only in that manner, then "any other bodily injury" would add nothing to "wounding" and such redundancy should not be presumed; but harried draftsmen sometimes use redundancies in an attempt to be certain they have included all of the things they intend to include. However, "death", "wounding" and "bodily injury" in English or in French can, almost as easily, all be construed to relate to emotional and mental injury. In Tyler, District Judge's own words :

Bodily injury is perhaps particularly significant in this regard because of the vast strides which have been taken relatively recently in the fields of physiology and psychology. It becomes increasingly evident that the mind is part of the body. Today, it is commonly recognized that mental reactions and functions are merely more subtle and less well understood physiological phenomena than the physiological phenomena associated with the functioning of the tissues and organs and with physical trauma. Therefore the phrase at issue could easily be construed to comprehend all personal injuries which directly and adversely affect the organic functions of a human being.³⁴

³¹*Rosman* at 234. The court in *Burnett* came to the same conclusion.

³²It has been argued that *Husserl* does not grant recovery for purely emotional distress in every action pursued under Article 17, but rather recovery was only available where the applicable substantive law (the state law) provided such a cause of action: *Eaton* at 576-577.

³³Ultimately the court concluded that to effect the treaty's avowed purpose, Article 17 should be construed broadly to include mental injury. See part II.F. below for a discussion of the Court's finding.

³⁴*Husserl* at 609.

Along the same lines of reasoning, but perhaps going a bit too far, is the case of *Kalish v. Trans World Airlines, Inc.*³⁵ In this case the court was greatly influenced by the extent of mental anguish that the plaintiff suffered over a protracted period of time, since the passengers on the flight were trapped on board the burning aircraft for approximately 20 minutes. The court felt justified in equating the mental suffering of the plaintiff to bodily injury, since the mental anguish which the plaintiff suffered was so pervasive as to be "tantamount to the infliction of physical blows" upon her body, and was the same as if she had suffered additional, actual bodily injuries.³⁶

No English court has addressed itself to the meaning of "bodily injury" in Article 17.³⁷ However, it has been suggested that when faced with such a question, the English court would hold that mere mental anguish or anxiety unaccompanied by bodily injury would not fall within Article 17.³⁸ "Wounding" has been interpreted for the purposes of the Offences against the Person Act 1861 as involving a breach in the continuity of the whole skin.³⁹ A fractured bone has been held not to constitute a "wound" when the skin remained unbroken.⁴⁰ Such fractures, together with torn ligaments, sprained or strained muscles, and perhaps bruises, would therefore be "bodily injuries" and thus the phrase would not encompass mental injury. This reasoning remains to be tested in English courts.

C. The "French legal meaning" approach : "lésion corporelle"

³⁵ 14 Avi. 17, 128, 89 Misc. 2d 153, 390 N.Y.S. 2d 1004 (1977) [hereinafter *Kalish* cited to *Avi.*]. Decision of Hentel, Judge. There was panic on board the aircraft as passengers rushed to disembark. The plaintiff fell to the ground, was trampled upon and suffered physical and mental injuries. The court found that the mental suffering of the plaintiff was prolonged, lasting twenty minutes or more.

³⁶ *Ibid.* at 131. This finding, however, may be put down as *obiter dicta*, since in fact the plaintiff had suffered bodily injuries when she was trampled upon.

³⁷ Shawcross and Beaumont, *Air Law*, Vol. 1, 4th ed. (London: Butterworths, 1994) at VII(154) [hereinafter *Shawcross*].

³⁸ *Ibid.*

³⁹ *Moriarty v. Brooks* (1834) 6 C&P 684; *R v. M'Loughlin* (1838) 8 C&P 635.

⁴⁰ *R v. Wood* (1830) 1 Mood CC 278, followed in *C (a minor) v. Eisenhower* [1984] 1 Ch 331, [1983] 3 All ER 230 (QBDC).

The court in *Burnett*, after holding that the controlling phrase for the purpose of interpretation is the French phrase "*ou de toute autre lésion corporelle*", looked to the literary works of A. Colin and H. Capitant⁴¹ to reach the conclusion that French law draws a sharp distinction between bodily injury (*lésion corporelle*) and mental injury (*lésion mentale*),⁴² and that *lésion corporelle* has been defined to mean "an infringement of physical integrity" (*l'atteinte à l'intégrité physique*).⁴³ Support for this conclusion, said the court, was found in the work of Professor Juglart,⁴⁴ who stated that Article 17 as now constituted does not permit recovery for mental injuries and that to so recover, the Article would have to undergo amendment to read "*lésion corporelle ou mentale*".⁴⁵ Finally, the court looked to Cassell's New French-English, English-French Dictionary (1962) for the translations of the words *lésion* and *mentale* and concluded that the phrase "*lésion mentale*" referred to mental wrong or injury.⁴⁶

The court in *Palagonia* came to an opposite conclusion.⁴⁷ First, the court found that it would be improper to place any reliance on a dictionary translation to find the meaning of a phrase used in a legal document.⁴⁸ Second, the court placed heavy reliance

⁴¹Citing A. Colin and H. Capitant, *Traité de Droit Civil* (1959) at 605 (as revised by J de la Morandière and translated by Henry P de Vries). Henry Capitant, Professor of Law, University of Paris; Juillot de la Morandière, Dean Emeritus of the Faculty of Law, University of Paris.

⁴²According to *Floyd* at 414, this sharp distinction drawn by the court in *Burnett* was a "fundamental problem" in analysis because the court has taken the common law distinction between mental and physical injuries and imposed it on Article 17 of the Warsaw Convention, a creation of civil lawyers.

⁴³According to *Floyd* at 408, the court in *Burnett* took too literal a translation of "*lésion corporelle*", to imply that recovery for *dommage mentale* is unavailable, and that this literal translation did not fully capture its French legal meaning. Cf the view of McDonald J. in *Eastern Airlines, Inc. v. Charles King* 22 Avi. 17, 816 at 821.

⁴⁴Citing Juglart, *Traité Élémentaire de Droit Aérien* (1952) at 330. Professor Juglart was professor of the Law Faculty at the University of Paris.

⁴⁵Citing M. Florio, *La responsabilité du Chemin de Fer pour la Mort et les Blessures de Voyageurs en Traffic International* (1969) at 51 as being of the opinion that only after such amendment did Article 17 allow recovery for mental injuries.

⁴⁶*Mankiewicz* article at 197 has criticised this process as a "mistake", since the court found dictionary translations for the words "*lésion*" and "*corporelle*", but none for the composite phrase "*lésion corporelle*".

⁴⁷In doing so, the Supreme Court of New York went against the principle of *stare decisis* and chose not to follow the decision of the New York Court of Appeals in *Rosman*, deciding that because the *Rosman* court did not hold any hearings at which evidence on the French legal meaning of the key words *lésion corporelle* could be given, there was no full and complete hearing.

⁴⁸*Palagonia* at 673, per John C. Marbach, Justice:

on the writings of two men- Dean George Ripert⁴⁹ of France and Professor Otto Riese⁵⁰ of Germany- the "two principal drafters of the Warsaw Convention", who in their written analysis "made it very clear that the concept of lesion corporelle includes psychic damage or mental disturbance".⁵¹ In an extract from the Journal of International Law written by George Ripert in 1930, shortly after the Warsaw Convention of October 1929, he uses the expression, "les dommages corporels", which covers damage suffered by a person as distinguished from damage also suffered by that person in his patrimonium. In the Civil Law, under the concept of dommage corporel there would be compensation for mental injury alone.⁵² The second authority relied on by the court was Professor Riese's translation of Article 17 of the Warsaw Convention into the German language.⁵³

The *Palagonia* decision was followed by the United States Court of Appeals (11th Circuit) in *Floyd* in coming to the conclusion that mental injuries fall within the purview of Article 17, preferring the analysis in *Palagonia* to that in *Burnett*⁵⁴. In reaching this decision, the court in *Floyd* also relied on the writings of Mankiewicz⁵⁵ and

The dictionary or literal translation of lesion corporelle as "bodily injury" is not accurate as used in a legal document. The French Civil Law distinguished only between injury or damage suffered by a person and damage done to that person's patrimonium. There is no categorical separation between physical and mental damage.

⁴⁹ Mankiewicz article at 201 calls Dean George Ripert a "chief architect of the Warsaw Convention".

⁵⁰ Otto Riese was a member of the German delegation to the Warsaw Convention and later a Judge of the German Supreme Court, as well as the head of the German delegation at The Hague Conference. He was also Dean of the Faculty of Law of the University of Lausanne.

⁵¹ *Palagonia* at 673.

⁵² *Ibid.*

⁵³ See part II.E.iii. below for subsequent judicial comments on the use of German translations.

⁵⁴ In the words of Anderson, Circuit Judge at 413:

While the Court in *Burnett* purported to apply French legal meaning of Article 17, 368 F. Supp at 1155, it actually considered only the French linguistic meaning of the French words of Article 17 at issue. See Kreindler, 1 Aviation Accident Law ss 11.03[2][b] at 11.43. We therefore find its analysis unpersuasive. [Emphasis added]

On the other hand, the court found that the *Palagonia* decision contained an "exhaustive analysis" of the French legal meaning of Article 17, which the *Floyd* court found "persuasive"; the one flaw of the *Palagonia* decision was that it failed to consider the prior and subsequent history of the Convention.

⁵⁵ Citing Mankiewicz book at 178.4 where the author submits that in French Law the expression *lésion corporelle* covers any 'personal' injury whatsoever, i.e. any injury suffered by the plaintiff as a person as distinct from any injury done to his patrimony, i.e. his belongings, economic assets or interests, etc. It is another expression for *dommage personnel* as opposed to *dommage patrimonial*. The author gives six reasons for this opinion :

Miller⁵⁶ and argued that if *lésion corporelle* was intended to refer *only* to injury caused by physical impact, it is likely that the civil law experts who drafted the Warsaw convention in 1929 would not have singled out and specifically referred to a particular case of physical impact such as *blessure*("wounding").⁵⁷

One of the primary goals of the *Eastern* decision by the Supreme Court of the United States was to determine and settle the conflicting conclusions arrived at by the New York Court of Appeals in *Rosman* (holding that pure mental injuries do not fall within Article 17 of the Convention) and the United States Court of Appeals in *Floyd* (holding that pure mental injuries do fall within Article 17 of the Convention). In search of the French legal meaning of "*lésion corporelle*", the first authorities referred to by the court were two French-English dictionaries⁵⁸ and the results were that the proper translation of *lésion corporelle* is bodily injury. These translations clearly suggested to the court that Article 17 did not permit recovery for purely psychic injuries.⁵⁹

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- a. If *lésion corporelle* referred only to injury caused by physical impact on the body or its organs, distinguished lawyers like those assembled at Warsaw in 1929 would not have singled out and specifically referred to a particular case of physical impact such as 'wounding'(blessure).
 - b. The doctoral thesis written by Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international*, Paris 1933, p. 62 under the supervision of Dean Georges Ripert.
 - c. The German translation of Article 17 rendered by Professor Riese and adopted by Austria, Germany and Switzerland, discussed in part II.E.iii. below.
 - d. The notice requirement of the *Montreal Agreement*, discussed in part II.E.ii.b. below.
 - e. Use of the expression 'personal injuries' in the Hague Protocol, discussed in part II.E.ii.a. below.
 - f. Use of the expression 'personal injuries' in the Guatemala City Protocol, discussed in part II.E.ii.c. below.

⁵⁶Miller at 122-23 : "*Domage corporelle* in French Law includes physical, mental, and moral damage, as well as any pecuniary loss resulting from personal injury."

⁵⁷Floyd at 409, citing *Mankiewicz book* at 141. This approach, it is submitted, would not stand in the light of the hypothetical English court approach suggested above, and has also been explicitly rejected by the court in *Eastern*.

⁵⁸To consult a dictionary would be to determine the ordinary normal meaning of the words used in the treaty, an approach that is entrenched in the *Vienna Convention*. Article 31(1) reads :

- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This approach is also approved in *Stanculescu* at 342, where the writer is of the opinion that first, the literal, non-technical meaning of a phrase must be established before ascertaining the legal meaning of the same phrase.

⁵⁹The court recognized that dictionary definitions were too general for purposes of treaty interpretation. Their concerns were partly allayed by the fact that the dictionary translation accorded with the wording used in the two main translations of the 1929 Convention in English, namely the US Senate translation

In dealing with the argument in *Floyd* that the word *blessure* would be redundant if the phrase *lésion corporelle* were restricted to physical injury, the court in *Eastern* held that the surplusage argument is not dispositive; if "*blessure*" refers to injuries causing visible ruptures in the body, "*lésion corporelle*" might well refer to a more general category of physical injuries that includes internal injuries caused, for example, by physical impact, smoke or exhaust inhalation, or oxygen deprivation.⁶⁰

The court then moved on to review the principle sources of French law *as existed at or before 1929*, when the Warsaw Convention was finally signed, in search of the meaning of "*lésion corporelle*". This, it is submitted, is the proper approach in attempting to decipher the intention of both the drafters and signatories to the Convention.⁶¹

Turning first to French legislation, the court concluded that there was no legislation in force in 1929 that contained the phrase "*lésion corporelle*". Turning next to French cases, again the court found that there were no decisions of the French courts on or before 1929 that explain the phrase "*lésion corporelle*". There were, however, recent automobile accident cases which construed "*lésion corporelle*" as referring only to physical injuries. However, because they were decided well after the drafting of the

when ratifying the Warsaw Convention and the translation used in the *Carriage by Air Act* (U.K.) of 1932. *Eastern* at 369-370.

⁶⁰*Ibid.* at 371. It is interesting to note that in *Mankiewicz* article at 198, the writer took a different approach; his argument there was that "*blessure*" could be used to describe both internal as well as external injury, which would mean that "*lésion corporelle*" is dedicated to injuries beyond internal and external injury, i.e. mental injury.

⁶¹There are two views; one view is that the treaty should be interpreted with regard to the context in which the treaty was made, as illustrated in the instant case. The other view is that the treaty should be interpreted progressively, since, as stated in *Day v. Trans World Airlines* 528 F. 2d 31 (2d Cir. 1975) at 35: "conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787...The plain meaning of the treaty must be adaptable to the practical exigencies of air travel in these parlous times." This same approach was taken by the Court in *Georgopoulos. Stanculescu* at 350 is of the view that this question remains open, but he wrote his article in 1985, before the *Eastern* decision of 1991.

Warsaw Convention, these cases did not necessarily reflect the contracting parties' understanding of the term "*lésion corporelle*".

Turning to French treatises and scholarly writing covering the period leading up to the Warsaw Convention, the court found no materials indicating that "*lésion corporelle*" embraced psychic injury. Subsequent to the adoption of the Warsaw Convention, said the court, some scholars have argued that "*lésion corporelle*" as used in Article 17 should be interpreted to encompass such an injury.⁶² These writers draw on the fact that, by 1929, France, unlike many other countries, permitted tort recovery for mental distress.⁶³ However, this general proposition of French Tort law did not demonstrate that the specific phrase chosen by the contracting parties covers purely psychic injury. Moreover, these writers did not base their argument on explanations of this term in French cases or French treatises or even in the French Civil Code; rather, they chiefly relied on the principle of French tort law. Following *Saks*,⁶⁴ the court's task was to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties".⁶⁵

It is submitted that there are two reasons why the courts have arrived at conflicting positions. First, some courts have looked generally at French Tort law and concluded that pure mental injury was a recognised recoverable damage, and have based their judgments on this, whilst some courts have looked more carefully at the specific meaning of *lésion*

⁶²Referring specifically to *Mankiewicz book* and *Miller*.

⁶³For example, *Mankiewicz book* at 178.3 :

In 1929, French law had recognized for many years the right of a plaintiff to recover for mental suffering alone (*pretium doloris* and *pretium solacium*), even though it was not caused by a physical injury; French Supreme Court, 26 August 1857 : *Dalloz Pratique* I, 345; more recently 13 February 1923: *Dalloz Pratique* I, 52. On the other hand, in the United Kingdom, notwithstanding *Hambrook v. Stokes Brothers*, [1925] 1 KB 141, recovery for nervous shock *per se* was not definitely recognized until the early 1940s. Moreover, the Courts of New York adopted that rule only in 1961; see *Battalla v. State of New York*, 10 N.Y. 2d 237 (1961).

⁶⁴*Saks* at 399.

⁶⁵*Eastern* at 371.

corporelle.⁶⁶ Second, and leading from the first, it may be that the phrase "*lésion corporelle*" may not be a French legal term of art, and therefore cannot be conclusively defined. This view is held by *Sisk*⁶⁷ where he explains that the basic forms of damages in French law are *dommage matériel* (pecuniary or financial loss) and *dommage moral* (non-pecuniary loss, including emotional distress), these two terms sometimes loosely referred to together as *dommage corporel*. *Dommage Corporelle* on its own is occasionally used to describe a type of damages which may result from personal injury, for example medical expenses, loss of wages, pain and suffering, damage resulting from loss of attractiveness due to permanent scars, and so forth. In other words, *dommage corporelle* includes financial loss (*dommage matériel*) together with compensation for mental and physical suffering (*dommage moral*). *Lésion*, on the other hand, has two precise meanings : first, as a term of art in French contract law that means pecuniary loss, and second, as a classical definition of an injury to an "organ",⁶⁸ clearly having a physical connotation. When *lésion* and *corporelle* are read together, "it becomes manifest that the phrase is not intended to be a legal term of art. Rather, it is simply a plain description, using ordinary French words, of an injury to a physical organ, i.e. a "bodily injury".⁶⁹ *Sisk* goes on to submit that *lésion corporelle* should therefore be ascribed its natural and ordinary meaning,⁷⁰ and only if there is room for doubt in interpreting the natural and ordinary meaning should the English text be looked at.⁷¹

D. Drafting History

⁶⁶ As recognised by the court in *Eastern*. See also *Yoran* at 824-825 and 829, citing *Teichner* as an example of a court that looked only at French Tort law generally and concluded that since recovery for mental injury was recognised in French Tort law at the time, the drafters would have specifically excluded it from the Convention if they meant to.

⁶⁷ See also *Miller* at 112-113, and *Stanculescu* at 361, who give the same explanation of the French concept of damages but do not draw the conclusion *Sisk* does that "*lésion corporelle*" is not a legal term of art.

⁶⁸ *Ibid.* at 127, citing *Miller*.

⁶⁹ *Ibid.* at 138.

⁷⁰ *Ibid.* at 140, citing the *Vienna Convention*, article 31(1).

⁷¹ *Ibid.* at 141. Cf *Stanculescu* whose general approach appears to be to look at the ordinary and legal meaning of the words in French, and then supplement this with the ordinary and legal meaning of the English words and the other tools of interpretation such as legislative history and subsequent action.

There are two main schools of thought relating to interpretation of an international treaty. One school endorses the *textual* approach, which considers the text of the treaty alone to be the authentic expression of the parties' intent. The other school adopts the *contextual* approach, which determines the parties' intent by looking beyond the language of the treaty to other evidence that aids in its interpretation.⁷² This difference in approaches has been resolved by the landmark decision of *Block*⁷³ which decided in favour of the *contextual* approach and has been followed extensively in subsequent cases. Hence, the meaning of the phrase "*en cas de mort, de blessure ou de toute autre lésion corporelle*" in Article 17 of the Warsaw Convention is to be determined by attempting to ascertain the intentions of the drafters and signatories, the understanding of the Executive and Senate when they ratified and adhered to the Convention, the subsequent actions of the signatories to the extent such actions clarify intent, and the construction most likely to effect the purposes of the Convention.⁷⁴ In order to do so, the courts should look to, *inter alia*, the legislative history and external aids. The following section of this paper will look into the drafting history of the Convention and review some of the arguments raised by the courts on this issue.⁷⁵

i. Travaux Préparatoire : Paris in 1925 to CITEJA to Warsaw in 1929

The First International Conference on Private Air Law held in Paris in 1925 produced an initial draft of the liability provision which read:

Le transporteur est responsable des accidents, pertes, avaries et retards.

⁷²*Stanculescu* at 345.

⁷³*Block* at 335, where the court found that consideration of the Convention's legislative history and relevant extrinsic aids would be in line with the court's obligation to keep a treaty's interpretation as uniform as possible in accordance with the intent of the framers

⁷⁴*Husserl* at 608.

⁷⁵J.K. Lindauer, "Recovery for Mental Anguish Under the Warsaw Convention" [1975] *J. Air L. & Com.* 333 at 339 [hereinafter *Lindauer*] and J.M. Grippando, "Warsaw Convention-Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits" (1985) 19 *Geo. Wash. J. Int'l L. & Econ.* 59 [hereinafter *Grippando*] at 84 both suggest that the legislative history of the Warsaw Convention yields little aid to its interpretation. It is submitted that this is not the case, as discussed below.

The carrier is liable for accidents, losses, damage to goods and delays.⁷⁶

The broad phraseology would have permitted recovery for both physical and mental injuries. French law at the time allowed recovery for pure emotional conditions.⁷⁷ The Conference appointed a group of air law experts⁷⁸ who amended the draft and split the liability article into three provisions, the relevant portion reading:

*Le transporteur est responsable du dommage survenu pendant le transport: (a) en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur.*⁷⁹

The text they submitted to the Second International Conference in Warsaw in 1929 became the model for, and was largely retained in, the present Article 17.

This amendment by the *CITEJA* and subsequent acceptance by the High Contracting Parties to the Warsaw Convention has been interpreted in different ways. The court in *Burnett* found that by thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.⁸⁰ This view was criticised in *Floyd* as placing too much emphasis on the change of wording, and that there was "no evidence in the negotiating history of the Convention suggesting that the drafters intended to foreclose recovery for any particular type of injury; the drafters simply did not discuss the issue of whether purely emotional injury would be compensable under the Convention."⁸¹ The court went on to say that *Burnett*, in dealing with a question as important as the exclusion of particular forms of damages, placed far too much weight on an ambiguous piece of

⁷⁶ Article 5 of Convention draft, *Conference Internationale de Droit Privé Aérien*, 1926, *Ministère des Affaires Etrangères* 41-42, Series C.(79).

⁷⁷ As analyzed by Professor Mazeaud in Henri Mazeaud, Leon Mazeaud and Andre Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* (5th ed., 1957) at 416-417. See also *Husserl* at 609; *Palagonia* at 673; *Floyd* at 814; *Eastern* at 370-371; *Mankiewicz* book.

⁷⁸ *CITEJA*.

⁷⁹ *Compte Rendu de la 1e Session*, May 1926; Article 21 of the *CITEJA* draft.

⁸⁰ *Burnett* at 408.

⁸¹ *Floyd* at 414. This was also the view of the court in *Teichner* at 800.

drafting history of the Convention,⁸² but the court did not state how much weight should indeed have been placed on this change of wording.⁸³ When the case was brought before the court in *Eastern*, the court's simple answer was:

Although there is no definitive evidence explaining why the CITEJA drafters chose this narrower language, we believe it is reasonable to infer that the Conference adopted the narrower language to limit the types of recoverable injuries.⁸⁴

This view is supported by *Sisk*, who is of the opinion that a change in language speaks for itself, and the addition of a new and restrictive condition for liability cannot be ignored by simply asserting that it fails to demonstrate any intention of the delegates to limit air carrier liability. Moreover, it is an established canon of statutory construction, equally applicable to treaty interpretation, that the adoption of amendments during the legislative process is one of the clearest indications of legislative intent.⁸⁵

ii. Intention of the drafters, signatories, Executive and Senate in relation to the Warsaw Convention

It is generally agreed, from a study of the Minutes of the Warsaw Convention, that there is no evidence the drafters had considered the question of mental injuries at the time of drafting the Convention, or that the High Contracting Parties had considered this question at the time of signing the Convention.⁸⁶ The court in *Eastern* gave two common reasons given for this: first, at the time (1929) many jurisdictions did not recognize recovery for mental injury; second, the drafters of the Convention simply could not

⁸²*Ibid.*, citing *Miller* at 123-25. *Miller* is of the view that the reason for the amendments made by the CITEJA was not to produce a provision more readily acceptable to the nations whose law was not so liberal, as alleged in *Burnett*, but simply to produce an improved draft. Hence, according to *Miller*, *Burnett* had relied on a wrong reason in its analysis.

⁸³Presumably, given the court's adoption of *Miller*, no weight should be placed on the change of wording.

⁸⁴*Eastern* at 372. It is interesting to note that when dealing with actions taken by the signatories subsequent to the Warsaw Convention (Part II.E. below), the court in *Eastern* argues that since no specific intention is evidenced in the change of wording from "bodily injury" to "personal injury" in the *Hague Protocol*, *Montreal Agreement* or *Guatemala City Protocol*, no inferences should be drawn that the change in wording was either a clarification or a change in scope. This application of double standards was noted by the court in *Georgopoulos*. See also *Yoran* at 831.

⁸⁵*Sisk* at 143.

⁸⁶*Rosman* at 234; *Husserl* at 606-607, 609; *Krystal v. BOAC*, 14 Avi. 17, 936 [hereinafter *Krystal*] at 937; *Floyd* at 410; *Eastern* at 372-373. See also *Eaton* at 582.

contemplate a psychic injury unaccompanied by a physical injury.⁸⁷ It is also undisputed that the Senate of the United States, at the time of ratification of the Warsaw Convention, did not discuss the question of mental injury.⁸⁸ Although the courts generally agreed on a lack of specific intention on the part of the drafters, signatories and Senate, the courts came to two different conclusions.

First, there was the conclusion drawn by *Eastern*. While accepting that the drafters could not have contemplated the occurrence of a mental injury unaccompanied by a physical injury, the court stated that:

Indeed, the unavailability of compensation for purely psychic injury in any common and civil law countries at the time of the Warsaw Convention persuades us that the signatories had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.⁸⁹

It is submitted that this view is persuasive. Furthermore, because most jurisdictions at the time of the signing of the Convention did not recognise recovery for pure mental injury, any hint or suggestion that Article 17 permitted recovery for pure mental injury would have generated some debate amongst the participants at Warsaw, which was not the case.⁹⁰ As was recognised by the court in *Eastern*, subjecting international air carriers to strict liability for purely mental distress would be controversial for most signatory countries, and therefore the conclusion the court came to "avoids this source of divergence."⁹¹

Second, there was the conclusion drawn by *Husserl*, *Krystal*, *Rosman* and *Floyd* that since there was no evidence of any specific intention, this would not be helpful in

⁸⁷ *Eastern* at 372, citing *Husserl* at 614, *Teichner* at 242, *Mankiewicz hook* at 144-145, *Miller* at 123-125. See also *Yoran* at 832.

⁸⁸ *Husserl* at 609; *Grippando* at 84, citing 78 Cong. Rec. 11, 577-82 (1934).

⁸⁹ *Eastern* at 372.

⁹⁰ *Yoran* at 832.

⁹¹ *Eastern* at 376.

determining whether mental injuries fell within Article 17.⁹² The reasoning of the court in *Husserl* is, in this writer's opinion, instructive. The court there found that Article 24 of the Convention precluded alternative relief for injuries comprehended by Articles 17, 18 and 19; as such, it would have been simple for the drafters to have precluded all relief for other types of injuries, but no such provision was made. At this stage, the court could have concluded that therefore, by parallel reasoning, since mental injuries were not specifically excluded, the drafters must have intended them to be included. However, the court did not do so, but instead came to the conclusion that "the most plausible inference to be drawn from the Convention's silence on some types of injury is that the drafters neglected to deal with a problem, which they would have wished to resolve if they had been aware of it."⁹³ The court therefore drew no inferences on this point.⁹⁴ On the lack of evidence of the specific intention of the signatories, the court recognised that the arguments evoked by both parties could support the position of either party: mental injury causes of action existed at the time the Convention was ratified; on the one hand, since these causes of action were not specifically excluded, the signatories must have intended to *include* them. On the other hand, the fact that they were not specifically included means that the signatories must have intended to *exclude* them; therefore, the arguments contended by both parties were specious and no conclusions could be drawn.⁹⁵

E. Subsequent Action

The subsequent action of the signatories to the Warsaw Convention is also a relevant interpretation aid in determining the original intention of the parties.⁹⁶ Hence, it

⁹²The court in *Floyd* at 409 did state that the wording of Article 17 strongly suggested that the drafters did not intend to exclude any particular category of injury, but at 410 decided that the drafters did not discuss whether Article 17 encompassed recovery for mental injuries and therefore the legislative history was "not helpful".

⁹³*Husserl* at 606.

⁹⁴The court based its judgment on the purpose and objectives of the Convention, discussed at part II.F. below.

⁹⁵*Husserl* at 609.

⁹⁶*Block* at 335. As set out in Article 31(3) of the *Vienna Convention*:

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

is relevant to look at the subsequent actions of the High Contracting parties since the signing of the Warsaw Convention to shed some light as to the intended scope of Article 17. These include attempts in 1951 to amend the Warsaw Convention, substitution of the words "personal injury" for "bodily injury" in subsequent documents, namely the *Hague Protocol*, *Montreal Agreement*, *Guatemala City Protocol*, German translations of the Warsaw Convention as adopted by other signatory states, and the amendments made to the *Berne Convention*, a parallel multilateral transportation treaty.

i. Attempts to amend the Warsaw Convention

From an early date, commentators called for a revision of the Convention because it was unclear whether mental injury fell within the purview of Article 17.⁹⁷ In 1951, a committee composed of 20 Warsaw Convention signatories met in Madrid and adopted a proposal to substitute "*affection corporelle*" for "*lésion corporelle*" in Article 17.⁹⁸ The French delegate to the committee proposed this substitution because, in his view, the word "lésion" was too narrow, in that it "presupposed a rupture in the tissue, or a dissolution in continuity" which might not cover an injury such as mental illness or lung congestion caused by a breakdown in the heating apparatus of the aircraft.⁹⁹ The United States delegate opposed this change if it "implied the inclusion of mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury"¹⁰⁰ but the committee adopted it nonetheless. Although the committee's proposed amendment was never subsequently implemented, its discussion and vote in Madrid suggest that, in the view of the 20 signatories on the committee, *lésion corporelle* in Article 17 had a distinctly physical scope.

(b) any relevant practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

⁹⁷*Sisk* at 144, citing Beaumont, "Need for Revision and amplification of the Warsaw Convention" 16 J. Air L. & Com. 395, 402 (1949).

⁹⁸See International Civil Aviation Organization Legal Committee, Minutes and Documents of the Eighth Session, Madrid, ICAO Doc. 7229-LC/133 at xiii, 137(1951).

⁹⁹*Ibid.*, at 136.

¹⁰⁰*Ibid.*, at 137.

None of the earlier courts considered this point. Nevertheless, this attempt at amending the Warsaw Convention was found by the court in *Eastern*¹⁰¹ to carry some weight in the balance of the evidence of the post-1929 actions of the signatories¹⁰² to show that it was the understanding of signatories that mental injury was not covered by the term "*lésion corporelle*". It has further been suggested that this action also casts some doubt on the reasoning of some courts that the change of wording from "bodily injury" to "personal injury" is a clarification of the intent of the drafters (that mental injuries were contemplated).¹⁰³ This is discussed below.

ii. Substitution of "bodily injury" with "personal injury"

a. The Hague Protocol

In September 1955 an International Conference on Private Air Law was held at The Hague for the purposes of amending the Warsaw Convention of 1929. At the Conference, the American delegate proposed that passenger tickets should contain a notice to inform passengers that the Warsaw Convention may be applicable to the passenger's journey and therefore limit the liability of the carrier for "personal injury or death".¹⁰⁴ This proposal was extensively discussed by a Working Group, which suggested a change of wording to "death or personal injury", but more significantly in the French draft text of the notice the word "*lésion corporelle*" was used as the equivalent to "personal injury". This phraseology remained unchanged by the Drafting Committee,¹⁰⁵ and forms the current text of Article III of the *Hague Protocol*¹⁰⁶. While there was no discussion on Article 17 *per se* at the Hague Conference, and the United States has not ratified the Convention, nevertheless this history has been found to be of significance in

¹⁰¹ *Eastern* at 374.

¹⁰² *Sisk* at 144 agrees with this finding. See also C. Desbiens, "Air Carrier's Liability for Emotional Distress Under Article 17 of the Warsaw Convention : Can it still be invoked?", (1992) XVII-II Ann. Air & Sp. L. 153 [hereinafter *Desbiens*] at 164.

¹⁰³ *Yoran* at 836.

¹⁰⁴ ICAO Doc. 7686, Vol II, at 243.

¹⁰⁵ Composed of distinguished lawyers from Belgium, Czechoslovakia, France, Germany, Mexico, Spain, United Kingdom, United States and the then U.S.S.R. See *Mankiewicz* article at 190.

¹⁰⁶ The *Hague Protocol*, in fact, is authentic in three languages, but only the French and English texts are relevant to our discussion.

Palagonia,¹⁰⁷ *Floyd*,¹⁰⁸ and *Teichner*¹⁰⁹ in justifying a broader interpretation of *lésion corporelle*.

The court in *Eastern*, however, took an opposing view. After stating the general effect of the amendment made by Article III, the court opined that there was no evidence that the signatories intended the authentic English text to effect a substantive change in , or clarification of bodily injury. Moreover, the portion of Article 3 of the Hague Protocol in which "personal injury" appeared concerned solely the required notice to passengers that limits of liability for death or personal injury may be applicable. The signatories used "personal injury" not as an interpretive translation of "lésion corporelle" but merely as a way of giving a summary description of the limitations of liability imposed by the Convention.¹¹⁰

b. The Montreal Agreement¹¹¹

¹⁰⁷*Palagonia* at 675 :

Again, I deem it especially significant that the only document which is delivered to the air passenger informs him that the limitations of liability relate to personal injury or death. There is no record whatsoever that at the important Hague Conference or at the proceedings at Montreal that any objection was made to an official translation into English of "lésion corporelle" into "personal injury."

¹⁰⁸*Floyd* at 411.

¹⁰⁹The court "relied heavily" on the change of wording in the *Hague Protocol*, *Montreal Agreement* and *Guatemala City Protocol*. See *Yoran* at 833.

¹¹⁰*Eastern* at 374.

¹¹¹Eleven years after the *Hague Protocol* had been signed, it remained unratified by the United States. The United States Government was still dissatisfied with the low limits of liability provided under the Warsaw Convention, even as amended by the *Hague Protocol*, and in the interests of the traveling public on 15 November 1965 gave six months notice of denunciation of the Warsaw Convention; this notice was to become effective on 15 May 1966: United States Dep't of State Press Release No. 268, 53 Dep't State Bull. 923 (1965). This denunciation by the United States was particularly important given that, by 1965, the majority of all international air carriers and passengers were American: *Eaton* at 571, citing D.M. Haskell, "The Warsaw System and the U.S. Constitution Revisited" (1973) 39 J. Air L. & Com. 483, 487. The denunciation was rescinded just two days before it would have become effective, when most of the airlines serving the United States entered into an agreement to waive the defenses available under the Convention (in particular Article 20(1) of the Convention, hence imposing absolute, rather than presumptive, liability on carriers) and agreed not to invoke the limitation on liability up to \$75,000 (including legal fees and costs) or \$58,000 (plus legal fees). This agreement, known as Agreement CAB No. 18900 [hereinafter *Agreement 18900*], the requisite tariff, filed pursuant to the agreement, the Notice to Passengers included within the ticket informing the passenger of the change in the regime of the Warsaw Convention (and of its applicability), and the CAB order, constitute what is known as the *Montreal Agreement*. The *Montreal Agreement* was approved by the then alive-and-well Civil Aeronautics Board on 13 May 1966 (Order E-23680): Dep't of State Press Release Nos. 110, 111, (1966) 54 Dep't State Bull. 955, pp.955-57; CAB Press Release 66-61 of May 13, 1966; (1966) 31 Federal

Under the *Montreal Agreement*, the words "bodily injury"¹¹² and "personal injury"¹¹³ are used interchangeably, and the contention is that therefore this is evidence of the intention of the signatories to the Warsaw Convention that mental injuries, which form part of "personal injury", are comprehended by Article 17. This contention was determinative of the issue in *Krystal*. The actual Notice to which the airlines agreed changed the relevant wording to "death...or personal injury, and since notified passengers of the extent of airline liability, this suggested an intention to clarify the type of injury which was compensable. The court rejected the Defendant's argument that the alteration was prompted by the need to provide a generalized warning within a limited space as unpersuasive.¹¹⁴

One writer's interpretation of the judgment of the court was that since the air carriers agreed on the wording of the notification given to passengers, this was a demonstration that the air carriers had in fact "consented to an expansive reading of Article 17" to include mental injury.¹¹⁵ If what the writer meant by this interpretation is that the court found an agreed-upon notification is evidence of an agreement to enlarge the scope of Article 17, then it is submitted that this interpretation is incorrect, for there is no evidence in the judgment to suggest that the air carriers consented or agreed to expand the scope of their liability simply by the wording on the passenger notification, inasmuch as there is no evidence the United States Government can be said to have intended such expansion. Indeed, if the air carriers had "consented to an expansive reading of Article 17", then they would not have challenged the plaintiff's claim or resorted to litigation. In *Floyd*, the court noted the position adopted in *Krystal*, but did not adopt such an extreme position. Nevertheless, the court found that the interchangeable use of language

Register 7302. For detailed discussion see also N.M. Matte, "From Warsaw to Montreal with Stop-over at The Hague", II(no.6) Eur. Transp. L. 877 (1967) et seq.; J. E. Landry, "Airline Liability : The Long Overdue Updating of the Warsaw Regime in the United States" (1992) XVII-I Ann. Air and Sp. L. 49.

¹¹²As found in paragraph 1 of the *Agreement 18900*.

¹¹³As found in paragraph 2 of the *Agreement 18900*. Paragraph 2 is in fact the notice to passengers on limitation of the carriers liability, and is to be printed in type at least as large as 10 point modern type (i.e. the size of this text) on each ticket, a piece of paper attached to the ticket, or on the ticket envelope.

¹¹⁴*Krystal* at 937.

¹¹⁵*Grippando* at 87.

in the *Montreal Agreement* and the notice given to passengers should carry some weight.¹¹⁶

The Supreme Court in *Eastern* did not agree, finding that this argument was as inconclusive as the argument raised earlier on the issue of the change of wording in the *Hague Protocol*, and that the interchangeable use of words did not give any evidence of the signatories' understanding of *lésion corporelle* in Article 17. The court gave two reasons: first, the *Montreal Agreement* was not a treaty, but rather an agreement among all major international air carriers that imposes a quasi-legal and largely experimental system of liability essentially contractual in nature. Second, the *Montreal Agreement* did not purport to change or clarify the provisions of Article 17.¹¹⁷

To these reasons may be added five more. First, the head of the United States delegation to the Montreal negotiations has declared that "no legal significance should be attached" to any change in wording on the ticket, and that the bodily injury requirement was simply not addressed at Montreal.¹¹⁸ Second, the purpose and intention of the *Montreal Agreement* was to increase the monetary limit on liability and to waive the air carriers' defence of due care under Article 20(1) of the Warsaw Convention so as to appease the United States Government and to maintain its membership in the Warsaw

¹¹⁶*Floyd* at 410:

While we do not find the change in wording on the ticket form or the interchangeable uses of "bodily injury" and "personal injury" to be dispositive, neither do we completely discount them. It seems clear to us that there is significance in the fact that the *Montreal Agreement* itself and the Civil Aeronautics Board Order use the two terms interchangeably. It is also significant that the only document which is actually delivered to passengers informs them that the airline's liability is limited in cases of death or "personal injury", not merely "bodily injury".

Mankiewicz is of the same view. While recognizing that the United States has not ratified the *Hague Protocol* nor the *Guatemala City Protocol*, nevertheless the plenipotentiaries approved and signed both instruments after having participated in both the framing and drafting of both, and therefore at least as far as American courts are concerned the expression "*lésion corporelle*" should be understood to mean "personal injury". See Mankiewicz *article* at 192.

¹¹⁷*Eastern* at 375.

¹¹⁸*Sisk* at 145, *Yoran* at 834, and *Eaton* at 582, citing A.F. Lowenfeld, "Hijacking, Warsaw, and the Problem of Psychic Trauma", (1973) 1 *Syracuse Int'l L. J.* 345 at 347.

Convention, not to effect any changes to the scope of application of Article 17.¹¹⁹ Third, to construe the *Montreal Agreement* as an indication that mental injury is covered by Article 17 would be to go against an objective of the Warsaw Convention, namely to create uniformity among air carriers.¹²⁰ Fourth, while it may be possible to argue that since the only notice to passengers refers to "personal injury" (giving them the impression that mental injury is recoverable) and that therefore it would only be equitable that the courts give effect to this impression, it is also a rule that the courts are to give precedence to the provisions of the Convention above the wording of a mere notice.¹²¹ Finally, it has been argued by one writer that to read the *Montreal Agreement* as enlarging the scope of Article 17 would be erroneous on the ground that Federal jurisdiction of the United States' courts should not be expanded by prior action, agreement or consent of the parties.¹²²

c. *The Guatemala City Protocol*

By Article IV of the *Guatemala City Protocol*, Article 17 of the Warsaw Convention is amended by *inter alia* replacing "wounding ... other bodily injury" with "personal injury".¹²³ The French text of the same provision contains the phrase "*de toute lésion corporelle*". This situation is exactly the same as the *Hague Protocol*, and the same types of argument apply: first, that "*lésion corporelle*" may be equated to "personal injury", and second, that the change of wording from "bodily injury" to "personal injury" represents a clarification of Article 17.¹²⁴

¹¹⁹Sisk at 145.

¹²⁰*Ibid.*, at 147.

¹²¹Yoran at 834-835.

¹²²Grippando at 87-88, citing *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

¹²³The new Article 17(1) reads:

1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event 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. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

¹²⁴These arguments would also apply to a similar change of wording found in Article II of the *Montreal Protocol No. 3*, which amends Article 22 of the Warsaw Convention. See Floyd at 411.

Whilst the *Montreal Agreement* may be distinguished as being an agreement between air carriers, the *Guatemala City Protocol* may be distinguished as being a treaty that has not yet entered into force.¹²⁵ Therefore the arguments contended above become somewhat diluted, and this was admitted in both *Palagonia*¹²⁶ and *Floyd*.¹²⁷ That is not to say that the courts discarded the arguments altogether; they were still of the view that the actions that took place at Guatemala City were reflective of the international opinion as to the proper wording for Article 17. This position has been supported by *Lindauer*,¹²⁸ and also by *Sisk*, who found it significant that on two occasions, namely at The Hague and at Guatemala City, eminent lawyers from French-speaking civil law countries and English-speaking common law countries agreed and affirmed - as did the American Civil Aeronautics Board in the *Montreal Agreement* - "that the meaning of *"lésion corporelle"* in French civil law is the same as that of "personal injury" in the common law, and vice versa".¹²⁹

Miller, on a different tack, recognised that the precise reason why the drafting group¹³⁰ substituted "personal injury" for "wounding or bodily injury" is not known and therefore to say that the change was made to procure a better translation of the French text or to improve the English text would be guessing.¹³¹ The court in *Husserl*, in its characteristically astute analysis, found that it was not clear why "personal injuries" was used instead of the phrase "wounding or bodily injury", and that "[p]ersonal injuries"

¹²⁵As at September 1994, there were 11 ratifications to the *Guatemala City Protocol*; 30 are required to bring it in force.

¹²⁶*Palagonia* at 675.

¹²⁷*Floyd* at 411.

¹²⁸*Lindauer* at 345, stating that the change of wording in the *Guatemala City Protocol* "evidence[s] the conviction of the drafters that "bodily injuries" is too narrow a realm of recovery."

¹²⁹*Sisk* at 191.

¹³⁰ICAO Legal Committee Doc. 8878 LC/162, p.370 (LC/Working Draft No. 745-18)(Montreal 1970).

¹³¹*Miller* at 123. *Miller's* argument was directed more to questioning the accuracy of the translation of *"lésion corporelle"* into "bodily injury" in Article 17 of the Warsaw Convention; her argument was that the English text of the *Guatemala City Protocol* (which is an official text) translates *"lésion corporelle"* into "personal injury", thus casting doubt on the accuracy of the "unofficial" English translation of the Warsaw Convention.

could have been used in most cases as a shorthand for the phrase at issue, or as a clarification of it, or as a means of expanding its comprehension."¹³²

The court in *Eastern* put forward three reasons why the arguments contended for a wider reading of Article 17 were untenable. First, there was no evidence that the changes to the English or French texts were intended to effect a substantive change or clarification.¹³³ Second, neither mental injuries nor the minor drafting changes were discussed at the Guatemala City Conference.¹³⁴ Third, of the signatories to the Warsaw Convention, only a few countries have ratified the Protocol, not including the United States. To these reasons may be added a fourth, and perhaps alternative reason to the first one put forward by the court in *Eastern*, namely that the *Guatemala City Protocol* was intended to increase the limits of liability,¹³⁵ and therefore the broader language used served this purpose and cannot be used to justify a broader reading of the original Convention.¹³⁶

iii. The German translations

The German translation of the Warsaw Convention as adopted by Austria, Germany and Switzerland renders the term "*lésion corporelle*" as "any infringement on the health".¹³⁷ It is believed that this German translation came about with the aide of Professor Otto Riese, who was one of the German delegates at the Warsaw Conference. Therefore, it has been argued that this translation may more correctly reflect the

¹³² *Husserl* at 609. This analysis also applied to the change of wording found in the descriptive marginal note for Article 17 in the English translation of the Convention ratified by the Senate, The Hague Conference and the Guatemala protocol.

¹³³ *Eastern* at 375, citing *Miller* at 123 as a comparison for holding a different view (noting that the change to the English text was inconspicuously proposed by a drafting group of the ICAO Legal Committee as a minor drafting improvement.)

¹³⁴ ICAO, International Conference on Air Law, Minutes, Guatemala City, ICAO Doc. 9040 LC/167-1, pp. 31-38, 41-63 (1972).

¹³⁵ Article VIII of the Protocol which sets an air carrier's liability in the carriage of passengers to 1,500,000 francs for the personal injury or death of each passenger.

¹³⁶ *Sisk* at 145.

¹³⁷ *Mankiewicz book* at 146. Cf. *Mankiewicz article*, where the writer says that the term "*toute autre lésion corporelle*" is translated as "any other harm to the health of the person". It is submitted that these translations come to the same thing, since the operative word in both translations is "health".

understanding of the expression *lésion corporelle* by the delegates at Warsaw.¹³⁸ Two other German translations of the term *lésion corporelle*, also by Professor Riese, were found to be instructive. The first is the translation of the phrase as "any other harm to the healths of the person"¹³⁹. The second is found in a later article by Professor Riese entitled "*Precis de Droit Aerien International et Suisse*" a portion, when translated¹⁴⁰, reads:

The distinction made in the text between 'la blessure,' which means wounding, 'and toute autre lesion corporelle', demonstrates that the convention shall apply not only to the blessure, strictly speaking, but also to all harm done to the healths of the passengers, such as psychic shock or air sickness.¹⁴¹

The court in *Eastern* found these German translations to be of little value. First, this evidence adduced by the earlier courts were English translations of a German translation of a French text; as such, the court was reluctant to place much weight on the translations. Second, there were no German, Austrian or Swiss cases cited to the court adhering to the broad interpretation of Article 17; therefore it could not be said that the German translations indeed recognised mental injury.¹⁴²

iv. **The Berne Convention**¹⁴³

In the original *Berne Convention* of 1952, article 28, as translated into English, provided that the determination of "the liability of a railway in respect of death, injury, or other bodily harm sustained by a passenger" would be determined by the law of the

¹³⁸ *Floyd* at 410, citing *Mankiewicz* book above.

¹³⁹ *Palagonia* at 673. *Mankiewicz* article at 210 says:

Professor Otto Riese...comments on Article 17 in his leading treatise *Luftrecht* (at p. 442) as follows: "By using the expression 'harm to health' (a somewhat liberal translation of the French text which speaks of "*lésion corporelle*") next to *Körperverletzung*, one visibly intended to clarify that there is also to be included any infringement on the physical and psychic well being, even though such infringement was not caused by a mechanical impact nor resulted in an anatomic change in the body.

¹⁴⁰ The witness giving evidence and translations was Rene H. Mankiewicz, whose personal views accord with Dean Ripert and Professor Riese.

¹⁴¹ *Palagonia* at 674.

¹⁴² *Eastern* at 371.

¹⁴³ *International Convention Concerning the Carriage of Passengers and Luggage by Rail*, 25 October 1952, 242 U.N.T.S. 339. Signed at Berne [hereinafter the *Berne Convention*].

nation in which the harm occurred.¹⁴⁴ This translation comes from the phrase "*la mort, les blessures et toute autre atteinte, à l'intégrité corporelle*".¹⁴⁵ This is consistent with the translations of Article 17 of the Warsaw Convention: in the Warsaw Convention, "*lésion corporelle*" is translated as "bodily injury"; in the *Berne Convention*, "*l'intégrité corporelle*" is translated as "bodily harm". In 1961 the *Berne Convention* was revised, but article 28 was not changed in this respect.¹⁴⁶ Then in 1966, the *Berne Convention* was modified to "unify the rules of liability of the railway for damage resulting from death, personal injury or any other bodily or mental harm sustained by a passenger in the course of international carriage".¹⁴⁷ The relevant portion of Article 2 reads: "[t]he railway shall be liable for damage resulting from the death or personal injury or any other bodily or mental harm to, a passenger, caused by an accident arising out of the operation of the railway, and happening while the passenger is in, entering or alighting from a train"¹⁴⁸. The corresponding French text of the 1966 contains the words "*atteinte à l'intégrité physique ou mentale*" in both the preamble and Article 2.

The parallels between the Warsaw Convention and the *Berne Convention* are glaring; both are multilateral treaties that govern a system of liability for the international carriage of passengers and luggage. Furthermore, the wording used in the liability provisions of both conventions is very similar. Therefore, it may be argued that by analogy, the present wording of Article 17 of the Warsaw Convention does not allow

¹⁴⁴*Ibid.*, at 393.

¹⁴⁵*Ibid.*, at 390.

¹⁴⁶*International Convention Concerning the Carriage of Passengers and Luggage by Rail*, 25 February 1961, reprinted in *Transport: International Transport Treaties*, vol. 1, 10, 33 (Deventer, Netherlands: Kluwer Law and Taxation Publishers 1986).

¹⁴⁷Preamble, *Additional Convention to the International Convention Concerning the Carriage of Passengers and Luggage by Rail of Feb. 25, 1961 Relating to the Liability of the Railway for Death of and Personal Injury to Passengers*, 26 February 1966, reprinted in *Transport: International Transport Treaties*, vol. 46 (Deventer, Netherlands: Kluwer Law and Taxation Publishers 1986).

¹⁴⁸*Ibid.* The de Vries translation (*Journal Officiel de la République Française* 7173, July 1973) is slightly different and reads:

The railroad is liable for damages resulting from the death, wounds or any other infringement of the physical or mental integrity of a passenger caused by an accident related to the operation of the railroad sustained while the passenger remains within the cars, while entering or leaving.

recovery for pure mental injury suffered by passengers, and only a clear and specific amendment to Article 17 could provide such coverage. This analogy argument has been found to be persuasive in *Burnett*¹⁴⁹ and in *Eastern*, where the court held that when the parties to a different international transport treaty wanted to make it clear that rail passengers could recover for purely psychic harms, the drafters made a specific modification to this effect.¹⁵⁰

It may however be argued that the *Berne Convention* modification did not change the scope of recovery, but rather made the drafter's intentions regarding scope of recovery clearer. In other words the *Berne Convention* had from the outset allowed recovery for mental injury, and the modification simply elucidated that fact. This argument was not dealt with by *Eastern*, but one writer has suggested the rebuttal to this argument would be that even if the modification were only to clarify the original scope of the *Berne Convention*, that in itself shows that the drafters recognised the ambiguity of the *Berne Convention*, and likewise courts would have found it ambiguous and as a result not necessarily have allowed recovery for purely mental injury; hence the need for modification. By analogy, the drafters to the Warsaw Convention would have, like in the *Berne Convention*, made a similar modification so as to clear the ambiguity and allow recovery for pure mental injury.¹⁵¹

F. Purpose of the Warsaw Convention

As the official name of the Warsaw Convention suggests, the Convention was created "*pour l'unification de certaines règles relatives au transport aérien international*" - "for the Unification of Certain Rules Relating to International Carriage by Air". Where there is a dispute as to the extent of coverage of a provision of the Convention, the courts have always strove to adopt an interpretation of that provision so as to achieve

¹⁴⁹ *Burnett* at 408.

¹⁵⁰ *Eastern* at 373.

¹⁵¹ *Yoran* at 828.

uniformity. However, even with this common approach, the courts have often arrived at opposing conclusions.

One such conclusion was the one reached in *Husserl*. The court, after finding that the drafters of the Convention had no specific intention on the scope of Article 17 when drafting the convention, concluded that to regulate in a uniform manner the liability of the carrier, the drafters must have intended to be comprehensive. To effect the treaty's avowed purpose, the types of injury enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries were colorably within that ambit and were, therefore, comprehended by Article 17.¹⁵² Hence, it is said, the *Husserl* court had in mind two objectives of the Warsaw Convention. By allowing recovery for mental injury under Article 17, the court would be facilitating claims by passengers, and at the same time bringing mental injuries within the scope of the Convention and thereby regulating air carrier liability in a uniform manner.¹⁵³ This approach and conclusion was approved of in *Floyd*,¹⁵⁴ and followed in *Karfunkel*¹⁵⁵ and in *Krystal*.¹⁵⁶

Desbiens argues that a purposive approach to the Warsaw Convention, achieving the goals of the Convention (namely that the Convention was created to limit the liability of air carriers and encourage growth in a fledging industry, and to create some uniformity for carriers around the world) would raise doubts as to whether mental injury, *even when accompanied by physical injury*, can be compensated. Not only would allowing such

¹⁵² *Husserl* at 607-608.

¹⁵³ *Grippando* at 73.

¹⁵⁴ *Floyd* at 414, where the court approved of the "treaty's purpose" approach adopted in *Husserl* as "instructive", but criticised the judgment for interpreting the English text rather than the French text.

¹⁵⁵ *Karfunkel* at 617 where the court reasoned:

The goal of the Warsaw Convention was to create uniformity in actions for damages arising from international air accidents. Though there is an indicated difference of opinion on the question, it seems the better view that all claims for damages for personal injuries suffered by a passenger in an "accident", whether physical or mental, be resolved in one action under the Convention.

¹⁵⁶ *Krystal* at 937.

mental injury increase an air carrier's potential liability, but different courts in different jurisdictions would have different attitudes towards mental injury and would compensate such injury to varying degrees, hence going against the uniformity purpose.¹⁵⁷

G. *Air France v. Teichner*

A similar conclusion that mental injuries are recoverable was reached in *Teichner*, but by a different approach. The Israeli Supreme Court contended that the plain meaning of the treaty must be adaptable to the current conditions of both the aircraft industry and international law. Thus the Israeli Court maintained that a new examination of the goals of the Convention is necessary in light of the practical exigencies of air travel today and the development of the law in most countries towards acceptance of emotional damages independent of physical injury. If the Convention was not interpreted in this way, the Israeli Court contended that the Convention would become stagnant and useless in the face of modern reality.¹⁵⁸ This approach has been criticised because if the courts of the different parties to the Convention deliberately choose to ignore the intent of the Convention's drafters and instead interpret the Convention according to their own policy considerations, the entire *raison d'être* of the Convention as a binding agreement creating uniformity among its parties would be frustrated.¹⁵⁹

The writer *Yoran* has analysed the debate over mental injuries in the context of the three stated objectives of the Warsaw Convention. On the first objective, namely to protect and encourage the growth of the infant airline industry by limiting the potential liability of air carriers resulting from accidents, the writer found that to allow recovery for mental injury would be to encourage widespread litigation and enlarge the potential liability of an air carrier, thus frustrating this objective. No doubt the "infant industry" reason no longer exists, but nevertheless encouraging the growth of the industry remains an objective, and expanding an air carrier's liability will not serve to reduce the number

¹⁵⁷ *Desbiens* at 182 and 185.

¹⁵⁸ *Yoran* at 821 citing *Teichner* at 800.

¹⁵⁹ *Ibid.* at 822.

of bankruptcies occurring today.¹⁶⁰ On the second objective, namely to establish uniform rules to govern the rights and liabilities of air carriers, it was suggested that to allow recovery for mental injuries would create a "forum shopping" problem, as potential claimants would try to bring their law suits in jurisdictions that had a record of being more generous in their awards.¹⁶¹ Even though this reasoning would apply to physical injuries as well as mental injuries, the writer suggests that damages for mental injuries are much more difficult to quantify, and juries attitudes towards mental injuries in different jurisdictions will differ.¹⁶² On the third objective, namely to simplify the task of recovery for claimants by providing a shift of the burden of proof to the carriers, the writer has characterised this objective as the least important of the three objectives, since air carriers were intended to be the primary beneficiaries of the Convention.¹⁶³ Therefore, according to the writer, allowing recovery for mental injuries would violate the spirit of the Convention, as was the case in *Teichner*.¹⁶⁴

The significance of the *Teichner* case is that it was the first Supreme Court decision made on the question of mental injuries under Article 17 by a High Contracting

¹⁶⁰On the other hand, as recognised in *Lindauer* at 344, liability insurance is now available to protect the airlines from what would otherwise be economic catastrophes.

¹⁶¹Indeed, there is no reason why potential claimants will not "forum shop" for a state jurisdiction that allows the alternative state law remedy for negligent infliction of emotional distress. On the basis that such alternative state law remedy is available, it would make no difference whether mental injury fell within the scope of Article 17, since the alternative state claims will defeat any hopes of uniformity. See S.W. Holmes, "Recovery for Purely Mental Injuries under the Warsaw Convention: Aviation" (1993) 58 J. Air L. & Com. 1205 at 1220 [hereinafter *Holmes*]. To achieve uniformity, therefore, a court must hold that the Warsaw Convention provides exclusive remedy for mental injury claims under Article 17.

¹⁶²The same view is held by M.V. Pastor, "Absolute Liability under Article 17 of the Warsaw Convention: Where does it stop?" (1993) 26 Geo. Wash. J. Int'l L. & Econ. 575 at 581 [hereinafter *Pastor*]. Cf *Grippando* at 98, who suggests that viewed in the abstract, reliance on the various laws of fifty states contradicts the Convention's goal of establishing uniformity; but when compared with other Convention provisions, reliance on state law to create and govern a mental injury claim "is not incompatible" with the goal of uniformity. His argument, however, focuses on the issue of whether Article 17 provides an exclusive remedy; if it does not provide an exclusive remedy for death or wounding claims, then various state laws would apply and therefore the uniformity objective is "not absolute", even for the explicitly enumerated types of physical injury to a passenger. It would therefore not be contrary to the objective of uniformity to allow mental injury to be included under Article 17.

¹⁶³Cf *Lindauer* at 346, whose view is that whereas uniformity and airline growth may have once been primary objectives, the trend is towards greater passenger recovery. This trend is found in the subsequent revisions of the Convention, which have created conditions increasingly favourable to passenger recovery.

¹⁶⁴*Ibid.* at 838-842.

Party of the Warsaw Convention. Therefore, other courts, including superior courts in the other High Contracting states, though not technically bound by the *Teichner* decision, would be obliged to look carefully at this decision in order to achieve the primary purpose of achieving uniformity. The Supreme Court of the United States in *Eastern* chose to depart from *Teichner*. As explained by the court:

[w]hile acknowledging that the negotiating history of the Warsaw Convention was silent as to the availability of such compensation, *id.*, at 242, 23 Eur. Tr. L., at 101, the [*Teichner*] court determined that "desirable jurisprudential policy" ("la politique jurisprudentielle souhaitable") favored an expansive reading of Article 17 to reach purely psychic injuries. *Id.*, at 243, 23 Eur. Tr. L., at 102. In reaching this conclusion, the court emphasized the post-1929 development of the aviation industry and the evolution of Anglo-American and Israeli law to allow recovery for psychic injury in certain circumstances. *Ibid.*, 23 Eur. Tr. L., at 101-102. In addition, the court followed the view of Miller that this expansive construction was desirable to avoid an apparent conflict between the French and English versions of the Guatemala City Protocol. *Id.*, at 243-244, 23 Eur. Tr. L., at 102, citing Miller 128-129...Although we recognise the deference owed to the Israeli court's interpretation of Article 17, see *Saks, supra*, at 404, we are not persuaded by that court's reasoning. Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery...Moreover, we believe our construction of Article 17 better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation.¹⁶⁵

It has been suggested that the *Teichner* court was under external pressure to reach its decision. It has been said, for example, that it is entirely possible the court was swayed by factors unrelated to the Warsaw Convention. As the facts showed, the case was a political, emotionally charged, and unusual case. The Israeli community was angry and outraged at the treatment of the hostages and closely followed the outcome of the

¹⁶⁵ *Eastern* at 375-376. *Pastor* at 581 fully agrees with this approach, noting that this approach is also consistent with U.S. Tort law. However, it is argued by *Eaton* at 585-587 that the *Eastern* court has not in fact achieved uniformity of rules because the court declined to address the question of whether Article 17 provides an exclusive cause of action, and therefore mental injury claims whilst beyond the scope of Article 17 could nevertheless be brought under state law. For the same reason, it is argued that the court has failed in fact to give effect to another objective of the Warsaw Convention, namely to limit the liability of carriers to \$75,000 per passenger.

case. The emotional trauma that the hostages suffered was indisputable and it was commonly perceived that someone should be held liable for their injuries. Therefore, the Israeli Supreme Court was hard pressed to encourage Air France to compensate the sympathetic plaintiffs.¹⁶⁶ Finally, it may be argued that what was said in the *Teichner* decision on the mental injuries point may be *obiter dicta*, since in the end the court held that recovery under the Convention was time barred.¹⁶⁷

H. *Georgopoulos v. American Airlines*

The New South Wales Supreme Court has also decided that pure mental injuries are recoverable under Article 17. In the *Civil Aviation (Carriers' Liability) Act 1959, (Cth)*, which adopts the Warsaw Convention into national law, the wording used in Article 17 is "bodily injury". The court found that although the *Hague Convention*, *Montreal Agreement* and *Guatemala City Protocol* used the word "physical injury", this amounted to nothing more than "textual variants".¹⁶⁸ Hence, there was no need to examine the French text, and the court proceeded to interpret the meaning of "bodily injury".

The court looked to Anglo-Australian case law¹⁶⁹ and came to the conclusion that "nervous shock" was clearly a species of "bodily injury"; it was an injury to the nervous system, which is a recognisable part of the body. Further, this interpretation accorded well with the German translations of the phrase *lésion corporelle*.¹⁷⁰ Finally, according to a medical dictionary, "nervous shock" was defined as "an acute nervous collapse, typically accompanied by syncope, produced by severe physical or psychic trauma".¹⁷¹

¹⁶⁶ *Yoran* at 842.

¹⁶⁷ *Ibid.*, at 843.

¹⁶⁸ *Georgopoulos* at 14.

¹⁶⁹ *Dulieu v. White & Sons* [1901] 2 KB 669, *Victorian Railway Commissions v. Coultas* 13 App Cas 222, *Bell v. The Great Northern Railway Company of Ireland* (1890) 26 LR(Ir) 428, *Hay(Bourhill) v. Young* [1943] AC 92, *R. v. Miller* [1954] QB 282.

¹⁷⁰ *Georgopoulos* at 20.

¹⁷¹ *Ibid.* at 21.

Commenting on the American jurisprudence, the court approved of *Floyd* and *Husserl*. It criticised *Eastern* as being flawed because the intention of the Warsaw Convention was to limit liability to a fixed sum, not by reference to the heads of damages recoverable.¹⁷² Second, silence of the Convention on mental injury could be construed in two ways, one being that if the parties to the Convention meant to exclude mental injury they would have expressly done so.¹⁷³ Third, the *Eastern* court was wrong in relying on the *Berne Convention*, which was drafted in 1952, many years after the Warsaw Convention; besides, the Berne amendments could have been clarifying the availability of damages for mental injury, rather than expanding the scope of liability.¹⁷⁴ Finally, the *Eastern* court had double standards, since it refused to place any emphasis of the change in wording of subsequent instruments such as the *Hague Convention*, *Montreal Agreement* and *Guatemala City Protocol* while have no qualms about doing so in the change of wording between the 1925 draft of the Warsaw Convention and the 1929 text.¹⁷⁵

In concluding, the court noted that uniformity, while desirable, was not mandatory,¹⁷⁶ and in the light of the Anglo-Australian case law, and the fact that the Israeli Supreme Court had already decided differently from the United States Supreme Court, damages for nervous shock would be allowed in that jurisdiction.

III. Mental Injury accompanied with Physical Injury

The types of mental injuries that accompany physical injury fall into two main categories, those that occur *as a result of* physical injury sustained in the accident, and those that occur *before the occurrence of* a physical injury. The issue is not to access whether the conditions of the carrier's liability are satisfied because, *ex hypothesi*, there is

¹⁷² *Ibid* at 28.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*. at 29.

¹⁷⁵ *Ibid*. at 33.

¹⁷⁶ *Ibid*. at 25.

physical injury answering the requirements of Article 17.¹⁷⁷ In other words, it may generally be said that mental injuries, where accompanied by physical injury, fall within Article 17 of the Warsaw Convention. The issue is to what extent the courts have been willing to allow recovery for mental injury.¹⁷⁸

The operative words of Article 17 in this regard are "...carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury...*if the accident which caused the damage so sustained took place...*" Hence, to allow recovery for damage sustained under Article 17, a nexus or causal connection between the injury (whether mental or physical) and the accident must be established. It was held in *Rosman* that this nexus may be either a physical or a mental one:

[T]here must be some causal connection between the bodily injury and the "accident". In our view, this connection can be established whether the bodily injury was caused by physical impact, by the physical circumstances of the confinement or by psychic trauma. If the accident—the hijacking—caused severe fright, which in turn manifested itself in some objective "bodily injury", then we would conclude that the Convention's requirement of the causal connection is satisfied.¹⁷⁹

The court in *Burnett* was of the same opinion that the nexus may be either physical or mental. In rejecting the defendant's argument that a "contact rule" ought to be adopted, i.e. that any bodily injury sustained must be the result of physical contact between the body and another object, the court found that many instances may be posed in which bodily injury may result without any physical contact whatsoever, and therefore to accept the defendant's argument "would surely do violence to the intent of the Warsaw Framers."¹⁸⁰

¹⁷⁷ *Miller* at 121. It was earlier suggested by this writer at 113 that the courts were wary of recognising pure mental injury because it could be easily feigned, but this reluctance fell where the mental injury was accompanied with physical injury.

¹⁷⁸ For a discussion on the American case law of recovery for mental injury, see *Lindauer* at 341-344.

¹⁷⁹ *Rosman* at 235-236.

¹⁸⁰ *Burnett* at 409. See also *Eaton* at 574. *Desbiens* believes there is room for arguing that mental injury would not be a proper nexus for the purposes of Article 17. *Desbiens* at 184 argues that where mental injury precedes physical injury, the cause of action is the psychic trauma, not the physical injury, and since Stevens, Judge in his dissent in *Rosman* held that the Warsaw Convention does not contemplate mental anguish as a separate and independent cause of action, therefore mental injury *per se* would not be a sufficient nexus.

A. Mental Injuries that result from Physical Injury

Once the causal link is established between accident and bodily injury, and the "palpable, objective bodily injuries"¹⁸¹ are proven, then any mental injuries that result therefrom are recoverable.¹⁸² As found by the court in *Burnett*:

Certainly, mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury. The delegates apparently chose to follow this well-recognised principle of law allowing recovery for mental anguish resulting from the occurrence of a bodily injury, the emotional distress being directly precipitated by the bodily injury being considered as a part of the bodily injury itself. Therefore, plaintiffs may recover in this action for any such emotional anxiety that they can demonstrate resulted from a bodily injury suffered as a consequence of the hijacking.¹⁸³

The same view was held in *Rosman*:

For example, if plaintiff Herman's skin rash was caused or aggravated by the fright she experienced on board the aircraft, then she should be compensated for the rash and for the damages flowing from the rash. It follows that, if proved at trial, she should be compensated for her mental anguish, *suffered as a result* of the rash, since this anguish would have flowed from the "bodily injury".¹⁸⁴

The *Rosman* decision was followed in *Kalish*. The plaintiff was trapped in a burning aircraft along with the other passengers and crew, and in the ensuing panic the plaintiff was trampled upon. As a result, she suffered bodily injury, and they were of such a nature as did produce mental and emotional anxiety sufficient to trigger her recurrent,

¹⁸¹ *Rosman* at 236. *Lindauer* at 342 cites *Linn v. Duquesne Borough* 204 Pa. 551, 54 A. 341, 346 (1903) for the authority that the requirement for physical injury is satisfied no matter how slight the injury is.

¹⁸² The same recovery is recognised by the courts in pain and suffering cases, where as contrasted with mental injury, the plaintiff suffers pain as a result of his physical wounds. For e.g., see *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F. Supp 625 (E.D.N.Y. 1991).

¹⁸³ *Burnett* at 409.

¹⁸⁴ *Rosman* at 236. Stevens J in his dissenting judgment at 237 came to the narrower decision that *any* mental injury, whether or not accompanied by bodily injury, would not be recoverable under Article 17 :

The term "wounding" imparts a condition caused by some external force, intentional or otherwise. "Bodily injury" when used in conjunction with the words "accident which caused the damage" seems to envision impact or contact. The factual background to the writing of the Convention, and the recognised purpose of the Convention belie the view that it intended to include as area where the damages, even if real, could not be ascertained with some degree of precision.

aggravated colitis condition, an emotional stress-induced physical condition. The court, following *Rosman*, allowed recovery for the physical injury, mental and emotional anxiety and the colitis condition.¹⁸⁵

The sum of these cases is that mental injury resulting from physical injury is recoverable, since it is suffered in the event of a bodily injury and flows from that bodily injury.¹⁸⁶ It is further submitted that, *a fortiori*, the cases discussed above that allowed the claim for pure mental injury under Article 17, whilst not specifically dealing with the question of mental injuries resulting from physical injury, would have come to the same conclusion.

B. Mental Injuries that Precede Physical Injury

Whilst the cases are clear that mental injuries resulting from physical injuries are damages suffered in the event of a "bodily injury" and therefore falling squarely within Article 17, it is not so clear that mental injuries that precede a physical injury, and therefore cannot be said to flow from the physical injury, are covered by Article 17. Unfortunately, there is little judicial pronouncement on this issue.

One case that did not allow recovery for pre-physical mental injury was *Rosman*. The majority of the court was of the view that mental injuries which precede a physical injury, even if it were to cause the physical injury, would not be recoverable:

¹⁸⁵*Kalish* at 131, where the court held:

Here, however, the court finds that plaintiff suffered bodily injuries of such a nature and under such singular circumstances as would produce mental and emotional anxiety sufficient to trigger an aggravation of her pre-existing colitis condition, and which would also create sleep-disturbing nightmares over a prolonged period of time. Under the doctrine of the *Rosman* case recovery for such mental and emotional anguish is allowable. The emotional trauma which plaintiff was required to suffer as a result of her "bodily injury" were of such palpable, objective, and identifiable nature, manifested by "shivering, shaking, trembling, and crying out of control", as to be considered additional bodily, physical injuries and thus compensable as such."

¹⁸⁶See also *Holmes* at 1221, who agrees with this conclusion: "[s]ince the Convention explicitly provides for recovery for the physical injury, it seems logical that any further injury, even if mental, caused to the passenger by such physical damage should be included as recoverable. This result would probably expand only minimally the liability of the air carriers, and would not directly contravene the intent of the signatories to the Convention."

However, only the damages flowing from the "bodily injury", whatever the causal link, are compensable. We are drawn to these conclusions by the clear import of the terms of article 17. Those terms, in their ordinary meaning, will not support plaintiff's claim that psychic trauma alone, or even the psychic trauma which caused the bodily injury, is compensable under the Warsaw Convention.¹⁸⁷

This conclusion has been criticised by *Miller*. According to the writer, the conclusion reached in *Rosman* is supported neither by the wording of Article 17, nor by the drafting history of the provision which is silent on this point; further, Article 17 does not literally require a causal link between the damage and the death, wounding or other bodily injury. It only states that the carrier is liable for damage *sustained in the event* of death, wounding, or other bodily injury. In that writer's opinion, therefore, so long as the damage occurred *concurrently* with death, wounding, or other bodily injury, the requirement of Article 17 is satisfied.¹⁸⁸ Further support for this conclusion, it is argued, is found in the *Berne Convention*: since the provision in the *Berne Convention* specifies that the railway is liable only for damage *resulting* from death, wounding or personal injury; absence of such terminology in the Warsaw Convention must mean that concurrent damage is recoverable.¹⁸⁹

Miller's approach, according to *Sisk*, would lead to absurd results.¹⁹⁰ For example, if two passengers sat side-by-side in an aircraft that crashed, the passenger who suffered bodily injury could recover for the emotional distress suffered *before* the crash, while the passenger who suffered emotional distress but no physical harm could not recover for that emotional distress (narrow reading of Article 17). The "in the event of" language of article 17 is more naturally understood to require that any compensable damage be associated with the requisite bodily injury. In sum, emotional distress should be the

¹⁸⁷ *Rosman* at 236.

¹⁸⁸ *Miller* at 121 and 131.

¹⁸⁹ *Ibid.* at 121. According to *Miller*, the *Berne Convention* argument was used by the court in *Burnett* as an analogy showing why only mental suffering directly resulting from a bodily injury can be compensated. A careful reading of the relevant passage in *Burnett* (at 409), however, shows that this is not what the court said. The *Berne Convention* argument was used by that court to support the finding that mental injury alone does not fall within the term "*lésion corporelle*", not for the purpose of decided whether mental anguish was recoverable depending on whether it preceded or flowed from bodily injury.

¹⁹⁰ *Sisk* at 134.

subject of compensation only if the distress is precipitated by and flows from a physical injury.¹⁹¹

The upshot of authority leads to the conclusion that mental injury which precedes physical injury will not be compensated,¹⁹² while it is at best arguable that mental injury that occurs concurrently with physical injury may be compensated.

IV. Conclusion

It is evident that the debate on pure mental injury as well as mental injury that results from physical injury is settled in the United States, and that pure mental injury, unlike mental injury that results from physical injury, is not recoverable under Article 17. It is also evident that the debate on pure mental injury is resolved in Israel, and there is a decision of the Supreme Court of New South Wales, Australia that has reached the same opposite finding that pure mental injury is recoverable under Article 17.

The unfortunate conclusion that may be reached after a review of the various arguments raised in the three different jurisdictions is that these three High Contracting Parties to the Warsaw Convention are not in agreement on the scope of Article 17, and not surprisingly so given the different approaches and policies behind the decisions. Unless international action is taken to clarify the scope of Article 17 on the question of mental injury, the primary purpose of the Warsaw Convention to create a "Unification of Certain Rules Relating to International Carriage by Air" will not be reached, and there will always be a danger of further divergence of views coming from the courts of one of the other 123 Parties to the Warsaw Convention, should the unfortunate occasion arise for such judicial opinion.

¹⁹¹ *Ibid.*

¹⁹² This may be contrasted with the case of pain and suffering, where it is generally accepted that pre-death pain and suffering is compensable. *For e.g. see In re Air Crash Disaster Near Honolulu, Hawaii, on February 24, 1989*, 783 F. Supp 1261 (N.D. Cal. 1992).

Chapter Two: Wilful Misconduct

I. Introduction

Article 25 of the Warsaw Convention has become one of the most controversial and litigated provisions in the Warsaw system, partly because of inherent difficulties in interpretation and application, and partly because it is one of the few openings through which passengers and shippers can overcome the limits of the carrier's liability in Article 22 of the Convention and obtain full compensation for damage suffered.¹ As one writer has put it:

What plaintiff attorneys are apt to regard as the strait-jacket of the Warsaw Convention provides but little assistance to claimants attempting to circumvent the convention clauses which bestow upon the air carrier a protective monetary limit to its liability ... Of the weapons that are available it is without doubt the concept of wilful misconduct enshrined within art. 25 which has proved of greatest utility.²

While one of the goals of the Warsaw system is to create a uniform scheme of liability among all Contracting states, unfortunately the interpretation by national courts of the provisions of the Convention have not been consistent. This chapter will look at the original Article 25³ and the *Hague Protocol* Article 25 as interpreted by the various courts, and the proposed changes introduced by the *Guatemala City Protocol*.

¹Bin Cheng, "Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris" (1977) II Ann. Air & Sp. L. 55 at 55 [hereinafter *Cheng*].

²N. McGilchrist, "Wilful Misconduct and the Warsaw Convention" [1977] 4 Lloyd's MCLQ 539 at 539 [hereinafter *McGilchrist(1)*].

³In the authentic French text of 1929, Article 25 reads:

1. Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son *dol ou d'une faute qui*, d'après la loi du tribunal saisi, est considérée comme *équivalente au dol*. [emphasis added].

2. Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercice de ses fonctions.

In the corresponding English translation, Article 25 reads:

II. The Original Article 25

A. Drafting History

The original intent of the *CITEJA* proposal was to deprive the carrier of the benefit of limited liability in cases of *dol*,⁴ since the predominant influence was exerted by Civil law principles.⁵ However, due to conflicting concepts of law that existed between the Civil law and Common law countries, there was great difficulty in reaching any agreement that accurately embodied the concept of *dol* in Common law jurisdictions. This has led one commentator to characterize the essential phrase of Article 25 (as italicised above) as "the most unhappy phrase of the entire convention. It is the result and the starting point of a comedy of errors. Seldom have the dangers of conceptualistic thinking appeared so clearly as in the history of this text".⁶

There were many debates at the Warsaw Conference in 1929, but these debates, closely analysed by the courts and commentators over the years, have been considered "unhelpful" in the interpretation of Article 25.⁷ The preliminary draft which was established by the Paris Conference of 1925 did not contain any exception to limited liability. A provision was introduced by the Second Commission of the *CITEJA* to allow an exclusion in the case of intentional illicit acts (*actes illicites intentionelles*).⁸ At the

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

2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

⁴G. Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* (Deventer, The Netherlands: Kluwer, 1977) at 79, citing *Ilème Conférence Internationale*, 40 [hereinafter the book is referred to as *Miller*]. See part II.B.i. below for the definition of *dol*.

⁵*Ibid.* at 78.

⁶H. Drion, *Limitation of Liability in International Air Law* (The Hague: Martinus Nijhoff, 1954) at 197 [hereinafter *Drion*].

⁷Shawcross & Beaumont, *Air Law*, 4th ed., vol.1 (London: Butterworths, 1995) at VII(210) [hereinafter *Shawcross*].

⁸*Drion* at 197.

1929 debates, the Drafting committee incorporated the concept of *dol* into Article 25. The German delegate considered that, as a matter of principle, a carrier who was guilty of "*faute lourde*" should also be denied the benefit of liability.⁹ For some delegates, the only difficulty was that there was no similar concepts in other countries.¹⁰ For other delegates, the introduction of *faute lourde* was dangerous because it was a very vague concept which could allow almost any fault to be qualified as *faute lourde*, thus rendering meaningless the limitation of liability.¹¹ In the end, the phrase *faute lourde* was not specifically used in the final draft of Article 25, but provision was made for "... *d'après la loi du tribunal saisi, est considérée comme équivalente au dol.*" Thus emerged the *lex fori* rule in Article 25. If there is in the *lex fori* a rule providing that a particular category of fault is equivalent to *dol*, the liability would be unlimited in such case. But if the *lex fori* does not have any equivalent to *dol*, the liability would be unlimited in cases of *dol* only.¹²

When the debate came to the question of expressing the concept of *dol* in English law, a Common law jurisdiction, the British delegate Sir Alfred Dennis remarked that it was difficult to translate this concept meaningfully in terms of English law. He said, however:

We have at home the expression 'wilful misconduct', which I believe covers everything you want to say; it covers not only acts committed

⁹ See part II.B.ii. below for the definition of *faute lourde*.

¹⁰ *Miller* at 79, citing from *Procès-Verbaux IIe Conférence Internationale de Droit Privé Aérien*, 4-12 Octobre 1929, Varsovie (published by the Ministry of Foreign Affairs of Poland (1930)) [hereinafter the conference is referred to as *IIème Conférence Internationale*] at 41 (Luxemburg delegate), 42 (Swiss delegate). The British Delegate Sir Dennis said that "this expression [*faute lourde*] is not known in our laws, it is a question of degrees of negligence. We cannot translate in our language *faute lourde* in a way that it will have a legal meaning." (at 41). This has been criticised by *Drion* (at 201) because English courts had since the first half of the 19th Century distinguished between gross negligence and ordinary negligence, although admittedly of late this practice has stopped.

¹¹ *Ibid.*, citing the same source, 41 (French delegate).

¹² *Miller* at 79 points out two advantages of the final wording:

- (1) it allows the application of the concept of *faute lourde* in the countries where it already exists, without imposing it on other countries; and
- (2) its complicated manner of referring to what is, in fact, *faute lourde*, lessens the risk of courts too easily characterizing as *lourde* what would in fact be an ordinary fault.

deliberately, but also acts of carelessness committed regardless of consequences.¹³

It was agreed at the conference that 'wilful misconduct' corresponded "maybe not entirely, but almost entirely to '*dol*' and '*faute lourde*'."¹⁴ As such, the draft wording for Article 25 was agreed upon and a vote was taken which resulted in the final version of Article 25. Hence even though there were differences between the French and English texts, the seal of approval was given by the Contracting states. Unfortunately, the focus of the debates was not on which fact situations the provisions limiting or excluding the carrier's liability should apply, but rather the legal terminology to be used.¹⁵

One writer has said that the ideas of *dol* and *faute lourde équivalente au dol* "are perfectly combined" in the concept of wilful misconduct.¹⁶ The case of *American Airlines, Inc. v. Violet Ulen*¹⁷ has even gone so far as to say that the words of Sir Alfred Dennis are authority for the proposition that the governing translation of *dol* is wilful misconduct.¹⁸ It will be seen below, however, that the concept of wilful misconduct as applied by the courts is quite different from the concepts of *dol* and *faute lourde* and

¹³ *Ilème Conférence Internationale*, 30. *Drion* at 199, 202 and 207 suggests that the motivation behind this statement was the British sentiment that Article 25 should not be extended to include gross negligence; for example, at 199:

There can be little doubt that the real objection on the part of the British Delegation to the use of the words *faute lourde*, to which objections the Conference gave way, were not based on an hypothetical impossibility to translate these words into English, but on the view that the use of this notion would extend the scope of Article 25 in an unwarranted way.

¹⁴ *Miller* at 80, citing *Ilème Conférence Internationale*, 41 (Italian delegate). See also E. Cotugno, "No Rescue in Sight for Warsaw Plaintiffs from either Courts or Legislature - Montreal Protocol 3 Drowns in Committee" (1993) *J. Air L. & Com.* 745 (hereinafter *Cotugno*) at 772, where the writer agrees that there is no real English translation of the word *dol*, and the closest concept in common law jurisdictions is wilful misconduct.

¹⁵ *Drion* at 199.

¹⁶ G. Guerrieri, "Wilful Misconduct in the Warsaw Convention: A Stumbling Block?" (1960) 6 *McGill L.J.* 267 at 276 [hereinafter *Giuseppe*].

¹⁷ (1949) *U.S.Av.R.* 338, 186 F.2d 529, 2 *Avi.* 14, 990 (Dist. of Columbia, 1949) [hereinafter *Ulen* cited to *U.S.Av.R.*].

¹⁸ The appellant was arguing that *dol* was improperly translated and that it actually meant "fraud" or "deceit". This was rejected by the court.

therefore uniformity of application among the different jurisdictions, especially between the Civil law and Common law jurisdictions, was impossible to achieve.¹⁹ In contrast, another writer has suggested that even though the two concepts are not compatible, the proper approach to take is that since wilful misconduct has been raised by the British delegate as a legal concept corresponding to *dol*, then the delegate's interpretation should be controlling.²⁰ This last suggestion leads to the conclusion that the Common law courts would have to change their legal concept of wilful misconduct to that of *dol*, a suggestion which has never been and will never be accepted by the Common law courts. *Drion* is of a slightly different view, that wilful misconduct should be ascribed the meaning given to it, namely "acts committed deliberately as well as acts of carelessness committed without any regard for the consequences."²¹

B. Wilful Misconduct, *Dol* and *Faute Lourde*: Definitions

i. *Dol*

Traditionally, *dol* in the execution of a contract is defined as a wrong intentionally committed.²² It has also been referred to as "an intentional unlawful act",²³ or "intentional

¹⁹L. Kreindler, *Aviation Accident Law* (New York: Bender, 1974) at 11-14 [hereinafter *Kreindler*]; *McGilchrist* at 542; *Miller* at 193.

²⁰WC Strock, "Warsaw Convention - Article 25 - 'Wilful Misconduct'" (1966) 32 J Air L & Comm. 291 at 293 [hereinafter *Strock*]. *Strock* is of the opinion that at the time the words were said by Sir Dennis, English law did not have a clear or precise definition of wilful misconduct, and this supports his opinion that Sir Dennis' definition should therefore be controlling.

²¹At 203 *Drion* states (footnote omitted):

If one then considers that the formula of Article 25 was not intended to let the national laws each establish for themselves which forms of misconduct should result in unlimited liability, but only to let them each choose the terminology most appropriate to the single uniform solution aimed at, and if one also takes into account that the English Delegation had explained to the Conference the meaning of 'wilful misconduct' and made it clear that it understood the formula of Article 25 to be fully covered by this English notion, the best interpretation of the words '*dol*', or a fault which in accordance with the law of the court seized of the case is considered equivalent to '*dol*', would seem to be the definition given by Sir Alfred Dennis of the term 'wilful misconduct', i.e. 'acts committed deliberately or as of carelessness without any regard for the consequences.'

²²*Miller* at 195.

²³*Cheng* at 76.

fault" (*malitiis non indulgendum*).²⁴ It is not a concept unique to the Warsaw Convention, and in France has been used in insurance contracts and exclusion and limitation clauses. *Dol* would render an insurance contract unenforceable, and had the same effect on exclusion and limitation clauses in all other contracts and agreements.

There are three elements to *dol*. First, it requires an intention to commit an act. Second, it requires that the actor is aware of the wrongfulness of the act. Third, and most importantly, in *dol* the act is designed to cause damage to others.²⁵

In aviation law context, a unique feature of *dol* is that the *dol* of a servant would not automatically be imputed to the carrier. In an action against a carrier, liability would be unlimited if the plaintiff can prove *dol* on the part of the carrier. In an action against a servant of the carrier, liability would be unlimited if the plaintiff can prove *dol* on the part of the servant. But in an action against the carrier, if the plaintiff proves *dol* on the part of a servant, this will not constitute an obstacle as serious for the carrier as in the two previous cases, and it is possible that the liability limitation could be enforced.²⁶

ii. *Faute Lourde*

Faute Lourde is generally regarded as being equivalent to gross negligence.²⁷ Furthermore, it is an accepted rule of law in several civil law countries that *faute lourde* should be treated as *dol* on the basis of the maxim *culpa lata dolo aequiparatur* - "gross negligence is equivalent to *dol*".²⁸ Hence because of the words in Article 25 that deprives the carrier of limited liability in cases of acts "*équivalente au dol*", while the actual words "*faute lourde*" were not incorporated into the words of Article 25 the concept has been

²⁴ Miller at 73.

²⁵ Cheng at 76. Cf. Miller at 195 citing the case of *Sté des comédiens Français c. Giraud* D.S. 1969.J. 601 (Cass Civ. Ire, 4 February 1969) for authority that a deliberate breach of contractual duty would suffice, and there is no further requirement such as the intent to cause damage.

²⁶ Miller at 74.

²⁷ *Ibid.* at 196.

²⁸ *Ibid.*

applied in those Civil law countries that recognise this concept. While the concept of *faute lourde* may not have as much significance now after the passing of French legislation²⁹ and the signing of the *Hague Protocol*, suffice it here to give two definitions of *faute lourde* taken from *Hennesy c. Air France*.³⁰ The court of first instance there emphasized that *faute lourde* was to be taken *in abstracto*, by comparison with the conduct of a reasonable man placed in similar circumstances:

[F]aute lourde can be reduced neither to *culpa in concreto*, nor to professional negligence, nor to a breach of criminal law; its domain is the enormity which denounces either incapacity or wanton carelessness; it is recklessness, inability, blindness as well as conscious temerity.³¹

The Court of Appeal took a similar attitude and held that the plaintiff must establish "a particularly serious negligence, carelessness, or temerity".³²

Plaintiffs in Civil law courts were in a better position than in Common law courts, since most Civil law courts widened the scope of Article 25 by the use of the notion of *faute lourde*, whilst no similar move was made to resort to gross negligence in Common law courts.³³ This has been another source of divergence in the application of Article 25, and has necessarily created a lack of uniformity between the different courts.³⁴

iii. Wilful Misconduct

Wilful misconduct in American reports has been variously defined,³⁵ although essentially there is a wider, liberal (or more generous) definition and a stricter, narrow

²⁹French law 57-259, discussed in part III.C.ii. below.

³⁰*Miller* at 197 citing *Hennesy c. Air France* (1952) 6 R.F.D.A. 199 (Trib. civ. Seine, 24 April 1952), aff'd (1954) 8 R.F.D.A. 45 (C.A. Paris, 25 February 1954) [hereinafter *Hennesy*]. See also *Drion* at 219.

³¹*Ibid.*, citing from (1952) 6 R.F.D.A. 199 at 223.

³²*Ibid.*, citing from (1954) 8 R.F.D.A. 45 at 65.

³³*Miller* at 200.

³⁴*Ibid.* See also P. Chauveau, "Réflexions sur l'arrêt de Bordeaux" (1955) 9 R.F.D.A. 154 and A. Garnault, "La loi française du 2 mars 1957" (1957) 11 R.F.D.A. for the approach taken by the French courts.

³⁵See generally *Strock* where the writer discusses the various liberal and strict definitions given by American cases, and concludes at 292 that: "American cases manifest no consistent trend or pattern in the interpretation of 'wilful misconduct' under the Warsaw Convention." See also *Drion* at 214-6 for a

definition. The wider definition of wilful misconduct encompasses situations where the action was knowingly wrongful, but the actor did not have conscious knowledge of the *consequences* of his act. The narrow definition of wilful misconduct is more demanding and requires the actor to have knowledge of the consequences of his act, but he proceeded irregardless and not caring about the consequences. In *Rashap v. American Airlines, Inc.*³⁶ the court uses both definitions:

... in addition to doing the act in question, the person must have intended to do the act, or launched on such a line of conduct with knowledge of what the consequences would be and went ahead recklessly, despite his knowledge of these conditions [narrow definition]... Wilful misconduct ... means a deliberate act or omission which the person doing it: (1) knows is breach of his duty in the premises; or (2) knows is likely to cause damage to third parties; or (3) with reckless indifference does not know or care whether it is or is not a breach of his duty or likely to cause damage³⁷ [wider definition].

In *Pekelis v. Transcontinental & Western Air, Inc.*³⁸ the court adopted the wider definition of wilful misconduct:

Wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be intentional disregard of the probable consequences of the performance of the act ... Likewise, the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequence of the omission, would also be wilful misconduct.³⁹

discussion of the definitions found in *Ulen, Ritts v. A.O.A.* (1949) U.S.Av.R. 65 and *Goepp v. American Overseas Airlines*, (1952) 281 App. Div. 105 [hereinafter *Goepp*].

³⁶ (1955) US&CAvR 593 [hereinafter *Rashap*].

³⁷ *Ibid.* at 605. *Cheng* at 72 refers to these as the three "types of wilful misconduct".

³⁸ 187 F.2d 122 (2d Cir, 1951), *cert. denied* 341 US 951 (1951), 23 ALR 2d 1349, US Ar 1 per Augustus Hand J [hereinafter *Pekelis*].

³⁹ *Ibid.* at 124.

A slightly narrower definition of wilful misconduct, requiring the actor to have some knowledge of the *consequences* of his act, is found in *Grey et al v. American Airlines, Inc.*⁴⁰:

There is no dispute as to what constitutes wilful misconduct. The instructions required proof of "a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There *must be a realization* of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." This was in accordance with precedent.⁴¹ [emphasis added].

According to *Kreindler*, these differing definitions among American courts has arisen because Article 25 allows wilful misconduct to be defined "in accordance with the law of the Court seised of the case."⁴² While these fine differences exist among the various American decisions, it has been submitted by *Miller* that these variations in the definitions of wilful misconduct "do not amount to a substantial difference ... and that a significant divergence between the consequences resulting from the two different wordings is unlikely."⁴³ The reason *Miller* gives is that in a reckless act the actor already has an awareness of the probable harmful consequences; hence in both definitions there is a knowledge, or at least an awareness of the consequences.

The English courts use a wider definition of wilful misconduct. The wider definition is found in the leading English case of *Horabin v. British Overseas Airways Corporation*⁴⁴:

What I think is the best and shortest and most complete definition in English law, not an original definition, but one which has been used more than once in these courts, is this: To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is

⁴⁰4 Avi. 17, 811, 227 F.2d 282, cert. denied, 350 U.S. 989 (2d Cir., 1956) per Medina CJ [hereinafter *Grey* cited to Avi.].

⁴¹*Ibid.* at 813, citing *Ulen*, *Pekelis* and *Goepp* as precedent. It is to be noted, however, that these latter cases applied the wider definition of wilful misconduct, which did not require a knowledge on the part of the actor of the consequences of the act.

⁴²*Kreindler* at 11-15.

⁴³*Miller* at 198.

⁴⁴[1952] 2 All ER 1016 (Queen's Bench) per Barry J [hereinafter *Horabin*].

wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be.⁴⁵

For Common law courts, the question arises as to the meaning of "... such default ... as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct".⁴⁶ In English law, either there is conduct amounting to wilful misconduct, or there is not. There are no concepts of conduct considered to be "equivalent to wilful misconduct" in English law. Hence, for the English court, it is "meaningless" to speak of default which is equivalent to wilful misconduct,⁴⁷ and there is therefore no discussion of this phrase in the decided cases.

According to *Cheng*, wilful misconduct consists of three elements, namely:

1. an intentional act (psychological / material element);⁴⁸
2. the act is wrongful in the circumstances, *i.e.* a misconduct (normative element); and
3. an intention to commit the act in question, knowing it to be wrongful, *i.e.* wilfulness (psychological element).⁴⁹

The difference between negligence and wilful misconduct lies in the third of the element, namely an awareness of wrongdoing when the act is committed; while this awareness is present in wilful misconduct, it is missing in negligence. *Dol*, however, goes one step further than wilful misconduct, and requires the committing of the act with an intention to cause damage.⁵⁰ This difference between negligence and wilful misconduct, the awareness of wrongdoing, was explained as follows in *Horabin*:

⁴⁵*Ibid.* at 1022.

⁴⁶The second limb of Article 25(1).

⁴⁷*Shawcross* at VII(210). *See also Miller* at 199.

⁴⁸The psychological element in turn consists of two parts. First, the act or omission in question is intentional. Second, the doer must be aware that he is doing wrong. The material element consists of three parts. First, there must be the probability of damage. Second, the act is capable of doing damage. Third, the act is one that would cause damage to third parties. *See Cheng* at 64, 70-71.

⁴⁹*Cheng* at 64.

⁵⁰*Ibid.* at 66.

In order to establish wilful misconduct the plaintiff must satisfy you that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding, or , alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers for which and for whom he was responsible. That is something quite different from negligence or carelessness or error of judgment, or even incompetence, where the wrongful intention is absent. All these human failings - errors of judgment, carelessness, negligence, or incompetence - may give rise to acts which in the judgment of ordinary reasonable people may amount to misconduct, but the element of wilfulness is there missing.⁵¹

What is of significance is that any given set of facts, being identical, occurring at exactly the same time and under the same circumstances, may amount on one occasion to mere negligence, and on another to wilful misconduct. Barry J. gave the illustration of two motor cars which cross a traffic light just after it turned from yellow to red. In the first case, the driver may have been driving a little too fast, and through carelessness and not intending to break any law, he cuts the red light. In the second case the driver is in a rush, and when he sees the lights changing he makes the conscious decision that even though the right thing to do is to stop, he decides to drive on, realizing that he is taking a risk. In the first case there is negligence only, but in the second case there is wilful misconduct.⁵²

From the above definitions, it is to be noted that what is of primary importance is the state of mind of the actor at the time of the commission of the act or omission. It is the knowledge possessed by that person that determines whether he (and therefore his employer) is guilty of mere negligence or of wilful misconduct, and the burden of proving such knowledge lies on the plaintiff.⁵³

⁵¹ *Horabin* at 1020.

⁵² *Ibid.*

⁵³ For e.g., in *Grey* at 812:

But perhaps of greater significance is the general purpose of protecting international air carriers from the burden of excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical

C. Knowledge is the key, and may be inferred

The determination of knowledge is all important in deciding whether liability for the damage which arises from the act (or series of acts) will be restricted to the limits set by the Warsaw Convention. As stated in *Horabin*, in wilful misconduct the will is a party to the conduct, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. In the commission of an act the actor must not only knowingly (and in that sense wilfully) do the wrongful act, but also that, when he did it, he was aware that it was a wrongful act, i.e., that he was aware that he was committing misconduct.⁵⁴ Therefore if a pilot acted in the interests of his passengers, any jury or court might very well afterwards take the view that that he had acted foolishly and had committed a grave error judgment. It was not wilful misconduct unless the pilot knew he was acting contrary to the best interests of those for whose safety he was responsible.⁵⁵

In many of the so-called "pilot error" cases, the pilot does not survive the crash and consequently the court does not have the advantage of receiving direct evidence from the pilot himself as to his state of knowledge at the time of and immediately prior to the accident. This of course does not frustrate the action, for the court is perfectly entitled to infer from the proven facts the state of mind and intentions of the actor:

In the present case, there is no direct evidence of the state of mind or the intentions of the various persons said to have committed acts of wilful misconduct. The unfortunate pilot is dead. It may have been impossible - we do not know - to trace the person in the map dispatch department of the person from the staff of the line who was responsible for compiling the route book. But we have not seen them here, and there can be no direct

or human shortcomings which caused the disaster, because of the death of all on board and the destruction of the plane. We find implicit in the terms of the Convention an intention to relieve the carriers of this burden of proof, whilst at the same time giving the injured parties the opportunity to prove wilful misconduct, if they can.

See also Drion at 229.

⁵⁴*Horabin* at 1019.

⁵⁵*Ibid.* at 1024.

evidence as to their state of mind. You are not, however, confined to direct evidence. You are entitled to look at the whole of the facts and to *draw an inference* from those facts as to the state of mind and the intentions of the person who does some particular act.⁵⁶[emphasis added]

Likewise, writers have come to the same conclusion that inferences may be drawn to establish the intent of a person. For example, *Giuseppe* has said that:

... wilful misconduct can either be established by evidence or inference of the wilful intent of the person involved or by a complete disregard for the consequences of such doing or omitting. A conscious intent to cause injury or the inference of such an intention goes beyond what is usually described as gross negligence."⁵⁷

In referring to the *Rashap* definition of wilful misconduct,⁵⁸ *Cheng* is of the opinion that the only difference between type three and the other two types of wilful misconduct is that, whereas in the first two types, the doer has acted with actual knowledge of the wrongfulness, in type three the doer acts "... also with such knowledge, but he has unjustifiably banished it to the back of his mind. Now, such a 'very rare state of mind' can only be proved by inferences."⁵⁹ The writer goes on to say:

The true position appears to be that in the third type of wilful misconduct, the doer's knowledge is required, but greater freedom is implicitly allowed in inferring such knowledge - which must exist - from the circumstances. It differs from the objective test, where the doer's knowledge is not required. In the latter case, it suffices that a reasonable person, a *bonus pater familias*, or a "good pilot" (whatever may be the standard applied) would have had such knowledge.⁶⁰

It should be noted that there is a very real difference between inferring from the known facts the subjective knowledge of the actor, and the application of an objective standard of whether a reasonable person in the position of the actor would have had such knowledge as would satisfy the test of wilful misconduct. It is the subjective knowledge

⁵⁶*Ibid.* at 1021.

⁵⁷*Giuseppe* at 270.

⁵⁸ Part II.B.iii.

⁵⁹*Cheng* at 75.

⁶⁰*Ibid.*

that matters. An examination of the cases below will also show that time and again the courts have directed and inferred the mental knowledge of the actor from a given set of facts. There is nothing wrong in drawing inferences, and in the absence of direct evidence it is "perfectly legitimate to resort to circumstantial evidence."⁶¹ In fact, since the thing to be proven is a state of mind, any evidence of wilful misconduct "nearly always has to make use of some inferences."⁶² However, there is a line to be drawn when inferring and attributing certain knowledge to an actor, as there is always the danger of resulting injustice when, in the process of ascertaining the intent of the actor, the court is "prepared to exercise its imagination in seeking out evidence of actual intent"⁶³ and in so doing attributes a state of mind to the actor that he in fact may not have possessed. A case in point is *Koninklijke Luchtvaart Maatschappij NV KLM Royal Dutch Airlines Holland v. Gertrude Tuller*.⁶⁴ A flight from Amsterdam to New York crashed into the Shannon River approximately one minute after take-off from its intermediate stop at Shannon, Ireland. The plane had stalled and crashed into the river. Tuller and another passenger were stranded on the tail section of the aircraft for more than four hours. Sabena, KLM's agent and flight representative at Shannon, had turned off their radio immediately after the tower had radioed the aircraft at take-off, not bothering to wait for the aircraft's reply; Sabena therefore were unaware that the aircraft had not responded to the tower's message, and it was some 48 minutes before they discovered it. Even then, it was another 1 1/2 hours before Sabena notified Aer Lingus, KLM's operational representatives. Eventually, some four hours later, a rescue boat was dispatched but as it approached Tuller, Tuller fell into the water and drowned. There were four allegations of wilful misconduct against KLM:

(1) failure to properly instruct passengers of the location of life vests and in their use; no announcements or instructions concerning life vests were made; the booklet on the back

⁶¹ *Ibid.* at 68.

⁶² *Drion* at 230.

⁶³ *McGilchrist(1)* at 541.

⁶⁴ 7 Avi. 17, 554 (1961) (USDC, Dist. of Columbia) per Burger Cir. J [hereinafter *Tuller*].

of each seat stated that life vests could be found in one of three places, but at no time were passengers informed where they could be found in this particular aircraft. The court concluded that the *jury could reasonably find* the failure of KLM to establish and execute procedures to instruct passengers as to the location and use of life vests "*a conscious and wilful omission to perform a positive duty and constituted reckless disregard of the consequences*"⁶⁵ [emphasis added].

(2) failure to broadcast emergency message: the radio officer was at his desk in the plane with a microphone before him tuned to the tower frequency. But during the descent he was thrown to the floor because he had failed to take his seat and fasten his seat belt. KLM operations manual required all personnel to have a "conscious anticipation prior to takeoff of possible failure," and to send a distress message as soon as an emergency arose. This was not done, nor were any attempts made to send a distress message after the landing; there was evidence that the electrical supply to the radio would continue even when all other systems in the aircraft were shut down. Accordingly the jury was warranted in concluding that KLM's agents, in failing to send a distress message, committed wilful misconduct.

(3) failure to take steps to provide for the safety of Tuller after his peril was known: The crew tried to make their way in a rubber dinghy roped to the fuselage to rescue Tuller. They tried to paddle around the wing, but were pushed by the wind and current away from the tail. The crew were experienced in the use of the dinghies. The court found that various alternatives were available: one of the crew could have swum to the tail of the plane with the rope and pulled the dinghy to the men; or a crew member could have mounted the top of the cabin by use of ropes; or the tail passengers might well have been guided over the top of the cabin to the dinghy. Therefore, the court concluded, the jury could reasonably find that under these circumstances the failure to take available steps to

⁶⁵*Ibid.* at 557.

provide for Tuller's safety was "a conscious omission made with reckless disregard of the consequences when it was known he was in a position of peril."⁶⁶

One may question this finding. The fact is that the crew were not conscious of the alternatives, under the stressful and desperate circumstances. It appears that they had in good faith tried everything they knew, but they were simply unable to rescue Tuller; it was beyond their abilities. Under these conditions, it is submitted that it would be wrong to conclude there was here a wilful misconduct. On hindsight it is always easy to say what ought to have been done; but that is not the test for wilful misconduct. It is the knowledge and state of mind of the actor at the time of the act that is relevant.

(4) failure of Sabena to be aware of the loss of radio communication with the plane and to initiate prompt search and rescue operations.: As agent for KLM, Sabena was charged by contract with checking the progress of the flight and notifying Aer Lingus, the operational representative of KLM, in the case of retarded progress of the flight. Sabena had switched off the monitor radio without waiting for completion of the take-off message and before it was known whether the airplane had failed to respond; together with the absence of Sabena employees from their office, Aer Lingus was not notified till much later of the loss of communication. No real effort was made to check on the "missing" plane until nearly two hours after take-off when the tower sighted flares in the take-off pattern of the KLM plane. Even then, no surface craft were dispatched, and another plane in routine flight sighted the crashed ship in the growing light of dawn and finally surface craft were dispatched.

Ultimately, the Court of Appeal found wilful misconduct on the part of KLM on all four grounds. According to one writer, this decision reflects a subtle but immensely significant shift of emphasis in applying the test, in that the court took the liberty to imply knowledge or recklessness, and went overboard in the process. In a well written passage that justifies quotation in full:

⁶⁶*Ibid.* at 558.

In giving itself the right to infer mental attitudes from the objective facts the court was grasping at a line of reasoning which, carefully nurtured in the hands of a sympathetic Judge, could go far towards rendering impotent the narrow constraints of the doctrine of wilful misconduct. In what circumstances would a court conclude - by inference - that the wrongdoer's state of mind was such that he intended harm or was robustly indifferent to its possibility? If the view of Barry, J. [*Horabin*] was shared that even a minor failure could be regarded as misconduct it would not require a feat of mental gymnastics to conclude that almost any breach of duty relating in some way to safety considerations were committed recklessly. Irrespective of the actual state of mind of the pilot, if a lay Judge and jury could regard some dereliction as "reckless" by their own objective standards then they might infer that an experienced pilot who knowingly committed that breach of duty "must have been" recklessly indifferent to the consequences of his actions.⁶⁷

i. The Sufficiency of Evidence

Courts may draw inferences only where there is sufficient circumstantial evidence to draw an inference. *Berner v. British Commonwealth Pacific Airlines, Inc. Ltd.*⁶⁸ involved a flight from Sydney, Australia to San Francisco, California. On the approach to landing at San Francisco, a particular landing pattern had to be adopted by the pilot. The evidence showed that the pilot did not follow these instructions, and as a result the aircraft crashed on King's Mountain. The trial court found that "[t]he pilot need not recognize this [failure to follow the landing pattern] as extremely dangerous; it is enough if he knows or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct. The test is an objective one ..."⁶⁹ On appeal, the court found that the lower court was

⁶⁷ *McGilchrist(1)* at 540-541.

⁶⁸ 346 F.2d 532 (USCA, 2d Cir)(1965) per Moore Cir. J [hereinafter *Berner*].

⁶⁹ 8 Avi. 17, 781 at 805. It is interesting to note that *Kreindler* at 11-23 agrees with the objective test:

To show, subjectively, that the pilot actually knew the possible or probable consequences of his act, as well as the character of his act, would, of course, be an impossibility in virtually every case. It seems clear that the objective test is the only one possible and the only one the law requires.

It is submitted that *Kreindler* is wrong. He seems to have ignored the possibility of inferring subjective knowledge of the pilot from the circumstantial evidence.

wrong in concluding that subjective knowledge of resulting damage was *not* required.⁷⁰

Notably, the court in a footnote stated:

We do not mean to suggest that "wilful misconduct is an entirely subjective matter, see Prosser, Torts 189 (3d ed. 1964), but merely that we cannot know all the facts needed to make any kind of judgment, subjective or objective, as to what a man in the pilot's position should have done. The fragmentary reconstruction that can be made permits inferences other than wilful misconduct. That is enough to let a jury's verdict stand.⁷¹

Hence on the sketchy evidence it could not be said that the pilot's negligence was established as a matter of law, much less the pilot's wilful misconduct.

Similarly, in *Berguido v. Eastern Air Lines, Inc.*⁷² an aircraft crashed near Imeson Airport, Jacksonville, Florida. It was alleged by the plaintiff that there were two possible causes for the crash: first, the pilots had attempted a "sneak-in" landing, dropping down through a low cloud ceiling into a position below the authorized Instrument Landing System (ILS) approach minimum elevation; second, that the pilots had submarginal heart conditions, suggesting perhaps heart failure at the crucial moment. On the other hand, the defendants alleged that the crash was caused by the presence of jets entering the ILS glide slope of the aircraft. On the whole, the court below found the evidence of wilful misconduct "meager and incomplete, making the search for truth a most difficult task".⁷³ In such cases where the search is for the cause of the accident, the judgment of the court must be determined upon the probabilities insofar as they can be determined from the evidence, and not on a mere possibility, even if such possibility is disclosed by the evidence. Due to the lack of evidence, said the Court of Appeal, the lower court was

⁷⁰ Citing *Pekelis, Grey, Ulen and Tuller*.

⁷¹ Court of Appeal decision at 538.

⁷² 9 Avi. 18, 319 (USCA, 3d Cir. 1966) per Forman Cir. J [hereinafter *Berguido*].

⁷³ *Ibid.* at 321.

correct in coming to the conclusion that the plaintiff had failed to discharge the requisite burden of proof on the question of wilful misconduct or even negligence.⁷⁴

D. A Series of acts

The issue arises as to the effect of an actor's series of acts or omissions on the finding of wilful misconduct. Can a series of careless acts, individually in themselves not amounting to a wilful misconduct, nevertheless when put together amount to a finding of wilful misconduct? The answer seems to be "no" in English law, but "yes" in American law. In *Horabin*, the court held:

You must look at each act and judge it in the light of all the evidence about it and all that you know about the case, and then you must pronounce an individual judgement on it in the light of your knowledge of the whole case. You cannot add up a number of acts and say that, although no one of them really amounts to misconduct, yet put together they show among the whole staff of the defendants, including the pilot, so many small acts of carelessness that in the aggregate they amount to misconduct on the part of the defendants as a corporation. That would be wrong ... In forming a judgment about it you are entitled to look at the evidence as a whole and to take into account all that you know as a result of that evidence, but there must be an individual judgment on each act, and that act must in itself, in your view, amount to misconduct before any question as to wilfulness arises.⁷⁵

Hence, a pilot may be guilty of a long series of errors of judgment, but if each of the acts was done in what the pilot thought was the best interests of the aircraft and passengers, then the mere fact that there is a large addition sum to be done cannot amount to wilful misconduct.⁷⁶

This view is contrasted with the opinion of Samansky J in the New York Supreme Court decision of *Reiner v. Alitalia Airlines*⁷⁷, where the judge held:

⁷⁴*Ibid.* at 324. See also generally *Miller* at 217-219 where the writer discusses the question of drawing inferences only when there is sufficient evidence.

⁷⁵*Horabin* at 1022.

⁷⁶*Ibid.* at 1024.

⁷⁷9 *Avi.* 18, 228 (1966) [hereinafter *Reiner*].

The determination of willful misconduct does not require a single act of horror but may be based upon the cumulative effect of numerous departures from required standards on the part of the defendant or any of its officers, agents or employees. In the court's opinion there was evidence from which inference could have been drawn to justify a finding that the defendant was guilty of willful misconduct within the meaning of the Warsaw Convention ...⁷⁸

These two decisions are apparently in direct conflict. However, it should be noted that *Reiner* was a decision of the lower court of the state of New York, and the judgment itself was a short two page decision giving the skimpiest of facts and no discussion on them. On the other hand, it is submitted *Horabin* is a well considered and drafted judgment, and also the leading English decision on point. The authors of *Shawcross* have suggested that there is in fact no conflict between the two decisions, and that from the motorists example given by Barry J in the *Horabin* decision⁷⁹ it is clear that the judge *would allow* the jury to take the whole course of conduct into account.⁸⁰ It is submitted that this is not correct. While it may be true that it is permissible to look at the evidence as a whole, the purpose of examining the evidence *in toto* is only to evaluate whether *any one* specific act or omission amounts to wilful misconduct. That is very different from the approach taken in *Reiner*, where the "cumulative effect" of the many acts of misconduct are taken in determining whether there has been wilful misconduct.⁸¹ According to *Drion*, the facts in *Horabin* were unique in that it involved an aircraft flying from airport to airport in an attempt to land but unable to do so because of weather conditions or density of traffic, and running out of fuel while trying to return to the point of departure; under other circumstances, when there would not exist that continuous balancing of risks, the instruction to the jury would have been different. He submits that:

⁷⁸*Ibid.* at 228.

⁷⁹See part II.B.iii. above.

⁸⁰*Shawcross* at VII(209).

⁸¹According to *Miller* at 204, the French courts take the same position as *Reiner*, citing *Rioul c. Mutuelle d'assurances aeriennes* (1962) 25 R.G.A. 398 (C.A. Caen, 17 January 1962), *cassation*, (1964) 27 R.G.A.E. 74 (Cass. Civ. 2me, 5 March 1964); *Petit c. Perissel* (1970) 33 R.G.A.E. 292 (C.A. Aix-en-Provence, 29 September 1970); *Hennesy c. Air France* (1954) 8 R.F.D.A. 45 (C.A. Paris, 25 February 1954).

[I]t is also to be observed that the judge was careful to add: "the number of occasions on which acts are done is, of course, of some significance in considering the state of mind of the person who does those acts". In the same way that the violation of a statutory standard of conduct *may* justify an inference of indifference on the part of the defendant as to the possible consequences of his conduct, so *may* the fact that the defendant has frequently committed similar acts of carelessness in the performance of his duties evidence a disregard on his part for the consequences of his act, when one act of carelessness would not have been sufficient to warrant such an inference.⁸²

As a variation to the series of acts, what is the effect of a repetitive act or omission? Can such repetition amount to wilful misconduct? In a sense it is a pattern of conduct, which arguably when brought to the carrier's attention ought to be remedied to prevent further occurrence, failure to do so amounting to wilful misconduct. This question was considered in *Eastern Airlines, Inc. v. Charles King*.⁸³ On a flight from Miami to Nassau, Bahamas, one of the aircraft's engines failed, so the flight crew turned the plane around to return to Miami. After turning around, the plane's two other engines failed, and the passengers were prepared to ditch the plane. Fortunately, after an extended period, the crew managed to restart one of the engines and land the plane safely at Miami. However, the plaintiff King suffered mental injuries as a result of these events, and claimed damages above the Warsaw Convention limits (as amended by the *Montreal Agreement*) relying on Article 25. The plaintiff here alleged that Eastern failed to properly inspect, maintain, and operate its aircraft. The plaintiff further alleged that Eastern's records revealed at least one dozen prior instances of engine failures due to missing O-rings [oil seals], and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge; this constituted an "entire want of care" and "indifference", and implied "such wantonness, willfulness, and malice as would justify punitive damages."⁸⁴ The court came to the conclusion that such acts did not amount to wilful misconduct, but were merely negligent. The fact that there may have been at least one dozen prior instances of missing O-rings causing engine failures does

⁸² *Drion* at 229.

⁸³ 22 Avi. 17, 816 (Florida Sup. Ct.) (1990) per Grimes J.

⁸⁴ *Ibid.* at 817.

not reflect "extreme and outrageous conduct intentionally or recklessly" causing emotional distress. The court reasoned that despite Eastern's knowledge of the prior engine failures, Eastern's failure to take "appropriate" action to correct the problems would appear to negate an intentional act or an intentional failure to act on Eastern's part.⁸⁵

One may query the correctness of this conclusion. On the one hand, a dozen known prior incidences of engine failures due to missing O-rings must impute to the carrier a certain degree of knowledge, enough surely to know that failure to properly check the O-rings would lead to future engine failure and eventually an accident. On the other hand, it may be said that the carrier did not have actual knowledge that this particular aircraft had engines with missing O-rings, and therefore the requisite knowledge was absent. If the plaintiff could prove that the defendants, or the relevant employee, intentionally omitted to check the O-rings, and knew that as a result of such omission damage may result to third parties, then it is submitted that would satisfy the test in *Rashap* as being wilful misconduct.

E. Acts of Agents

Invariably, it is not the air carrier *per se* that has its actions scrutinised by the courts, but rather it is the acts or omissions of the carrier's agents or employees that are relevant. In most of the reported decisions these are the acts of the air crew (namely the pilot, co-pilot or first officer) in the air crash cases, or the acts of the cargo loaders in the cases of cargo damage or cargo theft. What is, or ought to be obvious, is that the default must be on the part of the carrier's agents or employees, and not those of some third party. The case of *Olshin v. El Al Isreali Airlines*⁸⁶ clearly illustrates this. The plaintiff was on a flight from New York to Tel Aviv. Her baggage was inspected by employees of the Isreali government before being placed on the conveyor belt. These employees had

⁸⁵*Ibid.* at 818.

⁸⁶15 Avi. 17, 463 (US Dist. Ct) (1979) per Costantino DJ.

seen jewelry in the baggage but said nothing to the plaintiff. The jewelry was later discovered missing, and the plaintiff claimed that the employees had acted with wilful misconduct in not warning her that Ben Gurion Airport had a history of baggage thefts, and that she should have removed the jewelry from her bag and carried the same by hand.

The court rejected the plaintiff's claim. The court concluded that since the inspection of the plaintiff's baggage was made by employees of the Israeli Government and not by defendant's employees, the defendant was not aware that the plaintiff had jewelry in her baggage and therefore, it could not have intentionally failed to warn her of the danger of theft.⁸⁷

Article 25(2) of the Warsaw Convention deprives the carrier of the limits of liability granted under the Convention when the agent of the carrier causes damage by his wilful misconduct whilst "acting within the scope of his employment."⁸⁸ This is, technically, a meaningless phrase, for in English law one speaks of the scope of *authority* of an agent or the scope of *employment* of a servant (or employee). Hence it is arguable that an agent who is not also an employee, and therefore has no scope of employment, is excluded from Article 25(2).⁸⁹ Nevertheless, this technical difficulty has not posed any real problems in practice, and the courts have treated the two concepts interchangeably.

It must be said that in most of the reported decisions the issue of whether the agent or servant was acting within the scope of his employment never arose, because the acts of the agent or servant were clearly within this scope. For example, a pilot, who through faulty navigation leads eventually to the crash of an aircraft, is clearly acting within his scope of employment in piloting the aircraft. Likewise, a loader of cargo who wrongfully leaves the cargo exposed to the elements, thereby causing damage to the cargo, is clearly acting within his scope of employment. The issue does arise, however,

⁸⁷*Ibid.* at 464.

⁸⁸See generally *Shawcross* at VII(133) for a general discussion on the court's interpretation of this phrase.

⁸⁹*Shawcross* at VII(133).

where the agent or servant commits an act of dishonesty or fraud while on the job, hence not quite performing that which he was employed to perform in a fashion expected of him.

In *Rustenburg Platinum Mines Ltd. v. South African Airways*⁹⁰ the plaintiffs shipped three boxes of platinum from South Africa, via London, to Philadelphia, USA. The cargo was unloaded from the SAA aircraft and transferred to the Pan Am aircraft at Heathrow. When the Pan Am plane arrived in Philadelphia, one of the boxes of platinum, worth \$102,000, was discovered stolen. It was found by the lower court that the box was stolen at Heathrow by a combined operation involving the loaders. One of the main issues arising at the trial was whether the loss was caused by the wilful misconduct of a servant or agent of the airlines acting within the scope of his employment.

At the lower court, the case of *Lloyd v. Grace Smith & Co.*⁹¹ was cited as the incontrovertible authority that the master was liable for the dishonesty or fraud of his servant if it was done within the course of his employment, no matter whether it was done for the benefit of the master or the benefit of the servant. Ackner J found that applying the law, if a master entrusts a duty to his servant, he is answerable for the way in which the servant conducts himself. No matter whether the servant was negligent, fraudulent, or dishonest, the master is liable.⁹² The court therefore had no trouble in finding that where, as here, the servant's duty was the broad and general one of taking care of the goods, and a theft of these goods is an improper mode of performing that authorized class of acts, the theft was one committed by a servant of the defendants within the scope of his employment. On appeal, the Court of Appeal came to the same conclusion. Since the box of platinum was stolen by one of the loaders who was entrusted with the task of loading it carefully and securely into the aircraft, it was an act done within the scope of his employment. As stated by Everleigh LJ:

⁹⁰[1977] 1 LLR 564 (Queen's Bench) per Ackner J, [1979] 1 LLR 19 (Court of Appeal) per Everleigh LJ and Denning MR. [hereinafter *Rustenburg*].

⁹¹[1912] AC 716.

⁹²*Rustenburg* at 575.

This loader was employed to load for safe transit. His job was to load it in a way which would see to its safe transit, but he in fact loaded it in a way which put it in peril. He put it in a position from which it could be readily stolen and that was his intention when he put it there. In my view he was doing wrongly that which he was employed to do.⁹³

In another similar case of theft by employees of the air carrier, the Canadian Court of Appeal in *Air Canada v. Swiss Bank Corporation*⁹⁴ found that the test was whether the employee had free access to the goods *because* of his duties. The facts involved a shipment of a parcel of C\$60,400 from Basle, Switzerland to Montreal, Canada via Zurich on an Air Canada Flight. Upon arrival at Dorval Airport, the parcel was handed over by the pilot to a ramp supervisor, one employee X, who apparently handed it to employee Y. Employee Y was supposed to place the parcel in a vault and enter receipt of it in a special register. This however was not done and the parcel, together with relevant documentation, went missing. At the time of trial employee Y could not be located, and had in fact been released from prison after serving sentence for other thefts at Dorval Airport. While there was no evidence to conclude that the parcel in question was stolen by employee Y or any other Air Canada employee, the trial judge had no doubt, given the circumstances, that the parcel was stolen by one or more unidentified employees of Air Canada having access to it and to the covering documents which delayed the investigation of the theft.

The trial judge, Walsh J, after examining several cases⁹⁵ came to the conclusion that the presumed theft of the parcel can be brought within the provisions of Article 25 as having occurred within the scope of employment or "*dans l'exercice de leurs fonctions*", the opportunity having occurred while the employees were working in the cargo shed

⁹³*Ibid.* at 24. Denning MR at 23 came to the same conclusion.

⁹⁴[1988] 1 FC 71 (Court of Appeal) [hereinafter *Swiss Bank*]. Although this case involved the interpretation of Article 25 as amended by the *Hague Protocol*, the relevant wording of Article 25 "acting within the scope of his employment" remained unchanged.

⁹⁵*Rustenburg, Morris v. C.W. Martin & Sons Ltd* [1965] 2 LLR 63, *Hudson Bay Co. v. Vaillancourt* [1923] 2 DLR 1008 and *Valen-Hattersley Valve Co. Ltd v. Johnson et al* [1971] Que. CA 190.

handling cargo of which the valuable parcel in question would be a part.⁹⁶ At the Court of Appeal, Marceau J held:

In my view the test to be applied to determine in a case of theft whether an employee was within the scope of his employment is the one which some courts have adopted and which consists in seeing whether because of his duties the employee had free access to the thing stolen.⁹⁷

It is appropriate at this stage to briefly mention one final point on the issue of agents acting within the scope of their employment. It was found in *Swiss Bank* that no *specific* employee could be identified as the perpetrator of the theft of the parcel of money. The court had however come to the conclusion that on the evidence, the parcel could only have been stolen by either employee X or employee Y, both of whom were working within the valuable cargo hold. The amended Article 25, as with the original Article 25, requires a plaintiff, if he wished to recover above the limits set in the Convention, to prove *inter alia* that the specific employee or agent was acting within the scope of his employment. The problem faced by the Swiss Bank Corporation was that it could not identify the particular employee that had committed the act, and hence show that he was acting within the scope of his employment. The Court of Appeal, however, decided that this was not a hindrance:

I admit that everything also hinges on the possibility of showing that the employee was within the scope of his employment even when the precise identity of that employee is unknown but I think it is hard to dispute that such a possibility exists. The evidence of a fact may be presented indirectly and by inference, from an analysis of the circumstances and a study of the possibilities, provided that a sufficient degree of probability can be established as a result.⁹⁸

In concluding, the court found that *in all probability* the theft was committed by employee X or Y. Since both of them were employed to handle valuable cargo, it was an easy step to conclude that either way, the perpetrator must have been acting within the

⁹⁶ 129 DLR 86 at 109.

⁹⁷ *Swiss Bank* at 83.

⁹⁸ *Ibid.*

scope of his employment. Hence this case stands for the principle that in order for claimants to claim the liberating effect of Article 25, they need not identify the specific employee or agent who was acting within the scope of his employment, so long as the facts show that the theft was in all probability committed by a definite set of persons.

The same conclusion was reached by the court in *Ospina v. Trans World Airlines, Inc.*⁹⁹ Apparently due to lax security screening procedures on the part of a number of employees of TWA, a saboteur managed to plant a bomb on the aircraft, causing damage during mid-flight. While it could not be identified which specific employee was at fault, the court held that:

No single person at TWA was aware of all of the circumstances of the boarding of the profile selectee. But the "willful misconduct" of TWA must be evaluated in light of the circumstances known to its employees, managers, and agents, collectively. At least one of those employees charged with responsibility for security made the decision to abandon the screening by TWA personnel and to leave the passengers at the mercy of Egyptian personnel known by TWA to be untrustworthy.¹⁰⁰

It is submitted that the approaches taken by the courts in *Swiss Bank* and *Ospina* are correct. Where the identity of the actors can be narrowed down with reasonable accuracy, then there is no reason why a plaintiff should be frustrated simply because he cannot single out the one employee from the group of employees all working for the same employer in the same department and therefore all having the same scope of employment.¹⁰¹

F. The breach of duty, rules and regulation

⁹⁹975 F.2d 35 (USCA, 2d Cir)(1992) [hereinafter *Ospina*]. See part II.F. below for a discussion of the facts.

¹⁰⁰*Ibid.* at 39. This was a dissenting judgment of Nickerson DJ, but only because the majority of the court found no willful misconduct on another ground that TWA had not breached any FAA regulations.

¹⁰¹See part III.F.i below for the alternative approach taken by Walsh J in the lower court decision of *Swiss Bank*, where the judge did not apply this "group identity" logic but instead resorted to an objective test of knowledge of a hypothetical reasonable employee.

Sometimes, the act or omission on the part of the agent or servant of the air carrier involves the contravention of a rule or regulation, whether governmental or internal to the air carrier's operations. The issue that arises is whether such a breach *prima facie* amounts to wilful misconduct.

In *Pekelis* the aircraft crashed when making a turn to land. It was shown that this was due to a faulty altimeter resulting from a mechanic's having intentionally omitted to perform a necessary safety test. The plaintiff, administratrix for the deceased, claimed that here there was a deliberate purpose on the part of the carrier or one of its employees not to discharge some duty necessary to safety and this constituted wilful misconduct, and on appeal claimed that the trial judge had erred by not stating so in his direction to the jury. The trial judge's direction to the jury was centered around the question of knowledge and disregard, not a breach of duty: did the employee have knowledge of the probable consequences of his act or omission, or did he proceed with disregard of the probable consequences? The Court of Appeal rejected the plaintiff's claim, holding that the trial judge had acted properly "because it [the plaintiff's claim] failed to state that the employee must either have *known* that the test was necessary for safety, or his duty to make it must have been so obvious that in failing to make it his conduct would be reckless, rather than merely negligent."¹⁰² Hence the court made it very clear that for wilful misconduct, subjective knowledge was essential, and that a mere failure to carry out some duty *per se*, even one for safety, did not necessarily constitute wilful misconduct. What was important was the knowledge of the employee.

Ulen was a case that hinted a deliberate failure to discharge some duty necessary to safety amounted to wilful misconduct. This case involved a flight from Washington to Mexico City which crashed close to the summit of Glade Mountain in Southwest Virginia. The pilots did not survive the crash. The carrier's authorized and experienced agents planned, agreed upon, and were in the process of executing a flight plan which

¹⁰² *Pekelis* at 126 [emphasis added].

called for the plane to fly at an altitude of 4000 feet on the leg of the flight on which the accident occurred. At the time this flight was planned and flown there was in effect a Civil Air Regulation promulgated by the Civil Aeronautics Board which read as follows:

No scheduled air carrier aircraft shall be flown at an altitude of less than 1000 feet above the highest obstacle located within a horizontal distance of 5 miles from the centre of the course intended to be flown.¹⁰³

The plane crashed at an altitude of 3910 feet. American Airlines possessed charts showing that the Glade Mountain was between 3500 and 4000 feet, and it was clear that they had breached the Regulation since the aircraft's course was within two miles of the mountain.

At the lower court, the relevant portion of the judge's charge to the jury was:

Now, the mere violation of these [safety rules and regulations], ... even if intentional, would *not necessarily constitute* wilful misconduct, *but* if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and, likewise, if it was done with a wanton and reckless disregard of the consequences. [emphasis added].

The Court of Appeal agreed with this charge to the jury, but went on to suggest that a failure to discharge some duty is wilful misconduct:

We are of the opinion that this charge to the jury was *substantially correct* ... One recent federal court decision defines the term as follows: "'Wilful misconduct' means a deliberate purpose not to discharge some duty necessary to safety." [Circuit Judge Minton in *Rowe v. Gatke Corporation*, 126 F. 2d 61, 66]. This definition squarely fits the facts in the instant case. The obvious and sole purpose of Civil Air Regulation 61.7401, *supra*, is safety. It imposed a duty upon all scheduled carriers which appellant deliberately, knowingly and intentionally violated.¹⁰⁴ [emphasis added].

¹⁰³ Civil Air Regulation 61.7401, effective May 7, 1943, 8 Fed. Reg. 6589.

¹⁰⁴ *Ulen*, at 344. *Giuseppe* at 269 is of the opinion that the conclusion must be wilful misconduct where there is a deliberate breach of a safety regulation *with knowledge* that such a breach is likely to cause injury.

The Court of Appeal found the trial court's charge to the jury, which stressed the knowledge requirement, substantially correct but at the same time seemed to be of the opinion that because there was a deliberate violation of the safety regulation, there was wilful misconduct.¹⁰⁵ Subsequent cases have construed the Court of Appeal's decision as affirming the trial court's position that knowledge is clearly the deciding factor, and not the violation of a rule or regulation.¹⁰⁶ In *Tuller*, the court said:

Wilful misconduct is the intentional performance of an act with knowledge that the ... act will probably result in injury or damage, or ... in some manner as to imply reckless disregard of the consequences of its ... failure to act" in such circumstances. This was substantially the charge approved by this court in *American Airlines, Inc. v. Ulen* [2 Avi. 14, 990], 87 U.S. App. D.C. 307, 186 F. 2d 529 (1949), where we also suggested that wilful misconduct means "a deliberate purpose not to discharge some duty necessary to safety." *Id.* at 311, 186 F.2d at 522.¹⁰⁷ [emphasis added].

Here, the court had reverted to the traditional definition of wilful misconduct, and reduced the requirement of a breach of a duty necessary to safety to the status of a *suggestion*. In this case the Irish Government's regulation required life vest instructions only on flights that had routes which flew more than 30 minutes from land. As this KLM flight was never more than 30 minutes from land, life vest instructions were not necessary. Nevertheless, the court found that it was not bound by this regulation, and there was wilful misconduct in failing to give life vest instructions.¹⁰⁸ More importantly,

¹⁰⁵ The court went on to find the pilot guilty of wilful misconduct. Was the court was correct? There was nothing in the evidence to prove that the pilots were aware of the existence of the safety regulation which they had violated, nor was there evidence that they had knowledge they were violating this regulation; yet the court was willing to conclude that the pilots had deliberately, knowingly and intentionally violated this regulation. The court also found that the same pilot had flown this same route in the same manner several times before, which the court treated as "evidence of deliberateness and full knowledge which renders appellant's actions the more reprehensible." (at 346). The court had therefore inferred subjective knowledge because the pilot had flown the route before. It is submitted that any act, no matter how grossly negligent, no matter how reprehensible, cannot amount to wilful misconduct without the element of wilfulness, which involves knowledge of the danger involved and taking of the risk regardless. The fact that the pilot had flown the route before was immaterial.

¹⁰⁶ For example, *Berner* at 573, which was subsequently applied in *In Re Air Disaster at Lockerbie, Scotland, Pagnucco v. Pan American World Airways, Inc.* (2d Cir. 1994) 1994 US App. LEXIS 1535 (CA2 January 31 1994).

¹⁰⁷ *Tuller* at 556.

¹⁰⁸ *Ibid.* at 557.

this case shows that whilst a breach of regulation *per se* may not amount to wilful misconduct, compliance with regulation may *still* result in wilful misconduct.

The position in law therefore is that a breach of a duty, rule or regulation in itself does not amount to wilful misconduct. For there to be wilful misconduct, the breach of duty, rule or regulation must be accompanied by a knowledge that the violation was likely to cause injury, and a wanton and reckless disregard of that probability.¹⁰⁹ The position in England is the same.¹¹⁰ Without this realization neither the intention to harm nor a disregard for the result of the act or its omission could be inferred, and the breach of duty could not then be classified as wilful misconduct.¹¹¹ *Cheng* takes a more abstract view and couches the whole debate in terms of risks. He says:

The inevitable conclusion from equating the creation of a risk of probable damage to others to a breach of the duty as regards the safety of others is that there is a general duty not to create such risks. The wrongfulness in misconduct consists in a breach of this duty, rather than in, as has been explained before, any specific legal rule or regulation. An additional element of culpability in wilful misconduct is of course to be found in the doer's intent to commit the misconduct. But the quintessence of the wrong is the risk of harm to others.¹¹²

A recent decision that considered the effect of acts in compliance with regulation was *Ospina*. The case involved TWA flight 840 from Cairo to Athens. A bomb planted on board the aircraft exploded, killing four passengers and injuring others. The plaintiff, who was seated near the bomb, was blown out of the aircraft by the explosion and died.

¹⁰⁹ *Drion* suggests that for the purposes of determining the presence of a conscious disregard for the consequences of a breach of regulation the following three factors are relevant:

1. the seriousness of the consequences which the Statute intended to prevent;
2. the degree of probability of these consequences happening as a result of a violation; and
3. the character of the interests for the sake of which the violation was committed.

Drion also suggests at 227 that these considerations apply equally to government regulations and airline internal instructions.

¹¹⁰ *Shawcross* at VII(209).

¹¹¹ *Guiseppa* at 270.

¹¹² *Cheng* at 71. *Drion* also hints at a similar concept when he states at 221 that misconduct must at least be an "undue risk creating conduct".

The aircraft however managed to land safely with a large hole in the fuselage. The issue was whether TWA had been guilty of wilful misconduct in not carrying out certain pre-boarding checks. The pre-boarding checks were of two kinds, those required by FAA regulation, and those which had been agreed upon privately between TWA and the United States Government on the understanding that Egyptian security measures at Cairo airport were inadequate, and therefore there was a need for TWA to conduct its own security screening.

At the Court of Appeal, Meskill CJ held that to be culpable for wilful misconduct in a case based on an omission, the defendant must either have known that the omitted act was necessary for safety, or his duty to perform the omitted act must have been so obvious that in failing to perform it his conduct would be reckless, rather than negligent.¹¹³ The plaintiffs needed to show that TWA omitted to do an act (1) with knowledge that the omission of that act probably would result in damage or injury, or (2) in a manner that implied a reckless disregard of the probable consequences. Due to security reasons, the measures which TWA could have taken were not reported in the judgment. However, in concluding that there was no wilful misconduct on the part of TWA, Meskill, CJ said:

[N]one of TWA's other acts or omissions violated a specific FAA requirement, and each of TWA's acts complied with all positive FAA safety procedures and regulations as well as the laws of the countries in which TWA operated ... Of course, if TWA had searched the place where the bomb was hidden, the bomb would have been discovered. That would be true in any case involving a hidden bomb. However, the test for wilful misconduct is not 20-20 hindsight.¹¹⁴

Nickerson DJ, the dissenting judge, was of the opinion that there was wilful misconduct, but only because the acts of TWA in respect of the a "profile selectee" were wanting. According to the judge, "TWA's abandonment of an established screening procedure was not the result of inadvertence or negligence. It was a deliberate action made with full

¹¹³ *Ospina* at 37.

¹¹⁴ *Ibid.*

knowledge of the probable consequences. In a word, it was willful."¹¹⁵ What is significant, however, was that there was no reference to the effect of compliance with FAA regulation; in other words, these were irrelevant to the judge.

G. Other illustrative cases

A proviso must be made when considering any of the decided cases: an appreciation of the facts is of paramount importance. It is axiomatic that when considering wilful misconduct, everything depends on the facts of each case. The facts in turn are the result of a distillation process by both judge and jury (in some jurisdictions), and are coloured by the presentation given to them by the parties acting within the framework of rules of evidence and procedure which varies from court to court. Hence in considering the cases, an open mind must be kept. It has been said that "it is of little sense to analyse the formulas devised by courts as if every letter had its special significance and try to distill some very precise definition. That would be like designing a chemist's balance for weighing potatoes."¹¹⁶

i. *Wing Hang Bank, Ltd. v. Japan Air Lines Co. Ltd*¹¹⁷

Plaintiffs packaged US\$250,000 in Hong Kong for shipment to National Bank of North America in New York. The package arrived safely in New York, and by arrangement with American Airlines was placed under safekeeping in their valuable Cargo Area. This area was enclosed by heavy wire and kept under lock and key, which was kept in the possession of the supervisor. The area was patrolled by unarmed guards and monitored by closed circuit television, though no particular employee was tasked to watch the television. The area was broken into and the package stolen. The plaintiffs sought to escape the limitation of liability which applied under the Warsaw Convention by claiming wilful misconduct on the part of American Airlines.

¹¹⁵*Ibid.* at 39.

¹¹⁶*Drion* at 210.

¹¹⁷12 Avi. 17, 884, 357 F. Supp. 94 (USDC, SDNY, 1973) per Carter DJ.

The Court approved of the various definitions of wilful misconduct found in *Pekelis, Grey, Ulen and Berner*, without drawing any distinction between them. The Court also considered that American Airlines had taken additional steps to tighten security by limiting the number of its own personnel who would obtain advance notice of the impending arrival of valuable cargo, by employing professionals to handle security and by restricting access to the Valuable Cargo Area. As such, there was no wilful misconduct on the facts.

ii. *The Bank of Nova Scotia v. Pan American World Airways, Inc.*¹¹⁸

This case involved a flight from Guatemala City to San Salvador with a cargo of 4 pieces of gold grain. The loader of the cargo (an employee of the defendants) took the decision that since the pieces were heavy, only 2 would be placed in the valuable pouch, and the other 2 outside the valuable pouch. The pieces were noted on the cargo manifest as gold. Upon arrival at San Salvador, 2 pieces of the gold were discovered missing.

After citing the definitions of wilful misconduct in *Pekelis, Grey, Ulen and Berner*, which the court recognized as clearly requiring subjective knowledge on the part of the loader, the court nevertheless went on to hold that "[h]ere the reasonably foreseeable consequences of [the employee's] recklessness was the loss of the gold. This result obtains whether it is framed in terms of knowledge of the consequences or in terms of proximate cause."¹¹⁹ Thus while the court realized that a subjective knowledge is required, it in fact applied an objective "reasonably foreseeable" test. The court sought to justify its findings by stating that such knowledge must have been in the possession of the loader by inferences drawn from the facts:

What is in contention are the inferences to be drawn from these facts. The pieces were identified as gold, as valuables, and were relatively easily transportable. Therefore it can be *inferred* that [the employee] knew the

¹¹⁸16 Avi. 17, 378 (USDC, SDNY)(1981) per Sweet DJ.

¹¹⁹*Ibid.* at 380.

probability of their theft unless safeguarded in accordance with the regulations.¹²⁰ [emphasis added].

It is submitted that the conclusion arrived at by the court is plainly wrong. There was insufficient evidence to justify the inference that the court drew. It is exactly this sort of decision that has led various writers to criticize the practice of courts being over zealous in imputing knowledge, when such knowledge never existed.

iii. *Korean Air Lines Company, Ltd v. State of Alaska*¹²¹

This case involved a collision between a KAL flight and a SCA Piper when the KAL aircraft attempted to take off from Anchorage International Airport. Due to fog, visibility was very poor, and the KAL flight had in fact attempted to take off from the wrong runway. It was established by the evidence that while taxiing, the pilot had great difficulty navigating to the runway. Eventually, the aircraft arrived at a point where the taxiway intersected with a runway. The pilot testified that he knew he was on a runway because of its white edge lights. He did look for the large painted numbers designating the end of Runway 32, the runway which he was supposed to have been on, but did not see them. Neither did he see any area on the runway which should have been cleared of snow by the jet blast of previously departing aircraft. Nevertheless, the aircraft attempted take off and collided with the SCA Piper waiting at the other end. As a result, the crash destroyed cargo belonging to Motorola, Inc., which was worth \$2,050,000 but which, applying the limitation provisions, would only be valued at \$118,580.

KAL contended that although their acts were wrongful and were the cause of the crash, their performance was only negligent and did not amount to wilful misconduct. Significantly, it was accepted in evidence that the pilot did not ever believe or have any inkling that the DC-10 might be on the wrong runway.¹²² The pilot admitted that just prior to takeoff he was concentrating so hard on the visibility outside the aircraft that he

¹²⁰*Ibid.* at 379.

¹²¹22 Avi 17, 388 (Alaska Supreme Court)(1989) per Moore J.

¹²²*Ibid.* at 390.

forgot to follow his normal practice of confirming the aircraft's heading as shown by the cockpit directional instruments against the runway heading. After deliberation, the jury found that KAL had engaged in wilful misconduct. There is no discussion in the report on how the jury came to this conclusion.¹²³ The evidence however clearly showed that the pilot believed he was on the correct runway assigned to him. Undoubtedly the pilot did not do everything possible to ensure he was on the correct runway, such as to check his compass and chart while taxiing, or to request for a "follow-me" car to lead the way; however, it was not a case where he thought he was on the wrong runway but nevertheless decided to take off, regardless of the consequences. It is submitted that the line here between mere negligence and wilful misconduct is very thin, but the jury came to the wrong conclusion in finding wilful misconduct. It is submitted that the crew's actions were, at worst, negligent.

*iv. In Re Korean Air Lines Disaster of September 1, 1983, Korean Air Lines Company, Ltd.*¹²⁴

This case involved another KAL flight, KE007 from New York to Seoul, South Korea via Anchorage. The flight strayed into Soviet airspace, and in an act of unwarranted hostility was shot down by a Russian military jet. The District court found that KAL were guilty of wilful misconduct and awarded compensatory damages as well as punitive damages of \$50 million. The evidence was that the aircraft was a route which has a series of navigational checkpoints along the way with precise geographical coordinates, each about 300 miles apart. At one of these checkpoints, NABIE, if the

¹²³The Jury instruction No. 32, at 391 was as follows:

I will now define "willful misconduct" for you. "Willful misconduct" does not mean that KAL or its crew had a deliberate intention to wreck the DC-10 jet or to commit suicide. It is not necessary for the plaintiffs to prove that KAL or its pilots intended to cause the harm which resulted from their conduct. The defendants' behavior is willful misconduct if they intentionally performed or failed to perform some act or a series of acts either:

(1) with knowledge that such act or omission would probably result in injury or damage, or

(2) in a manner from which could be implied reckless disregard of the probable consequences of the act or omission

¹²⁴23 Avi. 17, 505 (Dist. Columbia, 1991) per Mikva CJ. See also (1982) 17 Eur. Tr. L. 181.

flight had been on-course KE007 should have been able to communicate directly with Anchorage Air Traffic Control through the St. Paul Island radio transmitter, but the crew were unable to do so and had to relay the message through a sister flight KE015. The same occurred at the next checkpoint, NEEVA. In addition, wind conditions reported by KE007 were inconsistent with those reported by KE015, which was flying the same route four minutes behind KE007. The flight was eventually more than 500 km off-course, over the Kamchatka Peninsula, when it was shot at and crashed into the Sea of Japan.

The plaintiffs claimed wilful misconduct in that an error was made in programming the Inertial Navigation System (INS) of the aircraft prior to departure from Anchorage. The INS units use gyroscopes to calculate positions during flight, and they must be programmed before takeoff by inserting the exact coordinates for latitude and longitude at the particular gate where the aircraft is parked. Hence it was argued that from soon after take-off the flight already began drifting off-course. The ICAO Secretary General reached the same tentative conclusion in his 1983 report¹²⁵ that it was probably a programming error of the INS. The Plaintiffs' expert witnesses testified that the crew would have known of the deviation or, if they did not, that their ignorance was due to gross negligence in failing to check their instruments. The ICAO report concluded that the crew probably were not aware of the error. The plaintiffs also introduced evidence of prior KAL incidents to suggest that the crew knew they risked suspension if they returned to Anchorage for reprogramming, and that the crew was aware of the hazards of straying into Soviet airspace. KAL conceded that the crew of KE007 would have known about the consequences of their conduct.

The defendants on the other hand claimed that the aircraft was on-course all the way until checkpoint NIPPI, when for some mysterious reason it strayed off-course. The plaintiffs disputed this, further stating that even if this were true, the flight must have made a sudden turn in order to reach the crash site, such a turn requiring gross negligence amounting to wilful misconduct. The court decided to accept the evidence of the

¹²⁵ ICAO Doc C-Min.110/17.

plaintiffs that in all probability there was a programming error of the INS, and that the aircraft started drifting off-course from the time it took off from Anchorage.¹²⁶ Given these facts, the court held:

[N]o one knows exactly what happened. There was sufficient evidence here from which to decipher a pattern of conduct giving rise to liability. If the only evidence for the proposed course deviation had been the wreckage in the Sea of Japan, plaintiffs could not have prevailed simply by drawing a straight line from Anchorage and arguing that the crew would have known of this course deviation but chose to cover it up. Here there was additional, albeit not uncontroverted, evidence that a course deviation appeared almost immediately after take-off, consistent with a 10 degree error in setting the INS longitude coordinate at Anchorage, combined with somewhat suspicious radio reports from the crew. When "questions [of willful misconduct] depend upon inferences to be drawn from essentially circumstantial evidence ... [o]ne can hardly imagine a clearer case in which such questions should have been left to the jury." *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532, 538 (2d Cir. 1965).¹²⁷

Without any reported discussion, the jury found that there was wilful misconduct. Again we may question the correctness of the decision. No doubt this was a very celebrated and emotional case, causing a great uproar the world over for violations of International law and the disproportionate use of force by the then Soviet Union. It created sympathy for the victims of the crash at a time where there was in the United States a dissatisfaction with the low limits of liability. However, it is to be remembered that the crew, knowing the dangers of intruding into Soviet airspace, would never have intentionally jeopardized the lives of the passengers and their own. Hence it is reasonable to conclude that the crew never realized they were off-course. Various tell-tale signs

¹²⁶ In December 1992 after Judgement was rendered, the Russian Federation handed-over previously undisclosed evidence, including the Cockpit Voice Recorder and the Digital Flight Data Recorder. Based on this new evidence, ICAO concluded that KE007 had indeed maintained a constant magnetic heading on the wrong course (heading 245 degrees) for over five hours, and this was due to the crew's failure to note that the autopilot had either been left in the heading mode or had been switched to INS when the aircraft was beyond range for the INS to capture the desired track. We can only speculate what effect this new evidence would have had on the final result, because attempts to re-open the case were rejected by the court.

¹²⁷ *Ibid.* at 510.

should have given the crew a clue of this, such as their inability to communicate with certain ground radio stations which they normally would have if they were on-course. However, it is also possible that communication with these ground stations were hindered by atmospheric conditions and radio interference. An act is wilful only if it occurred to the crew that they were off-course, yet proceeded with indifference irregardless. It may be said that the crew's acts were perhaps negligent, but not amounting to wilful misconduct. It may also be argued that the true cause of the accident was not the deviation *per se*, but the missiles that were fired by the Soviet interceptor.

v. *Jenny Claudio v. Avianca Aerovias Nacionales De Colombia, SA* ¹²⁸

This case involved a flight from Paris to Bagota with an intermediate landing at Madrid. The copilot made an error when reading off and entering the altitude for flying over the outer threshold radio beacon on the approach path, giving it as 2382 feet instead of 3282 feet. As a result, the Boeing 747 sank below the altitude laid down for overflying the beacon. Thereupon, the Ground Proximity Warning System (GPWS) issued visual and acoustic warnings to "pull up". The commander and copilot noted the warnings, but took no notice, and in particular failed to take immediate action. As a result the plane crashed, killing 181 of the 192 persons on board. The Commercial Court (lower court) held that the limitation of liability continued to apply, since the plaintiffs failed to prove the subjective consciousness of the pilots that their behavior would probably result in the damage which occurred, although it was not disputed that the pilots had objectively acted wrongly. This decision was affirmed by the Federal Court, and the plaintiffs failed in their action because they could not prove that the pilots were subjectively conscious that their behaviour would probably result in the damage that occurred.

The court came to the conclusion that by the way the pilots continued to talk among themselves in unhurried tones even after the acoustic and visual warning signals started until a few seconds before the crash and took no immediate action whatsoever, the

¹²⁸20 Avi. 18, 320, [1987] II BGE (113/3) 359, (1988) 37 ZLW 96, (1987) I S & B Av R VII/281. (Swiss Federal Court, 1987) [hereinafter *Claudio*].

knowledge laid down by Art. 25 Warsaw Convention as a precondition was not there.¹²⁹ In applying a very strict test of the requirements of wilful misconduct, the court held that knowledge must be actual and mere 'ought to recognize' is not sufficient. There must be intent, and the actor's knowledge causing the damage must be directed not only to his conduct, but also to the result, i.e. the damage.¹³⁰

III. The Hague Protocol: Intent, recklessly and with knowledge¹³¹

A. Drafting History

There were two main objectives of the *Hague Protocol*. First, there was the fairly straightforward desire for international uniformity, to remedy some of the differences that had arisen as a result of the different interpretations of the original Article 25. Second, there was the more complicated process of adjusting Article 25 and keeping the door to unlimited liability more or less ajar according to whether the limit of liability would be increased, either moderately or by a wide margin.¹³² As Maître Garnault, the French delegate remarked:

¹²⁹*Ibid.* at 325.

¹³⁰*Ibid.* at 324.

¹³¹ Article 25 in French reads:

Les limites de responsabilité prévues à l'article 22 ne s'appliquent pas s'il est prouvé que le dommage résulte d'un acte ou d'une omission du transporteur ou de ses préposés fait, soit avec l'intention de provoquer un dommage, soit téméairement et avec conscience qu'un dommage en résultera probablement, pour autant que, dans le cas d'un acte ou d'une omission de préposés, la preuve soit également apportée que ceux-ci ont agi dans l'exercice de leur fonctions.

The English text reads:

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

¹³²*Cheng* at 82.

Obviously, the limits could be very high in the case where the door [to unlimited liability] was well closed, and much lower if the door were left half open.¹³³

The new Article 25 does not refer to concepts such as *dol* or wilful misconduct, but rather contains a factual and concrete formulation of the substantive rule. It was hoped that this would forever eliminate any differences that different jurisdictions may have in interpreting Article 25.¹³⁴ In addition, the new Article 25 would remove any reference to any local or municipal laws by deleting the reference to any conduct which the court seised of the case considered as equivalent to *dol* or wilful misconduct. This would have the effect of stopping divergent national interpretation, a need which was frequently stressed.¹³⁵

Ultimately, the limit of liability under the Hague Protocol was doubled, but at the same time the door towards the unlimited liability of the carrier "closed by a perceptible margin".¹³⁶ This was seen as a compromise by those who wished to decrease the

¹³³*Ibid.* at 83, citing Minutes (Vol.1) of *The International Conference on Private Air Law (The Hague, September 1955)*, Doc. 7686-LC/140, p. 175, 14th meeting. [Hereinafter the Minutes will be referred to as *Hague Minutes*].

¹³⁴For example, *Giuseppe* at 275 states:

The comparison of the two texts of art. 25 shows that in the Protocol neither the word "dol" nor the phrase "faute équivalente au dol" have been used, thus avoiding any further discussion on the subject among delegates of different countries. The words disappeared but, instead, the concepts have been incorporated in the text as clearly as possible in order to avoid further differences of interpretations under different legal systems.

Miller at 81 states:

But the delegates to the Hague Conference did not repeat the mistake of their predecessors. After the substantive rule had been agreed upon, it was expressed in a factual formulation rather than being labelled as a specific concept which could not be 'translated' into another legal system, whatever the language used.

¹³⁵*Cheng* at 83, citing *Hague Minutes*, Greece, pp. 169 and 198, 14th and 16th meetings; Italy, p. 168, 14th meeting; Federal Republic of Germany, pp. 171-2, 14th meeting.

¹³⁶*Ibid.* at 90.

situations where a carrier may have unlimited liability¹³⁷ and those that sought higher limits,¹³⁸ a "*quid pro quo*".¹³⁹ The discussions at the Hague made it clear that it was not merely knowledge of the probability of damage that was required, by actual, as opposed to simply imputed, knowledge.¹⁴⁰ A vote was taken as to just how much the door should be closed. There was a choice of three wordings: "There should be unlimited liability if the person concerned has committed an intentional act:

- (a) and has acted recklessly : 3 votes
- (b) and has acted recklessly and knew or should have known that damage would probably result : 11 votes
- (c) and has acted recklessly and knew that damage would probably result : 13 votes

It therefore became clear that the prevailing view among the delegates was to prefer the narrowest approach and to require specific knowledge on the part of the actor. To put the issue beyond doubt, the Australian and New Zealand delegates suggested that the word "actual" be inserted before the term "knowledge" in order to exclude an objectivised attribution of knowledge during legal assessments.¹⁴¹ The proposal however was never implemented because the French and Mexican delegates felt that what was being proposed was already implicit in the French ("*la conscience*") and Spanish

¹³⁷The early Protocol drafts contemplated that it would only be damage intentionally caused that would lead to unlimited liability. See N. McGilchrist, "Article 25: An English Approach to Recklessness" [1983] Lloyd's MCLQ 488 at 489 [hereinafter *McGilchrist(2)*]. See also *Giuseppe* at 272-4.

¹³⁸*Strock* at 294 where he says:

This amendment by a change in wording indicates a dissatisfaction with the language in the Warsaw Convention among the nations which drafted and signed The Hague Protocol. Apparently, this was due to a change in times and circumstances plus a desire to decrease the situations where a carrier may have unlimited liability. As a compromise, the maximum liability was doubled. The Protocol restricts unlimited liability by replacing "wilful misconduct" with the requirement of knowledge as to both intentional damage and recklessness.

See also *McGilchrist(1)* at 542.

¹³⁹*McGilchrist(2)* at 489.

¹⁴⁰*Cheng* at 90.

¹⁴¹*Hague Minutes*, p. 284, 23rd meeting.

("sabiendo") texts, and that the additional word was not only superfluous but also confusing.¹⁴²

Comparing the old Article 25 with the new Article 25, it will be noticed that the new Article 25 is indeed a very close approximation of the Common law notion of wilful misconduct, as was intended.¹⁴³ Their common distinguishing feature is that in both there is an element of intention to commit the act in question coupled with an intention to do so knowing the action to be wrong in that it creates a risk of probable damage. They also share the same negative characteristic in that neither requires the intention to cause damage *without valid reason*, an element found in *dol*. However, because the new Article 25 is more explicit in its requirement for knowledge, and given the discussions at the Hague, courts will probably, perhaps subconsciously, place more restraint in inferring knowledge to the actor and setting a higher level of carelessness and temerity into the concept of recklessness. The net result, it has been suggested, is to close the door to unlimited liability by a small amount in Common law jurisdictions. For those Civil law jurisdictions that in the past had a liberal policy of assimilating *faute lourde* to *dol*, the door would apparently be closed even more.¹⁴⁴

B. A lacuna¹⁴⁵

The second limb of the new Article 25 (recklessly and with knowledge) has certainly been the source of more litigation than the first limb, for it is obvious that it is much easier to identify an "intent to cause damage" than the mental state of recklessness with knowledge that damage would probably result. Cases of intent tend to be clear cut;

¹⁴²Hague Minutes, p. 285. 23rd meeting.

¹⁴³It was said by the French delegate Mr. Garnault at [1956] R.F.D.A. 6 (translation) that:

the new article 25, in defining and limiting the extent, conveys the notion of wilful misconduct as applied by the anglosaxon judges, without *significantly* departing from the French jurisprudence handed down in recent years on the matter of responsibility arising from air catastrophes which have plagued national aviation). [emphasis added].

¹⁴⁴See Cheng at 92-93.

¹⁴⁵See generally Cheng at 84-85.

for example in the case of theft of air cargo, either the cargo has been stolen, a deliberate and wilful act of taking for personal gain, or it has not.¹⁴⁶ A search for the *mens rea* and *actus reus* in an intentional act to cause damage is easier. As another example, in the cases of aircraft crashes, it is seldom, if ever, the case that a pilot intentionally crashed the aircraft. Unless he were insane, he would not deliberately take his own life and the lives of others.

A potential problem could arise where an act which a crew *knows* will cause damage is nevertheless carried out in order to avoid a greater evil, such as greater damage. In such cases, should the carrier still be deprived of limitation of liability? For example: A flight is carrying both passengers and cargo. Whilst in mid-flight, a passenger falls seriously ill, and the flight has to make an unscheduled stop for this passenger to receive immediate medical attention. The crew take the decision to do so. As a result, the cargo is delayed and consequently damages have accrued. Here there is an intentional act, and the crew has knowledge that delay would result. Yet they went ahead with the act. Would it be fair to deprive the carrier of limitation of liability in such a case?

This problem was recognised by the Dutch Delegate at the Hague Conference, Dr. Drion.¹⁴⁷ While the original concept of *dol* contained an inherent element of illegality and the French Law 57-259¹⁴⁸ provided that an inexcusable default was one carried out "without valid reason", hence providing an escape route for morally justifiable actions, the Hague Article 25, however, does not provide for such cases. This issue was never further addressed at the Hague Conference, and no further action was taken. It remains to be seen how a court of law would handle this issue, although there is *dicta* in the *Goldman*¹⁴⁹ case that suggests the solution would be to read recklessness as involving a

¹⁴⁶This may be contrasted with the case of cargo damage, where there is no personal gain for the carrier; there is no good reason why a carrier would want to intentionally damage cargo. If damage did occur, it would probably be due to carelessness or negligence, and the question would be whether it was a result of a reckless act with knowledge that the damage would probably result.

¹⁴⁷*Hague Minutes*, p. 198, 16th meeting, cited by *Cheng* at 85.

¹⁴⁸Discussed in part III.C.ii. below.

¹⁴⁹Discussed in part I.I.E.i below.

degree of moral turpitude, and therefore an avoidance of a greater harm would not be considered reckless.

C. The French position

i. Changes made by the new wording

It has been suggested that the words *dol* and *faute équivalente au dol* have disappeared and these concepts have been incorporated in the new French text which will avoid further differences of interpretations under different legal systems. The logic of this suggestion is flawed. If the incorporation has been perfectly carried out then different interpretations *would continue* to occur since *faute équivalente au dol* is not equivalent to "recklessly and with knowledge that damage would probably result". In fact, it was recognized by the French delegate at the Hague negotiations that the new wording involved a sacrifice on the part of French jurisprudence. Up till the Hague negotiations, the French courts consistently considered gross negligence (*faute lourde*) as default equivalent to *dol*. Gross negligence was a purely objective concept, and had nothing to do with intent. However, with the new wording of Article 25, the ideas of intent and knowledge were introduced, and in the same stroke removed from Article 25 the concept of *faute lourde*. In this sense there has been a sacrifice made. Indeed, the French delegation was willing to make the compromise only if higher liability limits were agreed. In the words of Mr. Garnault:

[the new] Article 25 marked a step backwards with regard to the interpretation of gross negligence (*faute lourde*) proceeding from the application of the Warsaw Convention. This concept could not make [the French] Delegation happy, since it was far from what French law applied, but it was in that direction that a compromise could be achieved ... this Delegation was prepared to accept the article on condition of the payment of a certain price, that being, of course, in the form of higher limits.¹⁵⁰

Therefore, it is not accurate to suggest that the concepts of *dol* or *faute équivalente au dol* have been incorporated into the new Article 25, for while *dol* may have been incorporated, *faute lourde* has been removed.

¹⁵⁰Hague Minutes, p. 199, 16th meeting.

To put the understanding of the French delegation beyond doubt as to the requirement of actual knowledge under the new Article 25, during one of the discussions at the Hague, Mr. Garnault commented on the draft put forward by the First Working Group. This draft contained the phrase "recklessly without caring that damage would probably result". He said:

What is meant by the expression 'without caring'? Did it mean that the author of the damage had no knowledge of what was going to result, that he did not care about it, that he did not direct his attention to the probability of the damage? Or did it mean that, in spite of having knowledge of the fact that he was taking a risk which would probably result in damage, he decided to take the risk? The French Delegation interpreted the proposed Article 25 in the latter sense ...¹⁵¹

Having pointed out the ambiguity and the interpretation that the French Delegation took, Mr. Garnault suggested a change of wording to remove the ambiguity:

For some Delegates, the latter words meant that the author of the fault had knowledge of the damage which would probably result. Therefore, [Mr. Garnault] suggested that the words 'without caring', in the text of the Working Group, be replaced by the words 'with knowledge'.¹⁵²

From the discussions at the Hague, it is clear that for the French Delegation, actual knowledge of the actor is required to escape the limits of liability imposed by the Warsaw Convention.

ii. Changes made by Law 57-259

While the Hague Protocol was signed on September 28, 1955, it did not come into force until August 1, 1963, ninety days after the deposit of the thirtieth instrument of ratification.¹⁵³ Meanwhile, on March 2, 1957, Law 57-259 on the liability of carriers by air was adopted by the French Parliament, whereby Article 42(1) of the Law of May 31, 1924 on the same matter was amended by providing that the fault equivalent to *dol* was

¹⁵¹ *Ibid.*

¹⁵² *Hague Minutes*, p. 203, 17th meeting.

¹⁵³ As required by Article XXII of the *Hague Protocol*.

"*faute inexcusable ... la faute délibérée, qui implique la conscience de la probabilité du dommage, et son acceptation téméraire sans raison valable*". In English:

Article 42 - For the application of Article 25 of the said [Warsaw] Convention [or any convention amending it (See Article 41)], the default considered as being equivalent to *dol* is inexcusable default (*la faute inexcusable*). A default is inexcusable if it is *a deliberate default* which involves *knowledge of the probability* of damage and its *reckless acceptance* without valid reason.¹⁵⁴[emphasis added].

By this definition, it became clear that default considered to being equivalent to *dol* as found in the unamended Warsaw Convention was now to carry an element of intent, with knowledge of the probability of damage. Law 57-259 bore significant similarity with not only the Common law definition of wilful misconduct, but also the new Article 25, and not surprisingly given that the law was passed shortly after the Hague negotiations. In fact, it has been said that the French Cour de Cassation treats the wording of the new Article 25 and Law 57-259 as "equivalent and interchangeable."¹⁵⁵

Law 57-259 made some fine changes to the law as interpreted in France at that time. With the new Law, the default now had to be deliberate, or in other words, wilful. Also, even though the default now had to be deliberate, it no longer needed to be gross, since the requirement was that the *faute* be inexcusable, not gross.¹⁵⁶ While at first glance it may appear that the new Law made Article 25 more accessible to plaintiffs because less

¹⁵⁴[1957] R.F.D.A. 101 (translation).

¹⁵⁵ Miller at 202, citing *Diop c. Cie Air France* D.S. 1968. J. 569 (Cass. Ire civ. 24 June 1968), (1969) 32 R.G.A.E. 61., (1968) R.F.D.A 453 [hereinafter *Diop* cited to D.S.]. According to *Cheng* at 79-80, there are 4 similarities:

1. there must be an intention to act (psychological element);
2. the act must be one which creates a risk of probable damage (material element);
3. there must be knowledge of the probability of damage and its reckless acceptance (psychological element); and
4. the act must be a default (normative element).

¹⁵⁶ Miller at 202.

than gross default was enough, the qualification that it had to be inexcusable perhaps made it in fact more onerous¹⁵⁷, especially with the necessity of proving knowledge.

Law 57-259 had the effect of closing the gap which existed between the French courts and Common law courts in relation to the interpretation of Article 25 of the unamended Convention.¹⁵⁸ It is submitted by *Cheng* that Law 57-259, if construed in accordance with the French delegate's interpretation of '*la conscience*' (as being the fullness of the intellectual responsibility of the person committing the act)¹⁵⁹ would "fully measure up to the standard set in the Warsaw-Hague Convention and effectively implement what those who drafted its Article 25 had in mind."¹⁶⁰ As the French judicial decisions will show, however, this has not been the case.

iii. Interpretation by the French Courts¹⁶¹

The French courts have not shown a consistent approach in applying the original Article 25 as modified by Law 57-259, or in applying the new Article 25 after the *Hague Protocol* came into force. In some cases, the courts would support the subjective requirement (an appreciation *in concreto* of the facts) but would allow inferences to be drawn that sometimes bordered on an application of the objective test. In other cases, the courts would openly renounce the subjective test in favour of an objective one (an appreciation of the facts *in abstracto* by comparison with the behaviour of a reasonable man). In fact, the two tests are inseparably linked, and the difference between the two is *relative*. An objective test simply means that the test is more objective than subjective. There are subjective elements which are taken into consideration; this happens when the "reasonable man" is placed under the same or similar circumstances as the actor.

¹⁵⁷This is the view of *Cheng* at 79-80.

¹⁵⁸*Miller* at 203.

¹⁵⁹*Hague Minutes*, p. 285, 23rd meeting.

¹⁶⁰*Cheng* at 93.

¹⁶¹As the reports of the French cases are in French, this writer has had to rely on English translations of these cases found in other sources, such as decisions from other jurisdictions reported in English which have cited the French cases, as well as journals and articles. These sources, however, have not always been as detailed as this writer would have liked. *Miller* contains a good review of the French decisions.

Likewise, there is no purely subjective test, since in most cases the only evidence of an actor's state of mind has to be proved by the observable conduct of the actor and the surrounding circumstances. In doing so, an objective standard is applied in practice.¹⁶²

Perhaps the starting point is the case of *Riout c. Mutuelle d'assurances aériennes*.¹⁶³ Here a pilot who was informed of potential bad weather conditions persisted in carrying out the flight without first checking to confirm the weather conditions in the vicinity of the destination. As a result of the bad weather, the aircraft crashed. The lower court found that on the evidence the plaintiff had not proved that the pilot had knowledge of the dangers involved in the course of action he had adopted. When the case went before the Cour de Cassation, the court stated:

... after having noted the negligence of the pilot who, although he had been warned of the risk of bad weather on the region, had not used the means to find out the dangerous state of the atmospheric conditions existing in the direction of the place of destination, his recklessness in facing them once he himself had perceived the signs and tested them, as well as the carelessness resulting from his obstinacy in pursuing the trip, despite the numerous possibilities he then had to suspend it, the trial judges could not avoid characterizing such behaviour as *faute inexcusable*.¹⁶⁴

While it is not clear whether the court had applied an objective test and found the pilot's acts inexcusable when compared to the reasonable pilot, or whether the court had, from the evidence, inferred that the particular pilot had subjective knowledge of the danger, it is noted that the court did not require proof of actual knowledge of the pilot. In the eyes of the Cour de Cassation "[t]he facts spoke for themselves."¹⁶⁵

¹⁶² *Miller* at 206.

¹⁶³ (1962) 25 R.G.A. 398 (C.A. Caen, 17 January 1962), *cassation*, (1964) 27 R.G.A.E. 74 (Cass. Civ. 2me, 5 March 1964).

¹⁶⁴ *Ibid* at 83, as found in *Miller* at 208.

¹⁶⁵ *Miller* at 208.

In *Lamberth c. Guiron*¹⁶⁶, a helicopter crashed after flying on a new route which involved flying under some cables of an aerial railway. The helicopter had hit the lowest cable, causing the crash. The Paris Court of Appeal focused its inquiry on the pilot, and not on a comparison with what a reasonable pilot placed in similar circumstances would have done, thus applying a subjective test. On appeal, the Second Chamber of the Cour de Cassation appeared also to be apply the subjective test, but allowed inferences to be drawn as to the actual knowledge of the pilot:

[t]hese facts established the serious negligence committed by [the pilot] by going into such a dangerous area, the recklessness of his action, and the knowledge, which *he could not help but have*, of the risks to which he deliberately and unnecessarily exposed his passengers.¹⁶⁷ [emphasis added].

The case was remanded to the Dijon Court of Appeal for trial. The Dijon court held that there was no direct evidence that the pilot knew one cable was lower than the others, but this was irrelevant. The Dijon court had in fact applied an objective test, finding that a *reasonable* pilot would have foreseen the presence of the cable. Consequently, the absence of proof of the actual state of mind of the pilot could not assist the carrier. Eventually the case came back before the First Chamber of the Cour de Cassation, which unfortunately made no comment on the objective test used by the Dijon Court, limiting itself instead to the views held by its sister Second Chamber in the same case.¹⁶⁸

In *Emery v. Sté Sabena*¹⁶⁹ a flight from Brussels to Rome experienced difficulty in identifying the radio navigation beacon at Viterbo, and descended through clouds 60 kilometres off the intended route, crashing into some mountains. The trial judge

¹⁶⁶(1963) 26 R.G.A. 185 (C.A. Paris, 7 June 1962), *cassation*, (1966) 29 R.G.A.E. 377 (Cass. Civ. 2me, 9 June 1966), *on remand*, (1968) 31 R.G.A.E. 68 (C.A. Dijon, 31 January 1968), *aff'd*, (1971) 25 R.F.D.A. 290 (Cass. Civ. 1re, 2 March 1971).

¹⁶⁷(1966) 29 R.G.A.E. 377 at 378, as found in *Miller* at 208. *Miller* at 209 has characterized this as a subjective test "with rather lenient evidentiary requirements."

¹⁶⁸(1971) 25 R.F.D.A. 290.

¹⁶⁹(1965) R.F.D.A. 487 [hereinafter *Emery*].

determined that the pilot had failed to make use of all the navigational aids available to him. As the pilot did not survive the crash no evidence could be taken directly from him. The Paris Court of Appeal, in a judgment of March 24, 1965, confirmed the ruling of the court of first instance, ruling that there must be satisfactory evidence of the actual knowledge of the pilot:

what amounts to inexcusable default is not the *faute lourde* of which the author, acting as a supposedly diligent person, *ought to have had knowledge*, but that of which it has been established by satisfactory evidence that *he effectively has knowledge*.¹⁷⁰ [emphasis added].

The issue went to the Cour de Cassation, where Maître L'Avocat Général Lindon forcefully argued that the 1955 *Hague Protocol* and the 1957 Law required proof of intention and it was no longer open to the court to strike out the carrier's right to limited liability merely by concluding that the pilot's conduct was so grossly negligent as to be "inexcusable"; in other words, the test of knowledge was subjective, not objective. The Cour de Cassation however on December 5, 1967 overturned the decision of the Court of Appeal. It held that:

... the Court of Appeal, basing itself on a subjective assessment of the mistakes committed by the crew, has not drawn from the facts which it has found proven the proper conclusions, and has thus violated the above-mentioned texts [*Hague Protocol* and Law 57-259].¹⁷¹

There are two different views of the conclusion reached by the Cour de Cassation, because it is unclear whether the violation the court was referring to was in applying a subjective test, or in the failure to draw the proper subjective conclusion from the facts. According to *McGilchrist(1)*, the Cour de Cassation directed that where the pilot was dead and therefore it was impossible to establish the actual state of mind, any determination as to whether *he* had a guilty mind should be made by drawing inferences

¹⁷⁰*Ibid.* at 459, as found in *Cheng* at 80.

¹⁷¹*Ibid.*, citing a translation of p. 194 of the Cour de Cassation judgment, (1968) R.F.D.A. 184.

from the proven facts.¹⁷² *Cheng* on the other hand is of the view that the Cour de Cassation was actually enunciating an objective test.¹⁷³

The *Hague Protocol* came into force on August 1, 1963. The new provision was considered by the French court in the case of *Diop*, which applied a subjective test. The pilot of an aircraft had repeatedly attempted to land in bad weather conditions, and during one of these attempts crashed the aircraft. The court examined the pilot's conduct, analyzed a statement he had made to the control tower prior to the crash and found that the pilot had acted with the same recklessness that had caused him previously to be demoted by his employer. In drawing a conclusion from these facts, the court held that: "... it was impossible for the pilot not to be conscious of the probable risks to which he was exposing himself and the occupants of the aircraft."¹⁷⁴ [emphasis added]. The court had therefore made an attempt to get at the state of mind of the pilot at the time of the crash, to determine whether he had acted recklessly and with knowledge of the probable damage.

About eight years later, the case of *Moinot c. Cie Air France*¹⁷⁵ came before the First Chamber of the French Cour de Cassation. This case involved, like many of the earlier cases, an aircraft that crashed into a mountain due to navigational error. The court

¹⁷²*McGilchrist(1)* at 543.

¹⁷³*Cheng* at 81:

[t]he case was remitted to the Court of Appeal of Orleans which, applying the new *objective* test enunciated by the Cour de Cassation, had no difficulty in finding that the crew, even though they did not realise that the aircraft was off course, by not making use of all the available navigational aids to verify their own position were, account taken of the circumstances, guilty of a "*faute inexcusable*" within the meaning of the Law of 1957 and Article 25 of the unamended Warsaw Convention which governed the case.

Cheng's approach was regarded as the correct one in *Swiss Bank Corp. v. Air Canada* 129 DLR (3d) 85 at 102, although on appeal the court there avoided this question and held that it did not matter whether a subjective or objective test applied in the case of theft.

¹⁷⁴*Diop* at 570.

¹⁷⁵*Ciolkowski c. Cie Air France* (1971) 25 R.F.D.A. 186 (T.G.I. Paris, 12 February 1971), *rev'd sub nom Moinot c. Cie Air France* (1974) 28 R.F.D.A. 188 (C.A. Paris, 26 May 1973), *aff'd*, (1976) 30 R.F.D.A. 105 (Cass. Civ. Ire, 16 April 1975) [hereinafter *Moinot*].

of first instance had applied a subjective test and relied on the pilot's statement to establish that the crew had no knowledge of the dangers involved.¹⁷⁶ The judgment was overruled by the Paris Court of Appeal and this was affirmed by the Cour de Cassation:

[T]he Court of Appeal rightly considered that under Article 25 of the Warsaw Convention as amended by the Hague Protocol, in order to assess whether the author of the reckless act or omission, which was the cause of the accident, did have knowledge that damage would probably result, it was the objective test that should be applied, that is to say by reference to a normally careful and prudent person (*objectivement, c'est-à-dire par rapport à une personne normalement avisée et prudente*).¹⁷⁷

In conclusion, while there are authorities in France that apply the subjective test, coupled with the drawing of inferences from the proven facts, the weight of authority favours the application of an objective test. The highest court of the land has explicitly approved the objective test. The course the French courts have set for themselves is "not compatible with the history of the article itself",¹⁷⁸ and "to the English eye, it is very difficult to regard the French approach as consistent with the language of the amended convention."¹⁷⁹ It is also clear that Law 57-259, meant to be a guidance to the courts, has been ignored. It has been suggested that "what one witnesses here is a calculated departure from the law in pursuit of a definite objective or policy, that of avoiding the Warsaw or even Warsaw-Hague limits of Liability."¹⁸⁰ Whatever may be the reason for the deviation from the understood meaning of Article 25, it is:

... hoped that the highest court in the land which produces the second largest number of judicial decisions relating to the application of the rules of the Warsaw Convention and cognate principles will yet come round to the view that, in the long run, justice will be better served by an evenhanded application of the law rather than by flying in the face of it in search of absolute equity in individual cases.¹⁸¹

¹⁷⁶Miller at 211, citing *Ciolkowski c. Cie Air France* (1971) 25 R.F.D.A. 186.

¹⁷⁷Moinot at 107.

¹⁷⁸Cheng at 96.

¹⁷⁹Shawcross at VII(132).

¹⁸⁰Cheng at 96.

¹⁸¹*Ibid.* at 99.

D. The Belgian Position

On January 24, 1966, an Air India Boeing 707 bound for London from Bombay struck Mont-Blanc, giving rise to the case of *Consorts Tondriau v. Cie Air India*.¹⁸² Just before impact, the following conversation took place between the pilot and Geneva radar control:

Geneva : Air India 101, continue your descent to flight level 190.
 101 : 101, recleared to 190.
 101 : 101 is approaching 190.
 Geneva : Roger, maintain, unless you are able to descend VMC one thousand on top.
 101 : OK, Sir, will do that. Descend one thousand on top. And I think, we are passing abeam Mont-Blanc now.
 Geneva : You have five miles to the Mont-Blanc.
 101 : Roger.
 Geneva : Geneva QNH 1013.
 101 : 1013 and we are leaving 190 this time.

Within two minutes of this conversation, the aircraft crashed into the final ridge of Mont-Blanc some 200 feet below the summit, killing all on board. The question arose in the court as to the state of knowledge of the pilot at the time of the crash. The pilot could have had several possible interpretations of the message "You have five miles to the Mont-Blanc". It could have been that the pilot thought Geneva was confirming the aircraft's position, and that the aircraft was five miles abeam of Mont-Blanc. Or it could have been that the pilot thought Geneva was correcting the aircraft's position by telling him Mont-Blanc was five miles further along the aircraft's path, yet the pilot descended notwithstanding, believing there was little chance of actually hitting the peak. Given the ambiguity, the Belgian court of first instance followed *Emery* and held that in the absence of actual evidence of the pilot's mental state, it was necessary to draw inferences. In doing so the Court appeared to apply an objective test:

¹⁸²[1977] R.F.D.A. 193 (Cour de Cassation) [hereinafter *Tondriau*].

[A] good pilot *ought* in the circumstances *to have known* the existence of a risk and no pilot of an aircraft engaged in air transport ought to take any risk needlessly.¹⁸³

He was thus acting recklessly and the carrier's right to limit its liability for the death of the plaintiff was removed.

The Brussels Court of Appeal overturned this decision. It found that the Geneva message was ambiguous, and it was quite possible that the pilot misunderstood the message. In fact, the court held that "it would be altogether normal" for the message to be understood by the pilot as a confirmation rather than a correction of his position as reported.¹⁸⁴ Since there was no reason to believe that the pilot would have consciously endangered his own life and the life of others, the Court of Appeal concluded that there was no evidence to support a finding of recklessness. Equally important, if not more so, was the court's repudiation of the test applied in *Emery*. The court preferred the views of *Avocat-Général* Lindon, and decided that the test was to be a subjective one.

In January 1977, the Brussels Cour de Cassation affirmed the decision of the Court of Appeal. Noting that the Warsaw Convention was an international treaty whose object was to unify the rules of liability for different jurisdictions,¹⁸⁵ and examining the travaux préparatoire to the Hague Convention, the Cour de Cassation stressed that Article

¹⁸³Translation of transcript of judgment, p. 9 as found in *Cheng* at 59.

¹⁸⁴*Tondriau* at 205 and 207, as found in *Cheng* at 60.

¹⁸⁵*Ibid.* at 202, as found in *Cheng* at 61:

The interpretation of an international convention, the purpose of which is the unification of law, cannot be done by reference to the domestic law of one of the contracting States. If the treaty text calls for interpretation, this ought to be done on the basis of elements that actually pertain to the treaty, notably its object, its purpose, and its context as well as its preparatory work and genesis. The purpose of drawing up an international convention, designed to become a species of international legislation, will be wholly frustrated if the courts of each State were to interpret it in accordance with concepts that are specific to their own legal system ... Whereas the Hague Protocol has for objective in this connection the elimination of difficulties resulting from the former text by establishing by a compromise solution a common rule suitable for international air transport.

25 required proof of the actual state of mind of the pilot, and it was not sufficient to prove what a hypothetical experienced crew would have done in the circumstances:

the very wording of this provision already warrants the conclusion that it was the wish of the authors that one would have to prove that the carrier or his agents had *effective knowledge* of the probability of damage and not simply that they ought normally to have had such knowledge. This interpretation is, besides, in line with the purpose pursued by the Hague Conference and, moreover, confirmed by both the documents which had been submitted to it and which served as a basis for the drafting of the final text, and by the discussions which preceded the adoption of the latter [emphasis added].¹⁸⁶

i. A Composite Clause

It has been suggested that when examining the judgment of the Belgian court of first instance, the court had broken the second limb of Article 25 into two separate component parts, the "recklessly" component and the "with knowledge that damage would probably result" component, and had considered them separately.¹⁸⁷ Given the ambiguity in the term "recklessly", it would not be beyond reason to say that some courts would be led to apply an objective test, especially when "recklessly" was sometimes used to describe gross negligence.¹⁸⁸ However, the wording of Article 25 is clear; the second limb of Article 25 reads "recklessly *and* with knowledge that damage would probably result" [emphasis added]. There is no running away from the requirement of knowledge, and the two limbs are to be taken together.¹⁸⁹ Any other approach will lead to the wrong result.

¹⁸⁶*Ibid.* at 203, as found in *Cheng* at 61.

¹⁸⁷*Cheng* at 85.

¹⁸⁸*Ibid.* at 86.

¹⁸⁹*Cheng* at 87 states:

[T]o the initial requirement of a more or less objective type of recklessness in the sense of gross negligence, there has to be added a subjective type of recklessness in which the author wilfully engages in what he is doing, knowing its injurious nature. In other words, knowledge of the probability of damage renders the element of recklessness subjective and the whole action all the more culpable - for which the carrier should be deprived of the benefit of limited liability. For this reason it would appear difficult to attempt to deal with the two elements separately.

Shawcross at VII(131D) states:

E. The English position

i. The meaning of "recklessly and with knowledge"

The leading case in England on the Hague Article 25 is *Goldman v. Thai Airways International Ltd.*¹⁹⁰ This case involved a flight from London to Bangkok via Amsterdam and Karachi. The pilot had been given weather charts at both London and Amsterdam; both charts forecasted two areas of moderate clear air turbulence (CAT). There are 3 degrees of CAT: slight, moderate and severe, and of all turbulence experienced, 79% was light, 20% moderate and 1% severe. The pilot's flight manual contained instructions that the passengers must use their seat belts and the sign "Fasten Seat Belts" should be lit during taxiing, take-off, landing, all flying in turbulent air and when turbulence was expected. This was not done, and when the aircraft encountered severe turbulence, the plaintiff hit the ceiling and landed awkwardly, causing injury. In all about 13 passengers and crew struck the roof, resulting in another passenger breaking an arm and rendering one stewardess unconscious.

[E]ven if 'recklessly' must now be given an objective meaning, the phrase in article 25 of the amended convention requires the actor to act 'recklessly and with knowledge that damage would probably result'. A subjective interpretation of 'recklessly' rendered the whole phrase somewhat tautologous; an objective interpretation of the first word leaves the whole phrase with a meaning which is clearly subjective. It is undeniable that the actor himself must actually have knowledge that damage would probably result. It is not enough to show that some other person had that knowledge, or that he would have had it if only he had applied his mind to the matter.

See also Swiss Bank per Kirby, P at part III.G. below.

¹⁹⁰[1983] 2 All ER 693, [1983] 1 WLR 1186 (Court of Appeal) [hereinafter *Goldman* cited to All ER]. This case was recently applied in *Gurtner and others v. Beaton and others* [1993] 2 LLR 369, (1992) 1 S & B Av R VII/723 (Court of Appeal) [hereinafter *Gurtner*], which involved an aircraft crash caused by the pilot who descending below the clouds and crashed into some hills. It was a finding of the court that the pilot genuinely thought he was flying over low ground, had no fear in descending and therefore applying the *Goldman* test the pilot did not have the required knowledge of probability damage that would contravene Article 25. *See also* D. Kilbride, "Article 25 Revisited" (1992) XVII Air & Sp. L. 237 where the writer discusses *Gurtner* and is of the opinion that *Goldman* has placed a particularly onerous hurdle for the plaintiff to overcome, and that it would only be in the most extraordinary case that a pilot could be found to have acted in such a way as to permit a plaintiff to breach the limit of liability.

At the lower court, Chapman J. found that there was recklessness. In doing so, he relied on the definition of "reckless" as found in two criminal cases.¹⁹¹ The Court of Appeal did not agree with the trial judge's finding of recklessness, and did not approve of the use of the definitions of "recklessly" or "recklessness" as found in the criminal cases. As explained by Eveleigh LJ, it would be wrong to adopt an isolated meaning given to the phrase in a previous cases where it has been considered as a step in the solution of the meaning of some different phrase and to use such definitions in a case concerned with the construction of a clause in an international convention.¹⁹²

Eveleigh LJ's concept of reckless conduct was one that "engenders the risk of undesirable consequences."¹⁹³ A person therefore acts recklessly when his conduct indicates a decision to run the risk or a mental attitude of indifference to its existence. Therefore, to decide whether or not an act or omission was done recklessly it was necessary to consider the nature of the risk involved.¹⁹⁴ If all that was required by Article 25 was an element of recklessness, then Eveleigh LJ would have reached the same conclusion as did the trial judge that the pilot was in contravention of Article 25.¹⁹⁵ However, after studying the *travaux préparatoires* of the conference at The Hague, Eveleigh LJ rightly pointed out that Article 25 required more than simply recklessness:

If the article had stopped at the word 'recklessly' I would have been prepared to say that on the judge's findings the plaintiff had proved his case. This is because, on those findings, the pilot had deliberately ignored his instructions which he knew were for the safety of the passengers, and thus demonstrated a willingness to accept a risk ... However, the doing of the act or omission is not only qualified by the adverb 'recklessly', but also by the adverbial phrase 'with knowledge that damage would probably result'. If the pilot did not know that damage would probably result from his omission, I cannot see that we are entitled to attribute to him

¹⁹¹ *R v. Caldwell* [1981] 1 All ER 961 at 967 per Lord Diplock and *R v. Lawrence(Stephen)* [1981] 1 All ER 974 at 978 per Lord Hailsham LC.

¹⁹² *Goldman* at 698.

¹⁹³ *Ibid.* at 699.

¹⁹⁴ It is interesting to note the similar approach of *Cheng*, discussed in part II.F. above in relation to the concept of wilful misconduct and the taking of risks.

¹⁹⁵ The trial judge had dissected the second limb of Article 25 into two for the purpose of construing the word "recklessly". See *McGilchrist(2)* at 491.

knowledge which another pilot might have possessed or which he himself should have possessed ... I cannot believe that lawyers who intended to convey the meaning of the well-known phrase 'when he knew or ought to have known' would have adopted 'with knowledge'.¹⁹⁶

On the evidence, the Court of Appeal acknowledged that it was good practice to belt up before entering an area where moderate CAT was forecast. Equally there was evidence that "careful pilots exercised a discretion and waited for tell-tale signs of light turbulence before pinning the passengers to their seats."¹⁹⁷ There was no finding that the pilot was deliberately dishonest. It followed therefore that even if the pilot's omission to light the seat belt sign was reckless, there was no evidence from which the trial judge could conclude that the pilot had knowledge that damage would result from his omission.¹⁹⁸

One of the positive consequences of this case is that it preserves the discretion granted to pilots to form their own judgment in any particular circumstance which he thought and believed to be the best course of action to take. If the objective test prevailed, then a pilot would constantly be in fear that any of his judgment calls could, on hindsight and when compared to a hypothetical pilot, be wilful misconduct.¹⁹⁹

ii. The meaning of "probable" and the type of damage

The trial judge in *Goldman* held that the nature of the reckless act had to make the damage *probable, and not merely possible*, and so long as damage was probable the nature of the damage need not be of the type contemplated in order to be recoverable. He

¹⁹⁶ *Goldman* at 699. Therefore, the subjective knowledge of the pilot in this case was crucial. In order to succeed, the plaintiff had to prove the following:

- (1) that the damage resulted from an act or omission;
- (2) that it was done with intent to cause damage, or
- (3) that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability, and
- (4) that the damage complained of is the kind of damage known to be the probable result.

¹⁹⁷ *Ibid.* at 703.

¹⁹⁸ See also P. Martin, "Intentional or Reckless Misconduct: From London to Bangkok and Back Again" (1983) VIII Ann. Air & Sp. L. 145 and N. Price, "Goldman v. Thai Airways International Ltd, Court of Appeal 1983, Times Law Report, 7 May 1983" (1983) 8 Air L. 171 for summaries of *Goldman*.

¹⁹⁹ K. Bentil, "Recklessness and Airline Liability for Passenger Injury" (1985) 129 Solis. J. 75 at 76.

found this abundantly clear from the French text, which drew the distinction between "le dommage" and "un dommage".

The English Court of Appeal agreed with the trial judge that the probability of damage had to be greater than the mere possibility of it occurring. According to Eveleigh LJ, risk could be measured on a scale of probability. At the one end the probability could be so low that an act would not be considered reckless. He said:

An act may be reckless when it involves a risk, even though it cannot be said that the danger envisaged is a probable consequence. It is enough that it is a possible consequence, although of course there comes a point where the risk is so remote that it would not be considered reckless to take it. We look for an element of rashness which is perhaps more clearly indicated in the French text 'témérement'. Article 25 however refers not to possibility, but to the probability of resulting damage. Thus something more than a possibility is required. The word 'probable' is a common enough word. I understand it to mean that something is likely to happen. I think that is what is meant in art. 25. In other words, one anticipates damage from the act or omission.²⁰⁰

Drion rightly agrees that probability is qualified by the gravity of the consequences involved.²⁰¹ Hence in a serious harm, such as an air crash, a realization of a 1% chance of such occurrence as a result of an act or omission may satisfy the test of probability. On the other hand, a 25% chance that some shipment will not arrive on time at its destination might not be sufficient to bring the case under Article 25.

On the issue of type of damage, the Court of Appeal, however, did not agree with the trial judge's finding that *any* damage which resulted would fall within Article 25, although it was admitted by Everleigh LJ that he was less sure that the damage had to be the same kind as that contemplated. He said:

It is with rather less confidence that I have said that the damage anticipated must be the same kind of damage as that suffered. I have reached my conclusion because art. 25 is designed to cover cases of damage both to the person, in other words, injury, and to property. The

²⁰⁰*Goldman* at 700.

²⁰¹*Drion* at 223. He was speaking in the context of wilful misconduct

article contains no exception from liability in the case of an act done for justifiable cause. There may be occasions when an act can be said to be done recklessly in regard to one possible kind of damage, although morally wholly justified as the price of averting some other more serious hurt. Perhaps one could resolve this matter by saying that recklessness involves an element of *moral turpitude*. If all that can be anticipated is the spilling of a cup of tea over someone's dress, it does seem wrong that the pilot should be blamed for unexpected personal injuries. Whether or not I am right in this, I am satisfied that the pilot must have knowledge that damage will result from his omission ... *The damage, whether it is referred to as 'the damage' or merely 'damage', refers to something which results from the omission.* The French text, by the use of the word 'en', clearly establishes this [emphasis added].²⁰²

O'Connor LJ agreed that the damage must be *connected* with the act or omission.²⁰³ It would appear that while the category of "any damage" is too wide and is therefore not covered by Article 25, at the same time it would be too narrow an interpretation to say that the damage contemplated had to be of the exact same kind as that which occurs. Any sort of injury which was a *direct* result of the unfastened seatbelt would have fallen within the term "damage", whereas injury occurring because of turbulence, but having nothing to do with the lack of warning to put the seatbelts on, would probably have been excluded. The editors of *Shawcross* are of a different view. Their view is that:

provided some damage was contemplated it is immaterial that more extensive damage occurred, or, it would appear, that the actual damage was of a different type. So, if one of the carrier's servants intends to cause damage to property, but causes personal injury, it is submitted that article 22 will nonetheless be excluded.²⁰⁴

Perhaps the difference of opinion is not as wide as it may appear. It will be readily agreed by the *Goldman* court that damage more extensive but of the same type contemplated would fall within Article 25. Also, it is submitted the *Goldman* court would not disagree with the last sentence quoted from *Shawcross* that where there was an intent

²⁰²*Goldman* at 700.

²⁰³*Ibid.* at 703.

²⁰⁴*Shawcross* at VII(131B). The editors go on to say that the wine glass example in *Goldman* is obiter, since it was raised by way of an extreme example prompted by the first instance court.

to cause a particular type of damage the wrongdoer should not be excused from liability under Article 25 simply because the resulting damage is different from the type contemplated, for it is submitted an intent to cause damage is more culpable than recklessly caused damage and therefore should not go unpunished. The only real difference is with recklessly caused damage of a different type from that contemplated, but this difference is not insurmountable. The courts often infer the state of knowledge of the actor from a given set of facts; exactly what type of injury would have been in his contemplation will be deduced from the facts, and it would be in the rare case that the damage actually occurring is different from that contemplated. But where the damage is truly exceptional and beyond the inferred contemplation of the actor, then the two opinions cannot be reconciled. As discussed below, an Australian case has adopted the position that the damage must be of the type known to be the probable damage.²⁰⁵ In the end it is submitted that the question remains open and it would be a question of degree depending on the judge's discretion whether any particular injury could be said to come within the "damage" envisioned by Article 25.

iii. Breach of regulation

It was submitted that a breach of a duty, rule or regulation *per se* did not amount to wilful misconduct.²⁰⁶ A similar issue arises in the case of a breach of regulation with respect to the new Article 25: can it be said that a breach of regulation amounts to a reckless act with knowledge of the probable resulting damage? This was a question that was addressed by the court in *Goldman*.²⁰⁷ In this case because there were CAT forecasts, turbulence could have been encountered, even though the probability of encountering it

²⁰⁵ See part III.G. below.

²⁰⁶ See part II.F above.

²⁰⁷ The regulation took the form of a provision in the pilot's flight manual which stated that the "Fasten Seat Belts" sign should be lit when turbulence can be expected. The exact wording of the regulation was:

10.3 Use of Seat Belts. The passengers must use their seat belts and the sign "FASTEN SEAT BELTS" should be lit - During taxiing, take-off and landing - During all flying in turbulent air and when turbulence can be expected.

was slim. The court decided that a breach of a regulation, even one designed for safety, did not automatically amount to a contravention of Article 25:

As I understand art 25, it is not sufficient to show that he deliberately broke a regulation, even one which is designed for safety, unless it is also shown that he had knowledge that injury would probably result. While it is not necessary for my decision in this case, I would go further and say that it is in relation to that knowledge (and not to the regulations themselves) that his conduct is to be judged in order to determine whether or not it was reckless.²⁰⁸

Everleigh LJ also found that the regulation requiring the lighting of the "Fasten Seat Belt" sign allowed an element of discretion to the pilot. While this does suggest that in the case of a regulation which did not give the pilot any discretion the conclusion would be different, it is submitted that that is not necessarily so. The crucial question is the knowledge that damage would probably result; such knowledge must exist. Hence where there is no such knowledge, even a breach of a mandatory regulation would not satisfy Article 25, although it may amount to negligence *per se*.

While on the question of breach of regulation, it is appropriate at this point to mention the Italian case of *Belgian International Air Services v. Mandreoli*.²⁰⁹ In this case an aircraft crashed while attempting to land in bad weather conditions. There was thick fog over the runway, with visibility of approximately 250 metres, but nevertheless the control tower gave the pilot permission to land. On its approach path, the aircraft veered to the left and hit some trees next to the runway. After hitting the trees, the pilot brought the nose up and opened the throttle to gain height. This sudden manoeuvre caused the aircraft to stall and crash. In this case the visibility conditions were below the airline's minimum standards.²¹⁰

²⁰⁸Goldman at 702.

²⁰⁹1 S & B Av R VII/601 (Milan Court of Appeal) per De Ruggiero (President) and Napoli (Judge) [hereinafter *Mandreoli*].

²¹⁰*Ibid.* at 603. The BIAS's regulation stated:

If the RVR indicated during the approach is below the airline's minimum standards, but the pilot has sufficient oblique vision to carry out the approach and landing, he may

The court found that the weather conditions were critical, but not prohibitive. If they had been prohibitive, the control tower would not have given the aircraft permission to land. As for the airline regulation, it was clearly non-mandatory and gave the pilot discretion to continue the approach, provided he had "sufficient oblique vision". Therefore, the pilot had not acted recklessly:

The pilot was not required to comply with compulsory minimum standards, by virtue of the broad powers conferred upon him by r 2.4 of the Rules of the Air (appendix 2 of the Chicago Convention) which were intended to enable him to deal directly with any situation involving difficulty or danger. He was therefore within his rights in deciding to land. It is also true that, in exercising these discretionary powers, it is possible to exceed the limits of normal forethought and to act recklessly, which implies the conscious acceptance of a risk of almost certain damage. However, in this particular case, there is no firm evidence that this occurred, because landing in critical (but not prohibitive) weather conditions in itself involves a certain degree of risk. It is not possible to determine from the report whether the degree of risk was so high that the pilot should not have landed ... at the moment when he decided to land, and in the absence of reliable proof to the contrary, the pilot cannot be said to have made the decision in full knowledge that he would almost certainly cause an accident.²¹¹

Similar to the *Goldman* case, the regulation here was discretionary; it entitled the pilot to make a judgment based on the circumstances. The *Goldman* regulation wording appears to be more strongly worded than in *Mundreoli*, although in both cases the regulations were not of a mandatory nature. However, as submitted above, this does not make a difference and the crucial question is possession of knowledge of the consequences of the act.²¹²

F. The Canadian Position

i. Objective or Subjective test

continue the approach bearing in mind that the angle of visibility in specific weather conditions (ground fog) may suddenly decrease close to the ground.

²¹¹ *Ibid.* at 604.

²¹² See also *Shawcross* at VII(132).

While there have been hints that the Canadian courts adopt an objective assessment of the knowledge requirement, the Canadian courts have, where possible, avoided the issue and have come to the conclusion that the results of the cases that have come before it would have been the same whether adopting an objective or a subjective test. Hence there is no clear decision of binding authority. In the *Swiss Bank* case,²¹³ Walsh J. examined *in extenso* the historical development of Article 25 and various decisions from other jurisdictions, and came to the unfortunate but correct conclusion that there is no uniform jurisprudential treatment of this article.

One of the cases analysed by Walsh J was the Swiss case of *Lacroix Baartmans, Callens, Und, Van Tichelen S.A. c. Swiss*,²¹⁴ a judgment of the Swiss Federal Tribunal dealing with theft of bank notes consigned as valuable cargo where the Tribunal applied a subjective test, requiring proof of the knowledge of the employees guilty of the theft. The Tribunal held that the gross negligence of the carrier or of his employees was not sufficient to open the way to unlimited responsibility; even gross negligence committed knowingly was not sufficient. The responsibility was only unlimited when the carrier or his employees had intentionally caused the damage or when the act or omission had been reckless or inconsiderate and on condition moreover that it was aware that damage would probably result from the conduct.²¹⁵

The Federal Tribunal subsequently examined various hypotheses put forward by the plaintiff to explain the loss of the parcels. However, the Tribunal found the circumstances of the re-shipment so confused that it was impossible to know with certainty where and when the parcels were lost, or to identify the person whose fault caused the loss. As a result, the court could not determine the existence of subjective criteria of intention and knowledge of the probability of damage. Therefore the plaintiff's claim failed.²¹⁶ Walsh J concluded from this that the subjective approach "of necessity

²¹³ See part II.E. above.

²¹⁴ [1973] R.F.D.A. 75 [hereinafter *Lacroix*].

²¹⁵ *Ibid.* at 77 (Walsh J's translation).

²¹⁶ *Ibid.* at 78 (Walsh J's translation).

leads to a somewhat preposterous conclusion".²¹⁷ He reasoned that where a theft of goods occurred during a transit and it is known to have been committed by some employees of the carrier acting within the scope of their employment, but it was impossible to specify which employee or employees exactly were responsible, then applying the subjective test it would not be possible to determine whose intentions must be examined. Therefore, the exclusion of limitation of liability under article 25 would seldom be applicable. On the other hand, this problem would not be faced if the objective test is applied and the acts of a hypothetical good employee can be used as a comparison, and he proceeded to do so.

On appeal,²¹⁸ the Court of Appeal found sufficient evidence to conclude that the theft was committed by one of two employees of Air Canada within their scope of employment. On the question of intent, the court held that a theft is necessarily committed with the intent of causing damage, as by definition the thief is attempting to permanently deprive the owner of his thing by converting it to his own use. Therefore, the court came to conclude that:

[w]ith respect to the requirement that the act be done "with intent to cause damage" or "with knowledge that damage would probably result", it does not matter whether a subjective or objective test is applied when it is a case of theft.²¹⁹

The Court of Appeal therefore did not either approve or disapprove of the preferred choice of Walsh J for the objective test, but simply brushed the question aside. However, it can be seen that the judgments on appeal remove the basis upon which Walsh J based his preference for an objective approach, while not commenting directly on his conclusion as an abstract point of law.²²⁰ This is unfortunate, for Walsh J's judgment is the only Canadian one that has taken a firm stand in this debate.

²¹⁷*Swiss Bank* at 104.

²¹⁸[1988] 1 FC 71 (Court of Appeal).

²¹⁹*Ibid.* at 73.

²²⁰*Shawcross* at VII(133).

Recently the question came up for consideration in *Prudential Assurance Company Ltd. and 130850 Canada Inc. v. Canada, Kintetsu World Express Inc. and S.E.B. Cargo Inc.*²²¹ The facts were that F.M. Electronique imported from Japan to Canada 7000 electronic units, and were insured by Prudential. The carriers were Kintetsu, who placed the cargo with the sufferance warehouse of SEB, their authorised agents.²²² An unknown third party obtained the release of the goods by misrepresenting himself to Canada Customs and thereafter at the warehouse. The question arose as to whether SEB had acted recklessly and with knowledge that damage would probably result in the careless release of the goods.

The court referred to *Swiss Bank* as a case where intentional fault was found and therefore it was unnecessary to consider the question of recklessness. The court then noted that it was not yet settled in domestic criminal law whether the concept of recklessness was to be determined subjectively or objectively,²²³ but when on to say that "the civil law interpretation of the various concepts of negligence (including recklessness as used in that context) is *arguably* objective".²²⁴ Continuing on the same trend, the court recognized that this case was argued on the basis of so-called gross negligence or gross fault by Kintetsu, which by definition in a law dictionary incorporated the concept of "such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness"; the emphasized words indicated to the court the adoption of an objective standard.²²⁵

The court appeared to be bending towards the application of an objective test. Short of doing so, the court held:

²²¹[1993] 2 F.C. 293 (Court of Appeal) per MacGuigan JA [hereinafter *Prudential*].

²²²While this agency relationship was assumed by the court, this assumption has been criticised by R. Harris, "Article 25 of the Warsaw Convention in Canada" [1994] 23 Can. Bus. L. J. 279 at 280 [hereinafter *Harris*].

²²³Citing the cases of *R. v. Tutton* [1989] 1 SCR 1392, *R. v. Waite* [1989] 1 SCR 1436, *R. v. Anderson* [1990] 1 SCR 265 and *R. v. Hundal* (No.22348, March 11, 1993).

²²⁴*Prudential* at 310, citing *R. v. Wholesale Travel Group Inc.* [1991] SCR 154 at 210 [emphasis added].

²²⁵*Ibid.*

In any event, I am persuaded that the result would be the same in the case at bar whether the standard of recklessness be subjective or objective. S.E.B. Cargo had the onus of taking such care as to ensure proper delivery, and it can be concluded from the facts that it not only must have been but was aware that delivery to an unauthorized person was very likely to preclude the cargo's coming into the hands of its rightful owner. In other words, the result is so obvious that it would be the same whether taken subjectively or objectively.²²⁶

It is submitted that from the wording of the above passage, the court seemed to be more concerned with the subjective knowledge of S.E.B., holding that S.E.B. was aware of the damage which results from improper delivery of the cargo. The court backs away from this position at the last moment by holding that the result would have been the same applying either test. Therefore, the Canadian courts have so far not adopted a firm position of the question of whether to apply an objective or subjective test.

ii. Distinction between passenger and cargo cases

It has been suggested that in interpreting Article 25, there is a distinction between pilot error cases (personal injury and death claims) and cargo cases (cargo damage or loss claims). For example, Walsh J in *Swiss Bank* was of the opinion it was desirable to eliminate a review of the frequent cases involving airplane crashes since the facts are quite different from those of cargo loss cases, since a pilot whose own life was at stake when he flies at altitudes lower than those permitted, ignores directions from a controller or otherwise by act or omission behaves recklessly, cannot be found to have done so with intent to cause damage or knowledge that damage would probably result.²²⁷ It has been recognised that based on the principle of prevention, the consequences of an aircraft crash or accident are such that the threat of unlimited liability holds little weight as an additional incentive to the carrier, unlike in the case of cargo damage where the

²²⁶*Ibid.* Harris at 281-2 has criticised the conclusion of the court. His argument is that the courts have been too liberal in imputing knowledge, especially where the warehouse operators were doing no more and no less than standard industry practice required. By so deciding, the courts have made it too easy to apply Article 25, and therefore rendered the limits imposed by Article 22 meaningless.

²²⁷*Swiss Bank* at 100. The same distinction was drawn by D. Reynolds, "Cargo Damage - Article 25 Warsaw Convention" (1991) XVI Air L. 19 at 20 [hereinafter *Reynolds*].

preventative force of Article 25 is stronger. In law, however, there is no justification for this distinction.²²⁸ Nowhere in the Warsaw Convention is it suggested that personal injury cases should be treated any differently from cargo claims.²²⁹ Further, what Walsh J is suggesting would lead to the conclusion that in *all* airplane crash cases the carrier would never run afoul of Article 25, which is an impossible conclusion. In the Swiss Federal Court case of *Claudio* the drawing of this distinction was expressly disapproved. As the court there held:

the view expressed ... that in certain circumstances Art. 25 WC would allow reduced demands in respect of extending liability where injuries rather than material damage were at issue, should be rejected ... There is nothing in the international agreement to support such a differentiation.²³⁰

Cheng has pointed out that in the French courts also, there is no difference in the test to be applied for personal injury and cargo damage claims.²³¹

It is submitted that the above authorities disapproving of the drawing of a distinction are correct. On a higher plane, signatory states have already made the distinction between passenger and cargo claims. In the *Guatemala City Protocol*, which amends the Warsaw-Hague Convention, Article 25 continues to apply to the carriage of cargo, but not to passenger and baggage limits which are rendered unbreakable.²³² Conversely, in the *Montreal Protocol No. 4*,²³³ which also amends the Warsaw-Hague Convention, cargo damage limits become unbreakable, while Article 25 continues to apply to passenger and baggage claims.²³⁴ Therefore, where contracting parties have

²²⁸ *Drion* at 211.

²²⁹ *Shawcross* at VII(133).

²³⁰ *Claudio* at 324. This was a case construing the old Article 25.

²³¹ *Cheng* at 95, citing the case of *Cie Le Languedoc et al. v. Société Hernu-Perron et al.* (1976) 30 R.F.D.A. 109 (C.A. Paris, 17 November 1975) at 115-6, where the court applied the same objective test in a carriage of goods situation.

²³² Article IX, *Guatemala City Protocol*. See part IV below.

²³³ Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975. ICAO Doc. 9148.

²³⁴ Article VIII, *Montreal Protocol No. 4*.

intended to draw a distinction between passenger and cargo claims, they have provided for it in the form of new protocols; the absence of wording drawing such a distinction within the *Hague Protocol* clearly prevents any interpretation of Article 25 that allows for different treatment of passenger and cargo claims.

G. The Australian Position

The leading Australian case of *SS Pharmaceutical Co. Ltd and another v. Qantas Airways Ltd*.²³⁵ involved a shipment of pharmaceutical products from Melbourne to Tokyo with transit at Sydney's Kingsford Smith Airport. Whilst at Sydney, the goods were left exposed on the tarmac for 8 hours, during which time there was a severe rain storm (not uncommon in Sydney that period of the year) and the goods were damaged. The thunderstorm had been forecast, and began first as intermittent rain and later developed into a severe thunderstorm. The defendants led no evidence as to how it came to be that the goods were left exposed to the elements, even though they were in marked cartons that indicated they should not be left in the rain.

The court applied the subjective test, and in a 2-1 majority decision concluded that the plaintiffs had discharged the heavy burden of proof. The court showed it's dislike for the objective test, preferring instead the English position:

In particular, there was no dispute that the decision in *Goldman v. Thai Airways Ltd*. [1983] 1 WLR 1186 settled a number of questions arising under art. 25 which are relevant for the determination of this appeal. The "damage" that the reckless party must know "would probably result" from the act or omission need not be the actual damage to the particular cargo in question. It is sufficient if "the damage complained of is the kind of damage known to be the probable result" (p. 1194). Recklessness goes beyond mere carelessness (p.1191) and acts or omissions are done or omitted recklessly when the person concerned: ... acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence [p. 1194]. Finally, the requirement of knowledge involves: ... the proof of actual knowledge in the mind of the [actor] at the moment at which the omission occurs, that the omission is taking place and that it

²³⁵[1991] 1 LLR 288, (1990) 1 S & B Av R VII/443 (NSW Court of Appeal, 1990) [hereinafter *Pharmaceutical*].

does involve probable damage of the sort contemplated in the article (p. 1202).²³⁶

The court concluded that “actual, *as distinct from merely imputed*, knowledge must be shown”.²³⁷ This is an odd statement, for in applying the test the court was *willing to infer knowledge* from the facts:

The *inference* is fairly open, as we already held, that such servants ... observed the marks on the cargo which indicated that it should be stored in a dry environment, observed the poor state of the plastic wrapping later reported in Tokyo, observed that it was raining, and that a typical Sydney summer thunderstorm was likely, and left the cargo in the open without taking the steps that *they knew* would be essential to protect that cargo if it should rain heavily. On that basis such servants and agents *must also have known* that such “deplorably bad handling” of the cargo would probably result in damage to the cargo [emphasis added].²³⁸

It is submitted that the difference between “impute” and “infer” is semantic, and the court could have been more clear in its reasoning. Perhaps when the court said that knowledge may not be imputed was meant the court should not over-step the line and attribute knowledge to the cargo handler which he did not have, whereas an inference connotes the idea of concluding from the facts the knowledge that the cargo handler subjectively must possess. Nevertheless, the conclusion of the court has been criticised: the court had in fact inferred recklessness in the absence of *any* substantial evidence, and in so doing had over-stepped the line.²³⁹

Kirby P in a strong dissenting judgment adopted a very strict reading of the requirement for actual knowledge. He was of the opinion that the burden of proof fell entirely on the claimant, and that the carrier’s preference not to lead any evidence was perfectly legitimate. While the damage done was admitted by the carrier to have been the

²³⁶*Ibid.* at 290 per Gleeson, CJ and Handley, JA.

²³⁷*Ibid.* at 291. [Emphasis added].

²³⁸*Ibid.* at 293.

²³⁹*Reynolds* at 20. The writer goes on to suggest that even Kirby, P., the dissenting judge, had accepted the principle that an inference can be drawn in appropriate cases before the court without proof of the actual state of knowledge of the individual concerned. It is submitted that *Reynolds* is wrong on this point, and that Kirby P’s judgment stands for exactly the opposite.

result of its poor handling of the cargo, leading to natural feelings of dissatisfaction with the carrier, Kirby P insisted on applying the Article with ruthless adherence to its wording even though this could lead to unsatisfactory results. Indeed the result of such a construction, if deemed unsatisfactory, would be an argument for improved international arrangements, enhanced domestic legislation or for securing the protection of private insurance.²⁴⁰ This approach taken by Kirby P is laudable. He reviewed the *travaux préparatoires*,²⁴¹ and was critical of the differing interpretations of Article 25 given by other courts which has led to ambiguity. According to Kirby P the danger of inferring knowledge has led to the infiltration of objective principles into the test of knowledge.²⁴²

Of particular significance to the judge in interpreting Article 25 was the attempt by the Australia and New Zealand Delegates at the Hague discussions to insert the word "actual" before the word "knowledge",²⁴³ as it clearly showed the intention of the Delegates. The judge also found that the first limb of Article 25 (the intention to cause damage) was an extreme exception to limited liability, and gave a clue, without more, to the high stringency involved in the interpretation of the second limb. The addition of the words "recklessly and with knowledge that damage would probably result" involved *one composite concept*.²⁴⁴ Accordingly, Kirby P found proof of actual knowledge on the part of the carrier, its servants or agents, had to be established; this was the consequence of

²⁴⁰*Ibid.* at 295.

²⁴¹Noting that this is authorised by *Vienna Convention*, Articles 31 and 32, even though the Vienna Convention is not, in its terms, applied retrospectively to treaties which came into force before it did.

²⁴²*Pharmaceuticals* at 299-300:

Courts of the common law ... examine objective acts and to ask whether, derived from them, an inference could be drawn of intentional conduct or conduct done "with a wanton and reckless disregard of the consequences ... It was by this means that notions of reckless conduct were imported in a number of common law expositions of the meaning of "wilful misconduct" as appearing in art. 25 as originally drawn ... To some, the reference to inferences to be derived from objective facts suggested that the test to be applied, when considering an appeal to art. 25, was an objective rather than a subjective one. This led to a controversy.

Kirby P cited the French Cour de Cassation case of *Emery* as an example where a court had gone astray and determined that the test to be applied was an objective one.

²⁴³See part III.A above.

²⁴⁴*Pharmaceuticals* at 302.

the application of the subjective test. Not surprisingly, Kirby P went on to hold that the plaintiffs had not discharged the burden of the strict proof requirements of Article 25, since there was no evidence of an identified agent or servant of Qantas acting recklessly and with knowledge that damage would probably result.

It is questionable whether Kirby P was correct in his strict interpretation of the evidential requirements of Article 25. While the article does require knowledge of the damage that would probably result, and this knowledge is a subjective knowledge, the Article does not require direct evidence of this knowledge. That is a question of proof, and it is commonly accepted by other jurisdictions that the state of mind of the actor may be inferred from the proven facts, without degenerating into an objective test. It is submitted that Kirby P has erred on this point, and the majority decision of the court is a better approach.²⁴⁵

IV. The way ahead

Subsequent to the *Hague Protocol*, amendments were made to Article 25 by way of the *Guatemala City Protocol*. One of the changes introduced by the *Guatemala City Protocol* was to make the limitation of liability unbreakable²⁴⁶ with respect to passenger and baggage actions, and this was in part due to the nervous reaction of the rest of the World to the *Montreal Agreement* of 1966²⁴⁷ by which the United States "coerced" the major carriers of the world to agree to a higher limit of liability than was applicable at the

²⁴⁵ Except for the odd statement by the court that knowledge may not be imputed.

²⁴⁶ In order to entrench this limit, three things were done. First, Article VIII amended the original Article 22 by deleting the provision for "special contracts" between carrier and passengers that would allow them to agree to higher limits. Second, Article IX amended the original Article 24(2) by specifically stating that in the carriage of passengers and baggage the limits of liability "constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability". Third, Article X amended the original Article 25 by providing that the limits of liability set out in the protocol for cargo claims (only) would not apply in the case of conduct with "intent to cause damage or recklessly and with knowledge that damage would probably result". On the other hand, in return the carrier lost the "all necessary measures" defence previously available to it under Article 20 (except in the case of delay), but retained defences under Article 17 "state of health of the passenger" provision and Article 21 contributory negligence of the passenger provision.

²⁴⁷ See Chapter One, part II.E.ii.b. for a discussion of the *Montreal Agreement*.

time under the Warsaw Convention or the *Hague Protocol*.²⁴⁸ At the same time, the *Guatemala City Protocol* raised the limit to 1,500,000 francs per passenger for death or personal injury²⁴⁹, which in 1975 by *Montreal Protocol No. 3* was expressed as 100,000 SDR.²⁵⁰

The unbreakable nature of the limit of liability under the *Guatemala City Protocol* and *Montreal Protocol No. 3*²⁵¹ has been seen as "the fatal error" of the new scheme,²⁵² which will prevent these protocols from ever entering into force. Other writers have considered this "the worst feature".²⁵³ Are these terms unjustified? What would be the effects of this unbreakability if the protocols should come into force? The arguments for and against this feature are discussed.

A. Litigation

It is possible that removing the wilful misconduct exception would reduce litigation, as this exception would no longer exist as a ground for piercing the limits of liability. Proving wilful misconduct is always difficult and time-consuming, and since the beginning of the Warsaw system only twelve cases of wilful misconduct have been found by the United States courts, with one case taking fifteen years to litigate.²⁵⁴ In response, it

²⁴⁸ Under the Warsaw Convention the limit for passenger injury or death was 125,000 francs (approx. US \$10,000); under the *Hague Protocol* this limit was doubled to 250,000 francs (approx. US \$ 20,000). The agreed limit under the *Montreal Agreement* is US \$ 75,000.

²⁴⁹ *Guatemala City Protocol*, Article VIII.

²⁵⁰ *Montreal Protocol No. 3*, Article II. 100,000 SDR was equivalent to approximately US \$ 146,360 in 1993.

²⁵¹ Ratification of the *Montreal Protocol No. 3* would automatically include the amendments made by the *Guatemala City Protocol*, even if the latter was not in force: Article VII, *Montreal Protocol No. 3*.

²⁵² M. Milde, "Warsaw System and Limits of Liability - Yet Another Crossroad?" (1993) *Ann. Air & Sp. L.* 201 (hereinafter *Milde*) at 233.

²⁵³ B. Cheng, "What is Wrong with the 1975 Montreal Additional Protocol No. 3?" (1989) *XIV Air L.* 20 (hereinafter *Cheng2*) at 32.

²⁵⁴ E. Cotugno, "No Rescue in Sight for Warsaw Plaintiffs From Either Courts or Legislature - Montreal Protocol 3 Drowns in Committee" (1993) 58 *J. Air L. & Com.* 745 [hereinafter *Cotugno*] at 789, citing testimony of Kenneth Mead before the Senate Foreign Relations Committee [hereinafter *Committee*] on June 28, 1990, (1990) S. Exec. Rep. No. 21, 101st Cong., 2d Sess. at 56 where Mr Mead counted nine such cases. Since then the Courts have found wilful misconduct in the *Korean Air Lines Disaster of September 1, 1983* 922 F.2d 1475 (D.C. Cir. 1991), *Air Disaster in Lockerbie, Scotland, on December*

was submitted by an eminent lawyer that removal of the wilful misconduct exception would not speed up recoveries because plaintiff attorneys will continue to try to circumvent the liability limits.²⁵⁵ However, it cannot be denied that plaintiffs will have one less avenue of litigation, and therefore time will be saved.²⁵⁶ The advantage of keeping the exception, it is submitted, is this: the *threat* value of Article 25, of the possibility of a carrier being liable for unlimited damages in the event wilful misconduct is proven, will induce the settlement of law suits.²⁵⁷

B. Deterrence

An argument against the removal of Article 25 is that the security of air travel will be compromised. Carriers will no longer have the incentive to ensure safety,²⁵⁸ and further passengers would have no possibility of recovering provable damages beyond the fixed limit regardless of conduct. Hence it has been said that crashes caused by an intentional act of an employee,²⁵⁹ murder,²⁶⁰ sabotage,²⁶¹ or any other intentional criminal act would lead to the "absurd result" that the carrier or his servants or agents are sheltered from full liability.²⁶² It may even be that such limited liability would be "contrary to public policy, violative of *ordre public*, or *contra bonos mores*",²⁶³ or even unconstitutional.²⁶⁴

21 1988 and in re *Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986* 928 F.2d 1267 (2nd Cir., 1991).

²⁵⁵ *Cotugno* at 791, citing L. Kreindler at *Committee*, s. 12B.04(3).

²⁵⁶ M. Leigh, "The Montreal Protocols to the Warsaw Convention on International Carriage by Air" (1982) 76 Am. J. Int'l L. 412 at 417.

²⁵⁷ H. McCoy, "Yes or No to Guatemala Protocol - Con" (1975) 10 Forum 739 [hereinafter McCoy] at 755 states: "As a practical matter, in the past decade very few of the cases even went that far and upon the mere threat of attempting to prove willful misconduct most of the suits were settled."

²⁵⁸ *Cotugno* at 792, citing Senator Biden before the *Committee* on June 19, 1990, (1990) S. Exec. Rep. No. 21, 101st Cong., 2d Sess. at 54.

²⁵⁹ *Cotugno* at 786.

²⁶⁰ McCoy at 739.

²⁶¹ *Ibid.* at 755; *Cheng2* at 32.

²⁶² *Milde* at 234.

²⁶³ *Cheng2* at 32.

²⁶⁴ *Milde* at 234.

Be that as it may, four points should be remembered. First, it was never the purpose of the Warsaw Convention to deter criminal conduct.²⁶⁵ Second, safety of air flight is largely the concern of other international inter-governmental agencies such as ICAO, not the Warsaw Convention.²⁶⁶ Third, it should not be forgotten that carriers will always be sensitive to their public image, and they will take the necessary action to ensure a good public image or else face eradication. Finally, there will always be the deterrence offered by criminal law.

C. Consequence for Manufacturers

It is common practice nowadays, where there is an accident resulting in injury, for passengers to sue not only the carrier but also the manufacturers of the aircraft or the component parts. Unfortunately, while the carrier would enjoy an unbreakable limit of liability of 100 000 SDR, manufacturers do not; their liability is unlimited. In the case of joint liability for an award above the limit, the maximum that may be apportioned to the carrier is 100 000 SDR, with the balance paid by the manufacturer. This is discriminatory against manufacturers, for there can easily arise a case where the manufacturer is found to be only 10% at fault and the carrier 90% at fault, and yet the manufacturer is left to foot 400 000 SDR of a 500 000 SDR damages award.²⁶⁷ To exacerbate the situation, it is also very possible that the manufacturer of a component part is a small enterprise, with limited turnover and limited means to insure against possibly huge damages in a crash of a large passenger plane. In the event of multiple suits, there will arise the situation where the component manufacturer will be grossly underinsured.²⁶⁸

D. Flawed value system

²⁶⁵ See Chapter Three part VII.

²⁶⁶ *Ibid.*

²⁶⁷ *McCoy* at 740, 753 and 768.

²⁶⁸ L. Kreindler, "A Plaintiff's View of Montreal" (1967) 33 J. Air L. & Com. 528 at 534.

While the *Guatemala City Protocol* has removed the wilful misconduct exception for death and personal injury to passengers, the exception has been retained in the case of cargo claims.²⁶⁹ In effect, the *Guatemala City Protocol* offers greater protection to cargo than to human loss, a situation which should cause States to re-examine whether there is something inherently wrong with this regime.

E. Intercarrier Agreement 1995

On October 31, 1995 members of the International Air Transport Association (IATA) at their Annual General Meeting in Kuala Lumpur adopted a new Intercarrier Agreement that provided for recovery of unlimited compensatory damages. This agreement is to come into force on November 1, 1996 for all signatory carriers. While there are foreseeable problems in the implementation of the agreement,²⁷⁰ it is envisaged that eventually with this agreement there will be a reduction in litigation, since there will no longer be a need to rely on Article 25 to circumvent any limits of liability.²⁷¹

V. Conclusion

While the rest of the world, it seems,²⁷² have applied the subjective test to the amended Article 25, the French courts persist in their application of an objective test. This detracts from the original purpose of the Warsaw Convention, that of creating a uniform system of liability in the world. In never-ending attempts to meet the varied needs of the different nations, the Warsaw System has become, in the words of *Cheng*, "a disgraceful shambles".²⁷³ Borrowing from the closing remarks of Kirby. P, a judge who has perhaps surpassed all others in a valiant and extreme effort to apply the Warsaw Convention to the letter of the law:

²⁶⁹ Article X, *Guatemala City Protocol*.

²⁷⁰ See L. Kriendler, "The IATA Solution" (1995) 14 *Lloyds Avi. L.* 4; M. Milde, *IATA Intercarrier Liability Agreement* (Institute of Air & Space Law, McGill University, 1995) [unpublished].

²⁷¹ Except arguably for the purposes of claiming punitive damages, a possibility discussed in Chapter Three.

²⁷² With the exception of Canada, which is undecided.

²⁷³ *Cheng* at 55.

[T]he Australian Government should give urgent attention to the defects in the law called to light by this case... the operation of art. 25 might itself call for remedial action. That action may be needed both at an international level and at a national level. The average passenger and consignor using international air transport is almost certainly ignorant of the limitations on recovery which are imposed and the uncertainties and possible injustices involved in the limitations provided by the Warsaw Hague Convention. It would be preferable that these difficulties and injustices should be looked at in advance of, and not after, any major incident affecting large Australian interests.²⁷⁴

These words, it is submitted, apply equally not only to Australia but also to the other 125 signatories to the Warsaw Convention. The *Guatemala City Protocol* and the *Montreal Protocol No. 3* introduced several noteworthy changes to the Warsaw scheme of liability in attempts to improve and update the Warsaw system.²⁷⁵ However, it is questionable whether it was wise to remove the Article 25 wilful misconduct exception, and this, together with the introduction of the Intercarrier Agreement 1995, may forever prevent them from coming into force.

²⁷⁴*Pharmaceuticals* at 307.

²⁷⁵Namely the provision for ticketless travel (Article II), strict liability in the carriage of passengers and baggage (Article VI), setting of specific limits for delay (Article VIII), increasing the limits of liability (Article VIII), provision of a settlement inducement clause and award of legal costs (Article VIII) and the addition of one additional jurisdiction to bring suit (Article XII).

Chapter Three: Punitive Damages

I. Introduction

Until relatively recently in the history of commercial international air travel, the question of whether punitive damages were recoverable from an air carrier in the event of misconduct was seldom considered. Since the coming into force of the Warsaw Convention¹, damages for international flights were limited by the Convention in cases where the Convention applied, and where the Convention did not apply then recoverability of damages was left to domestic law. In recent years, however, there have been four major sources of litigation that have largely illuminated the issue of punitive damages where the Convention applied, namely the close encounter of Eastern Airlines flight 855 on May 5, 1983,² the Korean Air Lines disaster of September 1, 1983,³ the hijacking of a Pan American World Airways aircraft in Pakistan on September 5, 1986,⁴ and the Lockerbie disaster of December 21, 1988.⁵ Before these four major decisions, there were a handful of cases that dealt with this issue, but it was not until recently that a trend has developed disallowing punitive damages under the Warsaw Convention. The matter has not been considered yet by the Supreme Courts of any High Contracting Party, and therefore cannot be said to be finally settled.

On October 31, 1995 an Intercarrier Agreement was adopted at the Annual General Meeting of the International Air Transport Association, which denies recovery

¹On 13 February 1933.

²*Floyd v. Eastern Airlines, Inc.* 872 F.2d 1462, 21 Avi. 18, 401, (11th Cir, 1989) per Anderson Cir J., rev'd on other grounds, 111 S.Ct. 1489 (1991) [hereinafter *Floyd* cited to F.2d].

³*In re Korean Air Lines Disaster of September 1, 1983* 932 F.2d 1475 (D.C. Cir., 1991) [hereinafter *KAL*]

⁴*In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986* 729 F.Supp. 17 (SDNY, 1990) per Sprizzo DJ [hereinafter *Karachi*]. On appeal to the Court of Appeal, the judgment was decided together with the appeal in the *Lockerbie* case, *infra* note 5.

⁵*In re: Air Disaster in Lockerbie, Scotland, on December 21, 1988* 733 F.Supp. 547, 22 Avi 17, 735, 22 Avi 17, 858. (E.D.N.Y., 1990) per Platt CJ [hereinafter *Lockerbie* cited to F.Supp]; on appeal to the Court of Appeal, *In re Air Disaster at Lockerbie, Scotland on December 21, 1988 and In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986* 928 F.2d 1267 (2d Cir., 1991) per Cardamone, Cir. J[hereinafter *Lockerbie II*]. The Supreme Court refused to hear further appeal: 112 S.Ct. 331 (1991).

for punitive damages. The agreement will enter into force on November 1, 1996, and it remains to be seen what effect, if any, the agreement will have on punitive damage litigation.

II. Nature of Punitive Damages

Generally, punitive damages are private fines levied by civil juries to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future.⁶ Differing from compensatory damages, they are an award over and above what is necessary to compensate a party for his injury.⁷ Punitive damages are not measured solely by the bodily injury suffered by a plaintiff, rather, imposition of punitive damages is determined according to other factors such as the outrageousness of the injurious act, the defendant's culpability and wantonness, the defendant's malicious, fraudulent or evil motives and intent, and the nature and extent of the harm to the plaintiff.⁸ Punitive damages are not awarded to compensate for injury, but to further the aims of the criminal law and deter future similar conduct.⁹ Punitive damages have had "a hazy history"¹⁰, but are today recognized by federal courts to be retributive and deterrent in nature, and counter to the normal reparative function of tort and contract remedies.¹¹ At the state

⁶*In re Air Crash Disaster at Gander, Newfoundland, on December 12, 1985* 684 F.Supp. 927 (WD Kentucky, 1987) per Johnstone CJ [hereinafter *Gander*] at 931, citing *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48, 99 S.Ct. 2121, 2125-26, 60 L.Ed.2d 698 (1979)[hereinafter *IBEW* cited to U.S.]; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974); Prosser and Keeton, *The Law on Torts*, 5th ed., (St. Paul, Minn.: West Pub. Co., 1984) [hereinafter *Prosser*] s. 2 at 9-15. See also G. Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment" (1982) 56 S. Cal. L. Rev. 133.

⁷*Floyd* at 1482 citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 2759, 69 L.Ed.2d 616 (1981), *IBEW* and *Prosser*.

⁸See *Fowler v. Mantooth*, 683 S.W.2d 250, 252-53 (Ky.1984); H. Stoll, "Penal Purposes in Tort Law" (1970) 18 Am. Jour. of Comp. Law 3 [hereinafter *Stoll*].

⁹*Restatement (Second) Of Torts* s. 908(2) (1979) states: "[P]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."

¹⁰*Lockerbie II* at 1272. For deeper insight into punitive damages, see Owen, "Punitive Damages in Products Liability Litigation" 721 Mich. L. Rev. 1257; C. Morris, "Punitive Damages in Tort Cases" (1931) 44 Harv. L. Rev. 1173; Note, "Exemplary Damages in the Law of Torts" (1957) 70 Harv. L. Rev. 517; Kuklin, "Punishment: The Civil Perspective of Punitive Damages" (1989) 37 Clev. St. L. Rev. 1; *Wilkes v. Wood* 2 Wils K.B. 203, (1763) 95 E.R. 766.

¹¹*KAL* at 1486, and *Lockerbie II* at 1272, both citing *IBEW* at 2125 and *Browning-Ferris Indus. v. Kelco Disposal, Inc.* 492 U.S. 257, 109 S.Ct. 2909, 2932, 106 L.Ed.2d 219 (1989).

level, however, the purpose of punitive damages are not so well defined, and punitive damages are sometimes used to punish, and sometimes used to compensate a plaintiff for injuries to pride, dignity, or reputation that would not otherwise be compensated through traditional tort awards intended to make a plaintiff whole. In a minority of states punitive damages were viewed as serving a compensatory function, to compensate an injury in aggravated circumstances,¹² whilst in other states exemplary damages may properly partake of both a punitive and a compensatory character, or even having a purpose beyond punishment and affording the injured party a personal monetary recovery over and above compensatory loss.¹³

In the United States, with the exception of a minority of states, the accepted purpose of punitive damages therefore is to punish and deter. Traditionally, punitive damages were not available in contract actions,¹⁴ and courts have adhered to this rule.¹⁵ Recently exceptions have been made in product liability cases involving automobile, pharmaceutical and aviation products¹⁶ and cases where there is an implied duty of good

¹²P. Barlow, "Punitive Damages Under the Warsaw Convention: Mixing Apples with Oranges" (1992) XVII-II Ann. Air & Sp. L. 71 [hereinafter *Barlow*] at 77 gives the example of New Hampshire, where punitive damages have a compensatory function, citing *Fay v. Parker* (1873) 53 NH 342 and Ghiardi & Kircher, *Punitive Damages Law and Practice*, vol.1 (Clark Boardman Callaghan, 1984) at s.1.01. H. Edelman, "Punitive Damages Crash in the Second Circuit: *In Re Air Disaster at Lockerbie, Scotland* on December 21, 1988" (1992) 58 Brook. L.R. 497 [hereinafter *Edelman*] at 522 n.93 gives the example of New York, where courts view punitive damages as having a purpose beyond punishment, affording the injured party a personal monetary recovery over and above compensatory loss, citing *Racich v. Celotex Corp.* 887 F.2d 393, 397 (2d Cir. 1989).

¹³*Lockerbie II* at 1272. According to *Prosser* at 9 n.20, New Hampshire and Michigan have allowed punitive damages as extra compensation for injured feelings or sense of outrage, whilst Connecticut has allowed punitive damages for expences in litigation.

¹⁴F. Pollock, *The Law of Torts*, 3rd ed. (Philadelphia: The Blackstone Publishing Company, 1894) at 685: "Exemplary or vindictive damages, as a rule, cannot be recovered in an action on a contract, and it makes no difference that the breach of contract is a misfeasance capable of being treated as a wrong."

¹⁵*Barlow* at 79, citing *Croghan v. Metz* (1956) 47 Cal.2d 398 at 404-405, 303 p.2d 1029, 1033; *Chelini v. Nieri* (1948) 32 Cal.2d 480 at 487, 196 p.2d 915; *Restatement (Second) of Contract* (1981) s.355: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." Typically punitive damages were awarded in torts or assault and battery, libel and slander, deceit, seduction, alienation of affections, malicious prosecution, trespass to property, private nuisance and conversion: *Prosser* at 11.

¹⁶*Barlow* at 80, citing *Rosendin v. Avco Lycoming Div.* No. 202, 715 (Super. Ct. Santa Clara County, Cal., 8 March 1972); *Tool v. Richardson-Merrell, Inc.* 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *In re Johns-Manville Corp.* 26 B.R. 420 (S.D.N.Y. 1983); *Roginsky v. Richardson-Merrell Inc.* 378 F.2d 832 (1967); *Grimshaw v. Ford Motor Co.* No. 19-77-61 (S.Ct., Orange Cty., Cal. 7 February 1978), aff'd as

faith and fair dealing, where there is a special relationship between the parties.¹⁷ The latter cases typically involved fiduciary relationships, such as between insurer and insured, where the courts have held that a breach of contract can amount to a tort justifying punitive damages.¹⁸ The expansion of availability of punitive damages has been marked by continual challenges by courts, legislatures and commentators, leading to changes in the law to restrict such awards.¹⁹ To date, there have been no suggestions that a contract of carriage creates a special or fiduciary relation between carrier and passenger.

The courts have, as will be seen, determined that the Warsaw Convention was meant to be a *compensatory* scheme of liability. Therefore one of the arguments against punitive damage awards is that because it is penal in nature rather than compensatory, it cannot be recovered under the Warsaw Convention since the Convention was intended to be a compensatory scheme of liability.²⁰ As noted by the *Floyd* court:

Nowhere in the Minutes of the Convention is there any mention of deterring misconduct by imposing punitive damages on derelict air carriers. ... Thus, the concurrent legislative history supports the

amended, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); D. Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products" (1982) 49 U. Chi. L. Rev. 1; R. Allen, "Controlling the Growth of Punitive Damages in Product Liability Cases" (1985) 51 J. Air L. & Com. 567.

¹⁷*Barlow* at 81, citing *Seaman's Direct Buying Service v. Standard Oil of California* 36 Cal.3d 752, 686 P.2d 1158, 206 Cal. Rptr. 480 (1973); *Smith v. New Castle County Vocational-Technical School* dist. 574 F.Supp. 813, 826 (D.Del. 1983).

¹⁸But not without criticism; *Caruso v. Republic Insurance Company* 558 F.Supp. 430 (D.Maryland 1983); *W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.* 746 F.2d 215, 218 (3d Cir. 1984); Pennington, "Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years" (1989) 42 Ark. L. Rev. 31 at 50.

¹⁹*Barlow* at 83 gives the examples of legislative caps on punitive damages, appellate court pronouncements, higher standards of proof and constitutional challenges to punitive damages.

²⁰E. Vivo, "The Fatal Passage: Exemplary Relief and the Human Instinct for Self-Preservation" (1986) 51 J. Air L. & Com. 303 gives three reasons why punitive damages, and the related idea of deterrence, is not particularly well suited in aviation cases. First, there is no statute setting forth each degree of behavior and its relation to the degree of crime that has been committed; there is a sliding scale ranging from gross negligence through recklessness to malicious behavior against which a court has to apply the facts of the case. Therefore there is a grey area facing the court, whether the aircraft operator was reckless or perhaps possessed some evil motive in his actions leading up to the disaster. Second, punitive damages in an aviation case do not act as a deterrent, in that the crew members often have lost their lives as well. Hence there is only indirect deterrence, shifting the emphasis away from the cockpit to the origin of the conduct, namely the employer's improper and inadequate training. Third, there is little purpose in punishing the carrier for the split-second decisions that were made by the crew, especially since the crew must have known what was in store for themselves as well as their passengers.

interpretation that the Convention contemplates recovery of only compensatory damages.²¹

Another argument before the courts is that the Warsaw Convention was drafted primarily by Civil law jurists, and under the Civil law of contract, punitive damages were generally not available.²² Such damages are viewed as both excessive and redundant when unlimited compensatory damages are available.²³ For example, the *Lockerbie II* court has held that:

The context within which the Convention was written adds further support to the conclusion that the damages contemplated by Article 17 are purely compensatory. Under civil law, as noted, an action under the Warsaw Convention sounds in contract. Punitive damages are generally not available in civil law contract actions. In fact, under the civil law they do not appear to be available at all.²⁴

²¹ *Floyd* at 1482. The court went on to hold also that state law claims for punitive damages would be inconsistent with the intent of the Convention, and therefore would not be allowed:

As our discussion has indicated, the Warsaw Convention contemplated recovery of only compensatory damages. We believe that the intent of the Convention to provide compensatory damages suggests that it would be inconsistent to allow punitive damages which serve a purpose very different from compensating victims.

Similar holdings have been made in *KAL* at 1486 and *Lockerbie II* at 1284.

²² Shawcross & Beaumont, *Air Law*, 4th ed., vol.1 (London: Butterworths, 1995) [hereinafter *Shawcross*] at VII(115.1), citing *Floyd*, *Lockerbie II*, *KAL*, G. Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* (Denver, The Netherlands: Kluwer, 1977) [hereinafter *Miller*] at 233-237 and *Cooperativa de Seguros Multiples de Puerto Rico v. San Juan*, 289 F.Supp 858, (D.Puerto Rico 1968) [hereinafter *Cooperativa*] at 859-60 where the court held that "It may be validly asserted that in Puerto Rico, which is a Civil Law country, the doctrine of punitive damages does not prevail." See also R. Mahoney, "Punitive Damages: It's Time to Curb the Courts" *The N.Y. Times* (11 December 1988) 3 and *Edelman* where the writer throughout his article emphasizes this point.

²³ *Lockerbie II* at 1285-86.

²⁴ *Lockerbie II* at 1281, citing *Cooperativa*; M. Planiol & G. Ripert, *Treatise On the Civil Law*, 11th ed., (St Paul, Baton Rouge: Louisiana State Law Institute, 1959) trans. with the authority of Librarie Generale de Droit et de Jurisprudence, Paris [hereinafter *Planiol*] at vol. 2, pt. 1, no. 247. The plaintiffs argued that the national laws of many of the contracting parties allowed the equivalent of punitive damages because they weighed the degree of fault in tort actions. The court brushed aside this argument by stating that these damages were nevertheless free from punitive considerations and were explained by the principle that the plaintiff was entitled to adequate compensation or satisfaction for the mental harm suffered. The French Civil Code, Articles 1382-84 set out in no uncertain terms that any damages to be paid for damage done is to be for repairing the damage; it is compensatory. See also P. Tourneau, *La Responsabilité Civile*, 3rd ed. (Paris: Dalloz, 1982) at para. 1075, 1077 where the author states that for *la responsabilité délictuelle*, the principle is *l'adéquation de la réparation au préjudice, la réparation intégrale*.

Again, in *Floyd*, the court found that in civil law systems, an action under the Warsaw Convention sounds in contract²⁵, and punitive damages generally are not available in contract actions.²⁶ The damages that were available, according to the *Lockerbie II* court, were of two types, namely *dommage matériel* and *dommage moral*.²⁷ Both these types of damages were compensatory in nature, the former for pecuniary loss and the latter for nonpecuniary loss; they were not punitive in character, and therefore to allow punitive damages not compensatory in nature would be contrary to the expectations of the jurists who drafted Article 17 and the contracting states that adopted it.

In England, the cause of action for damages pursuant to the Warsaw Convention is an action in contract, and not torts.²⁸ English law has traditionally restricted punitive

²⁵Citing *Block v. Compagnie Nationale Air France* 386 F.2d 323, 331 (5th Cir, 1967), cert. denied, 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968) [hereinafter *Block* cited to F.2d]; Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law* (Montreal, Quebec: McGill University, 1981) at 403-04.

²⁶Citing *Plainol*; Barry Nicholas, *French Law of Contract* (London: Butterworths, 1982) at 226.

²⁷Citing from R. Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* (Denver, The Netherlands: Kluwer, 1981) at 157; Miller at 112.

²⁸*Grein v. Imperial Airways, Ltd* (1936) 1 Avi. 622 at 629 talks of "a case of liability arising out of a contract for international carriage"; again at 634:

Bearing in mind these general considerations as to the manifest object of the Convention I turn to a closer examination of its more important terms. The definition of "international carriage" is contained in paras. 2 and 3 of Art. 1. Para 2 at the outset begins the definition by reference to the contract itself. This indeed is what would be expected seeing that the Convention lays down rules governing the terms and operation of contracts of carriage which will be enforced in the Courts of the High Contracting Parties. The rules are rules relating not to journeys, not to flights, not to parts of journeys, but to carriage performed under one (or in cases falling under para. 3 more than one) contract of carriage. The contract ... is, so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not.

Furthermore, the drafting history makes it clear that a contract action was envisaged. Sir Alfred Dennis at the Conference said:

One must consider the liability of the carrier is provided for and regulated by Articles 22, 23, 24 and 25. I may say that the principle presently adopted by our Government is to consider that these questions must be solved by the free will of the parties. In the Convention we propose to replace a system of free contract by a system of law, of regulation, of by-laws. My Government feels that those rules must be of such a nature that they can appear in a just, equitable *contract* between equal parties placed upon equal footing.

damages, or exemplary damages, to cases of intentional torts. In 1964, the leading case of *Rookes v. Barnard*²⁹ stated that exemplary damages are damages whose object was to punish or deter, as distinct from compensatory damages (including aggravated damages), and therefore there were only three categories of cases in which an award of exemplary damages could serve a useful purpose, namely in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, in the case where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff, and where statute expressly authorized such damages.³⁰ It is therefore unlikely that punitive, or exemplary damages would ever be awarded in England under the Warsaw Convention unless the law is changed.

The nature of the cause of action for damages and the nature of punitive damages themselves, therefore, precluded any award for punitive damages in most jurisdictions.³¹ The only jurisdiction, in fact, where punitive damages were adjudicated upon was in the United States. It is to this jurisdiction that the rest of the discussion will focus.

III. The Beginning

In 1978, the New York Supreme Court had an opportunity to discuss the issue of punitive damages in *Cohen v. Varig Airlines(S.A. Empresa de Viacao Aerea Rio Grandense)*.³² The plaintiffs were on a tour of South America. On one leg of their journey, the plaintiffs were on a flight from Sao Paulo Brazil to New York, with a stop in Rio de Janeiro where the plaintiffs disembarked. The plaintiffs were concerned that their

Second International Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, R. Horner & D. Legrez trans. (South Hackensack, New Jersey: Fred B. Rothman & Co., 1975) [hereinafter *Minutes*] at 42-43. Elsewhere in the *Minutes* the delegates referred to contractual notions such as "contract clauses" (at 43) and "performance of the contract" (at 64, 71). The wording of the Convention also points to contract actions. For example, Article 1(2) refers to the "contract made"; Article 3(2) refers to the "contract of carriage"; Article 23 refers to the "whole contract".

²⁹[1964] 1 ALLER 367 (H.L.).

³⁰*Ibid.* at 410-411.

³¹For a discussion of punitive damages in other jurisdictions, see *Stoll*.

³²405 N.Y.S.2d 44 (Sup. Ct., 1978).

baggage would not be unloaded from the flight, and informed the defendants of this. The defendants refused to unload the plaintiffs' baggages, and in fact the luggage was lost and never recovered. The plaintiffs sued the airline for lost baggage, mental anguish, inconvenience, discomfort, humiliation and annoyances as well as punitive damages.

The majority of the judgment addressed the question of wilful misconduct, which the court found had not been proven. The lower court did not award any punitive damages, nor did the majority of the Supreme Court. The only suggestion that punitive damages might be recoverable is found in the dicta of the dissenting judgment of Lupiano J, where he says:

Finally, no recovery was given by the trial court for punitive damages. Such damages, in any event, could be recoverable only if the defendant's conduct amounted to a willful detention of plaintiffs' property with reckless and wanton indifference to plaintiffs' right or a malicious intent to deprive plaintiffs of same. Again, this record would not admit of such an award.³³

The first case in which the majority decision suggests that punitive damages may be recoverable was the case of *Hill v. United Airlines*³⁴. In this case the plaintiffs were flying from Kansas City to Tokyo via Denver, Colorado and Seattle, Washington. Whilst on the flight from Kansas City to Denver, the plaintiffs were told that all flights from Denver to Seattle were delayed due to inclement weather to Seattle. The plaintiffs were concerned as they had to catch the connecting flight from Seattle to Tokyo, and expressed their concern to United Airlines staff on the ground in Denver. They were again told that all flights to and from Seattle would be delayed due to the weather, but nevertheless the plaintiffs were put on an alternate Denver-Portland-Seattle flight. When the plaintiffs arrived at Seattle, their connecting flight to Tokyo had left, and the plaintiffs discovered not only that the airport had in fact been open all morning, but their original Denver-Seattle flight had been cancelled because the "necessary equipment", presumably an aircraft, was not available. As a result of the missed flight, the plaintiffs suffered delay

³³*Ibid.* at 55.

³⁴550 F. Supp. 1048 (1982) (USDC, D. Kansas) per Saffels DJ [hereinafter *Hill*].

and consequent damages. They claimed both compensatory and punitive damages under the Tort of intentional misrepresentation, and the defendants brought this motion to dismiss the claim. The court overruled the defendant's motion.

The court found that the action brought under an intentional tort was brought outside the Convention, since it was not an action for bodily injury, damage to baggage or cargo. In other words, the cause of action was not one founded in the Convention.³⁵ The court did not find this a problem, and held that the Warsaw Convention's provisions applied. The court went on to find that the plaintiffs had properly invoked Article 25 wilful misconduct, which:

make an exception to defendant's limited liability and *might* entitle plaintiffs to recover actual and punitive damages in a sum exceeding Ten Thousand Dollars (\$10,000) *if they prove* the elements of intentional misrepresentation.³⁶ [emphasis added].

Hence the court was of the opinion that if the plaintiffs could prove the necessary elements of misrepresentation, they would be entitle to punitive damages.

The judgment in *Hill* has not been without criticism. In fact, all the subsequent cases that have mentioned *Hill* have been critical of its reasoning, or lack thereof. The plaintiffs claimed damages for "intentional misrepresentation" under the Warsaw Convention. The court in *Hill* found that such a claim was completely outside the Warsaw Convention ("Liability, if any, is predicated on defendant's commission of the tort of misrepresentation, a circumstance completely outside of the Warsaw Convention."³⁷). Inexplicably, the court went on to allow a claim for punitive damages under the Article 25 "wilful misconduct" exception from limitation ("While the Warsaw Convention is basically the controlling law in this case, plaintiffs have properly invoked the provisions of Article 25(1), which make an exception to defendant's limited liability

³⁵It is therefore surprising that L. Moore, "The Lockerbie Air Disaster: Punitive Damages in International Aviation Under the Warsaw Convention" (1992) 15 Hous. J. Int'l L. 67 [hereinafter *Moore*] at 81 has stated that the cause of action was based upon Article 19 of the Warsaw Convention.

³⁶*Hill* at 1056.

³⁷*Ibid.* at 1054.

and might entitle plaintiffs to recover actual and punitive damages. ...³⁸). The court did not explain how the claim before it could be outside the Convention and yet grounded in the language of Article 25. This led the court in *Gander* to state that:

The court does not find the decision in *Hill* to be persuasive. ... The reasoning in *Hill* is not logically consistent and the court's holding is of dubious precedential value in this case. Consequently, this court declines to follow the rule or the decision in *Hill*.³⁹

The *Gander* court came to the conclusion that punitive damages are not recoverable, finding support for its conclusion in other decided cases.⁴⁰ One such case was *Harpalani v. Air-India, Inc.*⁴¹ *Harpalani* decided, *inter alia*, that no court has ever awarded punitive damages under the Convention, even where wilful misconduct was found.⁴² Referring to *Hill*, the court stated that:

[o]nly one court has suggested that the Warsaw Convention does permit punitive damage awards. ... That court did so in dicta and without carefully examining the authority for punitive awards, and this court declines to adopt its conclusion.⁴³

Similar criticisms have been levelled at *Hill* by the court in *Floyd*⁴⁴ and *Lockerbie II*,⁴⁵ which have declined to follow *Hill*. In so far as *Hill* purports to exclude *and* include the application of the Warsaw Convention in the same breath, it is not clear whether the court in *Hill* was of the opinion that punitive damages are recoverable in an action governed by the Convention.

³⁸*Ibid.* at 1056.

³⁹*Gander* at 933.

⁴⁰*Butler v. Aeromexico*, 774 F.2d 429, 431 (11th Cir, 1985) per Dumbauld, DJ [hereinafter *Butler*]; *Cohen v. Varig Airlines*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1978) [hereinafter *Cohen* cited to A.D.2d]; *Gander* and *Harpalani* [*infra* note below].

⁴¹634 F.Supp. 797 (N.D.Ill. 1986) per Duff DJ [hereinafter *Harpalani*].

⁴²Citing as examples *Merck & Co. v. Swiss Air Transport Co., Ltd.*, 19 Avi. 18, 190 (SDNY Dec 6 1985); *Tarar v. Pakistan International Airlines*, 554 F.Supp. 471 (SD Texas, 1982); *Cohen*; *Butler*.

⁴³*Harpalani* at 799.

⁴⁴*Floyd* at 1483.

⁴⁵*Lockerbie II* at 1277. The court noted that only two cases supported the argument that punitive damages do not conflict with the Convention's purposes, namely *Hill* and the District court decision in *KAL*. It criticised *Hill* as a holding not supported by any detailed reasoning, and the latter case as one affirmed without opinion. See *infra* note 105.

IV. Silence of the Warsaw Convention

The Warsaw Convention is silent on the issue of recoverability of punitive damages under its provisions; similarly, the *travaux préparatoire* contain no express discussion on this issue.⁴⁶ This silence has led to the invention of many ingenious arguments for or against the award of punitive damages, which will be discussed below. At this juncture, however, two contrasting approaches taken by the courts on the issue of silence would be mentioned. The first approach in favour of punitive damages is that punitive damages have always been a part of the common law tort remedies, and therefore if it is to be excluded then this must be expressly stated. This was the reasoning employed by the court in *Karachi*, citing *Racich v. Celotex Corp.*⁴⁷ In *Racich* the court rejected an argument that punitive damages were not available to the plaintiff unless statutorily provided for. The court stated that:

[s]ince a common law tort action for personal injury by definition includes the element of damages, including punitive damages when factually appropriate, the omission in the revival statute and the legislative silence with respect to punitive damages do not preclude such a recovery.⁴⁸

Therefore, said the *Karachi* court, since no language in the Convention or its legislative history expressly preempts or precludes claims for punitive damages, these would be allowed, although consistent with Article 22, all damages, including punitive damages, cannot exceed \$75,000.⁴⁹

The counter argument is that the Warsaw Convention was the product of a largely Civil law background, and therefore if punitive damages are not expressly provided for

⁴⁶See for example *Floyd* at 1486, *Lockerbie II* at 1280 and *KAL* at 1485, all confirming this point. *Edelman* at 525 n.108 alludes to an instance when penal provisions were discussed at the Convention in relation to document requirements. The drafters decided not to include penal sanctions, and therefore the writer submits that the drafters would not have intended to include punitive damages either.

⁴⁷887 F.2d 393 (2d Cir., 1989) [hereinafter *Racich*].

⁴⁸*Ibid.* at 396.

⁴⁹*Karachi*, at 19, citing *Chan v. Korean Airlines, Ltd.*, 109 S.Ct 1676, 1683-84, 104 L.Ed.2d 113 (1989) [hereinafter *Chan* cited to S.Ct.].

then the drafters and signatories did not intend that they be awarded.⁵⁰ During the 1925 Paris Convention, out of the 44 countries present only 4, namely the United Kingdom, Canada, New Zealand and South Africa were Common law jurisdictions.⁵¹ At the 1929 Warsaw Convention, out of the 32 countries present only 3, namely the United Kingdom, Australia and South Africa were Common law jurisdictions.⁵² At the same time, the Common law world was starting to exclude such damages in wrongful death cases.⁵³ Therefore, as the argument runs in *Lockerbie II*, it is unlikely the drafters intended to preserve a Common Law right to punitive damages, and this view was reinforced by the drafter's silence on the subject of punitive damages:

The drafters' silence on this subject leads logically to the assumption that punitive damages were not addressed because they were never contemplated. The plaintiffs maintain that the fact that the Convention never referred to punitive damages is without significance because the Convention left the calculation of damages to local law, and did not need therefore to address the subject. Yet, there can be no doubt that had the question been raised it would have been hotly debated, especially since the concept is unique to the common law, and also because many of the airlines were state-owned. Again, nothing in the Convention's drafting history points to the drafters contemplating that the Convention would be used to punish or deter tortious behavior on the part of airlines. Rather, all of the drafters' actions point to the conclusion that they sought to limit recovery simply to compensation.⁵⁴

The fact that the Warsaw Convention is a product of the Civil law background is only one of the many arguments considered by the courts. Silence in itself is equivocal; it does not assist the debate on either side. It is the other arguments put forward that have

⁵⁰*Shawcross* at VII(115.1). R. Wilkinson, "Recovery of punitive damages under the Warsaw Convention: A hotly contested issue in the USA" (1991) 16 Air L. 25 [hereinafter *Wilkinson*] is of the same opinion.

⁵¹ The United States had observers in attendance but were not represented by official delegates.

⁵² Again, the United States had two observers in attendance but were not represented by official delegates.

⁵³ *Wilkinson* at 25, *Barlow* at 87, citing U.K.: *Law Reform (Miscellaneous Provisions) Act, 1934* (U.K.), 24 & 25 Geo. 5, c. 41; Canada: (current statutes) *Survival of Actions Act* 1978, (Alta), c.35; *Trustee Act*, R.S.M. 1970, c T-1960; *Survival of Actions Act*, R.S.N.B. 1973, c S-18; *Survival of Actions Act*, R.S. Nfld. 1070 c. 365; *Survival of Actions Act*, R.S.N.S. 1967 c. 298; *Survival of Actions Act*, 1978 (P.E.I.) c. 21; Australia: *Law Reform (Miscellaneous Provisions Act* 1944 (NSW); *Common Law Practice Act* 1867-1981 (Qld); *Survival of Causes of Action Act*, 1940 (SA); *Administration of Probate Act* 1935 (Tas); *Administration and Probate Act* 1958 (Vic); *Law Reform (Miscellaneous Provisions) Act* 1941-1962; *Law Reform (Miscellaneous Provisions) Act* 1956 (NT); New Zealand: *Law Reform (Miscellaneous Provisions) Act* 1936.

⁵⁴ *Lockerbie II*, at 1284.

led the majority of the courts to decide that punitive damages are not recoverable under the Warsaw Convention.

V. Exclusivity

Before examining the arguments proper for or against punitive damage awards, one other question will first be looked at - the question of exclusivity and preemption.⁵⁵ This question is important because for potential claimants, there are two alternative routes leading to the recovery of punitive damages. First, there is the argument that the Warsaw Convention itself either provides for implicitly,⁵⁶ or at least envisages punitive damage awards either by way of cause of action or remedy. Second, even if the Warsaw Convention itself did not envisage punitive damage awards, these may still be recovered because state or federal common law permits these awards, and they are not preempted or rendered impotent by the Warsaw Convention. In other words, does the Warsaw Convention provide a cause of action, and what effect would that have on subsidiary state or federal causes of action and remedy that permit punitive damage awards? A finding of a Warsaw Convention cause of action that is exclusive would instantly and in one fell swoop eliminate all recourse to other state and federal laws. There appear to be three positions:

- (1) Some cases hold that the Convention does not provide any cause of action. There is no preemption; state or federal common law applies and preceeds the provisions of the Convention.
- (2) Partial preemption; state or federal law applies alongside the Convention's cause of action but only applies to the extent that it does not conflict with, or prevent the application of the Convention. In other words, the Convention provides an independent cause of action *and* an exclusive remedy.
- (3) Total preemption; the Warsaw Convention provides the exclusive cause of action. State or federal common law causes of action are not permitted.

⁵⁵See F. Chapman, "Exclusivity and the Warsaw Convention: *In Re AIR DISASTER AT LOCKERBIE, SCOTLAND*" (1991) 23 U. Miami Inter-Am.L.Rev. 493, who argues that the Warsaw Convention provides a cause of action but not exclusively; however, all remedies are subject to the limits set out by the Warsaw Convention [hereinafter *Chapman*].

⁵⁶Since, as noted above, the Warsaw Convention is silent on the issue of punitive damages.

A. No Preemption and no cause of action

Historically, the earliest cases on the issue of the Warsaw Convention cause of action tended to find that the Warsaw Convention did not create a cause of action for wrongful death, and that any such action had to be brought under an enabling statute.⁵⁷ The first American court to consider this issue was the Southern District of New York in *Choy v. Pan American Airways Co.*⁵⁸. The court held that:

There is no enabling act vesting the ownership of the cause of action stated by the Warsaw Convention nor even stating who might be thought to be injured by a death, and, though the liability stated in Article 17 is part of the treaty which was adopted, we do not understand how it can be defined or enforced without statutory assistance, which it has not as yet received.⁵⁹

Hence, the survivors of a person wrongfully killed hold no right of action absent a specific statute that prescribes such recovery and names the persons entitled to share in it. *Choy* was followed in the New York Supreme Court in *Wyman v. Pan American Airways, Inc.*,⁶⁰ but not in the later case of *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*⁶¹. Without referring to the earlier cases, the court in *Salamon* reasoned, *inter alia*, that "[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do."⁶²

⁵⁷Such as *Fatal Accidents Act (U.K.)* 1846 9 & 10 Vict. c. 93, *Law Reform (Miscellaneous Provisions) Act 1934*, (U.K.) 24 & 25 Geo. 5, c. 41.

⁵⁸[1941] Am.Mar.Cas. 483 (S.D.N.Y.) [hereinafter *Choy*].

⁵⁹*Ibid.* at 488.

⁶⁰181 Misc. 963, 43 N.Y.S.3d 420, 423 (Sup.Ct. 1943), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785, *cert. denied*, 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432 (1944). At around the same time the case of *Ross v. Pan American Airways* 85 N.E.2d 880 (N.Y. 1949) [hereinafter *Ross*] was decided; this case held that the "Convention overrides and supplants any contrary local law as to the legality of limiting a carrier's liability" at 884. *Ross* has been interpreted by *Moore* at 75 as holding that the Convention provided an independent cause of action, preempting any local cause of action.

⁶¹107 N.Y.S.2d 768, 771 (Sup.Ct. 1951), *aff'd*, 281 A.D. 965, 120 N.Y.S.2d 917 (A.D. 1953).

⁶²*Ibid.* at 773.

Subsequently, the Southern District of New York again considered the issue in *Komlos v. Compagnie Nationale Air France*.⁶³ The court disagreed with the *Salamon* court, relying primarily on the text of a letter written by Secretary of State Cordell Hull to President Roosevelt describing the Convention:

The effect of article 17 (ch.III) of the Convention is to *create a presumption of liability* against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.⁶⁴ [emphasis added].

This portion of Secretary Hull's letter was interpreted narrowly by the *Komlos* court as clear evidence that the Warsaw Convention did not create a cause of action, only a presumption of liability. Oddly, Leibell J. went on to state that a separate right of action would stem from the Convention in the situation where an accident occurs in a forum that does not provide any cause of action for wrongful death.⁶⁵

The Second Circuit became the first circuit to discuss the question in *Noel v. Linea Aeropostal Venezolana*.⁶⁶ The court agreed with the interpretation given to Secretary Hull's letter that the Warsaw Convention did not supply the plaintiff with a

⁶³111 F.Supp. 393 (S.D.N.Y. 1952), rev'd on other grounds, 209 F.2d 436 (2d Cir. 1953) [hereinafter *Komlos* cited to F.Supp.].

⁶⁴*Ibid.* at 401-402, quoting [1934] U.S.Av.Rep. 239, 243.

⁶⁵*Ibid.* at 402, the judge held:

If the decedent meets his death in the course of an "international transportation," as that term is defined in Article 3 of the Convention, then if the place of the accident is within a nation that has not adhered to the Warsaw Convention and has its own statute for wrongful death actions, the conditions and limits of the Convention, including Article 24(2), would nevertheless be applied in a suit for wrongful death in a forum specified as a proper forum under Article 28 of the Convention. But if the law of the place of the accident does not provide for a right of action for wrongful death, the forum would apply Article 17 of the Convention; and under those circumstance it might be said that Article 17 created the right of action for wrongful death. Under those circumstances, it may also be said that the right of action, even though its gravamen is *ex delicto*, arises out of the contract of carriage which made the Rules and Regulations of the Warsaw Convention applicable to the international transportation.

⁶⁶247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907, 78 S.Ct. 334, 2 L.Ed.2d 262 (1957) [hereinafter *Noel* cited to F.2d].

federal cause of action.⁶⁷ The court went further and rejected Leibell J's statement in *Komlos* that the Convention provides a stopgap cause of action in situations where the place of injury does not.⁶⁸ The *Noel* decision was followed by subsequent cases such as *Maugnie v. Compagnie Nationale Air France*,⁶⁹ *Husserl v. Swiss Air Transport Co.*⁷⁰ and *Notarian v. Trans World Airlines, Inc.*⁷¹.

B. A cause of action under the Warsaw Convention and preemption

While the older cases have held that the Warsaw Convention did not create a cause of action, 21 years later the position was reversed. In 1978 the Second Circuit decided *Benjamins v. British European Airways*.⁷² In a majority 2-1 decision, the court held that the Warsaw Convention *does* create an independent cause of action for wrongful death.⁷³ In finding this, the court relied on three main arguments. First, the court stressed that the overriding policy goal embodied in the Convention is the desire to formulate a uniform and universal set of legal rules to govern international air transportation, and this could be best achieved through a Convention cause of action.⁷⁴ Second, Article 30(3) of the Convention created a right of action for a passenger whose

⁶⁷*Ibid.* at 679.

⁶⁸*Ibid.* at 679-80.

⁶⁹549 F.2d 1256, 1258 n.2 (9th Cir.), cert. denied, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977).

⁷⁰388 F.Supp. 1238, 1243 (S.D.N.Y. 1975).

⁷¹244 F.Supp. 874, 877 (W.D.Pa. 1965).

⁷²572 F.2d 913 (2d Cir., 1978), cert. denied, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979) [hereinafter *Benjamins* cited to F.2d]. It is interesting to note that Lumbard J., one of the majority judges in *Benjamins*, had ruled in *Noel* 21 years before that no cause of action was created by the Warsaw Convention. In *Benjamins* the same Judge takes the opposite conclusion.

⁷³*Edelman* at 544 has suggested that not only did *Benjamins* create a Convention cause of action, it also is authority for the proposition that the Convention creates the *exclusive* cause of action. His authority for this proposition is the passage at 919 : "that the desirability of uniformity in international air law can best be recognized by holding that the Convention ... is ... the universal source of a right of action." It is submitted that this suggestion is erroneous; the court never intended to go as far as to declare an exclusive cause of action. The entire focus of the decision was to determine whether the Convention created *any* cause of action, and the court concluded that the Convention did create *a* cause of action. Indeed, the quotation cited by *Edelman* supports this. If the court concluded as the writer had suggested, then the court would have held that the Convention was the "universal source of the right of action."

⁷⁴*Ibid.* at 917, citing *Reed v. Wiser* 555 F.2d 1079, 1092 (2d Cir.), cert. denied, 434 U.S. 922, 98 S.Ct. 399, 54 L.Ed.2d 279 (1977) [hereinafter *Reed* cited to F.2d]. In fact, after *Noel*, not even the total lack of an appropriate domestic law cause of action would permit an action to be founded on the Convention.

baggage was lost where more than one carrier was involved;⁷⁵ there was no good reason why this should not be the case for passenger injury where there was only one carrier involved.⁷⁶ Third, the court found compelling the fact that Great Britain had enacted legislation⁷⁷ that substituted any statute or common law liability for wrongful death with the liability imposed by Article 17 of the Convention. According to the court, this suggested that the British delegates to the Convention believed that the Convention carried its own cause of action. As for Secretary Hull's letter, the court criticised *Komlos* for its heavy reliance on this letter.⁷⁸

In 1982 the Ninth Circuit decided *In re Aircrash in Bali, Indonesia on April 22, 1974*.⁷⁹ This case did not focus on the issue of whether the Warsaw Convention created a cause of action, but rather whether the Warsaw Convention preempted state law. The test applied by the court was whether the state law conflicted with the Congressional scheme embodied in the Convention,⁸⁰ or in other words whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸¹ Recognizing that Congress did not intend to preempt all state legislation in the field, since the Convention specifically required the application of local law to some issues, the court found that in this case California law necessarily conflicted with the congressional scheme:

Neither uniformity nor an effective limitation of the airlines' liability could be achieved if state law doctrines could be invoked to circumvent the application of the limitation. Accordingly, we hold that California law is preempted by the Warsaw Convention *to the extent* that California law

⁷⁵Citing *Seth v. British Overseas Airways Corp.* 329 F.2d 302, 305 (1st Cir.), cert. denied, 379 U.S. 858, 85 S.Ct. 114, 13 L.Ed.2d 61 (1964).

⁷⁶*Benjamins* at 918. To insist that a would-be plaintiff had to first find an appropriate cause of action in the domestic law of a signatory to hear his claim is not literally inconsistent with the principle of universality, it is inconsistent with the spirit of this principle.

⁷⁷*Carriage by Air Act* (U.K.), 1932, 22 & 23 Geo. 5, c. 36, s. 1(4).

⁷⁸*Benjamins* at 916-17.

⁷⁹684 F.2d 1301 (9th Cir, 1982) per Fletcher, Cir. J [hereinafter *Bali*].

⁸⁰*Ibid.* at 1307, citing *Ray v. Atlantic Richfield Co.* 435 U.S. 151, 157-58, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978) [hereinafter *Ray* cited to U.S.] and *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973).

⁸¹*Ibid.*, quoting *Hines v. Davidowitz* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

would prevent the application of the Convention's limitation on liability."⁸² [emphasis added].

In 1983, the Ninth Circuit had an opportunity to comment on *Benjamins* in *In re Mexico City Aircrash of October 31, 1979*.⁸³ The court agreed with the holding in *Benjamins* and the reasoning therein, but found further reasons for the conclusion. First, the wording of Article 17 "[t]he carrier *shall be liable* for damages sustained"[emphasis added] in its normal and natural meaning implied that a passenger may maintain an action to impose liability, and "only a strained reading" of Article 17 would lead to the conclusion that it only created a presumption of liability.⁸⁴ Second, Article 29 of the Convention provided for a time bar for all actions under the Convention, and this would be redundant unless the Convention provided a right of action which was subject to the time bar. Third, Article 29 also spoke of "the right to damages", which implied a right was "already assured by virtue of the Convention."⁸⁵ Disposing with the "however founded" and "without prejudice" language of Article 24, which was frequently cited for the argument that the Convention did *not* create its own cause of action, the court held that this language "is best explained as the result of uncertainties among the Convention delegates concerning certain attributes of the right that they meant to create", in particular the uncertainty over the devolution of the cause of action in cases of death.⁸⁶ Finally, on the topic of Secretary Hull's statement, the court found that a creation of a presumption of liability did not contradict the hypothesis that the article *also* created a cause of action, and that it is doubtful Secretary Hull's statement was intended to be a concise statement of the law.⁸⁷ The court, therefore, concluded that the Warsaw Convention provided an independent cause of action, but preempted California law only to the extent that the

⁸²*Ibid.* at 1308, citing *Bradfield v. TWA* 88 Cal.App.3d 681, 687, 152 Cal.Rptr. 172, 175 (1979). It is interesting to note that state law claims for compensatory damages would be allowed; state law claims for punitive damages would be preempted by the Convention only if they prevent the application of the Convention's limits. This seems to go against the flow of the rest of the judgment, which disallows punitive damages in its entirety.

⁸³708 F.2d 400 (9th Cir., 1983) [hereinafter *Mexico City*].

⁸⁴*Ibid.* at 412.

⁸⁵*Ibid.*

⁸⁶*Ibid.* at 414.

⁸⁷*Ibid.* at 415.

workers' compensation statute attempted to create an exclusive remedy for the death of an employee.⁸⁸ The court, however, did not say whether the cause of action under the Convention was to be the *exclusive* cause of action. It is probable that the court did not consider this issue at all, for nothing was mentioned in the judgment.⁸⁹

Whilst the remedy is therefore provided by the Warsaw Convention to the exclusion of state law remedies, the question remained open whether the Warsaw Convention provided the exclusive cause of action.⁹⁰ The Second Circuit in 1980 shed some light on this issue in the case of *Tokio Marine and Fire Insurance Co., Ltd. v. McDonnell Douglas Corp.*⁹¹ There was a dispute over whether the cause of action created by the Convention was in contract or in tort. Without answering this question and with little opinion, the court held that Article 24 of the Convention indicates the drafters did not intend a cause of action under the Convention to be exclusive.⁹²

In contradiction to the finding in *Tokio Marine*, the Fifth Circuit in the case of *Boeinger-Mannheim Diagnostics, Inc. v. Pan American World Airways*⁹³ decided that the Warsaw Convention created a cause of action *and* was the exclusive remedy:

The essential inquiry is whether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law. We have not previously addressed this question. We hold today that the Warsaw Convention creates the cause of action and is the

⁸⁸*Ibid.* at 418.

⁸⁹Although *Edelman* at 514 n.72 has interpreted the *Mexico City* decision as standing for the conclusion that the Warsaw Convention creates a cause of action but not necessarily the exclusive cause of action.

⁹⁰Some district courts have decided that the Warsaw Convention provides a non-exclusive cause of action but provided the exclusive remedy: *Rhymes v. Arrow Air, Inc.* 636 F.Supp. 737, 740 (S.D. Fla. 1991); *Alvarez v. Aerovias Nacionales de Colombia, S.A.* 756 F.Supp. 550, 555; *Calderon v. Aerovias Nacionales de Colombia* 738 F.Supp. 485, 486 (S.D. Fla. 1990).

⁹¹617 F.2d 936 (2d Cir. 1980) [hereinafter *Tokio Marine*].

⁹²Judge Van Graafeiland, the dissenting judge in *Benjamins*, had an opportunity here to repeat his view, that the Warsaw Convention did not create an exclusive cause of action.

⁹³737 F.2d 456 (5th Cir., 1984) per Politz Cir. J., cert. denied 469 U.S. 1186 (1985) [hereinafter *Boeinger*].

exclusive remedy. Our colleagues of the Second and Ninth Circuits previously have so concluded ..."⁹⁴

The court found that the Warsaw Convention created the "controlling cause of action",⁹⁵ and by article VI clause 2 of the United States Constitution (Supremacy Clause)⁹⁶ all treaties were the supreme law of the Land and any state law in conflict with a treaty was invalid.⁹⁷ In addition, a state law must yield if Congress preempted the field, either expressly or by regulating a subject so pervasively that it completely occupies the field. The test for non-expressed preemption was whether: (1) the area requires national uniformity,⁹⁸ (2) there is evidence of congressional design to preempt the field,⁹⁹ or (3) the state statute actually and directly conflicts with the federal provision. The court found that the Warsaw Convention had a major purpose of securing uniformity of liability for air carriers,¹⁰⁰ and this uniformity had both an international and intranational application. Hence Texas law, as related to the cause of action, was preempted.¹⁰¹

C. The punitive damages cases

Returning to the punitive damages cases, *Butler*¹⁰² illustrates the extent of the application of the principle that the Warsaw Convention preempts state law remedies.

⁹⁴*Ibid.* at 458, citing *Benjamins and Mexico City*.

⁹⁵*Ibid.* at 459.

⁹⁶The Supremacy Clause of the United States Constitution provides that:

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

⁹⁷*Boeringer*, citing *Ray*. See also *Dalton v. Delta Airlines, Inc.* 570 F.2d 1244, 1246 (5th Cir. 1978), *Smith v. Canadian Pacific Airways, Ltd.* 452 F.2d 798, 801 (2d Cir. 1971) and *Hill v. United States* 550 F.Supp. 1048, 1054 (D. Kan. 1982). These cases are to the same effect.

⁹⁸*Florida Lime & Advocado Growers v. Paul* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) [hereinafter *Florida Lime* cited to U.S.].

⁹⁹*Jones v. Rath Packing Co.* 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) [hereinafter *Jones* cited to U.S.].

¹⁰⁰Citing *Block v. Compagnie Nationale Air France* 386 F.2d 323 (5th Cir. 1967).

¹⁰¹Two other courts, both district courts, have also held that the Warsaw Convention provides the exclusive cause of action: *Velasquez v. Aerovias Nacionales de Colombia, S.A.* 747 F.Supp. 670, 675 (S.D. Fla. 1990) and *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980* 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 85 (2d Cir. 1983), cert. denied, 464 U.S. 845 (1983).

¹⁰²*Butler*, *supra* note 41 above.

The facts were that an aircraft crashed while attempting to land at Chihuahua airport in Mexico. Evidence showed that the crew attempted to land despite knowledge of the bad weather. The crew had also deactivated the radar, and continued to descend despite losing visibility. The crew could have aborted the approach after losing visibility, but chose not to do so. The plaintiffs claimed wilful misconduct and punitive damages. Alabama law provided for recovery *only for punitive*, and *not for compensatory*, damages in wrongful death cases. The District court, however, awarded compensatory damages and the plaintiff appealed.

The Court of Appeal found wilful misconduct on the part of the crew, and also that because the suit was brought under the Warsaw Convention in a federal court in Alabama, compensatory damages could be awarded despite the uniquely unusual rule under Alabama law regarding punitive damages. The Court of Appeal held that "[m]anifestly such a regime conflicts with the tenor of the Warsaw Convention, which contemplates compensation for victims of air disasters."¹⁰³ The District court had therefore not erred in awarding pecuniary damages.¹⁰⁴

In the light of the many cases which have held that state law remedies are preempted to the extent they prevent the application of the Warsaw Convention, the District court decision in *Karachi* (the second of only two decisions permitting punitive damage awards¹⁰⁵) whilst applying the correct mechanics came to the wrong conclusion.

¹⁰³*Ibid.* at 431.

¹⁰⁴This decision has been approved by *Floyd* at 1483:

While the court in *Butler* did not squarely hold that only compensatory damages are available under the Warsaw system, the decision clearly points to that result, which we make explicit today.

¹⁰⁵The first being the District Court decision of *KAL* M.D.L. 565 Misc. No. 83-0345, 1989 U.S. Dist. LEXIS 11954 (D.D.C. August 3, 1989). This was however a jury's punitive damages award affirmed by Chief Judge Aubrey Robinson without written opinion. Defence counsel addressed the court on the motion to dismiss the plaintiff's claim for punitive damages, and the judge's reply was: "I have read [the memorandum], and I have gone around and around in my own mind and with my clerk about it, but in the scheme of things, ... our view of the treaty differs from your view." Transcript of Proceedings, Vol. 12 at 1645, lines 18-22. C. Dubuc, "More Judicial Alchemy: Punitive Damages Under the Warsaw Convention" (1991) 58 Def. Counsel J. 39 [hereinafter *Dubuc*] at 40 suggests that from the words of

This case involved a flight from Bombay, India to New York with a stop in Karachi, Pakistan. During the stop in Karachi, four armed terrorists seized the aircraft. Twenty passengers were killed and a number were injured during the course of the hijacking. The plaintiffs claimed for, *inter alia*, punitive damages, which were allowed by the District court. The District court was of the opinion that the Convention did create a right of recovery for wrongful death and personal injury. The court went on to hold that "that remedy, whether it be contractual or tortious in nature, does not supercede other state common law remedies *not preempted* by the Convention."¹⁰⁶ Up to this stage, the court cannot be faulted. Then, for reasons discussed in the sections below, the court held that one such state *cause of action* not preempted by the Convention was for punitive damages. The court seems to confuse a cause of action and a remedy; it is submitted that the court was really referring to remedies. In any case, it is further submitted that the court was wrong in concluding the remedy of punitive damages was not preempted by the Convention.

A case that nicely sets out the idea of *partial preemption* was *Floyd*. There the court accepted those cases holding that the Warsaw Convention itself created a cause of action.¹⁰⁷ The court went on to find that the Warsaw Convention did not bar all state law claims, recognising that there would be situations where a passenger suffers an injury not covered by the Warsaw Convention, for example an injury suffered after disembarkation. Here the Warsaw Convention did not govern the relationship, and state law must take over; after all, the Convention was to unify certain rules, not *all* rules relating to international transportation by air.¹⁰⁸

the Judge, the court determined that punitive damages were available under applicable local law and then decided that an award of punitive damages would not contravene the Convention.

¹⁰⁶*Karachi*, *supra* note 4 at 19, citing *Tokio Marine* at 942 [emphasis added].

¹⁰⁷*Ibid.* at 1466, discussing *inter alia* the cases already set out above, such as *Komlos*, *Noel*, *Salamon*, *Benjamins*, *Boehringer* and *Mexico City*.

¹⁰⁸*Ibid.* at 1476.

Where the Convention applied, however, it preempts any inconsistent state law provision.¹⁰⁹ This was the result of the Supremacy Clause of the United States Constitution. Hence in the instant case, to the extent that the cause of action for intentional infliction of emotional distress recognized under Florida law conflicted with the cause of action for intentional infliction of emotional distress recognized under Article 17 of the Convention, Florida law was preempted. The court concluded that the Warsaw Convention provided for recovery of compensatory damages only, and that it would be inconsistent with the Convention's scheme of recovery to allow plaintiffs to recover punitive damages on their state law cause of action. The court was asked whether the Convention completely preempts state law causes of action once its provisions are triggered by an "accident" within the meaning of Article 17. The court declined to decide this issue, being satisfied that the Convention preempts those aspects of the plaintiffs' state law claims which are inconsistent with the Convention.

D. Total preemption

There is no dispute that the Warsaw Convention must preempt state laws which are in direct conflict with the Convention, under the Supremacy Clause of the United States Constitution. The question left unanswered by the *Floyd* court is whether state causes of action are completely preempted when the alleged state claim falls within the scope of the Convention. Without an "in-depth analysis", the *Boehringer* court held the Convention cause of action to be exclusive.¹¹⁰

The *Lockerbie II* court came to the same conclusion as the *Boehringer* court, giving the following reasons. First, the Convention did not expressly preserve state law.¹¹¹ Second, other jurisdictions had enacted implementing statutes that made an Article

¹⁰⁹*Ibid.* at 1477, citing *Ray, Butler, Bali* at 1307-08, *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.* 739 F.2d 536, 537 n.2 (11th Cir, 1984) and *Burnett v. Trans World Airlines, Inc.* [12 Avi. 18, 405], 368 F.Supp 1152, 1155 (D.N.M. 1973) [hereinafter *Burnett* cited to F.Supp.].

¹¹⁰*Lockerbie II* at 1273.

¹¹¹*Ibid.* at 1273-74 citing *Boehringer* (5th Cir.) and *Mexico City* (9th Cir.) as two circuit cases which have held that the Warsaw Convention cause of action is exclusive. While that may have been the holding in *Boehringer*, it is submitted that a careful reading of *Mexico City* at 414, n.25 reveals the 9th Circuit

17 action the exclusive remedy for claims governed by the Convention.¹¹² Third, the Convention did not expressly preempt state law causes of action either, and hence state law may be preempted by Congress either (i) expressly,¹¹³ or (ii) by an enactment of a scheme of federal legislation so pervasive that a court may infer Congress left no room for the states to legislate in the area¹¹⁴, or (iii) when the subject matter demands uniformity vital to national interests such that allowing state regulation "would create potential frustration of national purposes".¹¹⁵ It was under the latter doctrine that the court deduced the Convention preempts state law causes of action, since "the principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application in those laws"¹¹⁶ and "any attempt to construe the meaning of punitive damages under the laws of various states may easily become mired down in a morass of conflicting rules."¹¹⁷ The court examined potential conflicting choice of law rules, substantive law complications and complexities between federal courts and state courts. The adoption of state law as federal law would not solve the problems, since the laws could still vary between states and would also vary from one federal court

thought otherwise : "The best explanation for the wording of article 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive." *See also Chapman* at 504.

¹¹²*Ibid.*, citing England: *Carriage by Air Act* (U.K.), 1932, 22 & 23 Geo. 5, c. 36 s. 1(4); Australia: *Civil Aviation (Carrier's Liability) Act*, 1959-1973, s. 12(2), 2 Austl. Acts P. 643, 645 (1974); Canada: *Carriage by Air Act*, R.S.C. 1979, c. C-26, s.2(5).

¹¹³*Jones* at 525.

¹¹⁴*Lockerbie II* at 1274-75, citing *Schneidewind v. ANR Pipeline Co.* 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988); *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

¹¹⁵*Ibid.* at 1275, citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959) and *Florida Lime* at 144, 83 S.Ct. at 1218, 10 L.Ed.2d at 248 (1964).

¹¹⁶*Lockerbie II* at 1275.

¹¹⁷*Ibid.* *See also Edelman* at 536-339 where the writer discusses the choice of law problems that will arise and possible repercussions. The writer at 542-43 cites three reasons in support of *Lockerbie II's* finding of exclusivity. First, state law on punitive damages directly conflicts with the goals of uniformity of the Convention, and the Convention must take precedence. Second, preemption of independent state claims is a positive step towards the uniform application of different liability standards. Third, international treaties should be governed by federal law since state law has traditionally remained outside the scope of international affairs. For these reasons, the preemption of state claims was the only alternative for the court to adopt.

to another, so that even federal law would not be constant. In a poetic passage, the court said:

In sum, the existence of the state causes of action would not only result in the inconsistent application of law to the same accident, but also would cause enormous confusion for airlines in predicting the law upon which they would be called to respond. It would sink federal courts into a Syrtis bog where they would not know whether they were at sea or on good, dry land, see J. Milton, *Paradise Lost*, Book II, reprinted in 4 Harvard Classics, *The Complete Poems of John Milton* at 134 (1909), when deciding what law a plaintiff can rely upon, what law the court itself should apply, and why... [t]his surface unity [presumption of liability and \$75,000 limit] ignores both the lurking legal chaos and the huge expenditure of time and expense in litigation over the choice of law, which would be inevitable if conflicting laws from various states were available in cases of willful misconduct.¹¹⁸

Allowing state laws would destroy uniformity, the primary purpose of the United States' adherence to the Warsaw Convention.¹¹⁹ As such, the only solution was to preempt state causes of action in their entirety.¹²⁰

This bold step forward¹²¹ has not been without criticism. In the subsequent decision in *KAL*, the majority decided not to take sides in the exclusivity debate. The dissenting judge, Mikva Chief Judge was of the opinion that the Convention does not provide the exclusive cause of action.¹²² First, he argued that the wording of Article 24

¹¹⁸*Ibid.* at 1276.

¹¹⁹See part VII below on the discussion of uniformity as the primary purpose of the Warsaw Convention.

¹²⁰The court also looked at the analogous Supreme Court Case of *Ray* above. This case involved the regulation of the design, construction and operation of oil tankers in order to ensure minimum standards of vessel safety and the protection of the marine environment. The Supreme Court found that the Congress had in mind a uniform set of rules in an area that had traditionally been one in which international, rather than national, action was preferable because of the international nature of the problem of marine pollution. Hence, the Supreme Court concluded that there was no room for any state law which would frustrate the congressional desire of achieving uniform, international standards.

¹²¹The United States Supreme Court has twice declined to determine the issue of exclusivity; *Eastern Airlines, Inc. v. Floyd* 111 S.Ct. 1489, 1502 (1991) [hereinafter *Eastern*] and *Air France v. Saks* 470 U.S. 392, 408, 105 S.Ct. 1338, 1346-47, 84 L.Ed.2d 289 (1985) [hereinafter *Saks* cited to U.S.].

¹²²It is important to understand the reason for Mikva, Chief Judge's criticism of the *Lockerbie II* decision. The majority of the *KAL* court had placed reliance on *Lockerbie II*, which was the case that held the Convention's cause of action was exclusive. However, if the *Lockerbie II* court had not come to the conclusion that the Convention provided the exclusive cause of action, then Article 17 would have been a limitation of liability in that it prevented the recovery of punitive damages which would otherwise

"any action for damages, however founded" clearly contemplates actions arising under separate sources of law but places some limits on recovery. Second, courts and commentators have rejected suggestions that the Convention provides the exclusive cause of action.¹²³ Third, the *Lockerbie II* court went against earlier Second Circuit precedent. He opined that for a long time, that court had held that *no* cause of action is established by the Convention. This was finally overruled by *Benjamins*. In subsequent decisions, namely *Tokio Marine*, the court ruled that this cause of action was not exclusive. Now, by dismissing the statement in *Tokio Marine* as mere dicta, the Second Circuit has gone full circle from believing that the Convention provides no cause of action to deciding that it provides the sole cause of action for plaintiffs. Fourth, besides failing to follow precedent, the *Lockerbie II* reasoning was also poor. That court had stressed that other countries have held the Convention is the exclusive cause of action. These were not based on interpretations of the Convention, but were due to legislative enactment (making Article 17 the sole cause of action), which the United States did not have. Fifth, the Supreme Court has twice declined to address the exclusivity question.¹²⁴ On a balance, said the judge, the authorities seemed to be equally divided on the issue, contrary to the

have been recoverable under state causes of action. This limitation would have been lifted in cases of wilful misconduct under Article 25, and punitive damages would be recoverable. As he said at 1491:

The majority decides that complaints sounding in other causes of action such as federal maritime law are also not entitled to punitive damage awards. I find this step in the court's logic somewhat difficult to fathom. There appear to be two basic rationales underlying such a conclusion: (1) the Convention provides the exclusive cause of action (thereby entirely preempting other possible causes of action that might separately allow punitive damages), or (2) Article 17 creates an implicit limitation on liability governing recoveries premised on separate causes of action. The majority appears to employ the latter rationale, but then dismisses the force of Article 25 in part on the strength of decisions premised on the exclusivity rationale. I think neither one is persuasive and therefore respectfully dissent.

It is submitted that the dissenting judge is mistaken in alledging that the majority dismisses the force of Article 25 in part on the strength of decisions premised on the exclusivity rationale. The majority dismiss the force of Article 25 on two grounds (at 1488-89): (1) that Article 17 is compensatory in nature; (2) Subsequent action (*Hague Protocol* and *Montreal Protocol No. 4*) confirm that Article 25 lifts only the monetary limits contained in Article 22.

¹²³Citing *Bali* at 1311 n.8: "[T]he Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury."; *Tokio Marine* at 942: "[T]he Convention draftsmen ... did not intend that cause of action to be exclusive."; Calkins, "The Cause of Action under the Warsaw Convention" (1959) 26 J. Air L. & Com. 323 [hereinafter *Calkins*] at 327-38.

¹²⁴Citing *Eastern and Saks*, *supra* note 122.

claim by the *Lockerbie II* court's claim that the authorities were fairly one-sided.¹²⁵ In conclusion, the judge found : "The fundamental error of the *Lockerbie* court's decision is the premise that the cause of action provided by the Warsaw Convention is exclusive, and my colleagues are wise not to enter this fray unnecessarily."¹²⁶

It is submitted that the *Lockerbie II* court did not have to come to the conclusion that the Warsaw Convention provided the exclusive cause of action. It could have just as easily not ruled on this matter, and still come to the same conclusion that punitive damages were not recoverable under the Convention because it was never contemplated to permit punitive damages, and to allow punitive damages awards would destroy its uniformity of application.¹²⁷ By going against the precedent of the Second Circuit, the court has needlessly opened itself up to criticism.¹²⁸

VI. The Convention's Provisions

A. Article 17¹²⁹

¹²⁵Citing *Lockerbie II* at 1282-83. In fact what the *Lockerbie II* court said was:

Courts that have considered this language have not agreed on whether the cause of action created under the Convention was meant to be exclusive. See *Floyd*, 872 F.2d at 1482, n. 33 (citing cases). Although the long list of cases cited by *Floyd* would seem to indicate otherwise, there is a paucity of direct authority on this question, with only the Fifth Circuit having directly ruled on it.

The cases cited by *Floyd* were evenly balanced between those in favour of exclusivity and those not in favour of exclusivity.

¹²⁶*KAL* at 1492.

¹²⁷*Cf* the view of *Edelman* at 533 n.140, who supports the position that the Warsaw Convention cause of action is exclusive. The writer is of the opinion that in order to reach its finding on punitive damages, the court "had no choice but to make the second determination [that the Warsaw Convention cause of action was exclusive]". His argument is that to ensure predictability and uniformity, the state law claims had to be preempted entirely.

¹²⁸See *Chapman* at 510-11, where the writer states that the *Lockerbie II* court was "not reasonable", because national interests did not require exclusivity, especially since the Convention itself provided for certain matters to be resolved by reference to local laws. See also K. Grems, "Punitive Damages Under the Warsaw Convention: Revisiting the Drafters' Intent" (1991) 41 Am.U.L.Rev. 141 [hereinafter *Grems*] at 170, where the writer criticised the *Lockerbie II* decision as going against twenty years of precedent and is therefore "flawed".

¹²⁹In French, Article 17 reads:

There is now no longer any doubt that Article 17 creates a cause of action. It has been argued by claimants that Article 17 provides for the recovery of punitive damages. However, the term "damages sustained" in its plain and natural meaning connotes the idea of physical damages which are received in the course of an accident, for example due to impact; it strongly implies that the carrier's responsibility is compensatory and extends only to the reparation of loss resulting from the death or injury of passengers. As such, one of the arguments frequently made by plaintiffs hoping to recover punitive damages is that the translation of "*dommage survenu*" as "damages sustained" in the English translation is unwarranted and incorrect.¹³⁰ Instead, they argue, the word "*survenu*" should be translated as "occured", "arrived", "happened" or "arisen"¹³¹ and not as "sustained", and when translated as such would permit punitive damage awards.¹³² This argument has been rejected for several reasons.

Le transporteur est responsable du *dommage survenu* en cas de mort, de blessure ou de toute autre *lésion corporelle subie* par un voyageur lorsque l'accident qui a *causé* le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. [emphasis added].

The English translation reads:

The carrier is 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. [emphasis added].

¹³⁰For example in *Ganley, Harpalani, Floyd, Lockerbie, Lockerbie II* and *KAL*.

¹³¹Sometimes the translation "arose" is also argued, for example in *Lockerbie* at 552.

¹³²T. O'Brien, "Flying the Warsaw Convention's Not-So-Friendly Skies: Should Air Carriers' Wilful Misconduct Go Unpunished?" (1992) 29 San Diego L.R. 335 [hereinafter *O'Brien*] at 353 has argued that according to the Cassell's New French-English Dictionary (London: Cassell, 1967) "*survenir*" is translated as "to arrive or happen unexpectedly". When so translated, Article 17 would read "[t]he carrier is liable for damage happening or arising unexpectedly in the event of the death or wounding of a passenger ...", and this, he submits, sets a less compensatory tone. He also submits that according to the John H. Baker, *Manual of Law French* (Amersham, England: Avebury Pub., 1979) at 189, the proper French translation for "sustain" is "susténir". Hence the English text of the Convention has been wrongly translated. M. Olin & J. Perwin, "Punitive Damages under the Warsaw Convention" (1991) Trial 40 [hereinafter *Olin*] at 42 argue that according to Harrap's Concise French and English Dictionary (London: Harrap, 1978), Dubois's Dictionnaire Moderne Francais-Anglais 688 (1965) and Van Nostrand's Concise Student Dictionary 354-55, "*survenir*" is translated as "befell" or "happened unexpectedly", which when read into Article 17 would most logically permit an award of all damages that "happened" in the case, with the litigants looking to the signatory's law to determine allowable damages.

i. **The text is authoritative.**

The courts have held, quite rightly, that the translation "damage sustained" was produced by the United States State Department.¹³³ It is also the translation which was before the Senate when it considered the Warsaw Convention in March 1934, and which the Senate ratified;¹³⁴ it is therefore the version found in the United States Code.¹³⁵ Finally, it is the text considered by the Supreme Court of the United States to be the definitive English translation of the Convention.¹³⁶ Not surprisingly, therefore, the courts have concluded that the translation is correct and authoritative, and any argument that the translation is incorrect is rejected.

ii. **The tone is entirely compensatory**

The three liability creating provisions in the Warsaw Convention are Articles 17, 18 and 19. Article 17 uses the terms "damage sustained" and "bodily injury suffered". Article 18 uses the terms "damage sustained" and "damage so sustained". Article 19 uses the term "damage occasioned". These have been repeatedly held by the courts to be compensatory in nature.¹³⁷ As such, *dommage survenu* is entirely compensatory in tone, whereas punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not "sustained" by the victim.

It has been argued that the intention of the drafters was never to limit the recovery of damages to compensatory damages by use of these words "damage sustained". Instead, the purpose of this particular wording was to make clear that families of passengers who were injured during the flight but died days later could maintain an action for damages not only for the wounding occurring during flight, but also for wrongful death which

¹³³*Lockerbie II* at 1281.

¹³⁴*Gander* at 931; *Lockerbie II* at 1280-81; *Floyd* at 1486-87; *KAL* at 1486.

¹³⁵*Lockerbie II* at 1281; 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1936), reprinted in note following (1976) U.S.C.A. ss. 1502.

¹³⁶*Gander* at 931, citing *Saks*.

¹³⁷*Gander* at 931, citing *Butler* at 431; *Harpalani* at 799; *Floyd* at 1278 and 1281. *Shawcross* at VII(115.1) has quite rightly submitted that the overall flavour of Articles 17 to 19 is more persuasive than individual adjectives; the tenor of the language is that there shall be compensation for loss, and punitive damages do not fit that understanding.

followed subsequently.¹³⁸ Hence the argument goes that "damage sustained" was meant to be inclusionary, rather than exclusionary, and not intended to limit the types of damages recoverable. There is some force in the argument, and it is admitted that this is one of the more convincing arguments in favour of allowing punitive damage awards. Unfortunately this argument has not been tried or tested by the courts.

iii. Subsequent actions confirm accuracy

The 1929 Warsaw Convention is authoritative only in French, and hence there is room for the argument that words found in the English translation could have been inaccurately translated. However, the *Hague Protocol* of 1955 is authoritative in three languages, namely English, French and Spanish.¹³⁹ The fact that the same words "damage sustained" were retained in the *Hague Protocol* was found by the courts to be of some significance in indicating the expectations of the contracting parties.¹⁴⁰ Likewise, the *Guatemala Protocol*, which is authentic in the same three languages as the *Hague Protocol*, retained the wording "damage sustained" in the amendments to Articles 17 and 18.¹⁴¹ These subsequent interpretations of the parties have cast no doubt as to the accuracy of the translation of *dommage survenu* as "damage sustained", unlike *lésion corporelle*.¹⁴² Hence "damage sustained" is the correct translation of *dommage survenu*.¹⁴³

¹³⁸B. Buono, "The Recoverability of Punitive Damages Under the Warsaw Convention in Cases of Wilful Misconduct: Is the Sky the Limit?" (1989) 13 Ford. Int'l L.J. 570 [hereinafter *Buono*] at 601-602 n.162, citing from *Minutes* at 166-67. The discussion cited therein shows that the discussion centered around clarifying the position with regard claims for wrongful death occurring after the carriage had been completed.

¹³⁹*Hague Protocol*, Article XXVII.

¹⁴⁰*Lockerbie II* at 1281.

¹⁴¹*Guatemala Protocol*, Articles IV and V. Article 19 of the Warsaw Convention, which used the words "damage occasioned", was unchanged by the *Guatemala Protocol*.

¹⁴²*Floyd* at 1482, *Lockerbie II* at 1281. For a full discussion on the phrase *lésion corporelle* see Chapter One on Mental Injury, above.

¹⁴³The courts have noted that the United States has not ratified either of these Protocols, and therefore the protocols "provide no binding authority, but they are nonetheless evidence of the expectations of the contracting parties to the Convention." *Lockerbie II* at 1281. Since the wording is retained, this serves as confirmation of the original. Where the words in subsequent protocols are different from the Warsaw Convention, however, the courts have held that they nevertheless confirm the original; see part VI.C.iii below.

- iv. Even if read as occurred, happened or arisen, it did not assist since "damage" was physical or mental damage, not legal damages.

The *Lockerbie* court found that in *Floyd* the translation as "damage sustained" was accurate. Nevertheless, the court did its own investigation. Checking with three French-English dictionaries, the court found that "survenir" was found to be most frequently translated as "to happen", "to arise", or "to arrive unexpectedly". This did not assist the plaintiffs, for even if "du dommage survenu" is translated as damage happened or arisen, Article 17 does not allow for punitive damages claims:

Under a literal translation, Article 17 would provide that the transporter or carrier is responsible for *damage, not damages*, happened or arisen in the case of death, wounding, or other bodily injury if the accident which caused the damage, not damages, took place on board. "Damage" in the context of Article 17 is damage or injury sustained, happened or arisen *to the body or mind of the passenger, not monetary damages*, and hence, regardless of whether "survenu" is translated as sustained or happened or arisen, Article 17 does not allow for punitive damage claims.¹⁴⁴ [emphasis added].

The *Gander* court had the same holding. Looking to the authentic French text, the court found that the phrase "lésion corporelle" is seen by some courts as the clearest evidence that Article 17 was designed to limit the air carrier's liability to only compensatory damages directly connected to bodily injury.¹⁴⁵

The reasoning expressed in those cases is that the drafters of the Convention chose with particular care to limit liability to damages for "bodily injury" only. Consequently, those courts ruled that recovery of other types of damages, such as for mental suffering, are not allowed under the Convention. This court finds those decisions to be authority for the proposition that the Convention limits air carriers' liability by excluding all noncompensatory claims against them.¹⁴⁶

Other courts have held that "damage" in Article 17 refers to bodily injury.¹⁴⁷ The *Lockerbie* court gave two more reasons why damage referred to physical damage only.

¹⁴⁴*Lockerbie* at 552.

¹⁴⁵*Gander* at 931, n. 4, citing *In re Eastern Airlines, Inc., Engine Failure*, 629 F.Supp. 307 (S.D. Fla. 1986); *Burnett* at 1152.

¹⁴⁶*Ibid.*

¹⁴⁷*Lockerbie II* at 1281:

First, Article 18 clearly states that the damage referred to is damage to baggage. Likewise, damage in Article 17 must refer to physical damage.¹⁴⁸ Second, if Article 17 was referring to monetary damages, at the very least *dommage* would be in its plural rather singular form and it is more likely that the phrase "in actions for damages" would have been used, as was done in Article 24.¹⁴⁹ Since the term "damage" is in the singular, it can only refer to physical injury.

- v. **Even if read as occurred, happened or arisen, it did not assist because punitive damages are imposed by a court; they are not "sustained"; they do not "happen" or "occur", nor are they "caused" by an accident.**

As noted above, punitive damages are private fines levied by civil courts to punish or deter future similar conduct. Punitive damages are not "damages sustained" by a particular plaintiff.¹⁵⁰ In *Lockerbie II* the defendants contended that the proper translation is "sustained", but in any case the exact translation did *not* matter because punitive damages do not "happen" or "occur" any more than they are sustained; rather, punitive damages were *imposed* by a court or a jury. The court agreed with the defendants:

Whatever the shades of meaning in the word "survenu", we agree that the way in which the Convention uses the term indicates that Article 17 refers to actual harm caused by an accident rather than generalized legal damages. The Article's later language - "subie par un voyageur lorsque l'accident qui a causé le dommage" (literally, suffered by a traveller if the accident that caused the damage) - supports the compensatory interpretation of the term "du dommage survenu," because an accident does not "cause" punitive damages.¹⁵¹

Whatever the shades of meaning in the word "survenu", we agree that the way in which the Convention uses the term indicates that Article 17 refers to actual harm caused by an accident rather than generalized legal damages.

KAL at 1485, following *Lockerbie* and *Calkins* at 335:

The words "damage sustained" do not refer to legal damages; they refer to actual harm experienced, whether physical injury to the passenger or, in the case of death, monetary or other loss to his survivors.

¹⁴⁸ *Lockerbie* at 552.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Gander* at 931, *Lockerbie* at 553.

¹⁵¹ *Lockerbie II* at 1281.

The *KAL* court agreed. The damage "so sustained" had to be "caused" by an accident on board the aircraft or in the course of any of the operations of embarking or disembarking. This reenforced the conclusion that recovery is available only for actual loss, and an accident cannot "cause" punitive damages.¹⁵²

For the above reasons, the courts have found that Article 17 is compensatory in nature, and in itself did not permit recovery of punitive damages.¹⁵³ If plaintiffs wished to recover punitive damages, they had to find an alternative arguments for doing so.

B. Article 24¹⁵⁴

Claimants have argued that the wording of Article 24, in particular Article 24(1) "however founded" strongly suggests that the Convention contemplates state causes of action, including those for punitive damages, not founded in or created by the Convention.¹⁵⁵ In other words, Article 24 preserves state causes of action for punitive damages.¹⁵⁶ This argument is reenforced by the words of paragraph (2) "without prejudice ... who are the persons who have the right to bring suit and what are their respective

¹⁵²*KAL* at 1486, citing *Lockerbie II* at 1281-2.

¹⁵³Even the dissenting judge in *KAL* (at 1490), who was in favour of awarding punitive damages, could not do so on the basis of Article 17, or under the Warsaw Convention. If at all, punitive damages could only be recovered under state law.

¹⁵⁴The French text of Article 24 reads:

1. Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.
2. Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. [emphasis added].

The English text reads:

1. In the cases covered by Articles 18 and 19 any action for damages, *however founded*, can only be brought *subject to the conditions and limits* set out in this Convention.
2. In the cases covered by Article 17 the provisions of the *preceding paragraph also apply, without prejudice* to the questions as to who are the persons who have the *right to bring suit and what are their respective rights*. [emphasis added].

¹⁵⁵For example, *Karachi* at 19, citing *Tokio Marine, Reed* at 1084-85.

¹⁵⁶*Lockerbie II* at 1282.

rights"; "respective rights" must refer to rights under local law allowing punitive damages. This argument was accepted by the *Karachi* court.¹⁵⁷ The court found that the wording of the Convention leads to the conclusion that punitive damages claims made pursuant to state causes of action would be permitted.¹⁵⁸ Courts reaching the opposite conclusion have two basic arguments.

i. The phrase "subject to the conditions and limits set out in this Convention" cannot be ignored.

In *Lockerbie* the court found that the phrase in Article 24(1) "however founded" must be read in conjunction with the phrase "subject to the conditions and limits set out in this Convention". When so read, all actions, whether founded in Article 17 or state law, would be subject to such conditions of the Convention as the requirement of uniform limit of liability, and hence non-recovery of punitive damages.¹⁵⁹ This was the same reasoning used by the court in *Floyd* in addressing the issue of whether a state cause of action for punitive damages was preempted by the Warsaw Convention, and the court there found that because of this same phrase, the plaintiffs could not bring punitive damages claims under state law; Article 24 of the Convention required the court to determine whether such a state cause of action would be within the "conditions and limits set out in this Convention". The claim for punitive damages under state law was not a cause of action within the conditions and limits of the Convention, and therefore could not be brought.¹⁶⁰

Second, the phrase "without prejudice as to who are persons who have the right to bring suit and what are their respective rights" must also be read in conjunction with the phrase "subject to the conditions and limits set out by this Convention". This is the

¹⁵⁷This argument was also accepted by Mikva, Chief Judge in his dissenting judgement in *KAL* at 1490.

¹⁵⁸*Shawcross* at VII(115.1) finds this conclusion by the *Karachi* court "astonishing" and "untenable", preferring the views expressed by the courts in *Lockerbie II* and *KAL*.

¹⁵⁹*Lockerbie* at 549. *Dubuc* at 43 suggests that the "however founded" language is most likely evidence of the drafter's intent that survivors of deceased passengers not be able to circumvent the convention's liability limits and limitations period by resort to an alternative state or local law cause of action, citing *Mexico City* at 414 n.25.

¹⁶⁰*Floyd* at 1480-81.

natural meaning of Article 24(2)'s "the provisions of the preceeding paragraph also apply", which expressly states that even actions for personal injury or death, governed Article 17, must comply with the conditions and limits of the Warsaw Convention.¹⁶¹ Again, when so read, the condition and limitation on recovery of punitive damages prevents such awards.

ii. The Article 24(2) phrase "without prejudice ... who are the persons who have the right to bring suit and what are their respective rights" refer to local laws of descent and distribution.

In *Lockerbie II* the plaintiffs argued that the above phrase of Article 24(2) leaves the question of the elements of damages to local law and thereby effectively also directs the court's inquiry on the issue of punitive damages to local law. The Defendants argued that this phrase intended to leave to local law only such questions as who is a proper plaintiff and the respective rights of beneficiaries regarding descent and distribution arising from the death of a passenger.¹⁶² The court preferred the defendants' argument, finding that this view was supported by the drafting history. The discussions on this clause were aimed at questions of descent and distribution. The initial draft prepared at the 1925 Paris Conference provided that "in case of decease of a passenger carried, the lawsuit regarding responsibility may be taken by the persons who have a right to take such action according to the law of the land of the deceased person but under the reserve of the limitation of responsibility provided for in the foregoing article."¹⁶³ The accompanying official report stated that :

There is a need to determine exactly the extent of the rights of legal claimants for, depending on the national laws, the nature of their rights could lead to an interpretation different from the legal basis and somehow cancel the limitation set by the preliminary project. Since it is impossible to set in a single formula the various legal concepts of the various States, it appeared simpler to specify in Article 8 that the claimants would be

¹⁶¹*Lockerbie* at 549.

¹⁶²In fact, two earlier cases had already held that Article 24(2) referred to hereditary laws: *Mexico City* at 414-15 and *Reed* at 1092. For this reason, *Karachi* has been criticised by *Dubuc* at 42 for being inconsistent with established interpretations of Article 24.

¹⁶³*Lockerbie II* at 1283, citing International Conference on Private Aviation Law (Paris 1926) (State Department Translation) Addendum at 12a.

determined according to the national law of the deceased, but that the rights of these persons would be limited to the maximum sum allowed by Article 7.¹⁶⁴

This initial draft was later modified in 1928 by the CITEJA to read:

In the event of death of the holder of the right, any action in liability, however founded, can be exercised ... by the persons to whom this action belongs according to the national law of the deceased or, in the absence hereof [sic], according to the law of his last domicile.¹⁶⁵

Finally, after further discussions, the Final CITEJA Report drafted by the official Reporter for the Convention, Henri de Vos, stated:

The question was asked of knowing if one could determine who are the persons upon whom the action devolves in the case of death are, and what are the damages subject to *reparation*. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independently from the present Convention.¹⁶⁶ [emphasis added].

Based on this drafting history of Article 24, together with the Civil law background of the Convention, the court found it extremely unlikely that Article 24(2) was intended by its drafters to preserve a common law right to punitive damages. Clearly, Article 24(2) referred to questions of heredity and descent, and leaves such questions to local law.¹⁶⁷ *Dubuc* has given one more argument in support of this argument. The writer argues that

¹⁶⁴*Ibid.*, citing International Conference on Private Aviation Law (Paris 1926) Addendum at 7a.

¹⁶⁵CITEJA Report, 3d session, May 1928, quoted in Haanappel, "The Right to Sue" (1981) 6 Air L. 66 at 67 n.8.

¹⁶⁶Report of Henri de Vos, CITEJA Reporter (September 1928), *Minutes* at 255.

¹⁶⁷In *KAL*, the plaintiffs argued that Article 24's references to actions for damages "however founded" and to claimant's "respective rights" make the availability of punitive damages a matter of local law. The court's reply (at 1488) was that any action for damages was subject to the Convention's "conditions and limits." Without coming to any conclusion on the debate whether the Warsaw Convention preserves or preempts any state causes of action, the court found that there was general consensus that the proper *measure* of damages recoverable under Article 17 was left to the domestic law of the contracting states. The question was whether such damages could be more than compensatory, and the court found that it could not. Turning to the CITEJA report on the preliminary draft (quotation of Henri de Vos, *ibid.*), the court found that the reporter's use of the word "reparation" bolsters the reading of Article 17 and tended to exclude the concept of punitive damages, and the problem was one of harmonizing the various national laws of descent and distribution. The inability of the CITEJA to find a solution to this problem did not suggest that the drafters ever contemplated the possibility of imposing liability that goes beyond compensation for loss, however determined. The *Lockertie II* court employed the same reasoning (at 1284).

the first draft of Article 24 appeared in one provision, but was later split into two, because the issue of survivors and representatives was not present in the case of loss or damage to goods and delay. These amendments by the delegates strongly suggest that the rights referred to in Article 24(2) are the rights of multiple representatives in wrongful death cases.¹⁶⁸

While the history of the provision puts beyond doubt that in cases covered by Article 17 (death or personal injury claims), Article 24(2) was meant to preserve local law on the question of heirs and distribution, two points should be mentioned.

First, this leaves a lacuna in the Convention. The reasoning applied logically leads to the conclusion that in cases not governed by Article 17, namely in the destruction or loss of registered luggage or goods (Article 24(1)), the question of distribution is not left to local law. What law, then, would apply? It is submitted that this lacuna was never intended by the drafters to the Convention, and was an oversight on their part. Local laws of heredity and distribution should apply to damages recovered for destruction of luggage or goods, as they do for personal injury.

Second, the Final CITEJA Report quoted above states that besides hereditary laws, the "*damages* subject to reparation" [emphasis added] would also be left to domestic laws. The sentence is ambiguous, and could refer either to the *type* or the *quantum* of damages. *Grems* has suggested that this sentence leaves the *type* of damages recoverable to local law, in particular local law allowing punitive damages.¹⁶⁹ The reply to this has already been supplied by the *KAL* court, which has held that because the word "reparation" is used, the damages referred to must be compensatory in nature.¹⁷⁰

¹⁶⁸*Dubuc* at 43, citing *Minutes* at 277-78, 290.

¹⁶⁹*Grems* at 177.

¹⁷⁰See *supra* note 168. *Edelman* at 527-58 gives two other reasons why it is unlikely that the drafters would have left the question of the types of awards available to local law. First, Article 17 only established liability for injuries sustained by passengers. The drafters exhibited no intent to provide punitive awards. Second, leaving to local law the issue of the types of damages would lead to much uncertainty regarding the scope of air carrier liability, thereby undermining the Convention's goal of establishing a uniform liability scheme.

C. Article 25¹⁷¹

The purpose of Article 25 is to prevent the carrier from relying on the limitations of liability provided by the Convention in cases where damage has been caused by his own wilful misconduct. The argument runs that Article 25 does not specify which are the provisions that exclude or limit a carrier's liability.¹⁷² Since, as carriers have claimed, Article 17 restricts their liability to compensatory damages only (preventing the recovery of punitive damages), plaintiffs argue that it is therefore a provision that limits a carrier's liability within the definition of Article 25. As such, when there is wilful misconduct,

¹⁷¹Article 25(1) reads:

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

The equivalent French provision reads:

Le transporteur n'aura pas le droit de se prévaloir des *dispositions* de la présente Convention *qui excluent ou limitent* sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalent au dol. [emphasis added].

¹⁷²*Buono* at 598-99 argues in favour of punitive damages under Article 25 that in the Preliminary Draft of the Convention submitted by the CITEJA in 1928, Article 24 (today) and Article 25 (today) were combined under one article in separate paragraphs, with the first paragraph (Article 24 today) excluding recourse to forum law whilst the second paragraph (Article 25 today) not excluding reference to forum law. The draft Article 24 read:

In the cases provided for in Article 21 [article 17 today], even in the case of death of the interested party, any liability action, however founded, can be brought only under the conditions and limits set forth by the present Convention.

If the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants.

Subsequent amendments were made by the drafting committee to Article 24, splitting the article into the predecessors of today's Article 24 and Article 25. Yet, no changes were made to Article 25 to exclude recourse to local law. *Buono* therefore argues that there can be recourse to local laws, allowing punitive damages, since there was an opportunity to change Article 25, but no changes were made in this regard. This argument, however, is not convincing. The presumption made by *Buono* is that the second paragraph as originally drafted evinces an intention to allow recourse to local law in cases of intentional illicit acts. The fact that there were subsequent amendments, such as the splitting of the article into two separate articles, adds nothing to her argument. She might as well simply allege that Article 25 today allows recourse to local laws because it does not expressly proscribe such recourse.

Article 25 lifts the bar of Article 17, and there can be recovery of punitive damages either under the Convention or under state law. In other words, Article 25 lifts the limit of \$75,000 as well as any and all limitations on damages. This argument was accepted by the *Karachi* court.¹⁷³

The other courts have concluded that Article 25 does not provide any authority for punitive damage awards, but merely removes the Convention's ceiling on liability for *compensatory* damages in cases where plaintiffs establish the carrier's wilful misconduct. They have rejected the argument that Article 25 allows punitive damage awards for the following reasons:

i. The Convention on the whole sets a compensatory tone.

It has already been discussed above that Articles 17 to 19 of the Convention are compensatory in nature, given that words such as "damage sustained" and "damage occasioned" are used. It has thus been said by the courts that Article 25 is most reasonably interpreted as an exception to the Convention's limitations on the recovery of compensatory damages, not as authority for a form of damages *not* permitted elsewhere in the Convention.¹⁷⁴ The same would apply in the case of Article 3(2), where a ticket

¹⁷³*Karachi* court at 20 held that even if Article 17 did preclude the recovery of punitive damages, Article 25 would bar Pan Am's reliance on Article 17:

Therefore, to the extent that Article 17 is construed to preempt a claim for punitive damages, it would be a limitation or exclusion of liability within the meaning of Article 25, and such claims would not be barred in cases involving wilful misconduct.

This argument has also found favour with some writers such as *Grems* (at 173), who's view is that Article 25 simply read prevents a carrier from relying on any limitation or exclusion of liability. *Olin* at 42 is of the same opinion that the plain language of Article 25 removes all limits to the extent that local law removes such limits, and therefore punitive damages are permissible when they are permitted by local law, even in an action that is brought under the Warsaw Convention itself.

¹⁷⁴*Harpalani* at 799, *Floyd* at 1484, *Lockerbie* at 552: "Thus, when Article 25 is read together with Article 17 which provides plaintiffs' cause of action, it is clear that Article 25 does not authorize punitive damages claims even if wilful misconduct exists."

was absent, irregular or lost; unlimited compensatory damages, but not punitive damages, would be recoverable.¹⁷⁵

In further support for the proposition that the Convention contemplates only compensatory damages, it has been noted that at the time of the drafting of the Convention, from the background of the Civil Law, Article 17 was a means of creating liability or at the very least shifting the burden of proof to the carrier. As has been graphically put by the *Lockerbie II* court:

Article 17 was not envisioned as a limit or exclusion of liability because, to a civil lawyer unfamiliar with the concept of punitive damages, Article 17 does not appear to limit liability in any way. For us to impose a common law view on the document, twisting the apple to appear to be an orange, would violate principles of Treaty interpretation.¹⁷⁶

O'Brien has argued in favour of punitive damages that neither the Convention's minutes nor text indicate that the framers ever purposely intended to shield an air carrier from punitive damages for an air carrier's wilful or reckless actions;¹⁷⁷ he further argues that the terms "punitive" or "exemplary damages" do not even appear in the minutes. It is submitted that his reasoning is flawed. Silence in itself is equivocal; hence it is the other arguments that determine the recoverability of punitive damages. *O'Brien* also argues that "[b]ecause the Convention signatories were willing to expressly compensate passengers more fully in cases of air carrier reckless behavior, it would seem inconsistent for the Convention framers to silently imply that the naturally following punitive damages

¹⁷⁵*Gander* at 932. The plaintiffs argued that in the appropriate case, to wit the case of wilful misconduct within article 25, punitive damages may be levied. Plaintiffs further argued that this was the case also when a ticket is not issued under Article 3(2). The court did not accept this argument:

When read in this light [that the Warsaw Convention sets the parameters of the right to recovery in Article 17 at compensatory damages only], the exclusions from limitation in Articles 3 and 25 are most reasonably interpreted as exceptions to the limitations on the recovery of *compensatory* damages within the Convention, not as authority for the recovery of *punitive* damages. *Harpalani v. Air India, Inc.*, 634 F.Supp. 797, 799 (N.D. Ill. 1986). Consequently, Articles 3 and 25 do not authorize recovery of punitive damages.

¹⁷⁶*Lockerbie II* at 1286. *KAL* at 1489 cites the same reason.

¹⁷⁷*O'Brien* at 356. *Buono* at 600 made the identical argument.

would not be recoverable."¹⁷⁸ He however ignores the fact that the Convention already provides for unlimited compensatory damages in the case of wilful misconduct; to allow punitive damages in addition would be unreasonable and superfluous.¹⁷⁹

Dubuc has suggested that allowing punitive damages would contravene not only the Warsaw Convention, but also any supplemental compensation plans.¹⁸⁰ Article XIV of the *Guatemala City Protocol* provides for states to establish and operate a system to supplement the compensation payable to claimants under the Warsaw Convention. The United States have devised just such a plan, which to date has not yet been put into operation.¹⁸¹ This plan would allow for victims to be compensated over and above the cap of U.S. \$75,000. However, this plan specifically prohibits the payment of punitive damages;¹⁸² it is, like the Convention it supplements, compensatory in nature. It was therefore submitted by the writer that to allow recovery of punitive damages would ruin the plan, because "no carrier would support the plan if a portion of the payout was potentially not covered because of awards of punitive damages."¹⁸³

ii. **The provision referred to in Article 25 which excludes or limits liability is Article 22.**

¹⁷⁸*Ibid.*

¹⁷⁹Plaintiffs would be already adequately compensated under the Convention when an airline has engaged in wilful misconduct. For example, an award arising out of the Lockerbie bombing for more than \$9 million: E. Frost, "First Lockerbie Damage Award - \$9.23 Million" *Reuters Ltd.* (22 July 1992); "Pan Am Award is Largest in Disaster History" *Nat'l L.J.* (3 August 1992) 6. Shortly thereafter, another victim received \$9 million: "Second Lockerbie Damage Award a Near-Record \$9 Million" *The Reuter Libr. Rep.* (29 July 1992). Recently, one claimant received \$19 million: "Widow of a Pan Am Crash Victim Is Awarded \$19 Million" *The New York Times* (19 April 1995). This was one of the largest financial awards to an individual in the history of commercial airline disasters. Furthermore, as *Edelman* at 521 explains, the marketplace severely punished airlines that fail to maintain high safety standards through negative publicity and, in turn, decreased ridership.

¹⁸⁰*Dubuc* at 45-46.

¹⁸¹Proposed Amendment S. 2945 of the *Federal Aviation Act of 1958* 49 U.S.C. 1301 before the 102d Congress, 2d Session on July 2, 1992. See M. Milde, "Warsaw System and Limits of Liability - Yet another Crossroad?" (1993) XVIII-1 Ann. Air & Sp. L. 210 at 221 for a discussion on the development and status of the United States plan.

¹⁸²*Ibid.* at s.1703(d), 1701(8).

¹⁸³*Dubuc* at 46.

In the original text of the Warsaw Convention, Article 25 does not specify the exact provisions of the Convention a carrier is prevented from relying on which exclude or limit a his liability. Hence plaintiffs have argued that a plain and simply reading of Article 25 would bar carriers from relying on Article 17 (which prevents recovery of punitive damages). Defendants on the other hand would argue that wilful misconduct would not affect the application of Article 17, and that punitive damages would still be precluded. The provision in the Convention which excluded or limited liability was only Article 22, and this would be the only Article which they would not be able to place reliance on in the case of wilful misconduct.

The plaintiffs' argument was accepted by the court in *Karachi*. The court stated that to give effect to Pan Am's argument, the wording of Article 25 had to be more explicit, such as "the provision, to wit Article 22, ... which limits *the amount* of his liability"; to read these changes into Article 25 "would constitute a judicial alteration of the plain language of the Convention."¹⁸⁴ This view is supported by *Buono*, who agrees that Article 25 bars any reliance on the Convention.¹⁸⁵

¹⁸⁴*Karachi* at 20, citing *Chan*. The court said:

For this reason the Court cannot accept as persuasive the reasoning set forth by the Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483-89 (11th Cir, 1989), which was followed in *In re Air Disaster in Lockerbie, Scotland*, M.D.L. 799, 1990 WL 1672, 1990 WL 1673 (E.D.N.Y. January 3, 1990). Both these cases rely heavily upon a judicially perceived need to construe the Convention in accordance with the intention of the Contracting Parties. However, this Court does not believe that *Chan* permits the Court to amend the plain language of the Convention to effectuate what it believes the Contracting Parties intended.

¹⁸⁵*Buono* at 602 argues that according to the *Minutes* at 62, Mr Ripert the French delegate stated that "[a]s much as it is just not to apply *the Convention* to the carrier when he has committed an intentional illicit act, so it is unjust to take away from him the benefit of the Convention when it is not the carrier himself but his servant who has committed this act." [emphasis added]. This shows that the intention of the delegates was to bar reliance on the entire Convention, rather than selected provisions. It is submitted that *Buono* has taken the sentence out of context, and that when these words were spoken by Mr Ripert, his emphasis was on the acts of agents of the carrier and he did not intend to speak with any authority or accuracy on the scope of influence of Article 25 on other provisions of the Convention.

Other courts have held that the exclusion or limitation referred to in Article 25 is Article 22. In *Lockerbie II*, the court determined that Article 25's reference to provisions that "exclude or limit" liability only referred *with certainty* to Articles 20(1) (due diligence and impossibility defences) and 22(1) (monetary limits) of the Convention, and that there was doubt as to which other Articles of the Convention were included.¹⁸⁶ The court also noted that *Shawcross*¹⁸⁷ includes Article 21 (contributory negligence) and 26(4) (statute of limitations for baggage and cargo). Article 25 clearly did not lift every limit on a carrier's liability, for example it does not lift Article 29 (statute of limitations). And it also did not lift Article 17 liability. As agreed by the *KAL* court:

Disagreement about whether other provisions are affected ... does not obscure the fact that certain key articles in the Convention continue to apply in cases of willful misconduct, and no authority suggests that the basic liability terms of Article 17 (or any of the other "conditions" preserved by Article 24) were to be displaced.¹⁸⁸

It was also noted in *Floyd* that the case law have consistently held Article 25 did not create a cause of action, but rather served only to remove the limitation on liability contained in Article 22 of the Convention.¹⁸⁹

iii. Subsequent action confirms this view.

The *Hague Protocol* (1955) Article XIII and *Montreal Protocol No. 4* (1975) Article IX have amended the Warsaw Convention Article 25 by specifying that in cases

¹⁸⁶*Lockerbie II* at 1287.

¹⁸⁷*Shawcross* at VII(213).

¹⁸⁸*KAL* at 1489, citing *Lockerbie* at 1286-87. M. Roazen, "International Law-Punitive Damages Unavailable in Cases of Willful Misconduct Under the Warsaw Convention-*In re Korean Air Lines Disaster of September 1, 1983*" (1992) 65 Temp. L.R. 1103 [hereinafter *Roazen*] at 1114 has criticised the *KAL* decision because the clear language of Article 25 plainly suggest that the opposite is true: the wilful misconduct waiver affects, without qualification, all provisions of the Warsaw Convention that exclude or limit liability.

¹⁸⁹Citing *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.* 739.2d 536, 539 (11th Cir, 1984) where the court held: "Minutes of the negotiations on the Hague Protocol, an amendment to the Convention, indicate that the delegates understood article 25 as referring only to article 22, which establishes monetary limits"; *Stone v. Mexicana Airlines, Inc.* 610 F.2d 699, 700 (10th Cir, 1979), 15 Avi. 17, 827; *Gander; Harpalani; Wolgel v. Mexicana Airlines* 821 F.2d 442, 445 (7th Cir) cert. denied, 108 S.Ct. 291 (1987) and *Magnus Electronics Inc. v. Royal Bank of Canada* 611 F.Supp. 436, 443 (N.D.Ill, 1985).

of intentional damage or recklessness (the successor to wilful misconduct), "the limits of liability specified in Article 22 shall not apply"; there has been a change in wording. It has therefore been reasoned that this indicates, or confirms, the fact that Article 25 of the original Warsaw Convention will only remove the application of Article 22 limits and not Article 17.¹⁹⁰ However, there are two sides to this argument, and it is possible that the subsequent actions at the Hague or at Montreal served to change the law rather than confirm it. Further, the use of these protocols are subject to criticism because some writers have argued that Article 25 is clear and unambiguous and therefore there should be no recourse to these protocols, and secondly these protocols have not been ratified by the United States.

The argument that subsequent actions has effected a change in the Warsaw Convention was accepted in *Karachi*. The Court found it significant that the *Hague Protocol* did amend Article 25 in the way Pan Am suggested the unamended Article 25 ought to be read, by referring specifically to Article 22 as the only Article which is affected by wilful misconduct. Since the United States has not adopted the *Hague Protocol*, the Court could not construe Article 25 narrowly as preventing the carrier from availing itself to Article 22 and not to Article 17. In other words, the *Hague Protocol*

¹⁹⁰For example, *KAL* at 1489:

These Protocols, among other things, clarified Article 25 to make it explicit that the limits on liability lifted in the event of willful misconduct are only the monetary limits contained in Article 22.

Although the United States was not party to either Protocol, the *KAL* court on the authority of *Saks* at 403-04, 105 S.Ct. at 1344-45 felt justified in looking to them for clarification of the Convention's terms. The court in *Saks* made references to the *Guatemala City Protocol* and *Montreal Protocols No. 3* and *4*, which had changed the word "accident" of the Warsaw Convention Article 17 to "event". While recognizing that because the Senate had not yet ratified these protocols, these amendments "do not govern the disposition of this case", nevertheless the court gave this change of wording some weight as evidence of the expansion of the scope of carrier liability to passengers, and therefore assisted in the interpretation of the word "accident". This type of reasoning was used here by the *KAL* court, and it is submitted, rightly. Though the *Guatemala City Protocol* (Article X) was not argued before *Floyd* or *Lockerbie*, the same argument can be applied because this protocol made similar explicit reference to Article 22. *Roazen* at 1114 has criticised the *KAL* court because he is of the opinion that Article 25 is clear and unambiguous and therefore under *Chan* and *Saks* subsequent proposed amendments should not be looked at. He also criticises the use of an unratified protocol, which is "clearly illogical" at 1115.

changed the law, and the non-ratification of the new changes showed that the new law was not acceptable to the United States.¹⁹¹

The converse argument has been accepted by the other cases. In *Floyd*, the court's view was that Article 25 only referred to Article 22 and this was confirmed by the subsequent conduct of the contracting parties at the *Hague Protocol*.¹⁹² *Lockerbie* agreed.¹⁹³ The plaintiffs argued that the drafters intended to deter wilful misconduct, and therefore where there is wilful misconduct both the specific monetary limit provided by the Warsaw Convention *and* the Warsaw Convention's general scheme of compensatory damages are disallowed. The court admitted that read on it's own, Article 25 could be interpreted in this way. However, following *Floyd*, the minutes of the negotiations at the *Hague Protocol* show that Article 25 referred only to Article 22 which established monetary limits for recovery under the Convention. Moreover, said the court:

It seems more likely that if the parties intended that carriers which engaged in wilful misconduct would be subject to punitive damages claims, Article 25 would have provided that the entire Warsaw

¹⁹¹ According to *Roazen* at 1116, the United States Senate rejected the *Hague Protocol* because in cases of wilful misconduct the protocol continues to allow certain provisions limiting the carrier's liability to apply. *Grems* at 174-75 adopts the same position, and therefore refers to *Floyd's* use of the *Hague Protocol*, discussed below, as an "inappropriate use of the unratified Hague Protocol to judicially amend the wilful misconduct exception." Following *Saks* at 403, use of an unratified protocol can never govern the disposition of a case, but *Floyd*, *Lockerbie II* and *KAL* had incorrectly "relied heavily" (at 176) on these protocols. It is submitted that *Grems* exaggerates, and that these courts did not place heavy reliance on these protocols, but instead noted that they were unratified and therefore only due weight should be given to them.

¹⁹² *Floyd* at 1483-84. The dissenting judge in *KAL*, Mikva Chief Judge at 1493 has criticised *Floyd*. First, the original language of Article 25 did not suggest that only Article 22 was covered. Second, the United States never ratified the *Hague Protocol*. Third, *Chan* at 1683, 490 U.S. at 134, 104 L.Ed.2d 113 was clear authority that "where the text is clear ... we have no power to insert an amendment ... We must thus be governed by the text - solemnly adopted by the governments of many separate nations - whatever conclusions might be drawn from the intricate drafting history." Hence, the judge was of the opinion that to the extent the 1955 negotiating history cited by *Floyd* reflects the Hague drafters' understandings about what their predecessors may have had in mind a generation earlier, it is entitled to "only marginal weight" at 1493-94. The judge was of the opinion that the subsequent actions showed only that Article 25 was ambiguous. Moreover, the Hague Protocol made a change to Article 25, and was not a mere clarification. The Hague Protocol represented a *quid pro quo*: in exchange for a higher ceiling on damages, carriers sought to narrow the waiver of limitations in cases of wilful misconduct.

¹⁹³ *Lockerbie* at 550.

Convention, rather than just certain provisions, was inapplicable in such cases.¹⁹⁴

It has also been noted by the *Lockerbie II* court that during the discussions for the *Montreal Agreement* and *Guatemala Protocol*, nothing was mentioned regarding the availability of punitive damages under Article 25. This silence, particularly in the context of the Civil Law countries, evinced an assumption that Article 25's "unlimited liability" meant only unlimited compensatory liability.¹⁹⁵ More significantly, the court found that the *Guatemala Protocol* provided that for passenger and baggage claims, 1,500,000 francs per passenger was the maximum limit "and may not be exceeded whatever the circumstances which gave rise to liability."¹⁹⁶ Therefore, because the *Gautemala Protocol* would not even allow unlimited compensatory damages, it follows *a fortiori* that the contracting parties to the Convention did not contemplate punitive damages. Moreover, all of the negotiations preceding the action concerned the circumstances in which Article 25 came into play and about how to translate the concept of *dol* into English, not about the extent of the carrier's liability once the Article was invoked.¹⁹⁷

Three comments need to be made on the arguments relied on by the courts. First, the amendment of Article 25 to make specific reference to Article 22, it is submitted, does not necessarily support the courts' view that this confirmed the original intent of the contracting parties to the Convention. The converse argument that the amendment to Article 25 by the *Hague Protocol* was meant to *change* rather than clarify the Article, is equally if not more persuasive. This is because whilst the Hague Convention sought to increase the monetary limits of carrier liability, in return - a *quid pro quo* - the circumstances for unlimited carrier liability were narrowed.¹⁹⁸ Hence while the carriers

¹⁹⁴*Ibid.*

¹⁹⁵*Lockerbie II* at 1287.

¹⁹⁶*Guatemala Protocol*, Article IX.

¹⁹⁷*Lockerbie II* at 1287, citing *Miller* at 78.

¹⁹⁸*KAL* at 1494. Mikva, Chief Judge in his dissent draws an analogy with workmen's compensation statutes which allow workers to recover prescribed compensatory damages for accidental job-related injuries. These laws reflected a *quid pro quo* between employees, who are relieved of the burden of proof, and employers, who benefit from the cap on damages. Where there was intentional misconduct by the employer, punitive damages were allowed. Citing *Pratt v. National Distillers & Chem. Corp.*

gave in on certain points, they received benefit on others.¹⁹⁹ By the same reasoning, it would therefore make sense that the new Article 25 was narrower (less potent) than the original Article 25, and would now only remove the cap set by Article 22. A change in the law had therefore taken place.

Second, the courts that had relied on the argument the new Article 25 merely clarified the law did not explain how it was that before the amendment, those same courts understood that wilful misconduct would lift not only Article 22, but also Article 20 and possibly others. This did not coincide with the amended Article 25, which refers specifically to only Article 22. Clearly therefore the amendment had changed the law and had narrowed the application of Article 25. However, none of the courts have put forward any suggestions to explain this discrepancy.

Third, in the dissent in *KAL*, the judge states that the Hague amendment of Article 25 supplanted the reference to forum law ("court seised of the case"), and hence cannot be considered as a mere clarification of which provisions of the Convention Article 25 was directed at.²⁰⁰ The response of the majority was that this did "not belie the view that the Protocol's specific reference to the monetary limits of Article 22 was understood only to be a clarification."²⁰¹ It is submitted that this is not a satisfactory answer. The fact is that there was more than a mere clarification; there was a modification.

853 F.2d 1329, 1336-39 (6th Cir.1988), cert. denied, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). He then goes on to give the example of a carrier who decided to deliberately sabotage one of its own flights in hopes of receiving a large insurance settlement on the aircraft. If such egregious conduct went undetected, a financially strapped airline could invest a paltry amount in anticipated payments to decedents' estates in exchange for a multi-million dollar insurance pay-off. The majority's decision would completely foreclose the availability of punitive damages even in such an egregious case. The judge would therefore remand the punitive damages question to the district court with instructions to engage in a proper choice of law analysis. However, this scenario ignores the important deterrence provided by the criminal law. Moreover, Article 17 requires an "accident", and the intentional destruction of its own aircraft by a carrier may not enable it to rely on the protection of the Convention. Finally, the possibility of so wanton an act does not license the court to disregard the policy choices made by the Convention's contracting parties.

¹⁹⁹See generally Chapter Two on the idea of give-and-take during the discussions at the Hague.

²⁰⁰In fact this was the interpretation given by the majority of the dissenting judge's opinion. *KAL* at 1489.

²⁰¹*KAL* at 1489, citing *Floyd* at 1483.

iv. **The triggering event in wilful misconduct and punitive damages in American law are the same, but the purposes are different.**

In *Lockerbie II* the plaintiffs argued that even if Article 17 did not allow recovery of punitive damages, that provision became inoperative in the event of wilful misconduct; Article 25 lifted the limit of \$75,000 as well as *any and all* limitations on damages. This flows from the idea that both the provisions of Article 25 and the right to recover punitive damages under American tort law are triggered by the defendant's wilful misconduct.²⁰² Put in other words, the concept of wilful misconduct under the Convention is strikingly similar to the conduct that supports an award of punitive damages under United States law.²⁰³ Hence, argued the plaintiffs, the purposes of Article 25 bear some relation to those of punitive damages and that punitive damages are *implicitly* authorized by Article 25. The court disagreed, stating that the purpose of Article 25 is to prevent a party from relying on exclusions to escape his own wrongdoing, rather than to punish the defendant. Deterrence was inherent in both ideas. Furthermore, when Article 25 refers to terms that limit or exclude liability, it refers only to those terms found within the Convention itself, as conceived by the contracting parties.²⁰⁴

Secondly, *Floyd* recognised that even though the triggering events for punitive damages were the same under American case law and Article 25, there was a lack of any

²⁰²*Olin* at 41 argue in favour of punitive damages that "the Convention explicitly sacrifices uniformity when the typical conditions for punitive damages are met. Under Florida law, and that of most other states, a punitive award is warranted only when there is proof that the defendant has engaged in wanton, willful, or reckless misconduct. That is one area where the convention has sacrificed uniformity in favour of local law."

²⁰³*Dubuc* at 44, citing *Butler* at 430-31 as the example where the definition of "wantonness" under Alabama law is substantially equivalent to "wilful misconduct" under the Convention. Despite this similarity, the court there held at 431 that the Warsaw Convention permitted recovery of only compensatory damages, since to allow punitive damages "[m]anifestly ... conflicts with the tenor of the Warsaw Convention". The writer goes on to submit that for a carrier to be punished twice for the same conduct, first by the removal of the cap of compensatory liability, and second by the imposition of punitive damages, is "civil double jeopardy" which is possibly unconstitutional and in violation of the due process rights of the carrier.

²⁰⁴*Lockerbie II* at 1285, citing H. Drion, *Limitation of Liability in International Air Law* (The Hague, Martinus Nijhoff: 1954) at 261 [hereinafter *Drion*].

mention of punitive damages in the latter. This was significant, and could only mean that punitive damages were not authorised by Article 25.²⁰⁵

v. Article 25 does not create an independant cause of action

The plaintiffs in *Floyd* argued that Article 25 served two functions: (1) to remove the limitation on compensatory damages contained in Article 22, and (2) creates a cause of action itself which authorizes recovery of punitive damages. The first argument has already been dealt with above, with the conclusion that Article 25 did not lift all limitations, only limitation on compensatory damages. On the second argument, it is difficult to understand how Article 25 could have created a cause of action, and therefore it is not surprising to find that this argument was only made in this one case. The court rejected the argument:

The structure of the Convention, the subsequent interpretation by the parties, and the unanimous case law persuade us that Article 25 operates only to remove the liability limitations of Article 22 in cases of "willful misconduct" by the air carrier, and was not intended to provide an independent right of action.²⁰⁶

It is therefore clear that Article 25 does not create a cause of action, whether or not there is wilful misconduct by the carrier.²⁰⁷ This view is supported by *Shawcross*, who agrees that the effect of Article 25 is to remove the limitations affecting the level of compensatory damages which may be awarded.²⁰⁸

vi. Other countries with similar provision do not allow punitive damages

The *Lockerbie II* court found support for its position that Article 25 did not authorize the recovery of punitive damages for other jurisdictions such as Mexico, El Salvador, Guatemala and Argentina.²⁰⁹ These countries had liability provisions and

²⁰⁵*Floyd* at 1481.

²⁰⁶*Ibid.* at 1478, citing authorities mentioned in the last paragraph of part VI.C.ii. above.

²⁰⁷This view was followed by *Lockerbie* at 552. *Cf Grems* at 178, who is of the opinion that Article 25 creates an independent cause of action for punitive damages upon a finding of a carrier's wilful misconduct.

²⁰⁸*Shawcross* at VII(115.1).

²⁰⁹*Lockerbie II* at 1286.

statutory limits on personal injury claims from common carriers, and these documents contained a provision similar to Article 25 and provided that in cases of "*dolo*" (the Spanish equivalent to "*dol*"), unlimited liability will apply. However, none of these countries allowed plaintiffs to recover punitive damages as well as unlimited compensatory damages when the liability limit is lifted.²¹⁰

D. Other Provisions reserved to Domestic law

The Warsaw Convention does not aim to prescribe rules to govern all aspects of international air transport liability. Questions of procedure (Article 28(2)), the effect of contributory negligence (Article 21), and the method of calculating the statute of limitations (Article 29(2)) are expressly reserved to be determined by local law. As we have seen, the conduct considered equivalent to wilful misconduct is also left to local law (Article 25(1)), as is the category of persons who have the right to bring suit and their respective rights (Article 24). This was significant to the *Karachi* court when concluding that punitive damages were recoverable, finding that the types of damages recoverable are also left to local law.²¹¹

However, the more persuasive argument is found in *Lockerbie*. The plaintiffs used the same argument that the Warsaw Convention expressly and explicitly left certain matters to be governed by local law, therefore, it is probable that the Warsaw Convention also intended to leave punitive damage claims to local law even if it was silent on the issue. The court, however, disagreed. The argument in fact worked against the point the plaintiffs were trying to establish:

However, that the Warsaw Convention was silent on whether punitive damages claims should be governed by local law while expressly providing for those other issues to be determined by reference to local law actually runs against the argument that the Warsaw Convention intended

²¹⁰*Ibid.*, citing K. Cagle, "The Role of Choice of Law in Determining Damages for International Aviation Accidents" (1986) 51 J.Air L. & Com. 953 [hereinafter *Cagle*] at 966-70.

²¹¹*Karachi* at 19, citing *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir, 1987), *Cohen v. Varig* 62 A.D.2d 324, 334, 405 N.Y.S.2d 44, 49 (1978). *Olin* are of the same opinion, and that the drafters had intended to sacrifice uniformity in certain areas, punitive damage awards being one of them.

punitive damages claims to be governed by local law. Because the application of various local laws to punitive damage claims would be a greater hindrance to the Warsaw Convention's primary goal of uniform and limited liability than the application of local laws to the questions of procedure, contributory negligence, or the statute of limitations, it seems the Warsaw Convention would have certainly expressly provided if punitive damages claims were to be governed by local law.²¹²

The reasoning of the court is only logical; where the Warsaw Convention intended local laws to apply, it had expressly provided for this. Therefore, where the Warsaw Convention did not so provide, local laws would not be applicable.²¹³

VII. Purpose and history

The purposes for which the Warsaw Convention was enacted have been variously described. Essentially, the primary purpose of the Convention was to unify the various laws governing international air transport of passengers, baggage and cargo by establishing uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation.²¹⁴ Subsidiary to these were the purposes of insurability at reasonable rates, establishing a limit on liability that would protect fledgling carriers, adequately compensate passengers for losses, and discourage litigation.²¹⁵ These ends were to be achieved by the strict limitation of liability.²¹⁶ In essence, the courts have considered that awarding punitive damages would

²¹²*Lockerbie* at 549.

²¹³*Moore* at 88 is of the same opinion.

²¹⁴As the name of the Convention suggests. See also *Farlow* at 92-93, where the writer sets out some of the comments made by delegates at the Convention stressing the commitment and importance of uniformity.

²¹⁵See generally *Minutes*; Lowenfeld & A. Mendelsohn, "The United States and the Warsaw Convention" 80 Harv. L. Rev. 497 (1967) [hereinafter *Lowenfeld*]; *Drton* at 12-44 (1954). See also *Trans World Airlines, Inc. v. Franklin Mint Corp.* [18 Avi. 17, 778], 466 U.S. 243, 256, 104 S.Ct. 1776, 1785, 80 L.Ed.2d 273 (1984) [hereinafter *Franklin Mint* cited to U.S.]; *Reed* at 1089.

²¹⁶At the time the Warsaw Convention was placed before the United States Senate for ratification, Secretary of State Cordell Hull wrote:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would

be contrary to achieving these factors.²¹⁷ In the United States, it must be borne in mind that the drafting history of the Convention can be used to assist in interpretation²¹⁸ when there is an ambiguous provision, "[b]ut where the text is clear ... [the courts] have no power to insert an amendment."²¹⁹ Hence, courts have to be careful to refer to the drafting history only when there is an ambiguity in the language of the text. For this reason, *Floyd* and *Lockerbie* have both been criticised as relying heavily upon a judicially perceived need to construe the Convention in accordance with the intention of the contracting parties.²²⁰ It is submitted that ambiguity is a question of degree; the fact that there has been litigation over the issue of punitive damages, and that the Convention is open to being interpreted either way, leads to the conclusion that the text is ambiguous, and therefore it is right and proper to refer to the drafting history of the Convention to try and ascertain the intention of the contracting parties.

eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, "Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules Relating to International Transportation by Air", Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934), [1934] U.S.Av.R. 239.

²¹⁷For example, in *Lockerbie II* at 1287:

Interpreting the Convention to allow such recovery would severely hobble most of the aims the Convention sought to accomplish: establishing a uniform carrier liability regime, limiting carrier liability, ensuring the carriers' ability to insure against losses, and adequately compensating injured passengers quickly and with a minimum of litigation.

²¹⁸*Saks* at 400 per Justice O'Connor: "In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation."

²¹⁹*Chan* at 134 n.5 continues: "Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history." One of the most quoted passages, at 135, quoting Justice Story in *The Amiable Isabella* 6 Wheat. 1, 71 (1821) reads:

[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops - whatever may be the imperfections or difficulties which it leaves behind

²²⁰*Karachi* at 20. The court therefore declined to follow these decisions. See also *Grems* at 173, where the writer argues that not only *Floyd* and *Lockerbie II*, but also *KAL* (which relied heavily on *Lockerbie II*), are wrong because they ignored the clear and unambiguous text of Article 25 which bars the carrier from provisions which *exclude* or *limit* liability, thus contravening *Chan*. If a carrier is guilty of wilful misconduct, it cannot secure the benefit of the Convention's limitations; it is as simple as that.

The often raised argument in favour of punitive damages is the positive deterrent effect of such damages. Since they are discretionary, they are difficult to predict with any accuracy, and as the *KAL* decision has shown may involve huge amounts of money that would deter even the largest airlines.²²¹ Further, the deterrent effect would be neutralized if carriers were allowed to insure against such eventualities; hence such damages are often uninsurable. This would keep airlines on their toes, and ensure certain minimum levels of maintenance and safety. Where a compensatory-only scheme of liability exists, it may actually be cheaper for airlines to buy insurance than to spend money maintaining their aircraft.²²² As a result, safety is compromised. Hence the argument for punitive damages may sound attractive, but is not persuasive for two reasons. First, it was never the purpose of the Warsaw Convention to deter unacceptable conduct; much as it is a worthy goal to deter unacceptable conduct, such deterrence was never the original intent of the Contracting parties.²²³ Second, the task of ensuring safety is invariably reserved to organisational bodies, such as National or Federal aviation authorities and international inter-governmental organisations such as ICAO.²²⁴

A. Uniformity

The courts have held that the recovery of punitive damages would be inconsistent with the goal of the Convention to provide a comprehensive and uniform scheme governing the liability of the airlines in the areas covered by the Convention. The text of the Convention points out the necessity of uniformity and the desire for a comprehensive

²²¹The district court in this case had awarded punitive damages of US\$ 50 million against the carrier.

²²²As suggested by *Roazen* at 1117. *Roazen* also suggests that disallowing punitive damages will remove any incentive for plaintiffs to allege or prove wilful misconduct, since they cannot receive punitive damages. It is submitted that this argument is flawed because the incentive to prove wilful misconduct is *unlimited* compensatory damages, which may far exceed the \$75,000 limit set by the *Montreal Agreement*.

²²³The text and legislative history of the Convention contain no evidence of any deterring function. Nevertheless, it may be a residual effect of the Convention. *See also Edel'ian* at 532.

²²⁴International Civil Aviation Organization as constituted under Part II of *Convention On International Civil Aviation*, 7 December 1944, [commonly known as the "Chicago Convention"] ICAO Doc. 7300/6 (1980). Article 44 of this convention sets out the objectives of ICAO, and in particular Article 44(a), (d) and (h) set out the safety objectives.

set of rules in those areas where the signatories intended the Convention to apply. The preamble of the Convention declares the intent of the signatory nations as "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".²²⁵ Article 1(1) of the Convention provides that "[t]his convention *shall* apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire" [emphasis added]. Hence uniformity of rules governing international air operations is a primary goal of the Convention.²²⁶

Allowing state law causes of action that allowed punitive damages would therefore be contrary to the goal of uniformity. As emphasized in *Lockerbie II*:

The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws ... Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. *We do not see how the existence of state law causes of action could fail to frustrate these purposes.*²²⁷

Apart from the United States, no other jurisdiction has considered awarding punitive damages in a claim under the Warsaw Convention. The uniform application of the treaty would be threatened if the United States, alone among contracting states, imposed a form of liability wholly outside the compensatory scheme of Article 17.²²⁸ Not

²²⁵*Floyd* at 1483.

²²⁶In *Reed* at 1090 the court held:

[T]he fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation which would supersede with respect to international flights the scores of differing domestic laws.

Again, in *Block v. Compagnie Nationale Air France* [10 Avi. 17, 518], 386 F.2d 323, 337-38 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968) the court held that it "has an obligation to keep interpretation as uniform as possible."

²²⁷*Lockerbie II* at 1275 [emphasis added].

²²⁸*KAL* at 1487, citing *Lockerbie* at 1287-88, *Floyd* at 1487-88.

only would uniformity be compromised, but claimants would as a result try to bring their claims in the United States:

The Convention should be read to further its purposes to the greatest extent possible, and one of its primary purposes was to achieve uniformity in the liability and amount of damages awardable ... Were the United States alone to allow such recoveries, it would act as a magnet so that every airline injury claim would, if possible, be brought in the United States. The enormous difference between the damages recoverable here and those recoverable in other forums would thereby destroy much of the value of the Convention.²²⁹

As *O'Brien* quite rightly points out, however, *because* no other countries have reported decisions allowing or disallowing punitive damages, a United States court would not be disrupting any uniformity among the contracting states by awarding punitive damages.²³⁰ The reply to this interesting point of course would be that punitive damages were never part of the signatories' agenda, and therefore the United States court that does award punitive damages would be going against the spirit of the Convention, and it is unlikely that such a precedent would be followed in any other contracting state. Hence uniformity would be disrupted.²³¹

At a lower or micro-level, it has also been argued that so long as there is uniformity of *application* of the Warsaw Convention within a signatory state, it did not matter that another jurisdiction did not apply the same rules.²³² Therefore, allowing punitive damages in one state but not in another was acceptable. The justification for this assertion apparently is that the "uniform *application* of the Convention and not uniform

²²⁹*Lockerbie* at 1287.

²³⁰*O'Brien* at 357.

²³¹It is also possible to make the argument that the Warsaw Convention itself, with all its amending protocols, sacrifice uniformity because each instrument provides a different level of liability limitation. Hence under the Warsaw Convention the limit for passenger injury is 125,000 francs, under the *Hague Protocol* 250,000 francs, under the *Guatemala City Protocol* 1,500,000 francs, under *Montreal Protocol No.1* 8,300 SDR, under *Montreal Protocol No.2* 16,600 SDR, under *Montreal Protocol No.3* 100,000 SDR. Differences are similarly found with respect to baggage and cargo limits. The distinction, however, is that here there are varying levels of liability in monetary terms, which it is submitted is acceptable (*cf Cagle's view*), and not varying application of the Convention, which is unacceptable.

²³²*Buono* at 600-601.

results was most likely the intention of the drafters."²³³ In support of this argument, the writer cites the disparity of tests applied in wilful misconduct cases (objective or subjective test), and the fact that in Canada funeral expenses are not recoverable, while in France, courts award such expences. It is submitted that this writer's views are wrong, and that to give such examples in support of the argument is to ignore the criticisms which have been levelled at the different tests applied by differing jurisdictions for wilful misconduct.²³⁴ Also, funeral expenses are often legislatively provided for in some states but not in others; in any case funeral expenses are compensatory in nature, and are therefore a different class of damages from punitive damages altogether.

B. Insurability and Adequate compensation

To allow punitive damage awards is detrimental to the insurability of a carrier. Punitive damages are by nature an uncertain proposition, since the cases in which they will be allowed and the quantum of such claims is entirely left to the discretion of the judge and the jury and vary not only according to the gravity of the conduct but also according to the defendant's wealth; the wealthier the carrier, the more likely punitive damages will be high.²³⁵ As such, insurance companies would have a difficult task calculating how much to charge its insureds.²³⁶ Second, even if the airline industry could obtain such insurance, the cost of a ticket would skyrocket in response to the higher cost of insurance. The higher cost of insurance would increase the costs of airlines overall and could contribute to the downfall of an airline teetering on the edge of insolvency.²³⁷ Finally, since to encourage some form of insurance is beneficial and indeed necessary to carriers, any factor that would prevent insurability is undesirable. Some states have traditionally barred insurance coverage of punitive damages, since that would go against

²³³*Ibid.*

²³⁴See generally Chapter Two on Wilful Misconduct.

²³⁵*Lockerbie II* at 1288, citing Belli, "Punitive Damages" 49 UMKC L. Rev. at 13.

²³⁶*Ibid.* The resulting unpredictability of punitive damages awards has, stated the court, caused difficulties in other sectors of the insurance industry, citing Mooney, "The Liability Crisis - A Perspective" (1987) 32 Vill.L.Rev 1235 at 1260.

²³⁷*Ibid.*

the goal of deterring future misconduct.²³⁸ If an airline could not find an insurer able or willing to sell insurance for punitive damages, it might well choose to go out of business, or at least out of the international market, rather than risk bankruptcy with every flight.²³⁹ Not surprisingly, therefore, the *Lockerbie II* court concluded that "[t]he goal of ensuring a viable airline industry to foster commerce and make international travel more extensive and accessible would be seriously undermined by allowing punitive damages."²⁴⁰ Similar conclusions have been reached by the *Gander* court²⁴¹ and the *Harpalani* court.²⁴²

²³⁸For example, California, Florida, Illinois, New Jersey and New York do not allow insurance of punitive damages; Arizona, Georgia, Maryland, Virginia and Wisconsin do. See S. Kenney, "Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma" (1983) 48 J. Air L. & Com. 753; *Edelman* at 540-42 also suggests that because of this difference in law between states, carriers will want to litigate their case in jurisdictions which allow punitive damages to be insured, whilst insurers would want the case litigated in a jurisdiction which does not allow punitive damages to be insured. Hence there is a conflict of interest, especially since insurers often agree to bear the costs of litigation. A carrier may have to obtain its own counsel in such instances, increasing litigation costs and delaying payment.

²³⁹This argument presumes that one of the goals of the Warsaw Convention is to deter wilful misconduct, which in fact is not the case; the Warsaw Convention was never intended to play a deterrent role, even though no doubt the prospect of unlimited compensatory liability would have this effect.

²⁴⁰*Lockerbie II* at 1288.

²⁴¹*Gander* at 932:

Nothing in this court's review of the learned materials presented to it, or the minutes of the Convention indicates that the signatories to the Convention intended to allow punitive damages. The purpose of the Warsaw Convention is to place strict, uniform limits on air carriers' liability which will allow adequate compensation for passengers' losses, yet which will be low enough to allow carriers to insure against losses at reasonable rates ... Neither uniformity, insurability nor an effective limitation of liability would be achieved if punitive damages could be recovered against an air carrier under the Convention. Consequently, punitive damages may not be recovered under the Convention. It follows that state law claims for punitive damages are pre-empted by the Convention to the extent that they would prevent the application of the Convention's limitations.

²⁴²*Harpalani* at 799:

The purpose of those provisions was to establish strict limits on liability that would adequately compensate passengers for most losses, yet would also be sufficiently low to permit carriers to insure against losses at reasonable rates. Allowing punitive damage awards would be inconsistent with this scheme, both because carriers cannot insure against such awards, and because the purpose of punitive damages - to punish and deter ... - is unrelated to the signatories' goal of ensuring minimally adequate compensation.

A secondary purpose of maintaining a strict cap on liability was to balance the insurability of carriers against the interests of passengers. By specifying this limitation, it gave passengers adequate compensation whilst at the same time permitting them to obtain individual insurance where the passenger thought it was necessary.²⁴³ This was pointed out by *Reed*, where the court held that "[i]t is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover such damages." Again, in *Floyd*, the court was of the opinion that "[t]he Convention was intended to place strict limits on air carrier liability for accidents, as well as to ensure at least a measure of compensation for accident victims."²⁴⁴

C. Infant industry

The Contracting states in 1929 believed limitations on liability would promote the development of the fledgling commercial air industry by allowing the airlines to predict their exposure to monetary damages and thereby obtain needed capital and adequate insurance coverage. It was necessary protection for a financially weak industry and ensured that catastrophic risks would not be borne by the air carriers alone, but by the insurers as well.²⁴⁵ The *Lockerbie* court found that while the Warsaw Convention did not expressly refer to punitive damages, in interpreting the Warsaw Convention, courts are obligated "to give the specific words of the treaty *a meaning consistent with the shared expectations of the contracting parties*",²⁴⁶ and this primary shared expectation was to set some *uniform* limit on an airline carrier's liability in order to promote the civil aviation industry which at the time of the Warsaw Convention was in its infancy.²⁴⁷

²⁴³*Lockerbie* at 553, n. 13.

²⁴⁴*Floyd* at 1482, citing *Lowenfeld* at 498-501.

²⁴⁵*Floyd* at 1465, recognizing that such limits on liability were not unknown in law, and drew an analogy to maritime law with its global limitation of a shipowner's liability which enables it to obtain necessary capital.

²⁴⁶*Lockerbie* at 549, citing *Saks* at 399 [emphasis added].

²⁴⁷*Ibid.*, citing *Franklin Mint* at 256; *Reed* at 1089; *Floyd* at 1467; *Lowenfeld* at 499.

The aviation industry has come a long way since 1929, and today would not generally be considered an infant industry requiring legislative protection.²⁴⁸ Other writers have rightly pointed out that perhaps the airline industry is not quite as lucrative as one might suppose, since the industry as a whole has suffered great financial losses in recent years and the demise of Pan Am, Eastern, Midway and Braniff airlines illustrate just how fragile the industry really is.²⁴⁹ Whatever may be the economic situation within the industry, the fact remains that it is only the political branches which have the power to repudiate or amend the Warsaw Convention. In a recent ruling on the Warsaw Convention in *Chan*, the United States Supreme Court admonished the courts that to "alter, amend, or add to any treaty would be ... an usurpation of power, and not an exercise of judicial functions."²⁵⁰

D. Minimise Litigation and quicker compensation

Allowing punitive damages claims would increase litigation in general because every plaintiff would claim wilful misconduct in the hope of receiving a windfall by way of a punitive damage award. This would increase the potential number of cases which will be litigated. Further, precisely because punitive damages recoveries are

²⁴⁸While it is *probable* that the majority of carriers are able to flourish even without a limitation of liability, there will be some smaller carriers which would not. This would also be true of airlines in developing or emerging states, where the level of the industry development would be in its infancy: *Cagle* at 993. Furthermore, the *Lockerbie* court at 552, n.13 has suggested that the continued existence of the law of limited liability may not be wholly without any rational basis. A number of international airlines may be wholly owned by sovereign governments which might well not consent to being sued for punitive damages. Also, private carriers subject to such damage suits might be placed at a substantial competitive disadvantage.

²⁴⁹*Edelman* at 521 n.88, and 532.

²⁵⁰*Chan* at 135, cited in *Lockerbie* at 552. The *Lockerbie* case came up for further argument because the plaintiffs claimed that the court had ignored *Chan*, which required that where the text of the Convention was clear, the courts had no power to insert an amendment. The court's response was that if there was no ambiguity, then the only conclusion it could come to was that the Convention does not create a cause of action for punitive damages. Here the Warsaw Convention was not clear, and because of the ambiguity it was entitled to look at extraneous material to determine the shared expectations of the signatories. The court also noted that here the plaintiffs have argued that the Warsaw Convention actually authorizes punitive damages claims, whilst in *Floyd* the plaintiffs asserted their punitive damages claims under State law and then simply asked that the Warsaw Convention not preclude their claims.

unpredictable, there is greater incentive to litigate a case to the end rather than settle.²⁵¹ Therefore, the goal of discouraging litigation is inconsistent with the recovery of punitive damages.

VIII. Conclusion

It is the position of this writer that punitive damages are not recoverable under the Warsaw Convention, primarily because the original intention of the High Contracting Parties was to provide a scheme of liability and compensatory damages. The Warsaw Convention's silence on this matter is a result of the fact that the signatories did not consider the issue at that time.

Whilst the courts so far have not allowed punitive damages, there are convincing arguments both for and against such awards, the rebuttals to which have at times been less than satisfactory. However, to put the matter beyond doubt, only a decision of the highest courts, or an explicit amendment to the Convention by all the parties, will suffice. As there does not appear to be any plans to take the latter course of action, we would have no alternative but to await a decision of a superior court to finally resolve the matter. It also remains to be seen what effect the Inter-carrier Agreement 1995 would have on punitive damage litigation when it comes into force, since under that agreement only compensatory damages may be recovered. In theory, the agreement does not affect the provisions of the Warsaw Convention or types of recoverable damages thereunder, and all the above discussion will apply. In practice, however, since there will be no limit to compensatory damages, perhaps the incentive for claimants to pursue punitive damages will be partially reduced, or claimants may even have to forego this right as a condition to receiving unlimited compensatory damages.

²⁵¹ *Lockerbie II* at 1270-71, citing Comment, "Punitive Damages", 22 U.S.F.L.Rev. 102; Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982) 56 S.Cal.L.Rev. 1, 45-46. See also *KAL* at 1490, *Floyd* at 1465, 1487-88 and *Lockerbie* at 1287-88.

CONCLUSION

On the question of mental injury, there is the decision of the Supreme Court of Israel which allows recovery of damages for such injury. In the face of this decision, the United States Supreme Court determined that such damages were not recoverable. Most recently, in the Supreme Court of New South Wales, Australia, the court there decided to allow damages for mental injury, despite the earlier American decision.

On the question of wilful misconduct, there are currently two different provisions of Article 25 that are in force for different jurisdictions, hence resulting in some disunification. On top of that, in the interpretation of the "improved" later version found in the *Hague Protocol*, there has been no uniform application of the test for reckless conduct with knowledge of resulting damage.

Finally, on the question of punitive damages, so far the trend has been to disallow such damages under the Warsaw Convention, at least in the United States. It will be noted, however, that none of the highest courts in any of the High Contracting Parties has determined this issue.

As has been succinctly noted by a Canadian judge, while the uniformity in interpretation of the Warsaw Convention and the reaching of consistent decisions is "a desirable end, the jurisprudence of various countries interpreting it has been by no means consistent any more than the decisions in the various countries interpreting The Hague Rules for Carriage by Sea or the American Carriage of Goods by Sea Act always reach the same results".¹ Given the different approaches and policy considerations of each jurisdiction, it is unlikely that the situation will improve.

¹Walsh J in *Swiss Bank*, 129 DLR (3d) 86 at 101.

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