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# PERSONAL INJURY DAMAGES IN INTERNATIONAL AVIATION LITIGATION: THE PLAINTIFF'S PERSPECTIVE

SUSAN E. LOGGANS\*

## INTRODUCTION

The nature of air disasters creates extremely complex litigation.<sup>1</sup> In addition to the staggering quantum of money and time involved in discovery,<sup>2</sup> proof of facts in such cases is often difficult. The popular view is that the complexity of aviation cases results primarily from the necessity of technical proofs. The truth, however, is that the major problem presented by an aviation disaster case lies not in the proof of liability, but in the issue of damages.

At the foundation of the Anglo-American concept of damages is the notion of compensation for loss or injury attributable to the wrongdoer.<sup>3</sup> In civil suits, recovery of damages is limited only by the established loss or injury sustained by the plaintiff. Measured by this standard of recovery, awards of damages in domestic air disaster cases have been unprecedented in amount.<sup>4</sup> Yet, this is not the case in international air crash liti-

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1. "The many reported decisions involving airplane accidents reveal that the proper preparation and presentation of such a case involves matters of a complicated technical nature and requires the benefits of expert guidance." *Branyan v. KLM*, 13 F.R.D. 425, 427-28 (S.D.N.Y. 1953).

2. See generally 1 L. KREINDLER, *AVIATION ACCIDENT LAWS* ch. 26 (1978) [hereinafter cited as KREINDLER]; Loggans, *Aviation Discovery: The Herculean Task*, 14 TRIAL 40 (1978).

3. C. MCCORMICK, *DAMAGES* 560 (1935).

4. Because death or severe injury is the unfortunate but common result of an airplane crash, the subject of damages assumes a special importance in the field of aviation litigation. The last twenty years have witnessed considerable development in the methods of bringing the facts of the case and the nature of the loss to the jury, as well as the theory of valuation proposed by the plaintiff. Demonstrative evidence, coupled with the growing use of experts in proving damages, has resulted in more respon-

gation.

Considerations in the interest of international comity and private enterprise have placed limitations on the recovery of damages by international air passengers. In a commercial aviation accident, international agreements may restrict the amount of damages recovered regardless of the severity of the injury suffered by the plaintiff. These international agreements have come to be known as the Warsaw Convention and its progeny.<sup>5</sup>

Due to the broad definition of "international travel" propounded by the drafters of the Convention,<sup>6</sup> air travel that may seem purely domestic may in fact fall within the rigid limitations of that treaty. In fact, two Americans seated next to each other on a commercial flight from Chicago to Bloomington, Indiana may be entitled to recover widely disparate awards of damages as a result of the application of the Warsaw Convention. Thus, any plaintiff's attorney who becomes involved in air disaster litigation is advised to acquaint himself, or herself, with the law of international air travel.

Because domestic air crash litigation is controlled by the same tort principles prevailing in other personal injury cases, this article will discuss only international aviation accident litigation. Initially, the history of the international agreements which govern the amount of recoverable damages will be examined. Subsequently, those cases which fall within the purview of the agreements or treaties, as well as those which

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sive, reasonable, and yet significantly higher verdicts. See Belli, *Demonstrative Evidence*, 10 Wyo. L.J. 15 (1955).

In a study conducted by the Civil Aeronautics Board [CAB], over 48% of the non-Warsaw death settlements for 1970 arising from aviation litigation exceeded \$200,000. The trend reported by the CAB is toward increasingly higher awards in such cases. CIVIL AERONAUTICS BOARD, LEVEL OF RECOVERY ON ACCOUNT OF PASSENGER DEATH AND SERIOUS INJURIES IN AIRPLANE ACCIDENTS (1970).

5. Warsaw Convention, *opened for signature*, Dec. 12, 1929, 49 Stat. 3000, T.S. No. 876. Article 22 provides in pertinent part that "[i]n the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [\$8,291]." The Hague Protocol, an agreement to which the United States is not a party, has increased that limit for some international travel to \$16,582. 2 INTERNATIONAL CIVIL AVIATION ORGANIZATION, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 1 (Doc. 7686-LC/140)(1956), W. EXEC. DOC. NO. H, 86th Cong., 1st Sess. 5 (1959).

Currently, the limitation on recovery for a passenger in an international air disaster is \$75,000 where the flight had significant contact with the United States. This is provided for in the Order of the Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, 49 U.S.C. § 1502 (1970). This order is known as the Montreal Agreement.

6. Article 1(2) of the Warsaw Convention defines "international transportation." See note 27 and accompanying text *infra*.

constitute exceptions to their application, will be discussed. Finally, the constitutionality of the damage limitations created by the agreements and an argument based upon contract law will be analyzed. Throughout, methods of procuring full compensation for the plaintiff will be sought.

#### HISTORICAL BACKGROUND

In 1925 and in 1929, representatives of many major commercial nations met in Paris and Warsaw. Their twofold goal was (1) to unify the law of international aviation, and (2) to protect the fledgling airline industry from the potentially debilitating effect of unlimited liability in the event of a disaster.<sup>7</sup> The result of these two international conferences was the Warsaw Convention,<sup>8</sup> which has since been the dominant consideration in international aviation accident litigation. The United States was not a party to these conventions, but it did send an observer to them. In 1934, however, the United States became an official adherent to the Convention,<sup>9</sup> adopting its provisions as part of the supreme law of the land.<sup>10</sup>

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7. *Rosman v. Trans World Airlines*, 34 N.Y.2d 385, 387, 314 N.E.2d 848, 851, 358 N.Y.S.2d 97, 101 (1974) ("The primary objectives of the Convention are to establish uniform rules of documentation in air transportation and to limit liability of the air carrier in case of accident.").

See generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967) [hereinafter cited as Lowenfeld & Mendelsohn] (authors present an excellent documentation of the United States' involvement in, and adherence to, the Warsaw Convention from its creation through the adoption of its several amendments).

8. Warsaw Convention, *opened for signature*, Dec. 12, 1929, 49 Stat. 3000, T.S. No. 876. See note 6 *supra*.

9. Article 38 of the Warsaw Convention provides that:

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.  
49 Stat. at 3023, T.S. No. 876.

In 1934, the President submitted the treaty to the Senate, which gave its advice and consent by voice vote on June 15, 1934. 78 CONG. REC. 11,582 (1934). The United States, pursuant to Article 38 of the Convention, deposited its instrument of adherence on July 31, 1934; the President proclaimed adherence only three months later. 49 Stat. 3000, T. S. No. 876 (1934).

10. A treaty ratified by the Senate, U. S. CONST. art. II, § 2, cl. 1, or an international agreement entered into pursuant to valid executive authority, *United States v. Pink*, 315 U.S. 203 (1942), is the supreme law of the land. See, e.g., *United States v. Belmont*, 301 U.S. 324, 327 (1937) (Court in reviewing the applicability of Soviet-United States agreement to New York civil suit held that the international treaty must take precedence over New York law); *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir.), *cert. denied*, 331 U.S. 808 (1946) (treaty, valid under the federal Constitution,

The core of the Convention is its limitation of liability. In its original form, the treaty limited an airline's liability for death or personal injury to approximately \$8,300 per passenger.<sup>11</sup> Although this ceiling on recovery was a sharp departure from common law tort principles and could produce harsh results, *quid pro quo* was the rationale suggested by its proponents.<sup>12</sup> The passenger relinquished his right to recovery in excess of \$8,300, and the carrier became saddled with a presumption of liability for any injury occurring while the passenger was embarking, on board, or disembarking the aircraft, unless the carrier proved its exercise of due care.<sup>13</sup> In addition, the carrier was not permitted to limit its liability beyond that provided by the treaty's restric-

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must be regarded as part of law of state and may override power of state over the great body of private relations which usually fall within its control); *Kelly v. Sabena Belgium World Airlines*, 242 F. Supp. 129, 145 (E.D.N.Y. 1965) ("The Convention, and the limitations therein, is the law of the land and must be applied, notwithstanding contrary state law or public policy.").

11. 49 Stat. at 3019, T.S. No. 876. Article 22 of the Convention also limits the air carrier's liability for loss of personal belongings and baggage. This article, however, will discuss only the issue of damages resulting from injury or death.

It should be noted that the Convention does not apply to the passenger's rights against the aircraft *manufacturer*. The limitations apply only to the carrier and may not be asserted as a defense in an action against other defendants.

12. "Though the carriers receive the chief benefit from Warsaw, the passenger was not entirely neglected . . . . [T]he essential bargain was a shift in the burden of proof in return for a limit of liability (except in cases of wilful misconduct) set at 8,300 dollars per person." Lowenfeld & Mendelsohn, *supra* note 7, at 500. *But see* Comment, *The Warsaw Treaty: The Quid Pro Quo*, 29 U. PITT. L. REV. 253, 256-58 (1967) (the student author noted that the tradeoff between the passenger and the air carrier may be inequitable in modern times, especially with the advent and extensive use of the doctrine of *res ipsa loquitur* in air crash cases).

13. "For all practical purposes the Warsaw Convention creates a presumption of liability of the carrier, up to a limited amount." KREINDLER, *supra* note 2, at § 11.02.

The presumption arises from the language of the following three articles of the Convention. Article 17 states:

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

49 Stat. at 3018, T.S. No. 876.

Article 20 provides that the carrier shall not be liable if it proves due care on its part. Finally Article 21 allows the carrier to escape liability, wholly or in part, if it can prove the contributory negligence of the passenger. *Id.* at 3019, T.S. No. 876.

For a complete discussion of the presumption of liability which derives from Articles 17, 20, and 21, see Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law*, 27 J. AIR L. & COM. 1 (1960).

tions.<sup>14</sup>

In the years after the United States adherence to the Convention, it became increasingly clear that the limits placed on liability had been set too low. In the United States, Great Britain, France, and other developed countries, awards in personal injury and death actions far exceeded the recovery amounts permitted by the Warsaw Convention.<sup>15</sup> It was argued that the airline industry had become stable and profitable and no longer needed the protection of the Warsaw limit.<sup>16</sup>

In a 1955 international convention at the Hague, many of the Warsaw adherents and signatories voiced their differences. Debate centered on Article 22's \$8,300 limitation on recovery.<sup>17</sup> The United States supported a \$25,000 per passenger limit, but this proposal was vehemently opposed by many of the less developed countries, and a \$16,000 maximum was settled upon.<sup>18</sup> Other modifications of the Warsaw Convention were adopted, and the agreements became known collectively as the Hague Protocol. The United States, a strong advocate of many of the modifications, signed the agreement, but ironically it has never

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14. Article 23 provides in pertinent part "[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void. . . ." 49 Stat. at 3020, T.S. No. 876.

15. Lowenfeld & Mendelsohn, *supra* note 7, at 504.

16. *Id.* See also Beaumont, *Liability of International Air Carriers*, 97 L.J. 643 (1947); Rhyne, *International Law Air Transportation*, 47 MICH. L. REV. 41, 54-61 (1948).

17. Calkins, *Grand Canyon, Warsaw and the Hague Protocol*, 23 J. AIR L. & COM. 253, 262 (1956) [hereinafter cited as Calkins] ("By far the most important issue considered by the Conference, and the one on which most debate was had, was the matter of limitation of liability for passenger death or personal injury."); Reiber, *Ratification of the Hague Protocol: Its Relation to the Uniform International Air Carrier Liability Law Achieved by the Warsaw Convention*, 23 J. AIR. L. & COM. 272, 282 (1956) [hereinafter cited as Reiber] ("The provision in the Warsaw Convention and the Hague Protocol which stirs the greatest controversy and overshadows, in the debate of those agreements . . . is the limitation on the liability of carriers for personal injury.").

18. Hague Protocol, art. XI. 2 INTERNATIONAL CIVIL AVIATION ORGANIZATION, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 8 (Doc. 7686-LC/1140) (1956), S. EXEC. DOC. NO. H., 86th Cong., 1st Sess. 10 (1959). Effective August 1, 1963, the Hague Protocol modifies the Warsaw Convention by increasing the maximum liability of airlines in international travel to \$16,582, exactly double the Warsaw limitation. In addition, paragraph 4 in Article XI provides that notwithstanding these limits, the expenses in litigation incurred by the plaintiff may also be recovered. The additional recovery is subject to the condition that the damages, excluding litigation costs, not exceed the amount offered by the carrier as settlement within six months after the date of the accident, or before the commencement of the action, whichever is later. This provision was included in order to induce quick settlements and avoid litigation. See generally Calkins, *supra* note 17; Ereli, *The Hague Protocol: An Abuse of Discretion*, 11 U.C.L.A. L. REV. 358 (1964); Reiber, *supra* note 17.

been ratified by the Senate as required by the United States Constitution.<sup>19</sup>

The doubling of the Warsaw limit by the Hague Protocol failed to mollify an increasingly angry American bar and bench.<sup>20</sup> As a result of this dissatisfaction, the United States filed articles of denunciation, as provided by the Convention, on November 15, 1965.<sup>21</sup> The denunciation was to become effective after six months. American criticism of the liability limitations of the Convention had reached its apex. In early 1966, the International Civil Aviation Organization held a conference in Montreal in an effort to avert America's withdrawal from the Convention. Representatives of the State Department and sixty-one individual American airlines agreed to attend. After arduous bargaining and compromise, the major airlines of the world agreed to waive the limitation of liability in Article 22 up

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19. KREINDLER, *supra* note 2, at § 12.01. The failure by the United States to adhere to the Protocol is of minor significance. Mr. Kreindler states:

As between adherents to the Hague Protocol, and adherents to the Warsaw Convention, not amended by the Hague Protocol, there is nothing in the Protocol that would render the unamended Convention ineffective. Thus, for all practical purposes, the Warsaw Convention, unamended by the Hague Protocol, would continue to be effective.

*Id.* at § 12.03[3].

20. In response to the severe limitations, courts began to find more cases within the exceptions to the Convention. *See, e.g., KLM Airlines v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961) (appellate court affirmed district court's finding of wilful misconduct on the part of the carrier and upheld the \$350,000 award); *Burdell v. Canadian Pac. Airlines*, 11 Av. Cas. 17,351 (Ill. Cir. Ct. 1969) (Illinois Circuit Court of Cook County found the Convention inapplicable on various grounds and sustained the award of \$210,000). *See also National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *Gannon v. American Airlines, Inc.*, 251 F.2d 476 (10th Cir. 1958); *Reuter v. Eastern Airlines, Inc.*, 226 F.2d 443 (5th Cir. 1955).

21. Article 39 provides:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

49 Stat. at 3022, T.S. No. 876.

In accordance with this provision, the United States gave notice of its denunciation, to become effective six months later. The press release by the State Department cited as its reason the low limit on recovery for passenger deaths or personal injuries. It contained an ultimatum, however, which stated that the United States would withdraw its denunciation if, prior to its effective date, a \$100,000 limitation would be reasonably forthcoming, with a \$75,000 provisional interim agreement. 53 DEP'T STATE BULL. 923 (1965).

*See generally* S. SPEICER & C. KRAUSE, AVIATION TORT LAW § 11:19 (1978) [hereinafter cited as AVIATION TORT LAW]; Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

to \$75,000.<sup>22</sup> In countries which permit the recovery of significant legal fees and costs, the limit was set at \$58,000 plus costs.<sup>23</sup>

The United States withdrew its renunciation of the Warsaw Convention on May 14, 1966, the day before it was to take effect.<sup>24</sup> The embodiment of the revisions to the Convention, known as the Montreal Interim Agreement,<sup>25</sup> presently governs the liability of air carriers whenever any location in the United States is a point of origin or destination, or an agreed stopping place. Thus, for the average American traveling internationally, the Montreal Interim Agreement controls the liability of the carrier in accident litigation.<sup>26</sup>

### INTERNATIONAL TRAVEL

The threshold question which should be asked by the aviation litigator is whether his client was engaged in international travel. The provisions of the Warsaw Convention (and of the documents that amend it) apply exclusively to "international travel" as defined by Article 1(2):

[A]ny transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High

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22. C.A.B. 18,900 (1965), reprinted in KREINDLER, *supra* note 2, at § 12A.03.

23. *Id.* The air carriers were required to file a tariff with the Civil Aeronautics Board raising the liability limits and waiving the defenses in Article, 20(1) of the Convention.

(1) The limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of US \$75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US \$58,000 exclusive of legal fees and costs.

(2) The carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

49 Stat. at 3019, T.S. No. 876.

24. C.A.B. 19,800 (1966).

25. 49 U.S.C. § 1502 (1970).

26. See note 5 *supra*. Shortly after the effective date of the Montreal Interim Agreement the Civil Aeronautics Board adopted the agreement as controlling the liability limitations in international air transportation having "contact" with the United States. Liability Limitations of Warsaw Convention and Hague Protocol, 31 Fed. Reg. 7302 (1968), reprinted in KREINDLER, *supra* note 2, at § 12A.06.

There will be occasions when the Montreal Interim Agreement will not apply to cases where American passengers have been injured or killed. Where the American passenger is traveling extensively abroad, or is a resident of another country (where the travel has no "contact" with the United States), the Warsaw Convention's \$8,300 or amended \$16,600 limitation may apply.



Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention.<sup>27</sup>

Air travel that would normally be considered domestic may be "international" under the Convention. Since it is the provisions of the individual airline ticket, and not the character of the particular flight, which are dispositive of the issue, two passengers on the same flight may be subject to two entirely different bodies of law.<sup>28</sup> The inequities are apparent.<sup>29</sup>

Article 1(2) focuses on the points of departure and destination. Without exception, if the limitations of the Convention are to apply, both places must be within the sovereignty of a High Contracting Party.<sup>30</sup> Consider the following variations:

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27. 49 Stat. at 3014, T.S. No. 876. A country is a High Contracting Party if it complies with the distinct prerequisites set forth in Article 38 of the treaty which reads:

- (1) This Convention shall, after it has come into force, remain open for adherence by any state.
- (2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.
- (3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

49 Stat. at 3022, T.S. No. 876.

28. *Tolson v. Pan American World Airways, Inc.*, 399 F. Supp. 335, 338 (S.D. Tex. 1975) (The determination of whether or not it is 'international transportation' is made by reference to the flight ticket of the appropriate individual passenger); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 705 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1975) (International carriage is primarily a function of the intention of the parties, as expressed in the ticket or contract).

29. The provisions of Article 1(2) have been subject to attack by many of the commentators. Kreindler states:

This definition of "international travel" occasionally leads to preposterous results. On the Eastern Airlines Electra aircraft that crashed in Boston on October 4, 1960, one of the passengers had a ticket which showed twelve different flights. He had started from New York City and flew to Boston. From Boston, he was to make successive trips throughout the United States, all of which were completely domestic, except for one flight from Cleveland to Toronto and a succeeding flight from Toronto back to a city in the United States. The crash in which he was killed was his second flight out of New York, and was simply Boston to Philadelphia. Yet, because the eleventh and twelfth flights shown on his ticket came within the definitions of "international travel" under the Warsaw Convention, his estate and beneficiaries were limited to \$8,300.00 under the Convention.

KREINDLER, *supra* note 2, at § 11.05.

30. See note 27 *supra*. Kreindler elaborates: "Note that under the language of the Convention there is one place of departure and one place of destination. This obviously refers to the entire trip, and not to the place of departure and destination of a particular flight, which might constitute only part of the overall trip." KREINDLER, *supra* note 2, at § 11.05[1]. See also *Burdell v. Canadian Pac. Airlines*, 11 Av. Cas. 17,351 (Ill. Cir. Ct. 1969) (des-

(1) *Passenger's ticket reads "New York to Paris."* This is the simplest fact pattern; the place of departure (United States) and the point of destination (France) are both High Contracting Parties, and therefore Passenger is an international traveler.

(2) *Passenger's ticket reads "New York to Chicago to Los Angeles to Detroit to Paris."* In this case, as above, the points of departure (United States) and destination (France) are High Contracting Parties. The fact that there are "agreed stopping places" does not affect the character of the agreement. If an accident should occur on a domestic leg of the journey, *e.g.*, between New York and Chicago, Passenger would be considered an international traveler under the terms of the Warsaw Convention.

(3) *Passenger's ticket reads "New York to Cuba to New York."* Cuba is not a High Contracting Party. However, Article 1(2) provides that even where the points of departure and destination are within the territory of the same High Contracting Party, if there is an agreed stopping place in another sovereignty, whether or not that country is a signatory, then the entire journey is considered international travel. Note that the place of stopover need not be a High Contracting Party.<sup>31</sup>

(4). *Passenger's ticket reads "New York to Cuba."* Here, the point of destination is not a High Contracting Party, and therefore the Warsaw Convention is not applicable. There is no damage limitation. Note that had Passenger arranged for return to New York he would be an international traveler as in variation (3) above, and his recovery would be severely limited in case of injury.

(5) *Passenger's ticket reads "New York to Paris to Cuba."* Here, as in (4), the point of destination is not within the territory of a High Contracting Party. Therefore, the Convention does not apply. An accident on the way to Paris from New York would fall outside the Convention's "jurisdiction."

(6) *Passenger's ticket reads "New York to Cuba to Paris."* As in example (3), the points of departure and destination are High Con-

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tinuation is determined not by one leg of the journey, but rather by the entire contract of carriage); *Bowen v. Port of Auth. of N.Y.*, 8 Av. Cas. 18,043 (N.Y. Sup. Ct. 1964) (destination is the last stop according to the contract of carriage, not where intermediate stops are made).

31. See *Doering v. Scandanavian Airlines Sys.*, 329 F. Supp. 1081 (C.D. Cal. 1971) (where point of origin and destination is the same High Contracting Party, with stops in other sovereign lands, provisions of the Convention are invoked); *Kelley v. Sabena Belgian World Airlines*, 242 F. Supp. 129, 144-45 (E.D.N.Y. 1965) ("[E]ach of the passengers involved in this action was travelling on a round trip ticket from a point within the United States to cities in Europe and return to the United States. Each ticket . . . thus provided for 'International' transportation under that part of Article 1(2) . . .").

Where there is a true break in the journey, the applicability of the Convention is determined when travel is resumed. Thus, if a passenger remained in Cuba for an extended period, the Convention might not limit his recovery for injuries incurred during a Cuba-Paris flight. Whether a "stop-over" in the territory of another sovereignty which is not a High Contracting Party will be considered merely a stop-over or a true break in the journey will depend on the intent of the passenger and carrier. Article 1(3) defines transportation as undivided if it has been regarded by the parties as a "single operation."

tracting Parties and thus the Convention controls, regardless of whether the stopover is in a non-signatory nation.<sup>32</sup>

The potential inconsistencies and injustices are legion. The damages which may be recovered by survivors of the victims of a single commercial air crash case will vary according to their tickets, even though they may be able to prove similar economic losses at trial.<sup>33</sup> For example, it seems inequitable that the amount of recoverable damages should vary so widely depending on whether the passenger who books a flight from New York to Havana also arranges a return flight to New York at the same time. It is equally unfair that a passenger on a purely domestic flight should be severely limited in his right to recover for an injury merely because he is scheduled to fly internationally at some future date. In 1967, 2 percent of all passengers on domestic flights were subject to the Warsaw Convention.<sup>34</sup> In light of decreased regulation of the airline industry, and increasingly common international travel, this percentage has grown considerably.<sup>35</sup> Thus, it is imperative that the diligent plaintiff's attorney make efforts to discover and scrutinize the contract of carriage. If the plaintiff is found to be an international traveler within the meaning of Article 1(2), other provisions of the convention must be examined.

#### ARTICLE 17: A FERTILE GROUND FOR LITIGATION

An "accident" is a fortuitous event which does not take place according to the usual course of things.<sup>36</sup> Normally, where

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32. See, e.g., *Wyman v. Pan American Airlines, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (1943), *aff'd*, 267 A.D. 947, 48 N.Y.S. 2d 459 (1944) (where the contract for carriage reflects international travel in that the points of departure and destination are two High Contracting Parties, then a diversion to a sovereign nation, not an adherent to the Convention, will not vitiate the international character of the travel).

33. See generally KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES ch. 3 (1963); Kennelly, *Aviation Law: International Air Travel — A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 178 (1975).

34. Lowenfeld & Mendelsohn, *supra* note 7, at 501 n.15.

35. See M. FAIR & J. GUANDOLO, TRANSPORTATION REGULATION (1976) (the authors note that increased regulation of the airline industry has become impractical with the growing amount of international travel by American flag carriers); Lazarus, *Perspectives and Problems in Regulation of Domestic Aviation*, in R. WEINSTEIN, THE AVIATION INDUSTRY: CURRENT PERSPECTIVES AND PROBLEMS (1978) (Noting that the trend in aviation regulation is on the downswing the author states that "[m]anagerial decisions will be made more and more by air carrier management, and less and less by C.A.B. More competition will exist." *Id.* at 143).

36. BLACKS LAW DICTIONARY 14-15 (5th ed. 1979). See *Ketona-Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1969) ("'Accident' has been defined to be an unexpected, untoward event which happens without intention or design."); *Koehring Co. v. American Auto Ins. Co.*, 353 F.2d 993, 996 (2d Cir. 1965) ("The word 'accident' refers to the event or occurrence

an accident results in personal injuries to an individual, no liability will attach because fault cannot be attributed to another.<sup>37</sup> The concept of "accident" has a unique meaning, however, in litigation controlled by the Warsaw Convention. According to Article 17, it is an accident which triggers the liability of an air carrier.<sup>38</sup> Because the Convention presumes the liability of the airline unless due care is shown,<sup>39</sup> an accident is merely defined as the event causing injury or death to the passenger, regardless of fault.

Governed by well-settled rules of treaty interpretation,<sup>40</sup> American courts have construed the term "accident" liberally. Furthermore, it is settled that the plaintiff, to succeed in an action based on the Convention, must prove by a preponderance of the evidence that an accident did in fact occur.<sup>41</sup> Nevertheless, a functional definition of accident, as it applies to the Convention, has eluded the courts, and the question has been addressed case-by-case.<sup>42</sup> Regardless of how the word is defined, there

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which produced the damages and does not require that . . . upon which the liability for the damages is predicated.").

37. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 140 (4th ed. 1971).

38. Article 17 of the Convention states:

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

49 Stat. at 3018, T.S. No. 876.

39. "The effect of Article 17 of the Convention as modified by the Montreal Agreement is to create liability regardless of fault or negligence on the part of the carrier." *DeMarines v. KLM Royal Dutch Airlines*, 433 F. Supp. 1047, 1051 (E.D. Pa. 1977).

40. As a matter of federal law, treaty interpretation involves a consideration of legislative history and the intent of the contracting parties. *See, e.g., Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 336-38 (5th Cir. 1967).

41. *E.g., MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971); *DeMarines v. KLM Royal Dutch Airlines*, 433 F. Supp. 1047, 1053 (E.D. Pa. 1977); *Scherer v. Pan American World Airways, Inc.*, 54 A. D. 2d 636, 638, 387 N.Y.S.2d 580, 581 (1976).

42. *See, e.g., Maignie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir. 1977) (where the passenger sustains injuries which are too far removed from the area of control of the carrier, there is no accident within the meaning of the Convention); *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (Sustained the district court's finding that there was no evidence of an accident under the Convention. The plaintiff had fallen in the baggage area immediately after disembarking but failed to prove that she fell as a result of any action by the carrier. The court held that she could just as likely have fallen due to her own infirmity since she was 74 years old); *DeMarines v. KLM Royal Dutch Airways*, 433 F. Supp. 1047 (E.D. Pa. 1977) (court defined accident as "the occurrence on board the aircraft . . . an unusual or unexpected happening." *Id.* at 1052. The event or occurrence is not

must be enough evidence for the jury to find that there was an accident.<sup>43</sup>

Once it's been determined that an accident occurred, Article 17 limits liability of the carrier: (1) if the accident took place on board the aircraft; or (2) if the accident occurred during embarkation or disembarkation. The plaintiff need only prove that the accident took place in one of these situations, and that it proximately caused the alleged damages.<sup>44</sup>

The interpretation of "on board the aircraft" has not produced much controversy in American courts.<sup>45</sup> The term has been applied broadly. An important federal court decision construed it to include "all of the time between embarkation at the *origin* of a flight and disembarkation at the *scheduled* destination of a flight."<sup>46</sup> Taken literally, this definition has enabled the courts to extend the meaning of Article 17 to hijackings, the damages for which include psychic injury, which is compensable under the Convention.<sup>47</sup>

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an accident if it results solely from the state of health of the passenger and is unconnected with the flight. In this case, the district court found that an accident had occurred when, due to the change in pressurization of the aircraft, the plaintiff sustained severe injury to his ears.)

43. The following charge to the jury was cited with approval in *DeMarines v. KLM Royal Dutch Airlines*, 433 F. Supp. 1047 (E.D. Pa. 1977):

[An] accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening.

The event or occurrence *is not an accident if it results solely from the state of health of the passenger and is unconnected with the flight.* *Id.* at 1059 (emphasis in original).

44. 49 Stat. at 3018, T.S. No. 876. See note 39 *supra*.

45. AVIATION TORT LAW, *supra* note 21, at § 11:33.

46. *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1247 (S.D.N.Y. 1975) (emphasis added). The court concluded: "Therefore, all events which caused the plaintiff's alleged injuries and which occurred during the time between leaving Zurich and returning to Zurich shall be considered to have occurred 'on board the aircraft.'" *Id.* at 1248.

47. *E.g.*, *Karfinkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 977 (S.D.N.Y. 1977) ("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."); *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1243 (S.D.N.Y. 1975) ("That phrase 'death or wounding . . . or any other bodily injury, as used in Article 17, does comprehend mental and psychosomatic injuries.'").

*Contra*, *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973) (mental injuries alone, which did not result from physical injury, were not within the purview of Article 17 and not recoverable as part of plaintiff's damages); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974) (mental injury as the result of hijacking was not compensable as bodily injury under Article 17).

For a general treatment of recovery for damages due to hijacking under

However, determination of what constitutes an accident in the course of embarkation or disembarkation has been a common issue in international air crash litigation. While a crash often results in death, injuries suffered while embarking or disembarking are usually less extensive. Since the revised "Montreal" limitation is \$75,000, it may be advantageous in these cases, as opposed to those resulting in death or severe injury, for the plaintiff's attorney to assert the applicability of the Convention. Although it is usually a defense asserted by the carrier, the virtual "strict liability" provisions of the Convention obviate the need for proof of negligence in a "slip and fall" case where such fault is extremely difficult to prove.<sup>48</sup> Thus, the liability provisions of the Warsaw Convention may be used offensively to procure a recovery where it might otherwise be impossible.

The most significant case dealing with the definition of embarkation is the 1975 Fifth Circuit decision, *Day v. Trans World Airlines, Inc.*<sup>49</sup> Several passengers were injured or killed in a terrorist attack at Hellenikon Airport in Athens, Greece.<sup>50</sup> The victims, all international passengers under Article 1, were waiting to be searched before boarding the plane when the "accident" occurred. The plaintiffs sought to characterize this event as an accident *while in the course of embarkation*. Finding for the plaintiffs, the court stated that this activity was within the purview of Article 17 of the Convention. In determining the parameters of embarkation and disembarkation, the *Day* court rejected a strict "locality rule."<sup>51</sup> Recognizing that a broad construction of Article 17 would better harmonize with modern theories of accident cost allocation, Judge Kaufman propounded a tripartite test inquiring into three areas: (1) *Activity* (What were the plaintiffs doing?); (2) *Control* (At whose direction?);

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the Convention, see Annot., 72 A.L.R.3d 1299 (1976). See also Note, *Recovery for Mental Anguish Under the Warsaw Convention*, 41 J. AIR L. & COM. 333 (1975).

48. AVIATION TORT LAW, *supra* note 21, at § 11:33. The authors note that in situations where the passenger sustains injury in the course of embarkation or disembarkation, "[i]f Article 17 were not applicable, the passengers could recover — if at all — only by maintaining a costly suit . . . . The expense and inconvenience of such litigation would be compounded by the need to prove fault and the requirements of extensive pretrial investigation, travel and other factors too difficult to anticipate." See note 39 and accompanying text *supra*.

49. 528 F.2d 31 (2d Cir. 1975).

50. Situations involving terrorist attacks on airports have been the focus of much of the litigation which has shaped the present day construction of "embarkation" and "disembarkation" under Article 17 of the Warsaw Convention. See Annot., 36 A.L.R. Fed. 490 (1978). See also AVIATION TORT LAW, *supra* note 21, at 733-36.

51. 528 F.2d at 33.

(3) *Location* (Where did the accident occur?).<sup>52</sup> These criteria have subsequently been well-received by other courts adjudicating embarkation and disembarkation cases.<sup>53</sup>

Since *Day*, courts have refused to use a strict geographical approach in deciding whether an accident was within Article 17.<sup>54</sup> Though the *Day* test has proved favorable to plaintiffs in cases hinging on "embarkation," this has not been true where accidents in the course of disembarkation have been litigated.<sup>55</sup> Embarkation is a more readily defined procedure. The embarking passenger is required to report to a certain point, go through customs and security checks, and generally to conduct himself according to the ritual for boarding an airplane. Disembarking, however, is significantly subject to less *control* by the carrier. Thus, the degree of control distinguishes embarkation from disembarkation under Article 17, and that distinction presents a formidable obstacle to recovery where plaintiff's injury occurs after his departure from the aircraft.

Yet for the lawyer involved in international air litigation involving injuries sustained by a "non-crash" accident, the Warsaw Convention and its strict liability provisions can be an aid to recovery. Without the burden of proving negligence, the prospect of an award is promising. The extent of "slip and fall" injuries do not make the \$75,000 ceiling burdensome. However, where the accident involved is an air disaster with deaths and severe injuries the likely result, the plaintiff's lawyer must seek to avoid the strictures of the Warsaw Convention.

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52. *Id.*

53. *See, e.g., Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (The plaintiff's injuries arose out of the same facts as in *Day*. The tripartite test was applied and plaintiff recovered under the Convention); *Upton v. Iran Nat'l Airlines Corp.*, 450 F. Supp. 176 (S.D.N.Y. 1978) (*Day* test applied to situation where plaintiff was killed when roof collapsed at Mehrabad International Airport, Tehran, Iran); *Leppo v. Trans World Airlines, Inc.*, 56 A.D.2d 813, 392 N.Y.S.2d 660 (1977) (*Day* test cited with approval in case involving the same incident in Athens, Greece).

54. *See* note 53 *supra*.

55. Accidents occurring in the airport terminals after disembarkation have uniformly been held not "in the course of operation of disembarking." AVIATION TORT LAW, *supra* note 21, at § 11:33.

*See Martinez-Hernandez v. Air France*, 545 F.2d 279 (1st Cir. 1976) (Plaintiffs were injured after leaving airplane and waiting for their belongings in baggage area of terminal. Court here applied the three-part *Day* test and concluded that due to the lack of control over plaintiffs by carrier, accident was not in the course of "disembarking.").

For a more complete treatment of the case law which has developed under Article 17 and the construction of "embarking" and "disembarking," see Annot., 39 A.L.R. Fed. 452 (1978); Note, *Warsaw Convention — Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 FORDHAM L.REV. 369 (1976).

## ARTICLE 3: SOME EXCEPTIONS TO THE WARSAW LIMITATIONS

*The Requirement of Delivery*

The plaintiff's attorney in any air disaster case must examine the contract of carriage. Because it represents the intent of the parties, this contract will determine whether the passenger was an international traveller under Article 1 of the Warsaw Convention. Furthermore, other information concerning the passenger's ticket may be an indispensable tool in avoiding restrictions imposed by the Convention and securing maximum recovery for the plaintiff.

Article 3 of the Convention requires that the carrier deliver the ticket to the passenger and that the ticket of passage contain certain information.<sup>56</sup> Failure to complete delivery prevents the carrier from asserting the liability protections of the Convention as a defense in the event of an accident.<sup>57</sup> The litigator's attention should be focused on the applicability of this exception as it has been the source of much litigation.<sup>58</sup>

Generally, the courts have viewed the element of *delivery* of the ticket as part of an affirmative defense of the carrier requiring substantiation by competent evidence.<sup>59</sup> Once proved, deliv-

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56. Article 3(1) provides that:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

49 Stat. at 3015, T.S. No. 876.

57. Article 3(2) provides:

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

*Id.*

58. Much of the hardest fought litigation, at appellate and trial levels in the reported decisions, has involved the construction, application and effect of Article 3. Dispute has centered on the provisions that a passenger ticket must contain, the requirement of delivery, and the adequacy and sufficiency of the ticket's "notice" that the transportation is subject to Convention rules relating to liability. AVIATION TORT LAW, *supra* note 21, at § 11:35.

59. See *DeMarines v. KLM Royal Dutch Airlines*, 433 F. Supp. 1047, 1061 (E.D. Pa. 1977) ("It is the carrier's burden to establish sufficient delivery to enable it to limit recoverable damages."); *Lisi v. Alitalia-Linee Aeree*



ery is not vitiated by a showing that the ticket did not conform to every detail set out in Article 3(1).<sup>60</sup> One of these "details," however, has received strict judicial scrutiny and will not be waived if the carrier alleges the Convention as a defense.

### *The Necessity of Notice*

The federal courts have adopted the view that the severe limitations on recovery can only be justified if the passenger receives notice of them.<sup>61</sup> The rationale is that the passenger should be apprised of his potential loss of rights so that he may secure additional accident protection.<sup>62</sup> This concept of notice to the passenger is embodied in subsection (1)(e) of Article 3, which requires "a statement that the transportation is subject to the rules relating to liability established by this Convention." The courts have construed 1(e) as requiring a timely delivery of the ticket allowing the passenger adequate time to discover his *redefined* rights of recovery in the event of an accident.<sup>63</sup>

The United States Court of Appeals for the Second Circuit

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Italiane, 253 F. Supp. 237, 243 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968) (equally divided Court) (court refers to the Convention as an affirmative defense requiring a showing of proof of delivery); *Ross v. Pan American Airways, Inc.*, 299 N.Y. 88, 85 N.E.2d 880, 885 (1949), *cert. denied*, 349 U.S. 947 (1955) ("There is no need for a carrier who claims the limitations to show more than the delivery of an appropriate ticket.").

60. Subsection (2) of Article 3 specifically states that the irregularity of the passenger ticket shall not affect the validity of the contract for carriage and its international character. *See* note 57 *supra*. *See Grey v. American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950) (court held that, in accordance with the language of Article 3(2), fact that the passenger ticket did not contain all "stop overs" during flight did not affect validity of contract for carriage and that airline could assert the Convention in defense of suit.); *accord*, *Rosen v. Lufthansa German Airlines*, 10 Av. Cas. 17,314 (1966).

61. *See, e.g., Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); *Seth v. BOAC*, 329 F.2d 302 (1st Cir. 1964).

62. *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494, 497 (9th Cir. 1965) ("The purpose of such a statement is to notify passengers of the applicability of the Convention, thus affording them the opportunity to take steps to protect against the limitation of liability.").

63. The *Warren* court held that the delivery of the ticket to the passenger must be such that he has a "reasonable opportunity" to take protective measures. *Accord*, *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2d Cir. 1965); *Demanis v. Flying Tiger Line, Inc.*, 10 Av. Cas. 17,611 (N.D. Cal. 1967); *Glassman v. Flying Tiger Line, Inc.*, 10 Av. Cas. 18,296 (N.D. Cal. 1966).

*Contra*, *Ross v. Pan American Airways, Inc.*, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied sub nom.*, 349 U.S. 947 (1955). The evidence at trial showed that the ticket had been laid on a table in front of the plaintiff whose travel arrangements were made by an employee of the United Service Organization in whose show the plaintiff was appearing. The fact that she had seen the ticket and later boarded the aircraft was construed as an implied ratification of the limitations contained therein, and she was held to the Warsaw limits in her recovery against the airlines.

set the standard of adequacy for the required notice on the ticket in *Lisi v. Alitalia Airlines, Inc.*<sup>64</sup> This court noted that it would be pointless to demand that the plaintiff receive notice of the Convention if the notice would not be recognized as such by the ordinary passenger. Though its decision was not based on traditional contract principles, the court recognized that the placement of notice of the Convention's applicability in "lilliputian print in a thicket of 'conditions of contact'" was unconscionable.<sup>65</sup>

The *Lisi* decision has been followed in subsequent cases involving the size, location, and color contrast of print of the "notice" statement.<sup>66</sup> The Montreal Interim Agreement has adopted the approach of the Second Circuit and, the result has been standardization of such notice on contracts for carriage.<sup>67</sup> It has not been settled, however, whether the notice issue should be resolved by reference to an objective standard, *i.e.*, notice most reasonably calculated under the circumstances to inform the passenger, or whether actual subjective notice is required. The attitude of the courts regarding the Montreal Interim Agreement will be the decisive factor. In any event, the notice provisions of the Agreement have been held to satisfy the requirements of the Convention.<sup>68</sup> Issues of delivery and notice, however, continue to be raised by the plaintiffs' bar as effective means of circumventing the Convention.

#### WILFUL MISCONDUCT: AN ISSUE OF FACT

Perhaps the best-known exception to the liability limits of the Warsaw Convention is wilful misconduct attributed to the airline. Article 25, which was not altered by the Montreal Agreement,<sup>69</sup> provides that the carrier shall not be entitled to avail

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64. *Lisi v. Alitalia Airlines, Inc.*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968) (passenger tickets in form of small printed booklets, which was standard airline practice, would no longer be sufficient to notify passengers that the exclusion or limitation provisions of the Warsaw Convention were applicable, and thus defendant airline could not assert Article 22 as a defense).

65. *Id.* at 514.

66. *E.g.*, *Burdell v. Canadian Pac. Airlines, Ltd.*, 10 Av. Cas. 18,251 (7th Cir. 1968). See note 80-86 and accompanying text *infra*.

67. The Montreal Agreement, 49 U.S.C. § 1502 (1970) provides that notice be given: (1) in 10 point modern type; (2) in contrasting color; (3) on each ticket; (4) each piece of paper attached to the ticket (or) on the ticket envelope.

68. *E.g.*, *Milliken Trust Co. v. Iberia Lineas de Espana*, 11 Av. Cas. 17,333 (N.Y. Sup. Ct. 1969).

69. The Montreal Agreement does not affect the "wilful misconduct" exception in Article 25 of the Warsaw Convention. KREINDLER, *supra* note 2, at § 12A.07(1). However, it should be noted that those cases which are con-

itself of the liability limits of the Convention if the accident was proximately caused by its "wilful misconduct."<sup>70</sup> Because Article 25(1) allows wilful misconduct to be defined in accordance with the law of the court to which the case is submitted,<sup>71</sup> the construction of wilful misconduct has not been uniform. Thus, strictly local definitions of wilful misconduct, as they may be applied to automobile death statutes or workmen's compensation acts, may play a part in defining international law.

The plaintiff bears the burden of proving that the accident occurred due to the wilful misconduct of the carrier.<sup>72</sup> Courts are reluctant from taking the matter of wilful misconduct away from the triers of fact.<sup>73</sup> Thus, the jury instruction defining wilful misconduct is of obvious importance and requires detailed consideration by any attorney involved in aviation litigation.

One New York court has determined that a finding of wilful misconduct requires that the pilot or other employee of the carrier<sup>74</sup> have intended the harmful result, or must have done the

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trolled by the Hague Protocol may be affected by the provisions on that document. In place of "wilful misconduct," it substitutes the following provision: "The limits of liability specified in Article XXII shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result. . . ." Hague Protocol, art. XIII. 2 INTERNATIONAL CIVIL AVIATION ORGANIZATION, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 10 (Doc. 7686-LC/140)(1956), S. EXEC. DOC. No. H., 86th Cong., 1st Sess. 5, 16 (1959).

70. Article 25 of the Warsaw Convention provides:

(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 to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment. 49 Stat. 3000, T.S. No. 876.

71. *Id.*

72. *E.g.*, *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628 (3d Cir. 1963), *cert. denied*, 375 U.S. 895 (1964); *In re Air Crash in Bali Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978); *In re Pago Pago Air Crash of Jan. 30, 1974*, 419 F. Supp. 1158 (C.D. Cal. 1976); *Goepf v. American Overseas Airlines, Inc.*, 281 A. D. 105, 117 N.Y.S.2d 276 (1952).

*See also* *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Pekes v. Transcontinental & W. Air, Inc.*, 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

73. *See, e.g.*, *Grey v. American Airlines, Inc.*, 227 F.2d 282, 286 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

74. Article 25(2) states: "[T]he carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment." 49 Stat. at 3020, T.S. No. 876. *See* note 70 *supra*. In *Reed v. Wisner*, 555 F.2d 1079 (2d Cir. 1977), the Second Circuit held that the Warsaw

act with the knowledge that injurious consequences were probable.<sup>75</sup> Under such a standard, plaintiff would be required to show that the pilot *intended* to destroy the airplane and injure the plaintiff. Fortunately for plaintiffs, the clear majority of courts do not take this approach.

Most of the jury charges which have been approved by federal courts focus on the "wilful" aspect of the misconduct and require a conscious act or intentional omission of duty.<sup>76</sup> Most courts agree that a "reckless and wanton disregard of probable consequences" is sufficient misconduct.<sup>77</sup> In any event, the finding of wilful misconduct, however it is defined in a particular jurisdiction, remains an effective means of vitiating the limits of the Convention.

The wilful misconduct issue often offers a particularly potent argument for a plaintiff because the jury may determine it at the same time it considers damages. Clearly, if the damages proven by the plaintiff are significantly in excess of the Convention's limitations, as they usually are, the jury may resolve the wilful misconduct issue in the plaintiff's favor. To limit the recovery of a severely injured plaintiff to \$75,000, when his proven damages are in excess of \$500,000, may appear unconscionable to the ordinary juror. Together the requirements of delivery and notice and the provisions concerning the carrier's wilful misconduct comprise the treaty's internal avoidance mechanisms. Other arguments embodied in the Constitution and traditional contract principles draw support from beyond the scope of the Warsaw Convention.

#### THE CONSTITUTIONALITY OF THE WARSAW CONVENTION

To the extent that the plaintiff's injuries are the result of an event which does not appear to be an accident within the meaning of Article 17, his attorney should be prepared to allege the applicability of the Convention. The availability of the Convention's strict liability provisions may be indispensable to the plaintiff's case in such instances where proof of negligence is ad-

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Convention's liability limits applied to suits against the agents, officers, and employees of the carrier for acts within the scope of their employment.

75. *Reiner v. Alitalia Airlines*, 9 Av. Cas. 18,228 (N.Y. Sup. Ct. 1966).

76. *See, e.g., Grey v. American Airlines*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Pekelis v. Transcontinental & W. Air, Inc.*, 187 F.2d 122 (2d Cir. 1951); *American Airlines, Inc. v. Ullen*, 186 F.2d 529 (D.C. Cir. 1949); *Goepf v. American Overseas Airlines*, 281 A. D. 105, 117 N.Y.S. 2d 276 (1952).

77. *See W. PROSSER, HANDBOOK OF THE LAW OF TORTS* 533 (1955); *Barrel, A New Approach to the Problem of Wilful and Wanton Misconduct*, 1949 *INS. L.J.* 716, 723 (1949).

mittedly unobtainable. Generally, however, the attorney will not want to align himself with the Convention and its harsh recovery limits.

In recent years, plaintiffs have assiduously argued before state and federal courts that the damage limitations of Article 22(1) violate a number of constitutional provisions. However, the courts have evaded these constitutional questions and based their decisions on other grounds.<sup>78</sup> Only four American courts have actually passed on the constitutionality of the Warsaw Convention.<sup>79</sup> One of these, a 1968 Illinois case, *Burdell v. Canadian Pacific Airlines*,<sup>80</sup> actually held the Convention unconstitutional. The *Burdell* decision rested primarily on due process and equal protection grounds. Although its reasoning was sound, the decision has had little impact because the trial court decided these constitutional issues only after disposing of the merits on the ground that the Convention was inapplicable.<sup>81</sup>

Despite the impropriety of deciding the constitutional issues, Judge Nicholas J. Bua decided to lay the groundwork for a constitutional assault on the Convention in future litigation.<sup>82</sup>

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78. See, e.g., *Molitch v. Irish Int'l. Airlines*, 436 F.2d 42 (2d Cir. 1970) (plaintiff did not properly raise question of constitutionality, therefore, issue not addressed on appeal); *In re Pago Pago Aircrash* of Jan. 30, 1974, 419 F. Supp. 1158 (C.D. Cal. 1976) (case disposed of on issue of wilful misconduct, constitutional issue never reached); *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 203 N.E. 2d 640, 255 N.Y.S.2d 249 (1964) (court did not discuss constitutional allegations, found for plaintiff on other grounds).

79. *Pierre v. Eastern Airlines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957) (Convention's liability limitation held constitutional in the face of allegations that it deprived plaintiff of Seventh Amendment right to jury determination on damages issue); *Indemnity Ins. Co. of N. America v. Pan American Airlines, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944) (due process rights of insurance carriers were not violated by Convention's limitations providing for presumption of liability); *Garcia v. Pan American Airlines, Inc.*, 269 A. D. 287, 55 N.Y.S. 2d 317 (1945), *aff'd per curiam*, 295 N.Y. 852, 67 N.E.2d 257 (1946) (Convention is constitutional as valid treaty).

80. 10 Av. Cas. 18,151 (Ill. Cir. Ct. 1968). The decision was later revised by the trial judge in 11 Av. Cas. 17,351 (1969).

81. The *Burdell* court held that the deceased passenger was not engaged in international travel as defined by Article 1(2). The court found that the points of departure and destination (Singapore) were not, in fact, adherents to the Convention at the time of the accident. 10 Av. Cas. at 18,154.

For excellent opposing discussions of the propriety and validity of the *Burdell* case, compare Hay, *Comments on Burdell v. Canadian Pacific Airlines and the Constitutionality of the Warsaw Convention*, 58 ILL. B.J. 26 (1970) with Kennelly, *Response to Comments on Burdell v. Canadian Pacific Airlines*, 58 ILL. B.J. 329 (1970).

82. "The Court feels it would be remiss if it did not pass upon these alternative [constitutional] arguments which may now have relevance and most certainly *will have relevance in the future of this litigation.*" 10 Av. Cas. at 18,155 (emphasis added).

Judge Bua felt obliged to write a subsequent opinion admitting the lack

He recognized the severe limitations on plaintiffs' recovery as violative of the due process and just compensation clauses of the fifth amendment.<sup>83</sup> The once appropriate limit on recovery was said to have no place in today's system of compensation. Furthermore, Judge Bua felt that the airlines should be accorded no more preferential treatment in cases of air disasters than the airplane manufacturers or the United States government, whose liability is not affected by the Convention.<sup>84</sup>

The Warsaw Convention was also found to abridge equal protection rights under the fourteenth amendment. The court characterized Article 22 and its provisions as "arbitrary, irresponsible, capricious and indefensible . . . in that such provisions would attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved."<sup>85</sup> Though *Burdell* has not been effectively argued as authority in any subsequent case, its reasoning could be used to support an assault on the constitutional integrity of the Convention's restrictions. In any event, the decision stands as a potent reminder that the Treaty is not unassailable and must conform to the dictates of the United States Constitution.<sup>86</sup>

#### CALIFORNIA ATTACK VIA CONTRACT ANALYSIS

Another basis for a rejection of Warsaw's application may be gaining impetus. A California federal court recently attacked the supremacy of the Treaty's provisions by applying a strict contract analysis to the operation of the liability provisions as they relate to an action under the state wrongful death statute.<sup>87</sup> In essence, the court found that the nature of the liability limitations of the Convention is contractual. The court ruled that the

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of necessity for his decision in light of the actual case disposition, but reaffirming his belief that the damage limitations were unconstitutional. 11 Av. Cas. at 17,354. Judge Bua now sits in the United States District Court for the Northern District of Illinois.

83. "The Court finds that the Warsaw Convention Treaty and any treaty, is subject to the Constitution of the United States, and any provision of a treaty which purports to take away a right of a citizen, provided for by the Constitution, is invalid as to that citizen." 10 Av. Cas. at 18,157.

84. *Id.* at 18,162.

85. *Id.*

86. The *Cherokee Tobacco*, 78 U.S. 616, 620 (1870) stated: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the natural and fundamental principles of our government."

87. *In re Crash in Bali, Indonesia*, 462 F. Supp. 1114 (C.D. Cal. 1978). Although the decedent was an international passenger and all the elements of the defense of the Convention were present, the district court held that recovery could not be limited by Article 22. Instead, the court held that the California wrongful death statute would govern damages.

contract between the deceased passenger and the air carrier could not limit or extinguish the independent cause of action of the passenger's estate.<sup>88</sup> This reasoning has not been evaluated by appellate review or in other trial court decisions. However, the contract argument is appealing and is another weapon for the plaintiff's attorney to use in securing just compensation in international air crash litigation.

### CONCLUSION

The complexities of air crash litigation are nowhere more apparent than in the issue of damages. Where the passenger's ticket brings him under the provisions of the Warsaw Convention and its progeny, his attorney must be prepared to marshal a variety of arguments, or be content with an award which may be far less than the damages which were proved. Just compensation is clearly not the norm in international aviation law.

Finally, it should be noted that an international agreement which would significantly alter the state of the law under the Warsaw Convention and its amending documents has been proposed. The Guatemala Agreement,<sup>89</sup> which has been before the

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88. The *Bali* court said:

It is a settled California rule that its wrongful death statute creates an original cause of action not derived from any rights the decedent may have had . . . . Because of the separate and original nature of this wrongful death action, a decedent, while he is alive, cannot contract away or compromise the wrongful death cause of action, nor effectively release from wrongful death liability a potential defendant . . . . [Any] contract of carriage pursuant to which a decedent purports to limit the right to recover for his death therefore cannot affect this cause of action (under the California wrongful death statute).

462 F. Supp. at 1117.

*Contra*, *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967). The *Block* court stated:

Georgia public policy does not control these actions. Federal public policy controls, and Federal public policy authorizes limitations of liability in international transportation by aircraft as shown by the United States' adherence to the Warsaw Convention. Federal public policy authorizes limitations of liability in international air transportation by aircraft in the amount of \$8,300 . . . . Regardless of the consequences, this Court is bound by the Treaty, the decisions, and the public policy established by the Treaty.

*Id.* at 810-11.

89. The Guatemala Protocol was completed and signed in that city on March 8, 1971. Its official title is "*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*". It is not yet the law in any place, since it is incapable of becoming effective until ratification by the United States has occurred. It does not seem likely to be ratified in its present form.

The new treaty would increase the maximum liability for damages for injury or death to a flat \$100,000. The liability would be absolute; require no

Senate for ratification since 1971, would increase the liability of the carrier to \$100,000. The price to the international traveler, however, is that this limit is *inflexible* regardless of whether there was delivery of the ticket, notice, or wilful misconduct. If ratified, this new body of international law will surely be accepted no more willingly by the plaintiff's bar than was the Warsaw Convention.

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notice to the passenger; and make no exception for wilful misconduct. Interestingly, however, if wilful misconduct is proved in an action for cargo loss, the maximum is upset and the true damage suffered may be compensated. Such distinctions have incurred the disfavor of the commentators. See KREINDLER, *supra* note 2, at § 12B.01; Kennelly, *Aviation Law: International Air Travel — A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 194 (1978). The Treaty would not impair an airline's right of recourse against another tortfeasor, such as a manufacturer, but would insulate the other tortfeasor's right against the airlines if the effect would be to increase liability over \$100,000.00.



