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**THE WORLD TRADE CENTER—TERRORIST AIRLINE
DESTRUCTION: WILL THIS BE THE FIRST TEST OF
THE WAR BETWEEN THE MONTREAL LIABILITY
CONVENTION’S ARTICLE 21(2)(A) AND 21(2)(B)?**

LARRY MOORE*

I. INTRODUCTION

ON SEPTEMBER 11, 2001 (“9/11”), two commercial Boeing 767 airliners crashed into the World Trade Center. The twin skyscrapers, which are among the architectural wonders of the modern world, as well as symbols of the world’s most powerful business district, came crashing down before the stunned eyes of the world and in the process, destroyed a large part of lower Manhattan.¹ At the same time, another commercial airliner crashed into the United States Pentagon, the center and symbol of the world’s mightiest military. The resulting deaths were equal to that of Pearl Harbor and were twice that of the Titanic.²

These were horrible disasters, vicious international crimes, and acts of war of unprecedented and epic dimensions directed against thousands of innocent, unsuspecting people going about their daily lives. In terms of international law, these acts reflect the kind of incidents that will be addressed by the new Montreal Liability Convention, which was ratified in May 1999 by its Member States to replace the 70-year-old Warsaw Conven-

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¹ The details and knowledge of this event will be etched forever in the conscious of a generation, but for future references, one need only refer to the archives of any general news source or database for the day September 12, 2001.

² The current list of casualties shows a total of 3,065 dead: 2,841 were reported dead or missing at the World Trade Center Towers, with 147 dead on the two hijacked planes; at the Pentagon, 184 were reported dead or missing, with 59 dead on the hijacked plane. *A Nation Challenged*, N.Y. TIMES, Feb. 12, 2002, at A10.

tion as the governing document for international commercial aviation.³

This article, utilizing the 9/11 air crashes as examples, analyzes how the new international commercial aviation agreement, the Montreal Liability Convention, will determine and set monetary damage limits for international passengers involved in air crashes where third parties can be implicated in causing the injuries.⁴

³ The "Warsaw System" collectively refers to the following instruments: Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]; 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, *opened for signature* Sept. 18, 1961, 500 U.N.T.S. 31 [hereinafter Guadalajara Convention]; 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, *opened for signature* Mar. 8, 1971, 10 I.L.M. 613, ICAO Doc. 8932 [hereinafter Guatemala City Protocol 1971]; 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, as Amended by the Protocol done at The Hague on 28 September 1955, *opened for signature* Sept. 25, 1975, ICAO Doc. 9145 [hereinafter Montreal Protocol No. 1]; 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, *opened for signature* Sept. 25, 1975, ICAO Doc. 9146 [hereinafter Montreal Protocol No. 2]; 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, *opened for signature* Sept. 25, 1975, ICAO Doc. 9147 [hereinafter Montreal Protocol No. 3]; Additional 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, *opened for signature* Sept. 25, 1975, *reprinted in* Sec. Rep. No. 105-20 [hereinafter Montreal Protocol No. 4].

⁴ The Montreal Liability Agreement was immediately signed by 52 nations, including the U.S., as the replacement document. *See* S. Doc. No. 106-45 (Montreal Liability Agreement formally submitted to Senate for ratification on June 23, 2000). *See also* The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002, No. 263, *available at* <http://www.hmsso.gov.uk/si/si2002/20020263.htm> (last visited Oct. 27, 2003); *Air Carrier Liability in the Event of Accidents*, *available at* <http://europa.eu.int/scadplus/leg/en/lvb/124169.htm> (detailing the European Council Regulation No. 2027/97 discussed on Oct. 9, 1997) (last visited Oct. 27, 2003). For discussion of the Montreal Liability Agree-

II. HOW IS A DOMESTIC AIR CRASH GOVERNED BY INTERNATIONAL LAW?

One of the more confusing aspects of international aviation law is how cases of this nature can be governed by either the Warsaw Convention or the Montreal Liability Convention. None of the 9/11 flights used in the destruction of the World Trade Center or the attack on Washington, D.C. were international flights.

Under the Montreal Liability Convention and its predecessor treaty, the Warsaw Convention, it is not where a flight originated, ended, or crashed that determines the applicability of international law, but whether the passenger is an international traveler who is using the local flight as a part of his journey. Therefore, if a traveler takes a flight from England to Boston, and then takes a flight from Boston to California, this domestic part of the trip is governed by international law.

It is unlikely that the rules governing this part of the treaty will change under the Montreal Liability Convention as Article 1 of the Montreal Liability Convention, which establishes the scope of application, is almost identical to Article 1 of the Warsaw Convention, except for some minor changes in wording.⁵

ment, see generally Larry Moore, *The New Montreal Liability Convention, Major Changes in International Air Law: An End to the Warsaw Convention*, 9 TUL. J. INT'L & COMP. L. 223 (2001) [hereinafter Moore, *New Montreal Convention*]; Larry Moore, *Domicile and the Death of the Warsaw System: The Revenge of Komlos*, 19 WIS. INT'L L.J. 1 (2000) [hereinafter Moore, *Domicile*].

⁵ *Warsaw Convention*, *supra* note 3. With regard to application of international status, the Warsaw Treaty provides the following:

Article 1(2) For the purposes of this Convention, the expression "international transportation shall mean any 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 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 if that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of another State is not international carriage for the purposes authority of the same High Contracting Party shall not be denied to be international;

(3) Transportation to be performed by several air successive carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form

The case of *Egan v. Kollsman Instrument Corp.* is a classic example of the court's application of the language of the new treaty.⁶ In *Egan*, the plaintiff bought a round trip ticket to fly from New York to Vancouver. Because of bad weather, the plaintiff could not fly out of Vancouver, so she cashed in her ticket, took a bus to Seattle and bought a new ticket to New York. The plane crashed while trying to land in New York.⁷ The court held that the plaintiff's claim was still governed by the international treaty even though she was an American who bought a ticket on an entirely domestic flight within the U.S.⁸

In light of the *Egan* holding, the Warsaw Convention and the Montreal Liability Convention would apply on a case-by-case basis to any 9/11 airline passenger who was traveling to or from the United States. A quick analysis of passengers coming into the U.S. shows that each flight would yield at least one international case.⁹ Indeed, in today's world of international business

of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the same sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Compare with the Montreal Liability Agreement, which provides the following:

Article 1(2) For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement made between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two State Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single state party without an agreed stopping place within the territory of another state is not international carriage for the purposes of this Convention

(3) Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

⁶ *Egan v. Kollsman Instrument Corp.*, 234 N.E.2d 199 (N.Y. 1967). Although this case has since received negative treatment, it reflects the court's analysis prior to the ratification of the Montreal Liability Agreement.

⁷ *Id.* at 200-01.

⁸ *Id.*

⁹ Passengers traveling into the U.S. from other nations.

AMERICAN AIRLINES FLIGHT 11

Albert Dominguez, 66, Sydney, Australia

and travel, it would be hard to imagine any air crash by a large commercial airliner not yielding at least one case that would be governed by international law.

III. LIABILITY LIMITS AND INTERNATIONAL AVIATION LAW

The old Warsaw Convention, which regulated international commercial aviation from 1929 until 1999,¹⁰ was a problem for the United States because it set comparatively low monetary awards for personal injury or death resulting from an international air flight accident when compared to the damages recovered for the same types of injuries sustained in the very same air accident by those U.S. passengers traveling only domestically.¹¹ Under Article 22(1) of the Warsaw Convention, the total damages allowed were 125,000 Poincare francs¹² or \$8,300.¹³ The United States eliminated the opportunity for inflation adjustments when it abandoned the gold standard even though gold was the official treaty standard for determining the value of the franc, and hence through the currency exchange rate, the dol-

Waleed Iskandar, 34, London, England

AMERICAN AIRLINES FLIGHT 77

Yvonne Kennedy, 62, Sydney, New South Wales, Australia

Shuyin Yang, 61, Beijing, China

Yuguag Zheng, 65, Beijing, China

UNITED AIRLINES FLIGHT 175

Alona Avraham, 30, Ashdot, Israel

Klaus Bothe, 31, Linkenheim, Baden-Wurttemberg, Germany

Ana Gloria Pocasangre de Barrera, 49, El Salvador

Heinrich Kimmig, 43, Willstaett, Germany

Wolfgang Peter Menzel, 59, Wilhelmshaven, Germany

UNITED AIRLINES FLIGHT 93

Christian Adams, 37, Biebelsheim, Germany

Toshiya Kuge, 20, Nishimidoriguoska, Japan

¹⁰ Moore, *Domicile*, *supra* note 4, at 1.

¹¹ See Andreas Lowenfeld & Allan Mendelsohn, *The U.S. and the Warsaw Convention*, 80 HARV. L. REV. 497, 504-05 (1967).

¹² Warsaw Convention, *supra* note 3. Article 22 of the Warsaw Treaty provides:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Compare to the terms of the Montreal Liability Agreement in Article 21.

¹³ Lowenfeld & Mendelsohn, *supra* note 11, at 499.

lar.¹⁴ As a result of this, the damage limits in dollars have been frozen at the last official United States gold to dollar exchange rate set in 1958.¹⁵ Because of the low amount of recovery with no adjustments for inflation,¹⁶ legal and judicial gymnastics were developed to avoid the treaty liability limits by the courts of the United States.¹⁷

The treaty was amended and modified over the years at several different conferences and meetings.¹⁸ Almost all of these were to appease the United States' objections to the low liability limits.¹⁹ Until the new Montreal Liability Convention, the United States had accepted only one of these modifications as

¹⁴ See Rene Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions: The Warsaw Convention's Days in Court*, 21 INT'L & COMP. L.Q. 718, 719 (1972).

¹⁵ Moore, *New Montreal Convention*, *supra* note 4 (discussing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 446 U.S. 243, 248 (1984), where the Court left the value of the treaty at about \$8,700 because of the gold exchange rate at the time, and up from \$8,200 at the time the treaty was enacted).

¹⁶ Warsaw Convention, *supra* note 3, at art. 22. Under Article 22(1) of the Warsaw Convention, the total damages allowed were 125,000 Poincare francs or \$8,300.

¹⁷ See Larry Moore, *Chan v. Korean Air Lines, Ltd.: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention*, 13 HASTINGS INT'L & COMP. L. REV. 229, 230-31 (1990). In *Chan*, the Supreme Court eliminated the American Rule in its interpretation of the Warsaw Convention. This rule set aside the limits of the treaty if the required warning on the ticket was set in a print size that was smaller than 10 point type.

¹⁸ *Id.* at 232-33.

¹⁹ For a discussion of the major rulings that shaped the Warsaw Convention in the United States since 1988 and helped lead to the Montreal Liability Convention, see Moore, *supra* note 17 and text; Larry Moore, *Mental Injury and Lesion Corporelle in International Aviation Under the Warsaw Convention: Eastern Airlines v. Floyd*, 22 ACAD. OF LEGAL STUD. IN BUS. NAT'L PROC. 504, 508-10 (1993) (discussing *Eastern* case, in which the Supreme Court rejected mental or psychic injury as an independent ground for recovering damages under the Warsaw Convention); Larry Moore, *The Lockerbie Air Disaster: Punitive Damages in International Aviation*, 15 HOUS. J. INT'L L. 67 (1992) (discussing Second Circuit ruling which brought the Court of Appeals into uniformity when it held that punitive damages could not be allowed under the Convention where the sole cause of action was for international air accidents); Larry Moore, *Air Disasters: Causes of Action in International Aviation Under the Warsaw Convention: Burying the Ghost of Komlos*, 2 J. OF LEGAL STUD. IN BUS. (1993) (discussing the Eleventh Circuit's holding reaffirming the rule that the treaty provides the only cause of action in international air accidents) [hereinafter Moore, *Air Disasters*]; see also LAWRENCE B. GOLDBIRSCHE, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* (Kluwer Academic Publishers 1988).

marginally acceptable.²⁰ However, that modification was not an official governmental treaty modification, but was a private agreement, reached in Montreal among the major commercial airlines, in which these companies agreed to strict liability for any international aviation accident and to an increase in liability limits to \$75,000.²¹ This agreement kept the United States in the Warsaw system for the last thirty-four years, however in retrospect, this agreement was probably illegal because the treaty barred any liability changes by contract as this agreement, in fact, created.²²

On October 31, 1995, under the direction and promotion of the International Air Transportation Association (IATA) and the International Civil Aviation Organization (ICAO), the International Agreement Relating to Liability Limitations of the Warsaw Convention was adopted by the members of these two international business and academic aviation organizations at Kuala Lumpur and presented to Member States of the Warsaw Convention for consideration.²³ After several years of discussion, negotiations, and modifications, it was ratified and formally went into effect on May 28, 1999 as the Convention for the Unification of Certain Rules for International Carriage by Air.²⁴ When ratified by a Member State, the new treaty will replace the

²⁰ Larry Moore & Stephen P. Ferris, *Air Disasters and Their Financial Effects on the International Aviation Industry: Justification for the Warsaw Convention?*, 4 J. OF LEGAL STUD. IN BUS. 107, 108-11 (1995).

²¹ *Id.* at 111.

²² Warsaw Convention, *supra* note 3. This section bars the members of the treaty from changing the law to be applied in advanced by contract, which would have included the law governing damages. The Montreal Agreement does exactly that.

Article 32 of the Warsaw Convention provides in part:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. . .

²³ Ludwig Weber & Arie Jakob, *Current Developments Concerning the Reform of the Warsaw System*, 21 ANN. AIR & SPACE L. 301, 304 (1996).

²⁴ Montreal Convention, *supra* note 3; see also *supra* text accompanying note 5; Sung Hwan Shin, *The Warsaw System: Liability and the Common Interest*, 22 ANN. AIR & SPACE L. 261 (1997). See the text of the IATA antecedent agreement to the Montreal Liability Agreement, *IATA Inter-Carrier Agreement on Passenger Liability*, 21 ANN. AIR & SPACE L. 293-95 (1996).

After much consultation with the United States, this country became an official party to the new agreement in 1997 by Department of Transportation [DOT] Order 97-1-2. A new formal document was then drafted and executed to govern

Warsaw treaty for that nation. On the other hand, a nation who does not ratify it and is a Member State of the Warsaw Convention will continue to be governed by the Warsaw Convention. The most controversial changes in the Montreal Convention are the new monetary damage recovery laws, which supersede those in the Warsaw Convention.²⁵

The most striking thing about the new Montreal Liability Convention is that it completely changes the basis for damage claims and the liability limits to be employed.²⁶ This Convention establishes a two-tiered recovery system for death or injuries arising from an international air accident.²⁷ The first tier is created by 21(1), which raises the limit from its Warsaw System/Montreal Convention limits of \$75,000 for the developed nations whose airlines signed the Montreal Agreement, and from approxi-

this agreement, was approved for ratification for member nations, and was called the Montreal Liability Agreement on May 28, 1999.

²⁵ Robert F. Hedrick, *The New Intercarrier Agreement on Passenger Liability: Is It a Wrong Step in the Right Direction?*, 21 ANN. AIR & SPACE L. 135, 151-52 (1996).

²⁶ Moore, *New Montreal Convention*, *supra* note 4, at 227-29. See Warsaw Convention, *supra* note 3; *but cf.* Montreal Convention, *supra* note 3.

Article 21 of the Montreal Liability Convention provides the following:

Compensation in Case of Death or Injury of Passengers. 1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability. 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

When Article 21(1) & 21(2) are taken together, the result is that there are no limits on damages allowed under Article 17 of the Treaty if negligence is proven. Section 2 merely shifts the burden of proof onto the airline to show that there was no negligence. Otherwise, negligence will be presumed and higher damage awards could follow automatically. Thus, a negligence claim under the Montreal Liability Convention would yield the same resulting damages as would an ordinary negligence claim anywhere else.

This in effect operates as a revocation of the governing principle behind the Warsaw Convention, which was to set a definite amount for damages so that any passenger traveling pursuant to the Warsaw System would know what he would be entitled to before an accident. Further, the new Convention totally eliminates the Article 25(1) principle of the Warsaw Treaty which only allowed unlimited damages if the airline was guilty of willful misconduct. What we now have is the American System applied internationally.

²⁷ *Id.* Moore, *New Montreal Convention*, *supra* note 4, at 227-29.

mately \$8,700 for many of the other treaty nations, to approximately \$145,000 or 100,000 Special Drawing Rights, or "SDR's" for all Member States.²⁸ The air carrier is also subject to strict liability for this first-tier amount as was the case in the old Montreal Agreement.²⁹

The second tier of recovery is created under 21(2) if the damages sought are above the initial amount of 100,000 SDR's.³⁰ Higher amounts can be awarded under 21(2) if the plaintiff alleges negligence by the air carrier³¹ and that carrier does not rebut it.³² This will result in unlimited recovery for actual damages.³³

Any potential World Trade Center litigation for injuries caused by terrorists to any international traveler under the Montreal Liability Convention would raise conflicting theories of litigation because of the provisions contained within Article 21(2). Under Article 21(2)(a), the plaintiffs will be attempting to negate any defense by the airlines to show that they were not negligent in allowing the hijackers to board.³⁴ Therefore, the airlines will attempt to limit their liability under article 21(2)(b) because it relieves them of any damages beyond the Article 21(1) limits if they can show that the injury was caused by third parties.³⁵ This re-opens the question that was examined in earlier civil trials for damage limits in cases involving terrorist activity.³⁶

IV. INTERNATIONAL LAW AND TERRORIST AIRLINE ATTACKS

A. AIRPORT ATTACKS

Under the old Warsaw Convention, the test for determining when injury or damage was caused by terrorist activity was set forth in the case of *Day v. Trans World Airlines*.³⁷ The facts in *Day* occurred at the airport in Athens, Greece.³⁸ Here, travelers had

²⁸ *Id.*

²⁹ *Id.* See also Ludwig Weber, *ICAO's Initiative to Reform the Legal Framework for Air Carrier Liability*, 22 ANN. AIR & SPACE L. 59, 62 (1997).

³⁰ Weber, *supra* note 29, at 62.

³¹ *Id.*

³² *Id.*

³³ Moore, *New Montreal Convention*, *supra* note 4, at 226.

³⁴ *Id.* at 227-29.

³⁵ *Id.*

³⁶ Moore, *Air Disasters*, *supra* note 19.

³⁷ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975).

³⁸ *Id.* at 32.

to go first through a passport check area and then down into the passenger lounge.³⁹ From there, they were called and directed to the departure gate where they were searched and their baggage was inspected by Greek police.⁴⁰ The attack occurred while the passengers were standing in line to be searched, prior to boarding the airplane. Two terrorists got through all of the searches with weapons,⁴¹ threw hand grenades into the line of passengers, and then sprayed the crowd with gunfire.⁴² The explosions and gunfire killed three travelers and wounded 40 others.⁴³

The court held that the test for determining carrier liability required analysis of three factors: (1) activity of the plaintiffs, (2) control over the plaintiffs, and (3) location of the plaintiffs.⁴⁴ The court found that at the time of the attack, the passengers were (1) in a location required by the airlines for security searches prior to boarding,⁴⁵ (2) engaged in passenger identification and clearance,⁴⁶ and (3) not free agents who could roam at will through the terminal, but instead were under the direction of the airline's agents.⁴⁷ For these reasons, the court found the airline to be liable.⁴⁸

The court rejected the notion that liability attached to an airline under the Convention simply because a passenger entered an airport.⁴⁹ However, because of the additional security requirements, the court held that the airline would be responsible for passengers while they were engaged in the security aspect of the boarding process because of the airline's economic power over the airport and because the airline was in the best position to persuade the airports to provide the necessary and adequate safety precautions needed to protect international passengers, even when traveling through the airport.⁵⁰

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 33.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 32.

⁴⁸ *Id.* at 33-34.

⁴⁹ *Id.* at 35.

⁵⁰ *See id.*

However, in *Buonocore v. Trans World Airlines, Inc.*,⁵¹ the court, in a case similar in many ways to *Day*, ruled in favor of the airline. In *Buonocore*, passengers in the Rome airport waiting for a flight to New York were the victims of a terrorist attack.⁵² Terrorists invaded the airport, hurled hand grenades, and fired into the crowd with machine guns.⁵³ The deceased plaintiff was one of 16 people killed in the attack.⁵⁴ This case was distinguishable from *Day* in that the passengers were not lined up under the care and control of the airlines prior to the attack.⁵⁵ The court found that because the passengers were not yet under the complete control of the airlines, were not making preparations for boarding, were hours from departing, and were not physically near the gate, the airline was not liable.⁵⁶ In this case, security was entirely the responsibility of the airport.⁵⁷

These cases established the limits of the airlines' responsibility in providing security for their passengers, and pointed out that in some instances, the question of passenger security is solely the responsibility of the airport.

B. IN-FLIGHT ATTACKS

In re Air Disaster in Lockerbie, Scotland was a case that arose out of an in-flight terrorist bombing that blew apart a Pan Am flight from London to New York over Lockerbie, Scotland.⁵⁸ The plaintiffs argued that under Article 25 of the Warsaw Convention, all liability limits should be removed for the willful misconduct of the airlines in permitting the injuries to occur by allowing the bomb to be slipped on board.⁵⁹ Note that the arguments accepted by the court to prove willful misconduct and to remove the liability limits were similar, if not identical, to the

⁵¹ *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 11 (2d Cir. 1990); see also *Sweis v. Trans World Airlines*, 681 F. Supp. 501 (N.D. Ill. 1988) (arising out of the same attack but denying liability under the Warsaw Convention).

⁵² *Buonocore*, 900 F.2d at 9.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 10.

⁵⁶ *Id.*

⁵⁷ *Id.* at 10-11.

⁵⁸ *Id.* *In re Air Disaster in Lockerbie, Scotland* on Dec. 21, 1988, 928 F.2d 1267, 1269 (2d Cir. 1991) [hereinafter *Lockerbie I*].

⁵⁹ *In re Air Disaster in Lockerbie, Scotland* on Dec. 21, 1988, 736 F. Supp. 18, 19 (E.D.N.Y. 1990) [hereinafter *Lockerbie II*].

normal requirements to prove common negligence.⁶⁰ The courts of the United States had a long tendency under the old treaty to allow proof of negligence to be substituted as proof of willful injury arguments as a means of circumventing the liability limits of the treaty in the United States.⁶¹ However, under the Montreal Liability Convention, negligence is the standard for removing these limits.⁶²

In *Ospina v. Trans World Airlines*,⁶³ a bomb exploded on a TWA flight as it approached the airport in Athens, Greece on April 2, 1986.⁶⁴ Though it killed four passengers, wounded others, and blew a large hole in the fuselage, the airplane managed to land safely with the survivors of the blast.⁶⁵ The plaintiffs charged the airline with willful misconduct in permitting the bomb to be hidden on board.⁶⁶ The court ruled that while the airline did not utilize all known procedures, this probably still would not have uncovered the bomb.⁶⁷ The court ruled that a simple omission by the airline would not be sufficient to raise the airline's actions to the level of willful misconduct.⁶⁸ Here, the court strictly applied the recovery limit and did not permit negligence to be recast as willful misconduct.⁶⁹ Thus, this decision recognized that skillful third parties could sometimes get past the system through no fault of the carrier.

In *Lockerbie III*, the court cited *Ospina* but did not follow it.⁷⁰ Instead, it accepted the plaintiff's evidence, which tended to

⁶⁰ *Lockerbie I*, 928 F.2d at 1269, *rev'd* in part on other grounds. See RESTATEMENT (SECOND) OF TORTS: RECKLESS DISREGARD OF SAFETY DEFINED § 500 (2003). The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

⁶¹ See generally Ruwantissa I.R. Abeyratne, *Liability for Personal Injury and Death Under the Warsaw Convention and Its Relevance to Fault Liability in Tort Law*, 21 ANN. AIR & SPACE L. 1 (1996).

⁶² Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, ICAO Doc. 9740.

⁶³ *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 36 (2d Cir. 1992).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 37.

⁶⁹ See *id.*

⁷⁰ *In re Air Disaster at Lockerbie, Scotland* on Dec. 21, 1998, 37 F.3d 804, 812 (2d Cir. 1994) [hereinafter *Lockerbie III*].

show negligence, and decided that it proved willful misconduct.⁷¹ The case also raised the question of what constituted correct actions by the airline in protecting its passengers from the actions of third parties.

At trial, the plaintiffs' position was that the defendant's baggage handling and inspection procedure was not effective in protecting the passengers of the airplane.⁷² Because of this defective procedure, a terrorist was able to hide a bomb in a suitcase and smuggle it on board the airplane.⁷³

The defendant's proof was that the airline's security procedures were in compliance with British security regulations⁷⁴ and that the security risk of unaccompanied luggage was relatively low.⁷⁵ However, the trial court excluded this evidence and the court of appeals held that this was harmless error.⁷⁶ This case, once again, opens up the question of what constitutes adequate protection under international law in airport screening of passengers and their luggage. This remains an open question under the new Montreal Convention.

V. WORLD TRADE CENTER/PENTAGON: NEGLIGENCE OR THIRD PARTY ACTION?

A. INTRODUCTION

Under the Montreal Convention, plaintiffs now no longer have to take acts of ordinary negligence and somehow convert them into the equivalent of a reckless or intentional act. However, the question that will be key in analyzing any international aviation passenger case that might arise out of the World Trade Center tragedies is whether, in spite of the enormity of the pain, injury and damage done, the airline was a negligent actor or just another victim of the activities of the hijackers.

B. INEFFECTIVE SECURITY INSPECTIONS

Prospective plaintiffs would rely on Article 21(2)(a) of the Montreal Convention, and argue that the defendants were negligent in allowing passengers to get on board with box cutters,

⁷¹ *Id.* at 820; see also Juan E. Acosta, *Willful Misconduct Under the Warsaw Convention: Recent Trends and Developments*, 19 U. OF MIAMI L. REV. 575 (1965).

⁷² *Lockerbie III*, 37 F.3d at 820.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 821.

⁷⁶ *Id.* at 822.

which were used to attack passengers and kill crew members, thus creating the opportunity for terrorist pilots to take over the airplane and crash them into pre-chosen targets. This argument would be bolstered by the current popular conception, which holds that, had the box cutters been detected, the tragedies could have been avoided. The belief that the safety inspections were defective has led to a public outcry for tighter airport security, and Congress has responded by federalizing airport security operations.⁷⁷ Under this argument, the airlines would be considered negligent in that they permitted third parties, the terrorists, to take over the airplanes in the first place. Prospective plaintiffs would further argue that this negligence caused the resulting injury or death.

C. TOO EFFICIENT SECURITY INSPECTIONS

The defendant airlines would rely on Article 21(2)(b) of the Montreal Convention, and argue that third party terrorists were the cause of the injuries, not the airline procedures. However, the defendants' case would be far more intricate and novel than that required of the plaintiff. That is, the defendants' proof would show that the terrorist takeover of the airlines was a well-planned, paramilitary-type action that actually took advantage of the efficiencies of the United States' airline inspections and of its cultural expectations.

The terrorists knew that the United States' screening techniques would effectively screen out everything Americans considered to be dangerous weapons, such as the machine guns and hand grenades used in the *Day* case. The terrorists knew that Americans are fixated on guns, bombs, grenades, and military knives in their idea of what constitutes dangerous weapons. Thus, kitchen knives, scissors, hair pins, nail clippers, etc., are generally considered harmless in American society. Our grade school children regularly use scissors in home and school activities. Hence, the hijackers knew that even if security inspectors saw these small, innocuous looking blades, they would consider them to be tools, not weapons, and would permit them on board. The hijackers also knew that once aboard, they would be the only armed individuals on the aircraft, as the American se-

⁷⁷ See Air Transportation Safety and System Stabilization Act, 107 Pub. L. No. 42, 115 Stat. 230 (2001); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), 107 Pub. L. No. 56, 115 Stat. 272 (2001).

curity system would have filtered out any weapon that could have been used against them. Thus, the hijackers knew that with surprise, any object, even one with a dull blade such as a plastic knife, would make them the only armed parties on the airplane.

The terrorists combined the above tendencies with the western practice of cooperating with hijackers in the belief that negotiating and military tactics would ultimately rescue the hostages. The terrorists knew that this cultural reflex would mean that the passengers and remaining crew would permit them to fly the planes into their targets, with the belief that they were being diverted elsewhere for negotiations.

The defendants' 21(2)(b) defense would essentially be that the essence of negligence is foreseeability, and that few Americans before September 11, 2001, would have foreseen that box cutters, with their half-inch blades and plastic knives, would be used as weapons to take over an airliner. In addition, before that day, Americans would never expect that an airliner, once hijacked, would be used as a human-controlled guided missile of destruction. Indeed, the terrorists knew what many Americans, with their many safety rules, laws, and equipment, have forgotten: a human is remarkably easy to kill, even with a plastic knife.⁷⁸

It is one of the bitter ironies of this attack that the terrorists depended on the current security system doing its job of guaranteeing that there were no standard weapons on board, while permitting items that Americans have long ceased to think of as weapons to come on board. Based on the cultural standards at that time, no legislation or security methods, even if in effect at the time of the World Trade Center attack, would have kept items like box cutters, letter openers, or metal rulers and the like, off the doomed airplanes. These laws would also not have

⁷⁸ This writer has delivered a series of lectures and written papers on how our technology was not only used against us in the "9/11" attack, but so too was also our common cultural expectations of what is dangerous and what is not was used to our disadvantage. I did this with a simple demonstration. I pretended to be a terrorist dressed as an ordinary business person who has been screened for weapons. Then, as a volunteer acting as a flight attendant turned her back, I took off my necktie and demonstrated a garrote strangulation of the attendant and then used my ink pen to show how to slash the throat of a passenger. At each demonstration the new awareness of how much our feeling of safety is influenced by what we perceive flashed over the audience. What we view as a weapon and what we see as harmless is determined more by our attitudes toward an object than the object itself.

prevented the passengers from cooperating with the hijackers once they had taken control of the airplane.

1. *Hijackings Prior to 9/11*

Based upon the previous actions and pattern of extremist Arab terrorists, most western safety officials would have presumed that the plane would have landed safely, right up until the moment that the first Boeing 767 crashed into the north tower of the World Trade Center. This is illustrated by the following history of aviation hijackings prior to September 11.⁷⁹

In *Herman v. Trans World Airlines*, Islamic terrorists hijacked a TWA airliner while in the air from Frankfurt, Germany to New York on September 6, 1970.⁸⁰ The plane was diverted to a Jordanian desert where the victims were released on September 13, 1970.⁸¹

In *Husserl v. Swiss Air Transport Co.*, also on September 6, 1970, a flight from Zurich, Switzerland, bound to New York was hijacked shortly after take off and diverted to the same desert in Jordan.⁸² These passengers too were held until September 11 and released on September 12.⁸³

The case of *In re Hijacking of Pan American World Airways Aircraft at Karachi International Airport*⁸⁴ arose out of a Pan Am flight from Bombay, India to New York City, which was hijacked at Karachi, Pakistan.⁸⁵ Twenty people were killed, and a number

⁷⁹ Many in the Islamic world trace the decline of Islam as the dominant religion and the ascendance of Christianity and western culture to the battle for Vienna in 1683. On July 5, 1683, Sultan Kara Mustafa, taking advantage of the feud between Protestants and Catholics, moved to conquer all of Europe by marching an army of 250,000 soldiers before the gates of Vienna. Mustafa then proceeded, through siege warfare, to crash down the walls. Only days before the collapse of the city, 26,000 Polish troops arrived on September 5, 1683, and joined with 18,000 troops from other parts of Germany to form an army of 60,000. On the night of September 11, they attacked the surprised Turks who had established no defenses whatsoever. By the end of September 12, the Turkish army fled, and with it, the zenith of the Ottoman Empire. Some Islamic terrorists or liberation groups have seen attacks on this day as the beginning of a new zenith.

WILL DURANT & ARIEL DURANT, *THE AGE OF LOUIS XIV* 423-24 (1963).

⁸⁰ *Herman v. Trans World Airlines, Inc.*, 337 N.Y.S.2d 827, 829 (N.Y. App. Div. 1970).

⁸¹ *Id.*

⁸² *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1242 (S.D.N.Y. 1975).

⁸³ *Id.*

⁸⁴ *In re Hijacking of Pan Am. World Aircraft at Karachi Int'l Airport*, 729 F. Supp. 17 (S.D.N.Y. 1990).

⁸⁵ *Id.* at 18.

of passengers were injured.⁸⁶ The trial court removed all damage limits because of the actions of the airline, notwithstanding the intervening actions of the terrorist.⁸⁷

The *Karachi* hijacking occurred on September 5, 1986, but ended shortly afterward in a shootout before the plane was completely commandeered.⁸⁸ Still, it occurred during the September 5 to September 12 period, which Islamic hijackers seem to favor. Thus, based on the historic behavior of the hijackers prior to the 9/11 hijackings, a reasonable person would not have anticipated anything more in the 2001 hijacking than the actions of the previous instances, none of which foreshadowed the use of a passenger plane as a Kamikaze weapon.

VI. CONCLUSION

The main issues from the Montreal Liability Convention cases from the World Trade Center disaster will be whether the security measures utilized by the airlines were negligent causes of the accident, or whether the skill of the terrorists in overriding the security system and the terrorists' unexpected actions relieved the airline of liability. Negligence requires proof of what a reasonable person within a culture perceives a risk or a hazard to be. In this case, our culture did not see small blades as a threat, and it saw cooperating with hijackers as a safety precaution. Whatever the result of any future litigation, expectations about what is dangerous and what is not, as well as how to respond to an airline hijacking, will never be the same.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Pan Am. Suspends Flights to Pakistan over Airport Security*, TORONTO STAR, Sept. 9, 1986, at A3.

