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Breaking the Limit - Liability for Wilful Misconduct Under the Guatemala Protocol

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BREAKING THE LIMIT—LIABILITY FOR WILFUL MISCONDUCT UNDER THE GUATEMALA PROTOCOL

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FROM THE time the limits of liability for passenger recovery, as established in Article 22(1) of the Warsaw Convention,[1] became outdated as a realistic and adequate amount of compensation for injuries and death, no acceptable plan has been found that complies with the competing interests of uniformity and adequacy of compensation. The large majority of nations desire a system whereby the amount of liability the carrier may incur will be set at levels which will make it economically feasible for them to participate and develop in international passenger carriage. On the other hand, the United States has maintained it will not accept a policy that limits liability if passengers cannot adequately be compensated in terms of damage awards obtained against its domestic airlines. Since revision of the limits of liability of the Warsaw Convention was first considered in 1955,[2] no satisfactory solution from the United States standpoint has been achieved. The adoption of the Montreal Interim Agreement[3] in 1967 can be seen as an enduring consequence of this stalemate.

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[1] Convention for the Unification of Certain Rules Relating to International Carriage by Air, *open for signature* December 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

[2] International Conference on Private Air Law, Hague, 1955.

[3] *Adopted* May 19, 1966, [1966] 17 U.S.T. 1521, T.I.A.S. No. 6108. Stipulation whereby carriers operating to U.S. agreed to passenger compensation awards under absolute liability to the amount of $75,000 for flights originating, stopping and ending in the U.S.

The Guatemala City Protocol was concluded upon the belief that it would be acceptable to the United States and once again establish the desired uniformity in international air travel that was enjoyed so long under the Warsaw Convention.[4] Article 35A of the Guatemala Protocol[5] was specifically included so that states like the United States could supplement the plaintiff's damage award.

Support for the Protocol within the United States has come chiefly from the American representative of IATA,[6] the State Department, the Department of Transportation, and the present administration.[7] Strong opposition has been registered from the bar associations as well as the American Trial Lawyers Association.[8] In addition, resistance will undoubtedly come from the manufacturers of aircraft frames, engines, and component parts, as well as from any other sector of the aircraft industry that might be discriminated against because of the carriers' shielded liability position. Since the Senate's deliberations will undoubtedly attract public scrutiny, public opinion will play a most important role. One of the most significant aspects of the Protocol, therefore, is the elimination of any sanction for injury occasioned by a carrier's wilful misconduct. The carrier under this protocol will be absolutely liable to a set limit under any circumstances except for the defense of contributory negligence.

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[4] The Warsaw Convention was the only treaty governing international air travel from 1929 until the adoption of the Hague Protocol to amend the Warsaw Convention, 478 U.N.T.S. 371 (1955) [hereinafter cited as Hague Protocol].

[5] Provision permitting a state to establish within its territory a system to supplement the compensation payable under the Convention. The U.S. believed in light of statistics of domestic air accident awards between 1968 and 1970, a $100,000 limit would be insufficient to compensate adequately its accident victims. *See* Protocol to Amend the [Warsaw Convention] signed at Guatemala City on March 8, 1971.

[6] International Air Transportation Association. ICAO Doc. No. 8932 (1971) [hereinafter Guatemala Protocol].

[7] McCoy, *Yes or No to Guatemala Protocol—Con.* 10 FORUM 739, 761 (1975).

[8] *Id.* Kreindler, *Guatemala Patch-up*, 1 AIR LAW 25 (1975); Kreindler, *Symposium, Guatemala Protocol*, 6 AKRON L. REV. 131 (1973). Kennelly, *A Novel Rule of Liability: Its Implications*, 37 J. AIR L. & COM. 343 (1970). Kennelly, *International Symposium Concerning the Warsaw Convention*, 75 ROYAL AERONAUTICAL JOURNAL 83, 99 (1971).

A. TAKING WILFUL MISCONDUCT OUT OF THE CONVENTION

1. *Wilful Misconduct Considered*

The question of replacing Article 25 of the Warsaw Convention[9] was a much debated topic at the Hague Conference on Private Air Law in September 1955.[10] Most of the discussion concerned the confusion existing among nations as to the precise meaning of "wilful misconduct" in terms of domestic law. The meaning of the phrase *faute lourde et de dol* as referred to in the original French draft of Article 25,[11] did not yield to a clear English equivalent. It was decided that "wilful misconduct" should be defined specifically in the article, and this change is reflected in Article 25 of the Warsaw Convention as Amended by the Hague Protocol.[12]

When the Article was first considered, it was proposed that any change in Article 25 should be made in conjunction with the question of increasing the limits under Article 22[13] in order that situations where the limits could be exceeded would be specifically

[9] Article 25 (1):

> The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct.

[10] ICAO Legal Committee, Report on Revision of the Warsaw Convention, International Conference on Private Air Law, Hague, 1955, ICAO Doc. No. 7686-LC/140.

[11] R. HORNER, SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, WARSAW, 1929, 212 (1975). President of the Committee (Giannini): "We have succeeded in finding this formula, . . . by which we have succeeded in adopting the expression 'faute lourde et de dol,' an expression difficult to translate into English." The original French text reads in part " . . . *si le dommage provient de son dol ou d'une faute qui, d'apres la loi du tribunal saisi, est considére comme équivalent au dol.*"

[12] Article 13 of the Hague Protocol reads:

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

Hague Protocol, *supra* note 4, at 383.

[13] The purpose for the International Conference at the Hague was to discuss changes to the Warsaw Convention and one change urged by many delegates was to increase the $8,300 limit for passenger compensation which they considered low compared to the standard of living of the 1950's. *See also* ICAO Legal Committee, *supra* note 10, Vol. II Report of Rio Conference.

enumerated in Article 25. The Australian delegate then suggested that a system of strict liability without defense should replace Article 25 altogether. He noted, however, that the proposal would probably receive little support.[14] In reply, it was pointed out that the suggestion failed to take into account the purpose for which Article 25 was inserted into the 1929 Warsaw Convention: to insure that the Convention did not offend the public policy of states that would be offended by provisions which protected persons guilty of criminal or unlawful acts.[15] Hubiert Drion of the Netherlands, in proposing specific language for a new Article 25, submitted that the concept of wilful misconduct should also embrace acts committed "with full realization of the reckless character of his or their conduct and of the danger that damages would result."[16]

2. *Fault to Absolute Liability*

Anglo-American tort law developed primarily on the principle that fault should be the basis for shifting loss from an injured party to the party whose conduct caused the injury.[17] The early common law decisions consistently took cognizance of whether particular behavior was blameworthy.[18] In 1868, *Rylands v. Fletcher*[19] introduced the principle of strict liability into tort law when the actor was made liable, irrespective of fault, for injury-producing conduct simply upon the basis of the inherently dangerous nature of the activity. The advent of socially interdependent societies prompted the suggestion that the main impetus in accident law should be to promote the well-being of accident victims regardless of fault if this could be achieved without imposing too great a so-

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[14] ICAO Legal Committee, Minutes 8th Sess., *supra* note 10, at 98.

[15] Certain instances of gross negligence, professional negligence, reckless driving or behavior are sometimes used interchangeably with the term criminal negligence where the conduct involved amounts to involuntary manslaughter as defined by the criminal codes. *See also* ICAO Legal Committee, Minutes 14th Sess., *supra* note 10, at 170.

[16] *Id.* at 198.

[17] Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 402 (1958-59). Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 444 (1894). 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 446, 447 (5th ed. 1942).

[18] Keeton, *supra* note 17, at 404. *See also* Orr, *Fault as the Basis of Liability*, 21 J. AIR L. & COM. 399, 402 (1954).

[19] L.R. 3 H.L. 330 (1868).

cial cost.[20] "Deep pocket," "better risk bearer," "enterprise liability,"[21] and "allocation of resources" have been some of the theories put forth to justify the use of "no-fault" principles in accident compensation.[22] The argument is that in terms of fairness, the defendant is generally the more efficient risk bearer because he can distribute those losses among those community members who benefit from the dangerous activity.[23]

Upon consideration of these principles, public transportation industries are obvious examples. In order to protect these industries so that they will be able to afford to compensate victims on a no-fault basis, however, it is necessary to limit the extent of their liability in most cases. Thus, insofar as it concerns international passenger transportation, absolute liability must be limited liability. The inclusion of the absolute liability provision in the Montreal Agreement[24] and later in the Guatemala City Protocol can generally be seen as a recognition of this principle.[25]

Professor Robert Keeton[26] has observed that, in general, tort law should not initiate a movement in a direction that is offensive to the public's moral standards.[27] The Montreal Agreement did not

[20] James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 569 (1948). *Cf.* Orr, *supra* note 19, at 404.

[21] *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 494-95 (4th ed. 1971).

[22] Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 501 (1961). *See also* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 559 (1967).

[23] Keeton, *supra* note 18, at 405.

[24] For discussion on the introduction of absolute liability as a replacement for common law fault concepts, see Lowenfeld and Mendelsohn, *supra* note 22, at 588, 589 and basic airline resistance to the introduction of the concept at 595.

[25] Subject to what is discussed *infra* concerning absolute liability and its purpose.

[26] Langdell Professor of Law, Harvard Law School.

[27] Keeton, *supra* note 17 at 422. In speaking of Workman's Compensation laws he noted that scheduled compensation became generally acceptable because it was believed the employer had the capacity and primary responsibility for developing safe working conditions and a duty of compensation where safety precautions became ineffective. Without this kind of compensation few workers could have overcome the hurdles of assumption of risks, contributory negligence, and fellow servant doctrines. Contrast this idea to that of the passenger *vis-a-vis* an international carrier, bearing in mind the doctrine of *res ipsa loquitur*. *See* Lowenfeld and Mendelsohn, *supra* note 22, at 522. "Clearly by the time of the 1960's, the Warsaw shift in the burden of proof—important as it was in 1930—no longer provided any substantial benefit to passengers that would be unavailable without the Convention."

need public endorsement to become effective, yet viewed from the community's perspective, the absolute limitation of liability to seventy-five thousand dollars was an improvement upon what had existed under the Warsaw system. Significantly, however, the Montreal Agreement maintained the wilful misconduct provision of the Warsaw Convention.

Paramount in any "no-fault" compensation scheme is the quick recovery of compensation for damages sustained. There is a certain *quid pro quo* in that the victim accepts reasonable compensation without a need to establish fault. Because of this lack of focus on fault, the *quid pro quo* analysis fails where the conduct involved amounts to intentional conduct. The leap from a system premised upon the concern for compensating the victim by eliminating fault in lieu of an absolute limited recovery, to be a compensation system which establishes absolute limited liability in all cases even where the blameworthy conduct is performed intentionally, wantonly or in reckless disregard for the consequences is morally indefensible. The victim is not completely compensated for the damages resulting from conduct which is tantamount to intentional conduct, and the wrongdoer enjoys the protection of limited liability exposure regardless of the nature of his conduct. Although the concept of strict liability coincided with public moral standards by subjecting those engaged in ultrahazardous and inherently dangerous activities to complete and absolute liability, protection of the wrongdoer by limiting his liability for intentionally wrongful or wantonly reckless acts should be rejected as contrary to public moral standards.

3. *Deleting the Wilful Misconduct Provision*

At the Montreal Conference in 1966[28] and again in 1969[29] the United States delegation was unsuccessful in concluding an agreement among the delegates that one hundred thousand dollars was a reasonable limit of liability for passenger compensation. That

[28] Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and Hague Protocol, ICAO Doc. No. 8584-LC/154-1 at 112 (1966).

[29] ICAO Subcommittee of the Legal Committee on the Question of Revision of the Warsaw Convention as Amended by the Hague Protocol, Montreal, 1969, ICAO Doc. No. 8839-LC/158-1. This subcommittee was formed as a result of a recommendation by the ICAO Legal Committee in September 1967, to give top priority to the item of possible revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955.

limitation was the priority item for the United States delegation; it was thought that any amount below that limit would clearly stand no chance of Senate approval. Consequently, a compromise plan known as the "New Zealand Package"[30] offered a realistic chance of concluding a widely accepted treaty.[31] This plan supported the one hundred thousand dollar recovery limit and made the carrier absolutely liable to that amount for passenger damages; however, it proposed that, except for the contributory negligence defense, the limit be unbreakable in all circumstances. Many nations agreed unbreakability was an essential condition for acceptance of the one hundred thousand dollar limit.[32] The New Zealand delegate offering the plan even noted that unbreakability was the "sugar that coated the rather bitter pill of the high figure."[33] Consequently, a strong majority of represented nations was successful in eliminating the provisions which would have allowed passenger recovery to exceed the maximum limit. This motion, which effectively eliminated any further discussion of exceeding the limit, passed by a vote of forty-three for, none against, and four abstaining.[34] Although some nations registered their basic disapproval of this action, they agreed not to oppose it in the spirit of compromise.[35] Many members considered it inevitable that the limit should be breakable in order to accommodate the doctrine of *dol*,[36] while the Italian delegate attacked the plan as not legally realistic.[37]

[30] ICAO Legal Committee, Seventeenth Session, Montreal, 1970, ICAO Doc. No. 8878-LC/162 at 145-49. The plan provided *inter alia* absolute liability for passenger injury or death to a $100,000 limit without possibility of exceeding this limit. These changes were incorporated into what is basically now the Guatemala City Protocol. Thus it is a compromise measure of the $100,000 figure without a wilful misconduct right to break the limit.

[31] *Id.* at 148. The vote for an unbreakable absolute liability to a limit of $100,000 was 25 for and 6 against, with Italy, France, Malagasay and Congo abstaining.

[32] For example, ICAO International Conference on Air Law, Guatemala City, 1971, 13th Meeting of the Commission of the Whole, ICAO Doc. No. 9040-LC/167-1 at 140, 141. [Hereinafter referred to as the Guatemala City Proceedings.]

[33] ICAO Legal Committee, *supra* note 30, at 152.

[34] *Id.* at 143.

[35] *Id.* Minutes of the Third Meeting, at 59. The French delegate had reservations about eliminating Article 25 and believed that absolute liability was not progressive and could not be effective, but decided, in order to achieve agreement, to consider the concept if certain defenses were reserved to the carrier.

[36] ICAO Subcommittee of the Legal Committee, *supra* note 29, at 4.

[37] *Id.* at 274-75. Dr. Bacalli of Italy, in drawing an analogy to maritime law,

Arguments in support of the unbreakability idea were primarily urged by the smaller, less developed countries and can be summarized as follows:

a) Multiple limits would lead to lack of uniformity in compensation.
b) Higher limits or situations of unlimited liability would mean higher fares for all passengers.
c) Only those passengers from the more affluent countries possess the expectation of a recovery in terms of the high limits.
d) Double and triple existing insurance costs would be imposed upon the small "infant" airlines, thus making it impossible for them to advance economically.
e) There would be no expectation of receiving swift compensation for passenger injuries or deaths.[38]

These arguments were persuasive enough that the majority present voted to eliminate the wilful misconduct provision. The IATA observer to the Conference noted that the most significant point was that breakability of the Convention limit had a direct connection with the cost of insurance, stating that there was approximately forty million dollars a year difference between a breakable one hundred thousand dollar limit and the unbreakable plan.[39]

4. *The Insurance Issue*

Many international carriers have enjoyed what may be an artificially low insurance cost for passenger liability because of the limits of recovery established by the Warsaw/Hague Conventions. Until the advent of the Montreal Agreement there was no available criteria to determine the extent to which insurance costs would increase if liability limits were raised. The Montreal Agreement affected only those carriers operating to and from the United States, and the main economic effect fell upon the United States international airlines. The Air Transportation Committee[40] statistics at the 1969 International Civil Aviation Organization Legal Subcommittee Meeting showed the increase in passenger liability premiums that different airlines experienced as a result of the Montreal Agree-

noted that no court ever allowed a carrier to benefit from any wilful misconduct or personal gross negligence or even the carrier's failure to exercise proper supervision.

[38] ICAO Legal Committee, *supra* note 30, at 77.

[39] *Id.* at 153.

[40] ICAO Subcommittee of the Legal Committee, *supra* note 29, at 43.

ment and the relative percentage of those premiums to the airlines' overall operating costs.[41] After the Montreal Agreement insurance premiums, for the most part, were only one per cent or less of the airlines' total operating cost.

At the Montreal Conference in 1966, the United States delegation submitted Civil Aeronautics Board estimates to the effect that airline costs would increase thirty-two cents per thousand revenue passenger miles if the one hundred thousand dollar passenger liability limit replaced the Warsaw/Hague limit; the difference between the two limits would be six cents per thousand revenue passenger miles.[42] These figures contemplated systems where the passenger liability limit could be broken upon proof of the carrier's wilful misconduct. It has been suggested that if there is no possibility of exceeding the Convention limit for passenger liability most major airlines will eliminate all passenger liability insurance.[43]

Arguments were raised at the Conferences[44] that insurance costs for the operation of small regional airlines would be proportionately heavier in comparison to the larger well established airlines; therefore, any substantial increase in the liability limits would be unfair to the smaller carriers and financially undesirable. The Jamaican delegate, whose view was shared by many, submitted that these airlines would be bearing extra insurance expenses so that the wealthy passengers of other countries could take advantage of the higher limits.[45] This argument has been criticized as an incorrect appraisal of the estimated risk a small regional air carrier would encounter. In those particular cases when the regional airline regularly flew routes where the potential liability was high, for instance from

[41] *Id.* at 45.

[42] Special ICAO Meeting on Limits, *supra* note 28, at 29.

[43] Kennelly, *supra* note 8, at 350:

> If a major airline knows that its liability is an unbreakable maximum of $100,000 per passenger regardless of its degree of fault, what need is there for insurance? Insurance, traditionally and practically, is designed to insure risks. But there will be no risks. Thus, if the proposed treaty is adopted, there appears to be little question but that excess or reinsurance companies will be immediately eliminated for all practical purposes from the insurance market, insofar as airlines are concerned . . . .

[44] Special ICAO Meeting on Limits, *supra* note 28; ICAO Subcommittee of the Legal Committee, *supra* note 29; ICAO Legal Committee, *supra* note 30; Guatemala City Proceedings, *supra* note 32, at 15.

[45] Special ICAO Meeting on Limits, *supra* note 28, at 7.

Jamaica to Miami, the costs could be effectively passed on to the higher income travellers through fare agreement.[46] When the United States withdrawal from the Warsaw system was anticipated, estimates showed that little if any change would be reflected in the insurance costs for the "infant industries" even though they could be subjected to unlimited liability under certain circumstances.[47]

The IUAI[48] observer at the 1966 Montreal Conference thought that legal liability coverage was a relatively small proportion of the overall operating costs of an airline and that too much importance might have been attached to the aspect of insurance costs.[49] Liability insurance costs for an airline depend upon an estimated risk of accident in combination with an estimated average compensation to be paid to those affected by accidents. Risks are calculated on the basis of past air safety records, taking into consideration such variables as climate, technical standards of the equipment and facilities being used by the airline.[50] Statistics show that airline safety continues to improve.[51]

Insurance costs remain a relatively small operating expense for the majority of airlines. Some reports indicate that a large percentage of the airlines' operating expenses are spent on such items as advertising and passenger comfort.[52] If due consideration is given to the risk/safety factor in regard to the utilization of their services by those who could demand large compensation awards, the impact of increased insurance premiums for the "infant airlines" of developing countries may not be as expensive as once feared.[53]

The damage award of one and one-half million dollars in *Kween*

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[46] Lowenfeld and Mendelsohn, *supra* note 22, at 565-66.

[47] Special ICAO Meeting on Limits, *supra* note 28, at 142.

[48] *Id.* at 140.

[49] Special ICAO Meeting on Limits, *supra* note 28, at 140.

[50] ICAO Legal Committee, *Seventeenth Session*, *supra* note 30, at 50.

[51] Special ICAO Meeting on Limits, *supra* note 28, at 53.

[52] Lowenfeld and Mendelsohn, *supra* note 22, at 567:

> Allowing for a reasonable margin of error in what were conceded to be only estimates of the incremental insurance costs at various limits taken as a proportion of operating cost, were clearly somewhere between the cost of the olive and the cost of the gin in the martini, and nowhere near the cost of an inflight movie.

[53] *See, e.g.*, the comment of Tunisian delegate, ICAO Legal Committee, *supra* note 30, at 78.

v. McDonnell Douglas[54] shows, insofar as this accident is concerned, that the risk underwriter is ultimately paying, regardless of the carrier's limited liability position. Consequently, insurance groups who write air liability and risk insurance may now desire to rethink completely the question of airline insurance in the context of spreading the risk of liability throughout the industry.[55]

B. Putting Wilful Misconduct Back Into The Convention

1. *Ordinary Jurisdictional and Conflict Rules*

One of the purposes of a convention that unifies rules governing international air travel is to facilitate the processing of legal claims arising from passenger carriage, baggage, and cargo in order to promote a fast and simple accident compensation system for injured victims.[56] The alternative would be to resort to ordinary conflict of laws principles for the settlement of even the most insignificant claims. This could entail protracted proceedings to determine the *lex fori*, what choice of law rules to use and whether the *lex loci delecti* principle is valid in a given case. This could pose tremendous problems when one considers that several national systems of law conceivably could affect each phase of the litigation.[57]

[54] Jury verdict, U.S. District Court Los Angeles, California, February 27, 1976.

[55] The dilemma for the insurance companies may be resolved in various ways of pooling risks and that in itself may become the subject of some kind of international agreement. When the same risk is insured several times over by policies for air carriers, manufacturers, air traffic controllers, component parts manufacturers independent contractors and freight forwarders, one may legitimately ask why some of those who participate in this same process should have their liability limited to the detriment of other segments of the industry that bear the risk of incurring verdicts of potential unlimited liability. If the *Kween* decision is a viable standard of potential liability, the argument becomes more poignant than ever. Thus, consideration could be given to the establishment of an international compensation award fund and all references in the convention to the amount of recovery for damage would refer to this fund; all other matters would be regulated by the convention. It appears that the expense for the airline would be prohibitive as it would have to make the major insurance contribution (at least where the fund would purport to compensate the claimants in full) unless studies conducted showed otherwise. *See also* Tompkins, *Limitation of Liability By Treaty and Statute*, 36 J. Air L. & Com. 421 (1970).

[56] Special ICAO Meeting on Limits, *supra* note 28, Opening Address of Temporary Chairman at 2.

[57] For general discussion of conflict of laws problems if the United States withdrew from the Warsaw system see Lowenfeld and Mendelsohn, *supra* note 22, at 526-32 & 575-86.

Hypothetically, assume no convention governed international air carriage of passengers, and that after a United States citizen concluded business in London, he had to go to Paris and then to Oran, Algeria, before returning to New York. He made his travel arrangements through Air France, and was issued a ticket: London to Paris via Air France; Paris to Oran via Air Algeria; and then Oran to Paris and Paris to New York via Air France. While boarding the stair ramp of the Air France plane at Oran airport, he was seriously and permanently injured when a firearm was discharged by a person who had not been checked by Air France security. The security employees claimed that the Algeria Port Authority had all security measures at the airport concerning passenger checks. Let us further assume that there was a specific Air France regulation that its personnel were to independently screen all passengers boarding its flights.

Conceivably four countries would have some interest in the litigation. A United States citizen incurred serious injuries; the contract of carriage was made in the United Kingdom; the carrier with whom the transaction was made and on whose ramp the injuries were sustained was French; and the place where the accident occurred was under the care and responsiiblity of Algerian authorities.

Applying traditional jurisdictional and conflict of laws principles, it would appear that the United States plaintiff would be able to bring suit in the United States against Air France but not against any Algerian defendant. Even if suit were brought in the United States, it is doubtful whether its domestic law would be invoked on the question of damages.[58] The court might exercise its discretion

[58] *Restatement of Conflict of Laws* § 378 (1934) states: "The law of the place of the wrong determines whether a person has sustained a legal injury." Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), applied the law of the place of injury (Massachusetts) but significantly, refused on public policy grounds to enforce its limitations provisions as to damages. Courts continued to disregard the language of the *Restatement*, but drew away from the much criticized language of "public policy reasons" and instead used "significant contacts" and "significant relationship." *See* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *See also* Carvers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1240 (1963), where Prof. Currie says "It will be quite impossible to draw a universal rule for choice of law designed to accommodate the *Kilberg* case, so interpreted" [based upon the most significant contacts]. Griffith v. United Air Lines,

and decline to hear the action, invoking the doctrine of *forum non conveniens*.[59] Thus the plaintiff would be subject to either French or Algerian domestic law on the question of the degree of negligence, limitations on recovery, if any, and the amount of recoverable damages.[60]

Under the Warsaw system, this situation would be covered by the Convention, and suit against Air France could be brought in the United States.[61] Under the proposed Guatemala City Protocol, the Protocol would control the forum, but the plaintiff's damage recovery would be limited, and could not exceed that limit even though wilful misconduct could be shown against the carrier.

2. *Considered Alternatives*

Until a plan gains the two-thirds majority approval of the United States Senate, as well as the endorsement of a large majority of other nations concerned with international air transportation, there will not be a single treaty governing international air travel.

The ideal solution would be for injured plaintiffs to receive complete compensation to the extent of their damages promptly and without the necessity of prolonged court action.[62] The "fair" solution is to have an international convention which leaves the de-

Inc., 416 Pa. 1, 203 A.2d 796 (1964), declined to apply Colorado's limitation of damages holding the place of the accident was "purely fortuitous." Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953), first applied the location of the most significant contacts, to the place of injury. Similarly English courts have adopted basically the same rule. *See* Boys v. Chaplin [1971] A.C. 356: Lord Denning's opinion in the Court of Appeal, [1968] 2 Q.B. 1, 20, " . . . the law of the country with which the parties and the act done have the most significant connection." In the House of Lords decision, though affirming, was reluctant to liberalize the old rule completely and adopt a theory based solely on a "contact" or "center" of "gravity" theory. *See* [1971] A.C. 356, 391. *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (P.O.D. II, 1968). Tramontana v. S.A. Empressa de Viacao Aerea Rio Grande, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966) holding Brazilian limits on wrongful death of U.S. sailor applied. Despite the scholastic appeal of Professor Currie's "interest analysis," the theory still lacks wide acceptance.

[59] In deciding, the court would have to consider the plaintiff's chances of obtaining an adequate remedy elsewhere among the obvious convenience and evidentiary factors.

[60] R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 224 (1971). One common method to avoid the application of the law of the place of the wrong in personal injury cases is to switch the label of the problem from "tort" to "contract."

[61] Warsaw Convention, *supra* note 1, arts. 1(3), 17, 28(1).

[62] Kennelly, *International Symposium*, *supra* note 8, at 99.

termination of liability to the domestic court of the plaintiff's domicile.[63] Some United States opponents of the Guatemala City Protocol have pressed for a similar solution, suggesting that the Protocol would be acceptable if it simply deleted all references to limitation of liability and allowed each state to establish its own limits.[64] The basic flaw in this suggestion is that it affords absolutely no protection to the small airline which could experience an irreparable financial setback by a single incident or be subjected to such insurance expenses to make profitable operations impossible. In addition, no country would become a party to an agreement which would subject its domestic carriers to claims of unlimited liability merely because a convention established jurisdiction in another state; rather they would prefer a system where the traditional jurisdictional and Conflict of laws principles apply.[65] A state would gain no significant benefit by submitting to a system which modified traditional choice of laws rules to the extent that another country's domestic law and legal theories could conceivably control over incidents occurring outside its territory and involving foreign corporations. Any regulatory uniformity that the convention might otherwise provide would not outweigh the uncertainty produced by unlimited liability and unpredictable forums.

Dr. Werner Guldimann, chairman of the legal committee at the 1969 Montreal Subcommittee Conference, suggested a plan whereby suit could be brought in the plaintiff's domicile if the carrier's operation were also to that state.[66] He noted that such a plan took into account the differences between states' living standards, exposed the carrier to suits in other jurisdictions to the extent of its geographical ambit of operation, and could be incorporated into the Warsaw system with little change by giving each state the

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[63] ICAO Subcommittee of the Legal Committee, *supra* note 29, at 131. *See also* Mendelsohn, *Symposium on Warsaw Convention*, 33 J. AIR L. & COM. 624 (1967).

[64] *See* note 8 *supra*.

[65] States traditionally are very protective of their sovereignty rights and are reluctant to give them up where they will not benefit from the arrangement.

[66] "A Multiple Limit System Based Partly on Domicile," ICAO Subcommittee of the Legal Committee, *supra* note 29, at 151. He noted that a system based purely on the plaintiff's domicile was very difficult to reconcile with the legitimate interests of the carrier who would have to take into consideration very high limits not connected in any way with the geographical boundaries of its operations.

option of choosing a limitation of liability.[67] The plan had certain disadvantages in that very complex insurance and legal situations could develop; it would discriminate between passengers aboard the same aircraft as well as promote competitive discrimination between carriers which operate to countries with high limits and those that do not. Indeed, Dr. Guldiman felt that such a plan would not be generally acceptable to other states.[68]

3. *A Possible Alternative*

The following is an example of incorporation of the wilful misconduct provision into a convention to afford passenger protection against conduct which is significantly more culpable than mere negligence, yet not offend basic principles of uniformity:

a) Insert the wilful misconduct provision into the convention only as a new section to be elected in lieu of absolute carrier liability. The election would be made by a declaration to proceed on traditional fault concepts under domestic law.

b) If the plaintiff chose to sue on straight fault theory and did not prove wilful misconduct, the total judgment, if any, could not exceed the convention limit plus the amount a supplement fund may contribute.

c) The carrier would have the right to show the proportion of his fault to the damages sustained by way of defense and by joining third parties into the action. The jury or court would make its findings in terms of percentages of fault for which each defendant (or to what extent the carrier, if sole defendant) is responsible.[69] Contributory negligence would be treated according to the domestic law of the member states.

d) Each contracting member of the convention would be free to establish a maximum limit, if any, for recovery beyond the convention limit for wilful misconduct verdicts.

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[67] *Id.*

[68] *Id.* at 152. *See also* the Athens Convention Relating to the Carriage of Passengers & Luggage by Sea, Art. 7(2) (1974), 14 INT. LEGAL MATERIALS 945 (July, 1975).

[69] *See* Dole v. Dow Chemical, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), where New York State has adopted the practice of the trier of fact apportioning *between defendants* their contribution to the entire accident. Thus each owes the total amount of recovery to the plaintiff, but as between themselves their damages are determined by the degree of their fault.

e) Strict jurisdictional rules would apply to the election to proceed on a wilful misconduct claim. Suit could be brought in the domicile of the plaintiff if the carrier possesses an establishment for the purpose of transacting business in that state. Otherwise the suit will be in the carrier's principal place of business.

A similar system has been in effect for those carriers operating to the United States[70] since the adoption of the Montreal Agreement. The effect on carriers' insurance rates, as under the Montreal Agreement, would depend upon the extent of airline service to countries which established high limits of recovery for wilful misconduct. There are several advantages to such a plan. In most cases the smaller developing airlines would be protected to the limit fixed by their domestic legislation; that limit could only be exceeded in cases involving a wilful misconduct verdict, in a country having a higher limit (provided the plaintiff is domiciled there and the carrier has an establishment for the purposes of transacting business). Small regional airlines which seldom fly the commercially expensive and more heavily travelled routes would not be substantially affected by this alternative.

The possibility of the plan's acceptance by a large number of nations would be enhanced; a wilful misconduct provision would conform more closely to national jurisprudence[71] and society's moral standards.[72] Whether to define specifically the term wilful misconduct would be open for negotiation at any international conference.[73] Carriers would be inclined to be more safety conscious

[70] *See* ICAO Doc. No. 8839-LC/1581-1 at 153-54 (1969).

[71] Keeton, *supra* note 17 and note 27. Also note that the domestic law of countries such as the Soviet Union base their civil code almost exclusively on fault principles as discussed in Johnson, *No Liability Without Fault, The Soviet View*, 20 CURRENT LEGAL PROBLEMS 165 (1967). A Japanese delegate expressed the opinion that deletion of wilful misconduct would conflict with Japanese law. Subcommittee on the Legal Committee, *supra* note 29, at 176, 195.

[72] *See, e.g.*, language in Jones v. The Flying Clipper, 116 F. Supp. 386 (S.D.N.Y. 1953):

> To uphold the carrier's contention that the limitation of liability is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier with recklessness to violate the terms of the bill of lading, knowing that it cannot be called upon to pay more than $500 per package. Such a policy, if upheld, would immunize the carrier against the consequences of its own wilful actions at the expense of an innocent party.

[73] Compare the following interpretations of wilful misconduct: Article 13,

in their procedures and personnel policies to protect against wilful misconduct claims. This would benefit the industry and the travelling public.[74]

The plaintiff would not generally sue on a theory of wilful misconduct because he would not want to risk the sure recovery of the convention plus whatever may be available from the supplement fund in exchange for a trial wherein he would have the burden of proof on fault principles. Plaintiff would not take this risk unless he had sound reasons for the election.

In order to protect the manufacturers and others from suits being financed by way of settlements with the carrier and the administrator of the supplement fund, a release amounting to a right of subrogation should be passed on to the carrier and administrator as a condition of settlement.[75] If this were required, it could be argued that the plaintiff would always sue the carrier and join any third parties that he could, thus defeating one of the principal objectives of the convention—reduced litigation. This would only occur where a supplemental fund provision existed, however. It should be noted that absent a verdict of wilful misconduct, the plaintiff could never recover more from the carrier than the convention limit as supplemented. In all cases where the issue of wil-

supra note 12; KLM v. Tuller, 292 F.2d 775, 778 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 921 (1961):

> the intentional performance of an act with knowledge that the act will probably result in injury or damage or in some manner as to imply reckless disregard of the consequences of its performance, and likewise, it also means failure to act in such circumstances . . . as a deliberate purpose not to discharge some duty necessary to safety.

See also McCoy, *supra* note 7, at 740: "Wilful misconduct has been defined as negligent misconduct so gross as to amount to either a reckless or intentional tort and is compatible with essential notions of substantial justice." *See also* Pekelis v. Transcontinental & W. Air, Inc., 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); Berner v. British Commonwealth Pac. Airlines Ltd., 346 F.2d 532 (2d Cir. 1965); Horabin v. British Overseas Airways Corp., [1952] 2 All E.R. 1016, 1019 (Q.B.).

[74] *See* United States v. Pan Am. World Airways, N.Y. Times, March 5, 1976, at 1, col. 8 and p. 53 col. 7. First criminal indictment of an airline as a result of a crash at Boston's Logan Airport, Nov. 3, 1973, Pan American pled no contest to a charge of criminal negligence.

[75] *See* Comment on Guatemala City Protocol to the Warsaw Convention and Supplemental Plan Under Article 35-A, 5 N.Y.U.J. OF INT'L LAW & POLITICS 313, 335 (1973). "Without the possibility of recovery [via subrogation rights] against the manufacturers and other parties, the administrator would undoubtedly have to substantially raise the level of the charges."

ful misconduct is not to be submitted to a jury[76] the carrier could either admit liability to the convention limit or try to mitigate his proportion of fault, hopefully coming well under the convention limit. This not only would be potentially advantageous to the carrier, but it would provide a fairer framework under which suits of this type would be brought.

In our example of the United States businessman receiving serious injuries in Oran, Algeria, suit against Air France could be established in the United States. The plaintiff could choose either to accept the convention limits, as supplemented, as compensation for his damages, or proceed on a fault basis and try to establish wilful misconduct. If the election against the convention limit were made, Air France would try to prove 1) it did not commit a wilful misconduct violation, 2) that it is not at fault at all, 3) and if it were at fault, its proportion of blame is small since the larger degree of fault should be attributed to the Algerian authorities.

CONCLUSION

The weakness of this suggestion from the standpoint of the international community is that it does not provide for a uniform, clear, and simple system for all nations conducive to the expeditious settlement of claims. It does not discourage litigation or the possibility of litigation. Nor does it protect the carrier from the possibility of unlimited liability. Manufacturers and other possible third parties would argue that juries would tend to decide the issues against them more often in an attempt to justly compensate the plaintiff; their liability *could* be limited while the carriers' would *always* be limited. On the other hand, when the carrier is totally at fault, but without wilful misconduct, the plaintiff's damage award could be limited to an amount substantially below that which he might otherwise expect to receive.[77]

It is doubtful that these competing interests will ever be fully satisfied. The alternative discussed herein, however, has a better

[76] For instance the introduction in federal courts of the multi-district panel method of dealing with suits from common disasters. Under federal statute all the cases are combined for pre-trial discovery and liability considerations under supervision of one federal court. *See* McCoy, *supra* note 7, at 760.

[77] The *Kween* verdict, *supra* note 54 graphically illustrates the point.

chance of gaining wide acceptance than a plan of absolute liability limitation. From a safety standpoint, it will afford the international traveller greater protection because carriers will endeavor to adopt policies that discourage or minimize the occurrence of wilful misconduct.[78] Society will not be able to charge that the carrier is protected by a limit of liability regardless of some fundamental breach of his obligation, or vindicated to the extent of its limitation, for the consequences of its wilful actions against innocent parties. A United States' Senator might be very wary to give his approval to a convention that makes it impossible for his constituents to recover more than a fixed amount of money regardless of the circumstances producing injury or death.[79]

A forty million dollar price tag for an entire industry is certainly a small insurance price to pay for the protection afforded, not to mention the benefit that could be achieved—a widely accepted treaty. The question of insurance costs has been unduly relied upon to defeat measures that would provide increased compensation to accident victims. Under the plan described, for instance, small developing airlines would be protected and able to assume increasing risks consistent with their growth. Uniformity to a significant degree would be accomplished. The fear of prolonged vexatious litigation would be greatly alleviated, resulting only if the plaintiff elected to disregard a guaranteed recovery.

The main objective is a single plan, acceptable to the large majority of nations. For such a plan to exist, every interest cannot be fully represented; however, this is not to say that the fundamental interests of the majority of nations and international travellers cannot be adequately represented.[80] The plan here presented offers a

[78] United States v. Pan Am., *supra* note 74. FAA survey found that a random check showed that in nine out of ten cases, federal regulations were not complied with. In 1974 officials reported 260 known violations.

[79] *Id.* The liability limitation of the Guatemala City Protocol would apply even in cases of criminal negligence, as in this case, or in cases involving passenger injury and death.

[80] But the all-or-nothing approach of true believers rarely supplies a workable formula for a workaday world. When the desirable aim of upholding the stability of the international structure collides with the laudable end of placing some domestic checks and balances upon the making of international commitments, the reasonable solution should be a compromise that protects both sets of interests to the maximum extent.

practical and reasonable resolution of the competing interests involved in this complex issue.

Kearney, *International Limitations on External Commitments Article 46 of the Treaties Convention*, 4 INT'L LAW. 1 (1969).

Case Notes