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# Flying Carpets and the Warsaw Convention Property Damage Limitation: Saba v. Compagnie Nationale Air France

## **Cover Page Footnote**

International Law; Commercial Law; Law

## NOTES

### **Flying Carpets and the Warsaw Convention Property Damage Limitation: *Saba v. Compagnie Nationale Air France***

#### **I. Introduction**

After World War I, airplane designers and manufacturers made steady advances in aeronautics, and by the late 1920s, airline companies began to carry passengers across national borders.<sup>1</sup> In 1929, just two years after Charles Lindbergh successfully flew across the Atlantic,<sup>2</sup> delegates of thirty-three nations met in Warsaw to establish ground rules for international air travel.<sup>3</sup> Recognizing that international flight would beget a litter of complex legal offspring,<sup>4</sup> the delegates saw the need for an updated legislative framework capable of handling these imminent problems.<sup>5</sup> The result of that conference was an international

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<sup>1</sup> See *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 219 F. Supp. 289, 322-23 n. 18 (1963); Lee Kreindler, 1 AV. ACCIDENT L. 342 (1963) (describing the airline industry in 1929).

<sup>2</sup> See Perry S. Bechky, *Management and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation*, 60 J. AIR L. & COM. 455, 460 (1995).

<sup>3</sup> See Francis Lyall, *The Warsaw Convention—Cutting the Gordian Knot and the 1995 Intercarrier Agreement*, 22 SYR. J. INT. L. 67, 69 (1996). The Warsaw Convention was not the first gathering of its kind. In 1925, the French hosted the First International Conference of Private Air Law, but no lasting treaty or agreement resulted. See David I. Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653, 657 (1980).

<sup>4</sup> For a sampling of some of the difficult legal questions arising out of international air travel, see Bechky, *supra* note 2, at 460.

<sup>5</sup> See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967). The delegates felt a great responsibility to modernize the law to keep pace with racing technology. The reporter for the Preparatory Committee told the Warsaw Conference, “[W]hat the engineers have done for machines, we must do for the law.” *Id.* (citing II CONFERENCE INTERNATIONALE DE DROIT PRIVE AERIEN, 4-12 OCTUBRE 1929, VARSOVIE 17 (1930) (Lowenfeld trans. 1966)).

treaty known today as the Warsaw Convention.<sup>6</sup>

In drafting the treaty, two policy goals were particularly important to Convention delegates.<sup>7</sup> First, they wanted to create uniformity and certainty in litigation arising out of international flights.<sup>8</sup> Second, they hoped to facilitate international travel by making it affordable—both to the fledgling airline companies and to their passengers.<sup>9</sup>

In furtherance of these goals, the Convention capped damages recoverable from airlines for harm occurring on international flights. In wrongful death cases, airline liability was limited to 125,000 *poincare* francs, or about 8,300 dollars per person.<sup>10</sup> For property loss or damage, the Convention limited recovery to 250 *poincare* francs per kilogram, or about 9.07 dollars per pound of damaged property.<sup>11</sup> The liability limits, however, were not

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<sup>6</sup> See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note 1 (1994) [hereinafter *Warsaw Convention*]. The United States did not formally participate in the drafting of the Convention, but ratified it in 1934 without substantive debate. See Lowenfeld & Mendelsohn, *supra* note 5, at 502. For a more comprehensive discussion of the historical background of the Warsaw Convention, see *id.* at 498-502.

<sup>7</sup> See Lowenfeld & Mendelsohn, *supra* note 5, at 498.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 498-99. For further discussion of the Convention's dual policy goals see, e.g., Naneen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437, 438 (1995) (stating that the Convention's goals "were to provide uniform liability limits and to develop uniform procedures for dealing with international" tort claims); Bechky, *supra* note 2, at 462 (arguing contrary to Lowenfeld & Mendelsohn that the delegates' aim to establish a uniform system for aviation claims was the more important of the two goals); Zachary Lawrence, *Aviation Law: Attempts to Circumvent the Limitation of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHI.-KENT L. REV. 851, 851 (1978) (stating that the liability limit was intended to "promote the rapid growth of international air travel.") (citing 1 L. Kreindler, *AV. ACCIDENT LAW*, § 11.01 [2] (rev. ed. 1977)); Sheinfeld, *supra* note 3, at 656 (stating that the different legal systems involved in international air travel necessitated the creation of uniform rules).

<sup>10</sup> See *Warsaw Convention*, *supra* note 6, art. 22. The text reads:

(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.

*Id.*

<sup>11</sup> *Id.* The text reads:

absolute. The Convention allowed traffickers of expensive goods to preemptively avoid the damage cap by making a declaration of "special value" to the carrier.<sup>12</sup> This declaration set the damage cap at the amount stated by the owner but had the negative effect of making the owner liable for additional shipping charges determined by the air carrier.<sup>13</sup> Moreover, the Convention specifically provided that the caps would not apply if the offending carrier were guilty of "willful misconduct" or its equivalent.<sup>14</sup>

The limitation amounts were considered modest in 1929,<sup>15</sup> and embarrassingly so in subsequent years.<sup>16</sup> Persistent attempts by the United States to raise the limit for personal injury cases have had only marginal success.<sup>17</sup> Today the property limitation remains

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(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to the sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.

*Id.*

<sup>12</sup> See Warsaw Convention, *supra* note 6, art. 22(2).

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* art. 25. The text reads:

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

*Id.*

<sup>15</sup> See Lowenfeld & Mendelsohn, *supra* note 5, at 499.

<sup>16</sup> See Baden, *supra* note 9, at 439. For further discussion of U.S. discontent with the Convention's low limits, see Eloise Cotugno, *No Rescue in Sight for Warsaw Plaintiffs from Either the Courts or Legislature—Montreal Protocol 3 Drowns in Committee*, 58 J. AIR. L. & COM. 745, 745 (1993) (citing Marc S. Moller, *The Warsaw Convention: A Continuing Dilemma For International Aviation*, 63 LAW INST. J. 1040, 1041 (1989); Ernest F. Hollings, *Defeat of the Montreal Protocols: Victory for Airline Passengers*, TRIAL, May 1983, at 20; Lee S. Kreindler, *The Pan Am 103 Atrocity*, LLOYD'S AVIATION L., Mar. 15, 1989, at 1, 3) (noting that critics have called the convention "heinous, absurd, archaic, outmoded, and outrageous").

<sup>17</sup> In 1955, The Hague Convention met and doubled the liability limit to 16,600 dollars. See Lyall, *supra* note 3, at 72. Still unsatisfied, the U.S. threatened to denounce the Convention in 1965. See *id.* at 73. Just days before it was to become effective, the U.S. denunciation was averted by the Montreal Interim Agreement of 1966 which raised the limit to 75,000 dollars. See *id.* The Interim Agreement was followed by further failed attempts to boost the limit in 1971 (The Guatemala Protocol), 1975 (the Montreal Protocols) and again in 1990 (Montreal Protocol 3). See *id.* at 74-76. The latest

unaltered from its original expression.<sup>18</sup> In spite of the apparent American disgust with the Convention, it still remains in force in the United States, and is the treaty with the single greatest number of international adherents.<sup>19</sup>

Not surprisingly, international shippers of goods and attorneys have attempted to skirt the Convention's limitations in a variety of ways.<sup>20</sup> The special declaration provided the surest avoidance of the damages cap, but for whatever reasons—economic considerations, ignorance, or sheer carelessness—not all owners of goods made the declaration. The willful misconduct exception continues to be a popular avenue for challenging the liability cap because it is available to all owners whose property is damaged regardless of prior declarations.<sup>21</sup> One such case, *Saba v. Compagnie Nationale Air France*,<sup>22</sup> was decided recently by the D.C. Circuit.

In *Saba*, Air France handled a large shipment of Persian carpets for a man named Mohammed Ali Saba.<sup>23</sup> Air France transported the carpets from Austria to New York and later trucked them to Virginia.<sup>24</sup> There, the carpets were stored outdoors because there was no room at the indoor storage facility.<sup>25</sup> While the carpets lay outside, heavy rains caused severe damage.<sup>26</sup>

That Air France was negligent in handling the carpets was not

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proposals involve voluntary agreements by air carriers to raise the ceiling. *See id.* at 77-78. For more comprehensive background on U.S. attempts to raise the liability limit, see Cotugno, *supra* note 16, at 750-59; Baden, *supra* note 9, at 441-47; Lowenfeld & Mendelsohn, *supra* note 5, at 501-601.

<sup>18</sup> The property limit is still \$9.07 per pound. *See Saba v. Compagnie Nationale Air France*, 866 F. Supp. 588, 593 (D.D.C. 1994), *rev'd* 78 F.3d 664 (D.C. Cir. 1996).

<sup>19</sup> *See* Cotugno, *supra* note 16, at 745 (citing Lee S. Kriendler, *Warsaw Convention: An American Anachronism*, N.Y. L.J., Aug. 30, 1988 at 3).

<sup>20</sup> *See* Bechky, *supra* note 2, at 492.

<sup>21</sup> In skirting the Warsaw Convention's limitations, plaintiffs have had the most success with the willful misconduct exception. *See* Lawrence, *supra* note 9, at 861. The willful misconduct exception is the most direct way to avoid the liability cap. *See* Cotugno, *supra* note 16, at 772.

<sup>22</sup> 78 F.3d 664 (D.C. Cir. 1996).

<sup>23</sup> *See id.* at 665.

<sup>24</sup> *See id.* at 666.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

at issue in *Saba*.<sup>27</sup> The real dispute concerned whether such negligence rose to the level of willful misconduct.<sup>28</sup> If it did, the Warsaw Convention's liability limitation would not apply and Mr. Saba would be able to recover his actual losses—the market value of the carpets minus their salvage value.<sup>29</sup> If the negligence was found to be something less than willful misconduct, Air France's liability would be limited by the Warsaw Convention to nine dollars per pound of carpet.<sup>30</sup>

*Saba* was the first case dealing with the Warsaw Convention's property damage liability limit brought to the D.C. Circuit Court of Appeals.<sup>31</sup> In three prior cases, the court dealt with the limitation as it applied to personal injury and wrongful death suits in mass disaster cases.<sup>32</sup> In each of those cases, the court found the airlines guilty of willful misconduct, bringing the case outside the liability limit.<sup>33</sup>

The *Saba* court, however, reached the opposite result on facts that were difficult to distinguish from the three disaster cases.<sup>34</sup> The court held that in order to prove willful misconduct on the part of an airline, a plaintiff must show that the actor had subjective

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<sup>27</sup> See 78 F.3d 664, 666 (D.C. Cir. 1996).

<sup>28</sup> See *id.* at 667.

<sup>29</sup> The carpets had a fair market value of \$461,150 in an undamaged condition. See *Saba v. Compagnie Nationale Air France*, 66 F. Supp. 588, 592 (D.D.C. 1994), *rev'd* 78 F.3d 664 (D.C. Cir. 1996). Mr. Saba was able to sell the damaged carpets for \$182,200. See *id.* Mr. Saba sought to recover \$278,950, the difference between the two figures. See *id.*

<sup>30</sup> See *id.* at 593. Neither the district court nor the circuit court mentioned the exact weight of the damaged carpets, so it is impossible to determine the precise amount Mr. Saba's recovery would have been reduced by the Warsaw Convention's damage cap.

<sup>31</sup> A D.C. district court did consider a property damage claim on one prior occasion in *Martin v. Pan American World Airways, Inc.*, 563 F. Supp. 135 (D.D.C. 1983). The court held that a baggage handler's refusal to see if a passenger's bag had been properly tagged did not constitute willful misconduct within the meaning of the Warsaw Convention. See *id.* at 138.

<sup>32</sup> *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949); *KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961); *In re Korean Airlines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991); see discussion *infra* notes 110-37 and accompanying text.

<sup>33</sup> See *infra* notes 110-37 and accompanying text.

<sup>34</sup> See *infra* notes 148-86 and accompanying text.

knowledge of the possible bad consequences of his actions.<sup>35</sup> As a practical matter, this new formulation of the rule may impose a substantial burden on a plaintiff suing under the Warsaw Convention because fulfilling the subjective test presents difficulties of proof which are absent under an objective test.<sup>36</sup>

Most importantly, the willful misconduct standard articulated in *Saba* will apply with equal force to both property damage and personal injury cases.<sup>37</sup> Although *Saba* only deals explicitly with the property damage provision, it will nonetheless affect all future litigation involving Warsaw Convention liability caps. Wrongful death plaintiffs and victims injured in air disasters alike will have to meet *Saba*'s more demanding terms—a result that in some ways conflicts with D.C. Circuit precedent and common judicial practice.<sup>38</sup>

This note will explore the facts and procedural history of *Saba* in Part II.<sup>39</sup> Part III will focus on the background law, giving special attention to the three above-mentioned disaster cases.<sup>40</sup> Part IV will analyze the court's opinion and its place relative to the disaster precedent.<sup>41</sup> Finally, Part V of this note will conclude that *Saba* provides only short-term results that offend the traditional judicial treatment of the Warsaw Convention.<sup>42</sup> The note, however, recognizes that in the long-term, *Saba* may encourage a final legislative resolution to the low liability caps in the Warsaw Convention.<sup>43</sup>

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<sup>35</sup> See *Saba*, 78 F.3d at 668.

<sup>36</sup> See *infra* notes 187-215 and accompanying text.

<sup>37</sup> In terms of the application of the willful misconduct exception, the Warsaw Convention makes no distinction between the two types of cases. See Warsaw Convention, *supra* note 6, art. 25. Moreover, the *Saba* court treated prior air disaster precedent as binding in deciding this property damage case. See *Saba*, 78 F.3d at 668. The reverse should also be true.

<sup>38</sup> See *infra* notes 148-86, 228-31 and accompanying text.

<sup>39</sup> See *infra* notes 44-109 and accompanying text.

<sup>40</sup> See *infra* notes 110-46 and accompanying text.

<sup>41</sup> See *infra* notes 147-227 and accompanying text.

<sup>42</sup> See *infra* notes 228-37 and accompanying text.

<sup>43</sup> See *infra* notes 238-40 and accompanying text.



## II. Facts and Procedural History

In 1990, Mohammed Ali Saba, a dealer of Persian rugs, contracted with Air France for the transportation of 800 hand-woven rugs from Austria to the United States.<sup>44</sup> On September 19, 1990, Air France packaged the carpets in Austria and air-freighted them to Kennedy International Airport in New York City.<sup>45</sup> At Kennedy Airport, Air France loaded the carpets on trucks for transport to Dulles Airport in Virginia.<sup>46</sup> At Dulles, Air France stored the carpet with its U.S. cargo agent, DynAir.<sup>47</sup> The carpets were to be stored in DynAir's storage facility at the airport, but the facility was full at the time.<sup>48</sup> In accordance with its customary practice in such cases, DynAir stored the carpets outside the facility.<sup>49</sup> DynAir employees put additional plastic over the carpets and stored several of them in bins where they sat outside for five days.<sup>50</sup> On September 30, 1990, the day before Mr. Saba was to pick up the carpets, a forecasted rainstorm hit Dulles, dumping a third of an inch of rain on the carpets.<sup>51</sup> The carpets were not adequately protected and eighty-seven of them suffered major damage.<sup>52</sup>

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<sup>44</sup> See *Saba v. Compagnie Nationale Air France*, 866 F. Supp. 588, 590 (D.D.C. 1994), *rev'd*, 78 F. 3d 644 (D.C. Cir. 1996).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* See also *Dynair Profile*, World Airport Week, Aug. 22, 1995, available in Westlaw, 1995 WL 9125058. The article noted that DynAir

operates at more than 50 airports in the United States, providing services to more than 150 customers, the majority of which are domestic and international airlines. Some 64% of its customers are based in North America, 13% in Europe and 12% in Latin America. DynAir's business covers general airport services (including ground support and equipment maintenance, baggage handling, aircraft cleaning, deicing, passenger ticketing and security); fueling (including fuel farm management and fuel distribution); and cargo handling (including design and operation of air freight hubs, cargo and mail, documentation and customs clearance, and aircraft loading).

*Id.*

<sup>48</sup> See *Saba*, 78 F. Supp. at 590.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 592. See *supra* note 29 and accompanying text.

### A. District Court

Mr. Saba brought suit against Air France in the United States District Court for the District of Columbia. In a non-jury trial, the district court determined initially that the terms and requirements of the Warsaw Convention governed the suit.<sup>53</sup> The court found, however, that Air France's initial packaging of the carpets in Austria and their subsequent shabby care at the Dulles airport rose to the level of willful misconduct and, therefore, the liability limitation in Article 25 did not apply.<sup>54</sup>

Central to the district court's reasoning was Air France's disregard of its own detailed regulations while packing the carpets in Austria.<sup>55</sup> Although the regulations called for humidity-sensitive cargo, such as carpets, to be stored in plastic containers,<sup>56</sup> Air France put most of the carpets on non-enclosed shipping pallets.<sup>57</sup> Furthermore, the few containers that were used were not water-tight.<sup>58</sup> While the regulations required a double covering to be in place and mandated that the tops and sides of cargoes be covered, Air France did neither.<sup>59</sup>

The district court also found that Air France must answer for the careless treatment of the carpets in Virginia.<sup>60</sup> Even though Air France effectively turned the carpets over to DynAir at the Dulles Airport,<sup>61</sup> the district court apparently imputed DynAir's negligence to Air France because Dynair was Air France's agent.<sup>62</sup> Thus, Air France was ultimately responsible for the failure of

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<sup>53</sup> See *Saba v. Compagnie Nationale Air France*, 886 F. Supp. 588, 591 (D.D.C. 1994). "The Warsaw Convention applies to 'all international transportation of . . . goods performed by aircraft for hire,' where 'according to the contract made by the parties, the place of departure and the place of destination . . . are situated . . . within the territories of two High Contracting Parties.'" *Id.* (quoting the Warsaw Convention, *supra* note 6, art. 1 (1), (2)).

<sup>54</sup> See *id.* at 593.

<sup>55</sup> See *id.* at 593-94.

<sup>56</sup> See *id.* at 593.

<sup>57</sup> See *id.* at 594.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

DynAir employees to shelter the carpets when the damaging rain began to fall.<sup>63</sup>

The district court concluded that “through a series of acts, the performance of which was intentional, Air France has demonstrated reckless disregard<sup>64</sup> of the consequences of its performance.”<sup>65</sup> This finding brought the case outside the Warsaw Convention limitation, allowing full recovery of actual damages.<sup>66</sup>

### *B. Circuit Court*

Air France appealed the district court’s decision.<sup>67</sup> In a two-to-one decision, the Circuit Court of Appeals for the District of Columbia reversed the district court, finding that the court had erred by applying the wrong legal standard for willful misconduct.<sup>68</sup>

#### *1. Majority Opinion*

Writing for the majority, Judge Silberman recognized the historic confusion in case law concerning the precise meaning of “willful misconduct or its equivalent” for purposes of the Warsaw Convention.<sup>69</sup> He dedicated most of his opinion to a discussion of willful misconduct as a legal standard and sought to clarify it.<sup>70</sup> The opinion essentially established two requirements for a finding of willful misconduct. First, the evidence must show that the

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<sup>63</sup> *See id.* at 594. *See also* *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 (D.C. Cir. 1996). The *Saba* circuit court also agreed that Air France would be liable for DynAir’s actions under principles of agency. *See id.* at 670 n. 6.

<sup>64</sup> The Warsaw Convention’s exception requires “willful misconduct” or its legal equivalent. Warsaw Convention, *supra* note 6, art. 25. Reckless disregard has been held to be the equivalent of “willful misconduct” for purposes of the Warsaw Convention. *See Saba*, 78 F.3d 664, 667. The terms are used interchangeably throughout this note.

<sup>65</sup> *Saba*, 866 F. Supp. at 594.

<sup>66</sup> *See id.*

<sup>67</sup> *See Saba*, 78 F.3d at 665.

<sup>68</sup> *See id.* at 670. The court acknowledged that had the district court applied the correct standard, its decision would be entitled to great deference under a “clearly erroneous” standard of review; however, since the district court did not use the proper legal standard, no deference was due. *See id.*

<sup>69</sup> *Id.* at 667.

<sup>70</sup> *See id.* at 666-67.

defendant acted intentionally.<sup>71</sup> Second, the evidence must demonstrate that the defendant possessed subjective knowledge of the risks inherent in his conduct.<sup>72</sup>

After reviewing the applicable case law, the majority stated that historically the reckless disregard standard was meant to provide "a proxy for willful misconduct's scienter requirement."<sup>73</sup> In other words, the reckless disregard standard ensured that the actor was "subjectively aware of the wrongfulness of his act."<sup>74</sup>

This subjective awareness, the court held, conceptually separated gross negligence from reckless disregard on a continuum running from negligence to intent.<sup>75</sup> Gross negligence, the court explained, is simply "a palpable failure to meet the appropriate standard of care."<sup>76</sup> Reckless disregard, on the other hand, serves as "a legitimate substitution for intent to do the proscribed act . . . ."<sup>77</sup> The court pointed out that negligence was measured against an objective or "reasonable person" standard, whereas for reckless disregard the actual knowledge of the particular actor must be considered.<sup>78</sup> For example, the majority read the Warsaw Convention to limit liability in cases "where a reasonable employee should have but did not understand that her actions posed a substantial risk of harm to a shipper's goods."<sup>79</sup> The majority's test, then, requires actual, subjective knowledge by an actor that her actions would lead to some harm.<sup>80</sup>

Recognizing the problems of proof such a subjective standard entailed, the majority acknowledged that "the actor's intent may be inferred from indirect evidence and the reckless nature of his acts."<sup>81</sup> Under the majority test, indirect evidence must be used to

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<sup>71</sup> See *id.* at 668.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 667.

<sup>74</sup> *Id.* at 668.

<sup>75</sup> See *id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at 667.

<sup>79</sup> *Id.* at 669-70.

<sup>80</sup> See *id.* at 669.

<sup>81</sup> *Id.* at 668 (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1136 (D.D.C. 1988)).

prove that “the danger was so obvious that the actor ‘*must have been* [subjectively] aware of it.’”<sup>82</sup> Objective facts and evidence must therefore permit the inference not that the actor *should* have recognized the danger, but that the actor *did in fact* know and appreciate the risks of his conduct.<sup>83</sup>

The *Saba* majority held that the lower court had applied an objective test with regard to “reckless indifference” and therefore committed reversible error.<sup>84</sup> Instead of looking to the actual, subjective knowledge of Air France’s employees, the district court, in the majority’s view, based its decision on what a reasonable Air France employee would and should have done to protect the carpets.<sup>85</sup> Negligence cases might be satisfied under such an objective test, but the majority held such an analysis inadequate as a matter of law to show “reckless disregard.”<sup>86</sup>

Applying its test to the facts on record, the majority noted that no evidence showed that Air France’s employees were “subjectively aware of serious risks attending packaging the carpets inadequately in violation of regulations . . . .”<sup>87</sup> Evidence that the employees had violated Air France’s packaging regulations was inadequate to give rise to the inference that the employees actually comprehended the danger.<sup>88</sup>

In closing, the majority suggested that the confusion about the proper legal standard, willful misconduct, and the “tort liability creep,” stemmed from the natural tendency by judges and juries to remedy obvious negligence.<sup>89</sup> In the court’s estimation, the district court had indulged its sympathies by impermissibly lowering the willful misconduct standard to allow Mr. Saba to slip by the liability limitation.<sup>90</sup> The court reasoned that such an “ex post”<sup>91</sup>

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<sup>82</sup> *Id.* at 669 (quoting *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992)) (emphasis added) (alteration added).

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 666-67, 670.

<sup>85</sup> *See id.* at 670.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 670.

<sup>89</sup> *See id.* at 671.

<sup>90</sup> *See id.*

<sup>91</sup> The dissent defines an “ex post” approach as one in which judges compensate

approach to the Warsaw Convention violated the policies that originally gave rise to the Convention: the "economics of air travel" and the "overall welfare of passengers."<sup>92</sup>

## 2. Dissent

Judge Wald dissented, arguing that the district court had applied the correct standard, but that even applying the majority's standard, Mr. Saba should still have prevailed.<sup>93</sup> She also disagreed with the policy reasons underlying the majority opinion.<sup>94</sup> Judge Wald was more concerned about the effects of "creeping unaccountability" on future passengers than "creeping tort liability" on airlines.<sup>95</sup>

Judge Wald first criticized the majority's subjective test because it lacked precision.<sup>96</sup> Her dissent, focusing on matters of proof, noted the failure of the majority to clearly set forth what a plaintiff must show to satisfy the subjective standard.<sup>97</sup> According to the n some places the majority "seem[ed] to suggest that a plaintiff must prove a carrier had actual knowledge that its actions posed a substantial risk of harm,"<sup>98</sup> while in other places acknowledging that such an inference can be made by a jury on the basis of objective facts.<sup>99</sup>

According to Judge Wald, such imprecision not only made the standard confusing, it added nothing to the caselaw already in place.<sup>100</sup> She read the majority's subjective rule as allowing a jury to infer that an actor has subjective knowledge of the wrongfulness of his actions when the actor "departs in an extreme fashion from the standards of ordinary care."<sup>101</sup> This, she contended, was no

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plaintiffs "because their injuries arouse our sympathies, . . . ." *Id.* at 677 (Wald, J., dissenting).

<sup>92</sup> *Id.* at 671.

<sup>93</sup> *See id.* at 675 (Wald, J., dissenting).

<sup>94</sup> *See id.* at 677 (Wald, J., dissenting).

<sup>95</sup> *See id.* (Wald, J., dissenting).

<sup>96</sup> *See id.* at 671 (Wald, J., dissenting).

<sup>97</sup> *See id.* at 672 (Wald, J., dissenting).

<sup>98</sup> *Id.* (Wald, J., dissenting).

<sup>99</sup> *See id.* (Wald, J., dissenting).

<sup>100</sup> *See id.* at 674 (Wald, J., dissenting).

<sup>101</sup> *Id.* at 673 (Wald, J., dissenting).

different from the objective standard which permitted the jury to make precisely the same inference.<sup>102</sup> She intimated that in spite of the majority's efforts to divorce the subjective test from the objective test, the two tests were identical for practical purposes because they were both based on quantitative, objectively measurable departures from the objective standard of care.<sup>103</sup> In the end, both tests boiled down to "how badly a carrier must behave before an inference of subjective knowledge of likely disastrous consequences will be permitted."<sup>104</sup>

Taking the argument to its logical conclusion, the dissent stated that because the majority's test added nothing to the test that the district court applied, there could be no error in the district court's use of the objective test.<sup>105</sup> In addition, the dissent contended that if the test truly required subjective knowledge of the actor, it conflicted with binding precedent in the circuit.<sup>106</sup>

Judge Wald then applied her reading of the majority's rule to the facts in the case. She cited Air France's *Aircraft Handling and Loading Operational Regulations*, a manual which gave specific instructions for the treatment of water-sensitive cargo.<sup>107</sup> Based on the numerous departures from the manual's instructions, Judge Wald concluded that the district court was warranted in making two inferences: first, that the regulation violations were so egregious that the Air France employees were undeniably aware of the danger of leaving the carpets outside,<sup>108</sup> and second, that storing carpets outdoors in such condition, despite forecasted rain, constituted a breach of the ordinary standard of care "to warrant, if not mandate, an inference that Dynair employees had to recognize the substantial risk created by their actions."<sup>109</sup> Thus, under either an objective or subjective formulation of "reckless disregard," the

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<sup>102</sup> See *id.* (Wald, J., dissenting).

<sup>103</sup> See *id.* at 675 (Wald, J., dissenting).

<sup>104</sup> *Id.* (Wald, J., dissenting).

<sup>105</sup> See *id.* (Wald, J., dissenting).

<sup>106</sup> See *id.* at 673 (Wald, J., dissenting).

<sup>107</sup> See *id.* at 675, 676 (Wald, J., dissenting).

<sup>108</sup> See *id.* at 677 (Wald, J., dissenting).

<sup>109</sup> *Id.* (Wald, J., dissenting). Dynair's actions were imputed to Air France under agency principles. See *supra* notes 60-63 and accompanying text.

dissent argued that the district court decided the case correctly.

### III. Background Law

The D.C. Circuit Court of Appeals has decided some of the leading cases on the Warsaw Convention's liability limits. The first of these, *American Airlines v. Ulen*,<sup>110</sup> involved a 1945 plane crash in Virginia.<sup>111</sup> One of the survivors of the crash brought a tort suit against the airline.<sup>112</sup> The jury found that the airline was guilty of willful misconduct primarily because the flight plan called for the plane to fly at an altitude of 4000 feet past a mountain 4080 feet in elevation.<sup>113</sup> This was a clear violation of Civil Air Regulations (CAR),<sup>114</sup> and plain common sense.<sup>115</sup> On appeal, the circuit court upheld the trial court's instruction to the jury as the appropriate standard for willful misconduct.<sup>116</sup> The instruction at issue read as follows:

Now, willful misconduct is not, as I have said, merely misconduct, but willful misconduct. So if the carrier or its employees or agents, willfully performed any act with the knowledge that the performance of that act was likely to result in injury to a passenger or performed that act with reckless and wanton disregard of its probable consequences, then that would constitute willful misconduct.<sup>117</sup>

The court found that the defendant had violated the CAR regulation with knowledge and had shown reckless and wanton disregard for the consequences of that violation.<sup>118</sup> Therefore, the court held that the jury was justified in finding willful misconduct on the defendant's part.

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<sup>110</sup> 186 F.2d 529 (D.C. Cir. 1949).

<sup>111</sup> *See id.* at 530.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 534.

<sup>114</sup> Civil Air Regulations 61.7401, 8 Fed. Reg. 6589 (1943). The regulation reads in part, "No scheduled air carrier aircraft shall be flown at an altitude of less than 1000 feet above the highest obstacle located within a horizontal distance of five miles from the center of the course intended to be flown . . . ." *Id.*

<sup>115</sup> *See Ulen*, 185 F.2d at 532.

<sup>116</sup> *See id.* at 533.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at 534.



In *KLM Royal Dutch Airlines Holland v. Tuller*,<sup>119</sup> a flight from Amsterdam to New York crashed into the ocean just after taking off from an intermediate stop in Ireland.<sup>120</sup> Due to lapses in communication on the part of KLM's employees in the control tower and in the downed plane, authorities were not immediately aware of the crash.<sup>121</sup> In fact, rescue efforts did not begin for nearly four hours.<sup>122</sup> Meanwhile, the decedent had exited the plane and managed to climb onto the tail of the aircraft where he waited for rescue.<sup>123</sup> Just as the rescue craft approached the scene, the decedent lost his footing, slipped off the tail, and drowned.<sup>124</sup>

The wrongful death action subsequently brought against the airline alleged four instances of willful misconduct by KLM employees:<sup>125</sup> 1) failure to notify the passengers of the existence, location, and use of life vests; 2) failure on the flight crew's part to broadcast an emergency message after the crash; 3) failure to provide for the safety of the decedent after his danger was known; and 4) failure of the KLM hierarchy to properly relay messages concerning the loss of communication with the plane.<sup>126</sup> Applying the standard for willful misconduct articulated in *Ulen*,<sup>127</sup> the circuit court held on review that the objective evidence presented at trial could reasonably lead a jury to find willful misconduct in each of the four categories.<sup>128</sup> The Warsaw Convention's liability cap therefore did not apply.

In the most recent Warsaw Convention case in the D.C. circuit, *In re Korean Air Lines Disaster of September 1, 1983*,<sup>129</sup> a Korean airliner that strayed into Soviet airspace was shot down, killing all

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<sup>119</sup> 292 F.2d 775 (D.C. Cir. 1961).

<sup>120</sup> *See id.* at 777.

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 775.

<sup>125</sup> *See id.* at 779.

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 778.

<sup>128</sup> *See id.* at 782.

<sup>129</sup> 932 F.2d 1475 (D.C. Cir. 1991).

of the passengers.<sup>130</sup> The facts about the flight were sketchy, and theories about the disaster involved some guesswork.<sup>131</sup> The plaintiffs in the suit hypothesized that the plane's Inertial Navigation System (INS) was improperly programmed, sending the flight off course.<sup>132</sup> According to the plaintiffs' theory, the pilots of the plane must have known that they were well off course, but decided to proceed rather than turn around. The plaintiffs alleged that the flight crew knew they would probably face disciplinary actions for negligently programming the INS,<sup>133</sup> and misrepresented their position during the flight to cover up the mistake.<sup>134</sup>

The jury returned a verdict in the plaintiffs' favor, and the circuit court did not disturb that determination.<sup>135</sup> The court deferred to the jury's role as trier of fact because the facts were few and ambiguous.<sup>136</sup> The opinion held that the plaintiffs' scenario, if accepted by the jury as true, properly constituted willful misconduct under the standard outlined in *Tuller*.<sup>137</sup>

In addition to the Warsaw Convention precedent, the *Saba* court looked to cases that construed the willful misconduct concept in other situations. Primary among these cases was *SEC v. Steadman*.<sup>138</sup> In *Steadman*, an investment adviser failed to register certain mutual funds under the Blue Sky laws of the various states where the funds traded.<sup>139</sup> In failing to do so, the adviser had relied on a letter from an attorney stating that registration was not necessary in each state.<sup>140</sup> After trading for

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<sup>130</sup> See *id.* at 1476.

<sup>131</sup> See *id.* at 1479.

<sup>132</sup> See *id.* at 1478. The INS "is a navigational device which stores preprogrammed flight plans and displays data during the flight showing deviations from the designated route." See *id.* at 1478.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* at 1478.

<sup>135</sup> See *id.* at 1477.

<sup>136</sup> See *id.* at 1481.

<sup>137</sup> See *id.* at 1479-80. The jury could have reasonably believed plaintiff's theory. See *id.*

<sup>138</sup> 967 F.2d 636 (D.C. Cir. 1992).

<sup>139</sup> See *id.* at 639.

<sup>140</sup> See *id.*

seventeen years, the SEC investigated the funds and concluded that the failure to register gave rise to serious securities violations, including fraud.<sup>141</sup>

The *Steadman* court held that in order to prove fraud, the SEC would have to prove “intent to deceive, manipulate, or defraud.”<sup>142</sup> The court recognized that extreme recklessness could satisfy the intent requirement, but noted that such recklessness was “not merely a heightened form of ordinary negligence.”<sup>143</sup> Holding that Mr. Steadman’s negligence did not amount to extreme recklessness, the court stated that,

[s]ophisticated professionals like Steadman might be assumed to have come across information (perhaps from competitors) at some point during the 17 years of non-registration that should have put them on notice that the opinion on which they relied might be incorrect . . . . But the evidence does not permit a finding that Steadman or any of the directors *actually knew* the opinion was wrong or was reckless in relying on it.<sup>144</sup>

The *Steadman* court understood the extreme recklessness test to require scienter or a lesser form of intent.<sup>145</sup> The *Saba* court focused on this analogy, arguing that the same analysis should apply to reckless indifference in Warsaw Convention cases.<sup>146</sup>

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<sup>141</sup> See *id.* at 640.

<sup>142</sup> *Id.* at 641.

<sup>143</sup> SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992).

<sup>144</sup> *Id.* at 642 (emphasis added).

<sup>145</sup> See *id.* at 641. The court held that recklessness is “an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.” *Id.* (citing *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)).

<sup>146</sup> After reviewing this analogous precedent, the *Saba* court stated: “Similarly, reckless disregard, in the Warsaw Convention context, requires a showing that the defendant engaged in an act that is known to cause or to be likely to cause injury.” *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 669 (D.C. Cir. 1996).

The *Saba* court also looked to other cases, notably *Farmer*, a case brought by a prisoner against prison officials for deliberate mistreatment. *Farmer v. Brennan*, 114 S. Ct. 1970 (1994). The Supreme Court held that “deliberate indifference” in the Eighth Amendment context was equivalent to recklessness and that both standards embodied a subjective component. *Saba*, 78 F.3d at 669 (citing *Farmer*, 114 S. Ct. at 1979-80). The Court noted:

The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is

#### IV. Analysis

The *Saba* court faced the precarious task of dealing with the nebulous and conflicting notions of reckless disregard in D.C. case law.<sup>147</sup> Complete reconciliation of all the precedent, both Warsaw Convention and non-Convention cases dealing with willful misconduct, would have been practically impossible for the *Saba* court because of the historic competition between the objective and the subjective tests.

##### A. Relation to Precedent

Some precedent, *Ulen* and *Tuller* in particular, resisted reconciliation with the subjective rule advanced in *Saba*.<sup>148</sup> Indeed, the *Saba* majority conceded that the misconduct in *Ulen* probably didn't amount to much more than gross negligence.<sup>149</sup> But the majority held that the disjointed jurisprudence of the willful misconduct standard showed only that willful misconduct embodied a variety of concepts.<sup>150</sup>

Specifically, the majority identified two competing strains of willful misconduct.<sup>151</sup> First, it admitted that willful misconduct had been thought of as a linear extension of negligence—a severe departure from an objective standard of care.<sup>152</sup> *Ulen* and *Tuller*

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either known or so obvious that it should be known . . . The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.

*See Saba*, 78 F.3d at 669, (citing *Farmer*, 114 S. Ct. at 1978-79). *See also* Prosser and Keeton § 34, pp. 213-214; RESTATEMENT (SECOND) OF TORTS § 500 (1965); R. Perkins & R. Boyce, CRIMINAL LAW 850-851 (3d ed. 1982); J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW, 115-116, 120, 128 (2d. ed. 1960); American Law Institute, MODEL PENAL CODE § 2.02(2)(c), and Comment 3 (1985); *but see* Commonwealth v. Pierce, 138 Mass. 165, 175-178 (1884) (Holmes, J.) (adopting an objective approach to criminal recklessness).

The *Saba* court adopted the subjective test in *Farmer*. The *Saba* majority held that willful misconduct was akin to this criminal intent and, as such, it required a showing of actual knowledge of risk. *See Saba*, 78 F.3d at 669. *See also supra* notes 73-80 and accompanying text.

<sup>147</sup> *See Saba*, 78 F.3d at 667. The *Saba* majority conceded that "we have never been very clear as to what we meant by reckless disregard." *Id.*

<sup>148</sup> *See infra* notes 157-68 and accompanying text.

<sup>149</sup> *See Saba*, 78 F.3d at 667.

<sup>150</sup> *See id.* at 669.

<sup>151</sup> *See id.* at 668-69.

<sup>152</sup> *See id.* at 668.

seem to fall into this category.<sup>153</sup> Second, willful misconduct was often defined in terms of the actor's subjective mind-set.<sup>154</sup> *Steadman, Ernst*, and arguably *In re Korean Air Lines* fit within this conception of willful misconduct.<sup>155</sup> The majority opinion in *Saba* appears to have definitively chosen the second definition of willful misconduct for Warsaw Convention cases.<sup>156</sup>

*Saba* cited *Ulen* as support for its subjective test, but the *Ulen* court's analysis is difficult to reconcile with *Saba's* formulation.<sup>157</sup> In *Ulen*, the circuit court upheld the trial court's finding of willful misconduct even though the defendants testified that they did not know the elevation of the mountain into which the pilot crashed.<sup>158</sup> Moreover, the defendants showed that the same pilot who crashed the plane had flown that same route on several prior occasions without incident.<sup>159</sup> Both of these facts cemented the pilot's negligence, but they also suggest that the pilot was subjectively unaware of the serious risks of his flight course.<sup>160</sup>

However, instead of disallowing a finding of willful misconduct on the basis of the pilot's ignorance, the *Ulen* court seized on that ignorance as further positive evidence of the pilot's willful misconduct.<sup>161</sup> By doing so, the court seemed to sanction the inference that if a regulation was knowingly violated, the actor should have understood the danger and could be charged with constructive knowledge of the risks of violation.<sup>162</sup>

The *Saba* court squarely rejected this sort of inference for the purposes of willful misconduct.<sup>163</sup> The court stated that negligence may be inferred from such evidence, but not willful misconduct. The only inference allowed by the *Saba* court was that "the danger

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<sup>153</sup> See *infra* notes 157-68 and accompanying text.

<sup>154</sup> See *Saba*, 78 F.3d at 668.

<sup>155</sup> See *infra* notes 169-86 and accompanying text.

<sup>156</sup> See *Saba*, 78 F.3d at 669.

<sup>157</sup> See *infra* notes 158-68 and accompanying text.

<sup>158</sup> See *American Airlines v. Ulen*, 186 F.2d 529, 534 (D.C. Cir. 1949).

<sup>159</sup> See *id.*

<sup>160</sup> See *Saba v. Air France*, 73 F.3d 664, 673 (Wald, J., dissenting).

<sup>161</sup> See *Ulen*, 186 F.2d at 534.

<sup>162</sup> See *Saba*, 78 F.3d at 669.

<sup>163</sup> See *id.*

[is] so obvious that 'the actor *must have been aware of it.*'"<sup>164</sup> Again, the distinction between the objective and subjective tests seemed to rest on what the actor should have known rather than what the actor did in fact know.<sup>165</sup> *Tuller* presented precisely the same problem. That court discussed at length the misconduct of KLM's employees,<sup>166</sup> but the opinion never suggested that the actors actually understood the danger inherent in their actions.<sup>167</sup> To the extent *Tuller* and *Ulen* allowed a finding of willful misconduct without a showing of the defendant's subjective knowledge, they are in tension with *Saba's* statement of the rule.<sup>168</sup>

The *Korean Air Lines* case provided an insightful comparison. In that case, the plaintiffs alleged that the pilots of the downed airliner actually knew the risks of attending deviations into Soviet air space.<sup>169</sup> The plaintiffs' experts first testified that the pilots would have been aware of their trespass because the plane's instruments were functional, aside from the INS system.<sup>170</sup> The plaintiffs also introduced evidence of a 1978 incident in which another KAL plane was shot down after straying off course over the Soviet Union.<sup>171</sup> This incident, the plaintiffs alleged, was discussed in later KAL training activities.<sup>172</sup> The court held that,

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<sup>164</sup> *Id.* (emphasis added) (quoting *SEC v. Steadman*, 67 F.2d 636 (D.C. Cir. 1992)).

<sup>165</sup> *See Saba*, 78 F.3d at 669-70. *See supra* notes 69-88 and accompanying text.

<sup>166</sup> *See KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775, 779-82 (D.C. Cir. 1961).

<sup>167</sup> *See Saba*, 78 F.3d at 679 (Wald, J., dissenting). The *Tuller* court did hold that "the jury could reasonably find that the failure to . . . instruct passengers as to the location and use of life vests was a conscious and willful omission to perform a positive duty and constituted reckless disregard of the consequences." *Tuller*, 292 F.2d at 779. Yet it is unclear whether that language means that the flight crew was subjectively aware of the danger resulting from its omissions or whether it simply indicated a gross deviation from the crew's objective duty of care.

<sup>168</sup> *See supra* notes 69-72 and accompanying text.

<sup>169</sup> *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1478 (D.C. Cir. 1991).

<sup>170</sup> *See id.* at 1481. Because the evidence recovered from the wreckage was inconclusive, there was some question concerning whether the pilots actually knew of their deviation. *See id.* The plaintiffs alleged that the pilots would have or should have known of the deviation, while a report issued by the International Civil Aviation Organization concluded that the flight crew probably would not have been aware of their error. *See id.*

<sup>171</sup> *See id.* at 1478.

<sup>172</sup> *See id.*

taken together, these two facts could have led a jury to infer that the pilots knew they were off course and that they knew of the dangers involved in that deviation.<sup>173</sup> This finding would satisfy even the subjective test advanced in *Saba*. While the *Korean Air Lines* court did uphold the jury's finding of willful misconduct,<sup>174</sup> it never explicitly held that the crew's actual, subjective knowledge of the risks was crucial to that finding.<sup>175</sup>

In order to be consistent with the subjective test advanced by the *Saba* majority, the flight crew in *Korean Air Lines* must have known of their deviation.<sup>176</sup> Otherwise, the crew would have been guilty of gross negligence at best.<sup>177</sup> The *Saba* majority argued that the *Korean Air Lines* court relied on the fact that the pilots knew or must have known that they were off course.<sup>178</sup> The dissent disagreed, stating that the *Korean Air Lines* opinion "at no point suggested that such knowledge was necessary for a finding of reckless disregard."<sup>179</sup> The dissent contended that the jury's finding of willful misconduct may just as easily have been made on the theory that the flight crew simply failed to adhere to the applicable standard of care.<sup>180</sup> This argument was consistent with the dissent's view of willful misconduct as an objective extension of gross negligence, not as a substitute for scienter.<sup>181</sup>

So while it seemed clear that the evidence in *Korean Air Lines* could have satisfied the *Saba* majority's test for willful misconduct, it was less clear that such allegations of scienter were

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<sup>173</sup> See *id.* at 1480.

<sup>174</sup> See *id.* at 1481.

<sup>175</sup> See *Saba*, 78 F.3d at 674 (Wald, J., dissenting). The *Tuller* decision contained similar ambiguities. See *id.* at 673-74 (Wald, J., dissenting); see also *supra* note 167.

<sup>176</sup> See *supra* notes 71-74 and accompanying text.

<sup>177</sup> See *Saba*, 78 F.3d at 668. The *Saba* court held that "the critical analytical division between the tort that can be made out through presentation of merely objective evidence—without regard to defendant's state of mind cuts recklessness in half. One meaning of recklessness, then, is simply a linear extension of gross negligence." *Id.* The *Saba* majority went on to hold that this first meaning of recklessness—an extension of negligence—would not satisfy its test for willful misconduct. See *id.*

<sup>178</sup> See *id.* at 668.

<sup>179</sup> *Id.* at 674 n. 5 (Wald, J., dissenting).

<sup>180</sup> See *id.* (Wald, J., dissenting).

<sup>181</sup> See *supra* notes 100-04 and accompanying text.

necessary to the holding.<sup>182</sup> The *Korean Air Lines* case was indicative of the ambiguity and competition between the objective and subjective approaches to the misconduct standard in the D.C. Circuit.

In short, the majority attempted to end the controversy by selecting the definition of willful misconduct that approximates scienter.<sup>183</sup> It did so without explicitly overturning cases like *Ulen* and *Tuller*, which seemed to be based on an objective approach to willful misconduct.<sup>184</sup> The *Steadman* and *Farmer* cases seemed to support the majority's rule more strongly,<sup>185</sup> while *In re Korean Air Lines* might be read as supporting either approach.<sup>186</sup> In any event, the *Saba* decision did effectively end the debate in the D.C. Circuit between the objective and the subjective tests. But what the *Saba* court's subjective test meant in itself was another issue altogether.

### B. Burden on Plaintiff

After *Saba*, a plaintiff seeking to avoid the liability limitations in the Warsaw Convention may face some added difficulties in proving willful misconduct.<sup>187</sup> Before *Saba*, the D.C. Circuit gave substantial weight to evidence showing that the defendant knowingly violated some regulation.<sup>188</sup> The *Saba* decision offers little deference to regulation violations standing alone.<sup>189</sup> Under the subjective test for willful misconduct, regulations played a more limited role.<sup>190</sup>

The *Ulen* court found the knowing violation of a regulation which forbade flying within five miles of obstacles to be willful misconduct.<sup>191</sup> The *Tuller* court relied on the KLM operations

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<sup>182</sup> See *Saba*, 78 F.3d at 674 (Wald, J., dissenting).

<sup>183</sup> See *id.* at 667-68.

<sup>184</sup> See *supra* notes 157-68 and accompanying text.

<sup>185</sup> See *supra* notes 138-46 and accompanying text.

<sup>186</sup> See *supra* notes 169-82 and accompanying text.

<sup>187</sup> See *infra* notes 190-217 and accompanying text.

<sup>188</sup> See *American Airlines v. Ulen*, 186 F.2d 529, 531-32 (D.C. Cir. 1949); *KLM v. Tuller*, 292 F.2d 775, 779-780 (D.C. Cir. 1961).

<sup>189</sup> See *Saba*, 78 F.3d at 670.

<sup>190</sup> See *infra* notes 197-99 and accompanying text.

<sup>191</sup> See *Ulen*, 186 F.2d at 532; see also *supra* note 114 and accompanying text.



manual, which required all crew members "to have a 'conscious anticipation prior to takeoff of possible failure,' and to send a distress message as soon as an emergency arose."<sup>192</sup> The *Tuller* court also cited the Irish Government's requirements that a distressed plane notify the "appropriate authorities 'by the quickest means available.'"<sup>193</sup> The *Saba* district court cited a New York case, *Bank of Nova Scotia v. Pan American Airlines*,<sup>194</sup> for the proposition that willful misconduct was an appropriate finding when the defendant breached its own regulations.<sup>195</sup> To a plaintiff, therefore, evidence that the defendant knowingly violated a *safety* regulation was valuable and might by itself lead to a finding of willful misconduct.<sup>196</sup>

The *Saba* rule seemed to diminish the weight of regulations as evidence of willful misconduct. Even though Mr. Saba established clear and knowing violations of Air France's regulations, the *Saba* court held that this evidence alone was insufficient as a matter of law to prove willful misconduct.<sup>197</sup> The court tentatively distinguished the packing regulations in *Saba* from those in *Ulen* and *Tuller* because they were not safety regulations promulgated for the protection of human life.<sup>198</sup> This was enough to distinguish *Saba*, but the court added that even the violation of a safety regulation was probably at best negligence per se.<sup>199</sup> While this

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<sup>192</sup> *KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775, 779-780 (D.C. Cir. 1961).

<sup>193</sup> *Id.* at 780. In *Tuller*, there was no regulation requiring the airline to notify passengers of the availability and location of life preservers on that particular flight. *See id.* at 779. The court found that the absence of a regulation will not excuse a defendant from its reasonable duty of care. *See id.*

<sup>194</sup> 16 Av. Cas. (CCH) 17,378 (S.D.N.Y. 1981).

<sup>195</sup> *See Saba v. Air France*, 866 F. Supp. 588, 593 (D.D.C. 1994). The majority ignored this case altogether and the dissent cited it with only qualified favor. *See id.* at 673 n. 4 (Wald, J., dissenting). Such a rule was correct, in the dissent's view, only if the violation "represent[ed] an extreme departure from the standard of care mandated by the regulation." *Id.* (Wald, J., dissenting).

<sup>196</sup> *See Tuller*, 292 F.2d at 778. The *Tuller* court further held that the "'deliberate purpose not to discharge some duty necessary for safety'" constituted willful misconduct. *Id.* (quoting *American Airlines v. Ulen*, 186 F.2d at 533). That duty was closely allied with the express requirements of safety regulations. *See id.* at 778-79.

<sup>197</sup> *See id.* at 670.

<sup>198</sup> *See id.* at 670, n. 5.

<sup>199</sup> *See id.*

latter assertion was not binding, the message to future plaintiffs was clear: no longer will evidence showing a regulatory violation be legally sufficient, standing alone, to show willful misconduct.

In order to establish willful misconduct, the *Saba* court would have required Mr. Saba to show that Air France was subjectively aware of the serious risks of violating its own regulations.<sup>200</sup> Specifically, the court noted that Mr. Saba had offered no evidence that the packers knew that the carpets were "likely to be left outside in inclement weather."<sup>201</sup> Additionally, the court noted that no evidence was offered that Air France's employees "actually expected rain, or knew that if it rained, the packaging provided by Air France" would be insufficient to protect the carpets.<sup>202</sup>

The *Saba* court apparently demanded some evidence which was different in kind from the objective evidence presented by Mr. Saba—some direct evidence which would open a peep hole into the defendants' minds.<sup>203</sup> But as a practical matter, this sort of direct evidence tending to show the defendants' actual knowledge may be difficult to discover, because such evidence may be in the sole possession of the defendants,<sup>204</sup> or destroyed altogether.<sup>205</sup>

In many cases, therefore, plaintiffs may still have to rely on objective evidence—measurable departures from a standard of

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<sup>200</sup> See *id.* at 670.

<sup>201</sup> *Id.*

<sup>202</sup> See *Saba*, 78 F.3d at 670.

<sup>203</sup> See *id.* at 668.

<sup>204</sup> The majority expressed concern that an objective test would allow defendants to ignore the consequences of their actions. See *id.* at 668. But the subjective test may also give rise to that danger. Defendants can claim ignorance of the consequences of their clear negligence and the heavy burden will fall to the plaintiff to prove otherwise. Moreover, the majority's subjective test creates difficulties in cases of vicarious liability such as *Saba*. The principal, in this case Air France, may hide behind the misconduct of its agent, Dynair, claiming ignorance of any negligence perpetrated by the agent. This creates a problem of proof for a plaintiff, who must prove that the principal had subjective awareness of the dangerous actions of its agent. This may cause inequity especially in cases where the agent is insolvent or judgment proof and the plaintiff has no alternative but to sue the principal. See *id.* at 677 (Wald, J., dissenting).

<sup>205</sup> See *In re Korean Air Lines*, 932 F.2d 1475, 1478. The court noted that the "flight recorders and most of the wreckage were never recovered, so the details of what happened remain a mystery." *Id.* In most air disaster cases where all the persons aboard a plane are killed, no one will have access to the pilot's subjective knowledge. See Cotugno, *supra* note 16, at 775. Cotugno used this fact to argue for an objective test for willful misconduct instead of a subjective one. See *id.*

care—to prove willful misconduct.<sup>206</sup> Mr. Saba did precisely that. He presented evidence of Air France's customary practice of leaving excess cargo outside the storage facility.<sup>207</sup> He showed that the ruinous rains were publicly forecasted.<sup>208</sup> Coupled with Air France's blatant disregard of its own safety statutes, this evidence could arguably lead to an inference that Air France did in fact know the dangers of their actions.<sup>209</sup>

The *Saba* court found that this evidenced nothing more than negligence on Air France's part.<sup>210</sup> Yet the court recognized that at some point such negligence could rise to a level where an inference of actual knowledge of risks would be proper.<sup>211</sup> This being so, the *Saba* dissent argued that the difference between the objective test and the *Saba* majority's subjective test all but evaporated.<sup>212</sup> The dissent would have thus collapsed the majority's subjective test into an objective one.<sup>213</sup> But even if the dissent was correct in asserting that the subjective test is objective in form, the two tests are still quantitatively different.<sup>214</sup> By the dissent's own admission, the subjective test would be the more burdensome in terms of the quantum of proof a plaintiff must produce.<sup>215</sup>

### C. Policy Considerations

The *Saba* decision reaffirmed the two major policy goals of the Warsaw Convention—economics of air travel and uniformity.<sup>216</sup> But nearly 70 years after the Convention's birth, scholars and

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<sup>206</sup> See *Saba*, 78 F.3d at 669.

<sup>207</sup> See *Saba v. Air France*, 866 F. Supp. 588, 594 (D.D.C. 1992).

<sup>208</sup> See *Saba*, 78 F.3d at 666.

<sup>209</sup> See *id.* at 675 (Wald, J., dissenting).

<sup>210</sup> See *id.* at 670.

<sup>211</sup> The majority wrote: "Intent can, of course, always be proved through circumstantial evidence," and "the actor's intent may be inferred from indirect evidence and the reckless nature of his acts." *Saba*, 78 F.3d at 668, 669 (citing *In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1136 (D.D.C. 1988)).

<sup>212</sup> See *Saba*, 78 F.3d at 675 (Wald, J., dissenting).

<sup>213</sup> See *id.* (Wald, J., dissenting).

<sup>214</sup> See *id.* (Wald, J., dissenting).

<sup>215</sup> See *id.* (Wald, J., dissenting).

<sup>216</sup> See *supra* notes 7-9 and accompanying text.

courts question whether those goals are deserving of continued deference.

The Convention gave protection to tiny air companies still in their economic infancy. Tort suits and high insurance costs might have easily sent the new companies into unprofitable tailspins.<sup>217</sup> But today, airline companies are generally not threatened with extinction as the result of one or even multiple tort judgments against them.<sup>218</sup> Furthermore, air travel has become increasingly safe, sending insurance prices down.<sup>219</sup> The economic reasons for the Convention's limitations, the argument goes, are therefore outdated.<sup>220</sup> Why airlines should be shielded while other large corporations go about their business exposed to full liability seems incongruous to critics in light of modern airline business.<sup>221</sup>

Critics have likewise pointed out the Convention's failure to establish any meaningful uniformity in international tort suits.<sup>222</sup>

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<sup>217</sup> See Lowenfeld & Mendelsohn, *supra* note 5, at 499.

<sup>218</sup> See Bechky, *supra* note 2, at 499.

<sup>219</sup> In 1955, the International Civil Aviation Organization met to discuss the possibility of amending the Warsaw Convention's liability limits. See Baden, *supra* note 9, at 442. Since 1929, experience and data had been collected on air carrier safety. It was determined that the airliners were much safer than previously thought. Fewer airline crashes meant fewer tort suits and lower insurance costs to the airlines. Delegates pointed to these factors to suggest that the liability limitation was no longer warranted. See *id.* (citing ICAO Legal Committee, Report On the Revision of the Warsaw Convention, ICAO International Conference on Private Air Law, vol. 2 at 96, ICAO Doc. 7686-LC/140 (1956)). Today, airlines are safer than ever and can typically afford to buy as much as 1.5 billion dollars in insurance for any one accident. See Symposium, *The Japanese Initiative: Absolute Unlimited Liability in International Air Travel*, 60 J. AIR. L. & COM. 819, 825 (1995).

<sup>220</sup> See Bechky, *supra* note 2, at 499.

<sup>221</sup> One critic of the economic justification for the Warsaw Convention has written:

Every commercial venture that sells a product or provides a service must bear the cost of insurance for the benefit of the public. That is as much of a cost of doing business as rent or salaries. No other business enjoys the liability limitations of the Warsaw Convention. Airplane manufacturers have managed to thrive without the benefit of this limitation, in spite of some enormous judgments against them in recent years.

Lawrence, *supra* note 9, at 864. For further discussion of the economic policies behind the Convention's liability limits, see, e.g., Bechky, *supra* note 2, at 499 (reviewing the judge's economic arguments against the Convention.); Lowenfeld & Mendelsohn, *supra* note 5, at 504 (noting that by the 1950s, some people argued that there was no longer any reason to afford special protection to the airlines).

<sup>222</sup> See Baden, *supra* note 9, at 465-66; Bechky, *supra* note 2, at 467-68. Bechky notes that the piecemeal solutions to the Warsaw Convention, such as the Montreal protocol, have arguably defeated the uniformity goal. See *id.* He also recognizes the

They note that even the liability limitations have created little, if any, certainty in international litigation because of the dissimilarities in local rules of procedure and tort law.<sup>223</sup> The Warsaw Convention itself allows each court to administer the willful misconduct exception in accordance with its own rules rather than some uniform standard.<sup>224</sup>

Other critics, including Judge Wald, question the theory that the Convention's limitations serve the overall welfare of the passengers. Judge Wald noted that airline companies hardly feel the sting of their neglect, especially in property damage cases.<sup>225</sup> No matter what the worth of the property harmed, an airline company will pay the same \$9.07 per pound in damages, which might actually discourage proper care of freight.<sup>226</sup> While market forces encourage general care of property, the occasional neglect which can cause severe damage to particular passengers or clients passes undercompensated.<sup>227</sup>

#### *D. Judicial Remedy*

Decades of legislative and executive effort have been unable to bring about a more equitable liability cap.<sup>228</sup> Where the other

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difficulty of achieving uniform results internationally because foreign countries as well as United States federal courts are at some liberty to interpret the terms of the Convention as they see fit. *See id.* at 472. To remedy the situation, he advocates the creation of a "shadow" court which would hear Warsaw Convention cases only. *See id.* at 526. *See also* James D. MacIntyre, *Where Are You Going? Destination, Jurisdiction, and the Warsaw Convention: Does Passenger Intent Enter the Analysis?* 60 J. AIR L. & COM. 657, 669-693 (arguing that the Warsaw Convention has failed to create absolute uniformity "with respect to the treatment given jurisdictional questions arising under the Convention").

<sup>223</sup> *See id.*

<sup>224</sup> *See* Warsaw Convention, *supra* note 6, art. 25; *but see* Bechky, *supra* note 2, at 485. Bechky notes that the United States achieved some uniformity in Warsaw Convention cases through the Multidistrict Litigation Act. *See id.*; *see also* 28 U.S.C.A. § 1407 (1993). The Act authorizes a judicial panel to "consolidate separate claims involving similar questions of law or fact before a single district court of its choosing." Bechky, *supra* note 2, at 485, 486.

<sup>225</sup> *See Saba*, 78 F.3d at 674 (Wald, J., dissenting).

<sup>226</sup> *See id.* (Wald, J., dissenting). In a domestic context, liability limitations have been rejected on the premise that the airlines will take better care of property absent any liability cap. *See* Eugene Wesley Albert, *Limitations on Air Carrier Liability: An Inadvertent Return to Common Law Principles*, 48 J. AIR L. & COM. 111, 130 (1982).

<sup>227</sup> *See Saba*, 78 F.3d at 674 (Wald, J., dissenting).

<sup>228</sup> *See supra* note 17 and accompanying text. Some commentators have opposed the view that the liability caps are inequitable. *See, e.g.*, Sir William Hildred, *Air*

branches have failed, the judicial branch has often intervened to permit fuller compensation.<sup>229</sup> At times, courts have explicitly denounced the policies behind the liability caps and allowed unlimited recovery.<sup>230</sup> More often, however, courts have simply read the exceptions to the liability limits expansively. By setting a low threshold for "willful misconduct," for example, courts have allowed plaintiffs to skirt the limits without explicitly slighting the terms of the Convention.<sup>231</sup>

The *Saba* court was at stark odds with this widespread judicial remedy-making. It denounced this ex post approach to the Convention as contributing to the "tort liability creep" of this century.<sup>232</sup> The *Saba* majority was careful, however, not to suggest that it believed the policy reasons behind the Convention still made sense. The opinion noted: "the *signatories* [of the Warsaw Convention] obviously thought that the economics of air travel, and therefore the overall welfare of the passengers, dictated those

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*Carriers' Liability: Significance of the Warsaw Convention and Events Leading Up to the Montreal Agreement*, 33 J. AIR L. & COM. 521 (1967); G.I. Whitehead, *Still Another View of the Warsaw Convention*, 33 J. AIR L. & COM. 651 (1967).

<sup>229</sup> The Warsaw Convention fixes damages so low that "[A]merican judges understandably are tempted to use their equitable powers to circumvent the damage cap." Bechky, *supra* note 2, at 493. Bechky further argues that many judges have in fact yielded to this temptation "even when this required forcing a square peg into a round hole, or drilling a new hole in the [Warsaw] Convention." *Id.*; see also Albert, *supra* note 226, at 141 (stating that the reluctance of American courts to enforce the liability provisions of the Convention without notice to the passenger represents a general judicial policy against all such liability limitations).

<sup>230</sup> See Bechky, *supra* note 2, at 499; see also Ray B. Jeffrey, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805, 806 (1983) (noting that the courts, "although bound by the treaty, have avoided enforcing its limitations whenever possible."). See, e.g., *Reed v. Wisner*, 414 F. Supp. 863, 866 (S.D.N.Y. 1976), *rev'd* 555 F.2d 1079, 1092 (2d Cir. 1977) *cert. denied*, 434 U.S. 922 (1977); *In re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1124-26 (C.D. Ca. 1978), *rev'd* 684 F.2d 1301, 1308 (9th Cir. 1982). In these cases, the respective judges evaluated the policy reasons behind the Warsaw Convention and finding them no longer of force, the judges ignored the liability caps.

<sup>231</sup> Bechky noted that American courts have generally interpreted willful misconduct as something akin to gross negligence. See Bechky, *supra* note 2, at 501-504. He argued that the French concept of "dol," the word used in the original French text of the Convention, implied much more than gross negligence. He wrote that he would interpret "dol," as the *Saba* court did, as requiring subjective intent to do harm. See *id.* The willful misconduct exception "provides the greatest latitude to avoid the limitations of liability embodied in the Warsaw Convention." Lawrence, *supra* note 9, at 862.

<sup>232</sup> See *Saba*, 78 F.3d at 671.

limitations.<sup>233</sup> The court essentially ignored the policy criticisms altogether, deferring to the goals as stated by the Convention's delegates.

The reasonable inference to be drawn from this portion of the majority opinion is that any alteration of the Convention is to be made by treaty or legislation, not by judges. The majority interpreted its judicial function narrowly, spurning the activist spirit that has led, in its opinion, to ill-founded judgments based on sympathy rather than the terms of the Convention. In doing so, the majority effectively washed its hands of the policy debate, and left to higher powers the responsibility of redressing any inequities that stemmed from a strict interpretation of the Warsaw Convention.<sup>234</sup>

The *Saba* dissent suggested that the majority treated this property damage case differently than a personal injury case.<sup>235</sup> In a case where the equities on the plaintiffs' side were admittedly weak by Warsaw Convention standards, the dissent accused the majority of seizing the moment to cut back on precedent when

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<sup>233</sup> *Id.* (emphasis added).

<sup>234</sup> The view expressed by Bechky is in substantial accordance with the *Saba* majority view. See Bechky, *supra* note 2, at 499-500. After noting the Convention's status as duly enacted law, he states:

Since Lyndon Johnson withdrew his denunciation of the Convention in 1966, six successive Presidents have declined to exercise their power to denounce the Convention again. Congress has never passed legislation to prevent the Convention's domestic enforcement. Therefore, whatever a judge may think about the policies underlying the . . . Convention, it remains the law and the judge must enforce it.

*Id.* at 500.; but see Jeffrey, *supra* note 230, at 830-34. Jeffrey acknowledged the historic tendency of the judiciary to let plaintiffs slip by the liability limitations and questioned the propriety of such action. See *id.* But, he continued:

In defense of judicial activism towards the Convention, the equitable function of the courts is an important consideration. American tort law is designed to provide full and adequate compensation to injured plaintiffs by imposing the cost of damages on the responsible parties. The courts strive to administer this compensatory system, but they are frustrated in those cases in which the Convention imposes its low ceiling on liability . . . Although the courts are not empowered to redraft the Convention as they see fit, they should not be faulted for their reluctance to enforce the treaty at the expense of fairness and justice.

*Id.* at 832-33. Some scholars take the view, contrary to Bechky, that the Warsaw Convention is private, rather than public international law. As such, it can be amended and altered unilaterally by the United States. See Symposium, *supra* note 219, at 826.

<sup>235</sup> See *Saba*, 78 F.3d at 667 (Wald, J., dissenting).

public outcry would be minimal.<sup>236</sup> The dissent implied that had *Saba* been a major air disaster case involving loss of life, the majority would not have been so quick to deny compensation through its strict subjective test.<sup>237</sup>

## V. Conclusion

Whether guilty of opportunism or not, the *Saba* majority affected the future of wrongful death cases as well as property damage cases. The holding sets the standard for future cases brought under the willful misconduct exception of the Warsaw Convention. Thus, even when the inequities worked by the Warsaw Convention are blatant, as in wrongful death cases, that inequity should not affect the outcome of the case in any way under the majority rule in *Saba*.<sup>238</sup> This may have the effect of creating more uniformity in Warsaw Convention cases in the D.C. Circuit, but it will certainly not make the Warsaw Convention any more popular to plaintiffs and scholars.

Despite its efforts, the *Saba* court may not have constricted the willful misconduct escape route to the extent attempted. While the majority purported to raise the standard for willful misconduct and slow the tort liability creep, the subjective test advanced in the opinion may still be vulnerable to ex parte decision making. The imprecision inherent in a test that seeks to determine subjective knowledge may allow judges to act on their sympathies in close cases of willful misconduct.<sup>239</sup>

If the subjective test retains such flexibility, the nagging question—"Did the *Saba* court really change anything?"—surfaces

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<sup>236</sup> See *id.* (Wald, J., dissenting).

<sup>237</sup> See *id.* (Wald, J., dissenting).

<sup>238</sup> See *supra* notes 37-38 and accompanying text.

<sup>239</sup> The willful misconduct exception has traditionally been a flexible one, malleable to fit the facts of the case at bar. As such, it is the most susceptible of creative work by plaintiff's attorneys . . . . Lawrence, *supra* note 9, at 862. The *Saba* test will probably not strip the exception of all its amorphous qualities. For example, if the *Saba* district court had applied the majority test to the facts, it may reasonably have found that the dangers attending the severe violations of Air France's regulations were so obvious as to warrant an inference of actual knowledge of those risks. If the district court had simply couched its opinion in those terms, its holding would probably not have been clearly erroneous so as to require reversal on appeal. Indeed, the *Saba* dissent argued that even applying the majority test, the facts of *Saba* constituted willful misconduct. See *Saba*, 78 F.3d at 675 (Wald, J., dissenting).



again. Plaintiffs now have notice of the subjective rule and may find ways of proving willful misconduct by simply adjusting their evidence. Only time and future cases will tell just how much of an additional hurdle *Saba* poses for victims of airline misconduct in the District of Columbia. Based on the nebulous nature of the test and the strong dislike for the limitations of the Warsaw Convention, it will probably not tighten the willful misconduct standard as much as the *Saba* majority would like.

Regardless of motive, the majority has affected the outcome of property damage and disaster cases. While the decision admittedly left one carpet dealer without an adequate remedy, the *Saba* decision may ultimately lead to more equitable compensation. If all courts were to adopt and strictly apply the subjective test in *Saba*, more recoveries would likely be capped. If more plaintiffs, including those family members of passengers killed in high-profile air disasters, were sent away from American courts with \$75,000 before attorneys' fees, the Warsaw Convention would become an American dinner table issue. This might in turn increase scholarly and popular pressure for a lasting legislative or executive agreement to either update the Warsaw Convention or eliminate it altogether.<sup>240</sup> Perhaps past judicial leniency in Warsaw Convention cases is one of the reasons such decisive action has not yet occurred.

BEN BROOKS

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<sup>240</sup> There are numerous advocates of both solutions. See generally Symposium, *supra* note 219.

