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Punitive Damages under the Warsaw Convention: Revisiting the Drafters' Intent

PUNITIVE DAMAGES UNDER THE WARSAW CONVENTION: REVISITING THE DRAFTERS' INTENT

KELLY COMPTON GREMS

INTRODUCTION

In today's society, the airplane is generally recognized as an efficient and safe method of travel. The same was not true sixty years ago.¹ Although the airplane was invented at approximately the same time as the automobile, it trailed by almost a generation in gaining acceptance as a reliable mode of transportation.² Nevertheless, in 1929, advocates of civil aviation had the acumen to plan for the important role the airplane later would play in transportation.³ These advocates recognized the need to regulate the airline industry as international flights inevitably linked countries with different customs and court systems.⁴ The outcome of their vision was the Warsaw Convention⁵ which to this day governs many facets of

1. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967) (noting that from 1925 to 1929 only 400 million passenger miles were flown with a fatality rate of 45 per 100 million passenger miles compared to fatality rate of 0.55 per 100 million passenger miles in 1965); Mankiewicz, *From Warsaw to Montreal with Certain Intermediate Stops: Marginal Notes on the Warsaw System*, 14 AIR L. 239, 239 (1983) (indicating that in 1920 traveling by air was adventure in which arrival on time was subject to wind, weather, and other events).

2. See Lowenfeld & Mendelsohn, *supra* note 1, at 498 (noting that civil aviation was still in its infancy in 1920s).

3. *Id.* (stating that delegates to 1929 Warsaw Conference were planning developments in law to match inevitable progress of civil aviation).

4. *Id.*; see 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11:4, at 635 (1978) (indicating need for uniform rules governing air travel).

5. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 [hereinafter Warsaw Convention], *reprinted in* 49 U.S.C. app. § 1502 note (1988) (adherence of United States proclaimed Oct. 29, 1934).

French was the sole official language of the Warsaw Convention. *Statutes at Large* contains the official French text as well as the English translation. 49 Stat. 3000-13. See generally SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, OCTOBER 4-12, 1929 (MINUTES) v (R. Horner & D. Legrez trans. 1975) [hereinafter MINUTES] (discussing problems in translating French concepts to English).

The 1929 Convention in Warsaw was the second of two conferences addressing international airline regulation; the first was held in Paris four years earlier. 1 S. SPEISER & C. KRAUSE, *supra* note 4, § 11:4, at 635 n.20. During the Paris conference, delegates established

international airline travel among more than 120 signatory nations.⁶

The Warsaw Convention, as amended by the Montreal Agreement,⁷ limits the liability of an air carrier to \$75,000 in damages for the death or injury of each passenger.⁸ A finding of wilful misconduct against the air carrier voids the liability limitation, however, making damages in excess of the \$75,000 limit possible.⁹

Prior to 1991, there was a division among the lower federal courts as to whether punitive damages in excess of the \$75,000 limitation could be recovered under the provisions of the Warsaw Convention if a defendant is found guilty of wilful misconduct.¹⁰ This Comment

the Comité Internationale Technique d'Experts Juridique Aériens (CITEJA) as an interim committee to prepare the draft document for the 1929 Convention in Warsaw. *Id.*; see also Mankiewicz, *supra* note 1, at 239 (discussing use of "certain" in official title of Warsaw Convention). The parties meeting in Warsaw did not intend to completely eliminate the differences in law that existed between countries or between civil law and common law; thus, the Warsaw Convention established only "certain" rules relating to international air travel. *Id.* Recognizing that no State would alter its substantive law to facilitate an international air carriage agreement, the delegates chose to leave some issues, including damages, civil procedure, and contributory negligence, to local law. *Id.*

6. See United States Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on Jan. 1, 1991*, at 284-85 (1991) [hereinafter *Treaties in Force*] (listing nations adhering to Warsaw Convention). Prior to the Convention, the United States had bilateral air agreements with Canada, Ceylon, Denmark, France, Ireland, Italy, Norway, Sweden, South Africa, and the United Kingdom. 49 U.S.C. app. § 1502 note (1988).

7. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board Agreement No. 18,900, approved by Executive Order No. 23,680, 31 Fed. Reg. 7302 (1966) [hereinafter *Montreal Agreement*], reprinted in A. LOWENFELD, *AVIATION LAW CASES AND MATERIALS* 971 (2d ed. Documents Supp. 1981).

8. See Montreal Agreement, *supra* note 7, ¶ 1 (raising liability limitation from \$8300 to \$75,000). The Convention established liability limits in French francs. At the time, one French franc consisted of 65 1/2 milligrams gold of millesimal fineness 900. 1 S. SPEISER & C. KRAUSE, *supra* note 4, § 11.36, at 764 & n.25 (explaining that sums could then be converted to any national currency). At the time of the 1929 conference, the dollar equivalent of the 125,000 Poincaré franc limit was \$4898. Lowenfeld & Mendelsohn, *supra* note 1, at 499 n.10. In 1933, the devaluation of the Poincaré franc resulted in a dollar equivalent of \$8300. *Id.* at 499. In this Comment, all references to monetary amounts in the Warsaw Convention are to the United States dollar equivalent of the French gold franc at the time of the Convention's ratification in 1934.

9. See Warsaw Convention, *supra* note 5, art. 25 (providing that carrier cannot avail itself of liability limitations in cases of wilful misconduct); see also *infra* note 35 (quoting text of Warsaw Convention article 25(1)).

10. See *infra* note 89 and accompanying text (discussing district court split on issue of punitive damages). Awarding plaintiffs punitive damages under certain circumstances derived from English common law and is a common practice in the United States. See *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275-77 (1989) (recognizing punitive damages as principle of longstanding in United States); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 807, 174 Cal. Rptr. 348, 380 (1981) (noting punitive damages as part of American tort system since late eighteenth century). See generally 5 *DAMAGES IN TORT ACTIONS* (MB) § 40.01 (1989) (explaining that punitive damages are also known as vindictive damages, reflecting primary purpose as vindication for wrong, or smart money, reflecting desire to make defendant "smart" so as not to engage in outrageous conduct again).

Punitive damages are expressly authorized in many state statutes. See, e.g., ALASKA STAT. § 09.17.020 (Supp. 1990) (allowing for recovery of punitive damages in any action where supported by clear and convincing evidence); COLO. REV. STAT. § 13-21-102 (1987) (permitting punitive damages under circumstances of fraud, malice, or wilful and wanton miscon-

examines the recent trend in United States courts of appeals to dis-

duct); FLA. STAT. § 768.73 (Supp. 1987) (authorizing punitive damages for wilful, wanton, or gross misconduct); GA. CODE ANN. § 51-12-5.1 (Supp. 1990) (allowing punitive damages for fraud, malice, oppression, wantonness, or wilful misconduct exhibiting such an entire want of care as to raise a presumption of conscious indifference to consequences); IDAHO CODE § 6-1604 (1990) (authorizing punitive damages in cases of malice, fraud, oppression, wantonness, or outrageous conduct); IOWA CODE § 668A.1 (1989) (authorizing punitive damages in cases of wanton and wilful disregard of rights or safety of others); MINN. STAT. § 549.20(1) (1990) (allowing punitive damages upon clear and convincing evidence that acts of defendant show deliberate disregard for rights or safety of others); MONT. CODE ANN. § 27-1-221 (1989) (allowing reasonable punitive damage award where defendant is guilty of actual fraud or actual malice); OKLA. STAT. tit. 23, § 9 (1989) (providing for punitive damages for fraud, malice, or oppression).

Often these statutes include factors with which to assess the defendant's conduct and liability for punitive damages. 5 DAMAGES IN TORT ACTIONS, *supra*, § 40.04. The factors may include: (1) seriousness of the hazard or risk to the public; (2) degree of defendant's awareness of this hazard or its excessiveness; (3) profitability of the misconduct for the defendant; (4) duration of the conduct and any concealment of it; (5) attitude and conduct of the defendant upon discovery of the conduct; and (6) number and level of employees who participated in or concealed the misconduct. *Id.*

Claims for punitive damages do not exist independently from an underlying tort liability. *Id.* Generally, the defendant's conduct must be so outrageous as to be labeled malicious, oppressive, fraudulent, wilful, reckless or with a conscious disregard, wanton, or opprobrious. *See id.* § 40.11 (identifying conduct that justifies punitive damages); *see also* Brown v. Missouri Pac. R.R., 703 F.2d 1050, 1053 (8th Cir. 1983) (denouncing defendant's attitude that it would be cheaper to be sued than to protect railroad crossings); Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 43, 616 S.W.2d 720, 726 (1981) (finding that one purpose of punitive damages is to deter manufacturers from determining that costs of paying compensatory damages to victims would be less than correcting their defective product).

Opponents of punitive damages argue that such awards require proof of *animus*, or evil motive. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 808-09, 174 Cal. Rptr. 348, 381-82 (1981). Normally, torts that result in punitive damages stem from an intentional act and have just one victim. *See* Courtney & Cavico, *Punitive Damages: When Are They Justifiable?*, TRIAL, Aug. 1982, at 53 (discussing applicability of punitive damages to product liability cases). In large tort cases, the interpersonal relationship between tortfeasor and victim does not exist. *See* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 700-01, 60 Cal. Rptr. 398, 414-15 (1967) (upholding award of punitive damages from corporation when there was ample evidence for jury to find that corporate officials knew of wrongdoing by corporation's agents and employees). Unlike some state statutes, the common law does not require a malicious intention to injure a specific person. Courtney & Cavico, *supra*, at 54 (discussing *Grimshaw* and other automobile manufacturer cases that resulted in award of punitive damages). A conscious disregard of the probability that the actor's conduct will result in injury to others is sufficient. *Id.*

Punitive damages differ from compensatory damages in both purpose and nature. While compensatory damages seek to reimburse a plaintiff for injuries sustained in an effort to make him whole, punitive damages serve other goals. 5 DAMAGES IN TORT ACTIONS, *supra*, § 40.10. First, punitive damages punish the defendant for outrageous conduct. *Id.* Second, punitive damages deter the defendant from engaging in the tortious conduct again. *Id.* Third, punitive damages act as a deterrent to others from engaging in that conduct by making an example out of the defendant. *Id.*; *see also id.* § 40.04 (advocating necessity of punitive damages to deter and punish conduct that would otherwise go unpunished by prosecutors).

Advocates of tort reform contend that punitive damages are out of control and should either be abolished or severely limited by the legislature. *See* Demarest & Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797, 824-25 (1987) (noting that tort reform advocates believe juries cannot fairly assess punitive damages in civil cases). One method of reform is to limit the amount of punitive damages that can be awarded for each verdict. *See id.* at 824 n.149 (noting alternate proposals to restrict punitive damages to double amount of actual damages, but never to exceed \$1,000,000 per person or to restrict punitive damages to cost of litigation plus \$10,000). Another propo-

allow the recovery of punitive damages under the Warsaw Convention. Part I provides a background of the Warsaw Convention and its several revisions. Part I also examines the Supreme Court decisions that provide guidelines for interpreting the Warsaw Convention.

Part II reviews three recent decisions in the courts of appeals. In 1989, the Eleventh Circuit, in *Floyd v. Eastern Airlines, Inc.*,¹¹ was the first court of appeals to hold that punitive damages are not recoverable under the Warsaw Convention. Two years later, in contravention of its own precedent, the Second Circuit held similarly in *In re Air Disaster at Lockerbie, Scotland on December 12, 1988 (Lockerbie Disaster)*.¹² Most recently, in May 1991, the District of Columbia Circuit, in *In re Korean Air Lines Disaster of September 1, 1983 (Korean Air Lines Disaster)*,¹³ adopted the reasoning of its sister circuits and became the third court of appeals to deny Warsaw Convention plaintiffs a recovery of punitive damages.

This Comment analyzes the foundations of these three decisions in Part III and concludes that the emerging trend disallowing punitive damages is flawed. The conclusion by the courts is inconsistent with the longstanding premise of non-exclusivity of the Warsaw Convention cause of action,¹⁴ ignores the plain meaning of the text of the Warsaw Convention,¹⁵ and disregards the intent of the treaty drafters to leave damages issues to local law.¹⁶

Finally, this Comment suggests two possible remedies to reverse this erroneous trend. First, the Supreme Court of the United States should grant certiorari on the issues raised in this Comment and put an end to judicial amendment of the Warsaw Convention. Second, a revision of the Warsaw Convention is necessary to protect the interests of international air travelers. The guidelines for revision, presented in Part IV, accomplish this goal while preserving the original purposes of the Convention.

sal, the aggregate method, limits the amount of damages that can be assessed against a particular defendant for the same misconduct. *Id.* at 824.

11. 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

12. 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

13. 932 F.2d 1475 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991).

14. See *infra* notes 177-85 and accompanying text (examining exclusivity of the cause of action under the Warsaw Convention).

15. See *infra* notes 186-215 and accompanying text (examining whether punitive damages are allowed under Warsaw Convention based on plain meaning of text).

16. See *infra* notes 216-24 and accompanying text (explaining that Convention leaves punitive damages issue to be determined by local law).

I. THE WARSAW CONVENTION

The treaty known as the Warsaw Convention was the product of two international conferences convened to promote the world's financially floundering airline industry.¹⁷ Until its enactment, airlines were potentially liable to the full extent of their assets for claims by passengers for personal injuries and baggage loss.¹⁸ The goal of the delegates to the 1929 conference in Warsaw, Poland was twofold. First, the delegates sought to achieve uniformity in the day-to-day operations of the international airline industry.¹⁹ Second, and more importantly, they sought to promote the growth of the industry by limiting the liability of the airlines for the death or injury of passengers.²⁰ In exchange for limited liability, the airlines became presumptively liable for passenger injuries or deaths resulting from accidents occurring aboard their aircraft or while embarking or disembarking.²¹ Within the framework of these goals, the delegates to the Warsaw conference sought to develop a system flexible enough to withstand the inevitable changes in civil aviation that would occur in the future.²²

17. See 1 S. SPEISER & C. KRAUSE, *supra* note 4, § 11:4, at 634-38 (describing conferences leading to formation of treaty); MINUTES, *supra* note 5, at 23 (noting that Convention Reporter Henri DeVos spoke of great strides being accomplished in air travel and encouraged delegates to do for international air law what engineers were doing for airplanes).

18. See Cohen, *Montreal Protocol: The Most Recent Attempt To Modify the Warsaw Convention*, 8 AIR L. 146, 151 (1983) (noting that domestic airlines enthusiastically encouraged United States government to sign treaty in order to reduce potential liability); Lowenfeld & Mendelsohn, *supra* note 1, at 499 (discussing Warsaw Convention limits on carrier liability).

19. Lowenfeld & Mendelsohn, *supra* note 1, at 498-99; see Silets, *Something Special in the Air and on the Ground: The Potential for Unlimited Liability of International Air Carriers for Terrorist Attacks Under the Warsaw Convention and Its Revisions*, 53 J. AIR L. & COM. 321, 330-31 (1987) (indicating that documentation of passenger tickets, baggage checks, and air waybills became subject to uniform regulation after implementation of Convention).

20. See Lowenfeld & Mendelsohn, *supra* note 1, at 499 (arguing that airlines sought limited liability in order to attract capital investors who might otherwise be discouraged by potential for unlimited liability arising from catastrophic airline accidents).

21. See Silets, *supra* note 19, at 331 (noting that Warsaw Convention shifts burden of proof to air carrier once plaintiff proves occurrence of accident). The presumption of carrier liability, however, is rebuttable. The Warsaw Convention provides two defenses for air carriers:

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Warsaw Convention, *supra* note 5, art. 20(1).

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Id. art. 21.

22. See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37-38 (2d Cir.) (noting wisdom of delegates at Warsaw Convention in drafting articles broad enough to consider facts of each case and to meet ever changing needs of civil aviation), *cert. denied*, 429 U.S. 890 (1975).

One example of a recent change in civil aviation is the scope of liability of an airline for injuries or deaths to passengers as a result of political terrorism, including hijackings, airport

Despite worldwide enthusiasm for the development of a document governing international aviation law, the United States neither sent an official delegate to Warsaw nor participated in any of the preliminary drafting conferences.²³ Several factors contributed to the decision not to participate. First, the United States was a relatively limited participant in international air travel in 1929.²⁴ Second, the principle of limited liability was not supported in the United States.²⁵ Third, unlike many foreign governments, the United States did not directly subsidize civil aviation.²⁶ Nevertheless, the United States eventually recognized the benefits of membership in the Convention²⁷ and became a signatory five years after

attacks, and midair explosions. See generally Silets, *supra* note 19, at 321-47 (discussing application of Warsaw Convention to terrorist attacks). Courts interpret terrorist incidents as "accidents" under article 17 of the Warsaw Convention. See, e.g., *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 706 (S.D.N.Y. 1975) (holding hijacking is accident under Warsaw Convention), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 657, 660 n.4 (S.D.N.Y. 1986) (agreeing that hijacking is accident for purposes of Convention); *Salerno v. Pan Am. World Airways, Inc.*, 606 F. Supp. 656, 657 (S.D.N.Y. 1985) (holding knowledge of bomb threat that caused miscarriage is accident for which airline is liable); *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971, 976 (S.D.N.Y. 1977) (holding hijacking to be accident within meaning of article 17 of Convention). But see *Air France v. Saks*, 470 U.S. 392, 406 (1985) (holding ear injury resulting from normal maintenance and operation of pressurized cabin is not accident under terms of Convention); *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 135 (3d Cir. 1984) (finding aggravation of preexisting condition from attendant's failure to provide place for passenger to lie down is not accident within contemplation of Convention), *cert. denied*, 470 U.S. 1059 (1985).

23. See Cohen, *supra* note 18, at 149-50 (citing preoccupation with growth in domestic airline industry and isolationism as reasons for United States' decision not to participate). Without a doubt, the absence of the United States from the Warsaw Convention contributed to the implementation of mainly civil law principles in the treaty, rather than common law doctrine. See Brief for Appellee Pan Am. World Airways, Inc. at 5, *In re Air Disaster in Lockerbie*, Scot. on Dec. 21, 1988 (2d Cir. 1991) (No. 90-7388) [hereinafter Brief for Appellee] (explaining that liability and remedies of Warsaw Convention are based on French civil law which, in turn, is based on principles of contract rather than tort); see also Cohen, *supra* note 18, at 150 (stating that lack of United States involvement led to treaty based on civil law principles).

24. See Cohen, *supra* note 18, at 150 (stating that in 1929, Pan Am was only carrier providing international air service from United States on flight from Key West, Florida to Havana, Cuba). The vast majority of international traffic took place between the European capitals, separated by an average of only 300 miles. *Id.* at 150 n.53.

25. See Cohen, *supra* note 18, at 150 (noting that public policy of United States disfavors limited liability for negligent acts).

26. Cohen, *supra* note 18, at 150.

27. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1468 (11th Cir. 1989) (listing benefits to passengers resulting from United States membership in Warsaw Convention), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *infra* note 34 (explaining benefits to plaintiff under Warsaw scheme as worthy of low liability limit). In encouraging the United States Senate to ratify the Warsaw Convention in 1934, Secretary of State Cordell Hull explained:

The principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

the treaty was opened for signature.²⁸

A. Liability Provisions of the Warsaw Convention

The Warsaw Convention, consisting of forty-one articles arranged in five chapters, governs all commercial international air travel between signatory nations.²⁹ The Convention establishes the terms by which passengers may recover damages from the air carrier after an accident.³⁰ The basis for liability of an air carrier to its passengers originates in article 17 of the Warsaw Convention which holds the carrier liable for damages resulting from the death or injury of a passenger.³¹ The accident causing the damage must take place either on board the aircraft or during embarkation or

Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, S. EXEC. DOC. G, 73d Cong., 2d Sess. 3-4 (1934).

28. See Cohen, *supra* note 18, at 149-51 (stating that United States ratified Warsaw Convention in 1934). The United States Senate ratified the Convention upon the recommendation of the executive branch and, in accord with the provisions of article 38, became a signatory to the Convention. Silets, *supra* note 19, at 336 & n.65. Article 38 provides:

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

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

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Warsaw Convention, *supra* note 5, art. 38. On October 29, 1934, the Warsaw Convention went into effect for the United States. Silets, *supra* note 19, at 336.

29. See Warsaw Convention, *supra* note 5, art. 1 (defining international transportation as encompassing all trips in which departure and arrival points are situated within territories of Warsaw Convention members).

The Warsaw Convention is organized into five chapters. Chapter I (articles 1-2) defines the scope of the Convention; chapter II (articles 3-16) establishes the requirements governing issuance of passenger tickets, baggage checks, and air cargo way bills; chapter III (articles 17-30) deals with air carrier liability; chapter IV (article 31) includes provisions governing combined (multimodal) transportation; and chapter V (articles 32-41) establishes the general provisions for participation by nations in the Convention.

30. Warsaw Convention, *supra* note 5, arts. 17-30; see *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978) (stating that Warsaw Convention is only invoked when air carrier fails to compensate victims for damages adjudged appropriate), *cert. denied*, 431 U.S. 974 (1977); W. TURLEY, *AVIATION LITIGATION* § 5.07, at 224 (1986) (explaining that victim can generally obtain subject matter jurisdiction for Warsaw Convention claim in four places). The four places of competent jurisdiction are: (1) the carrier's place of incorporation; (2) the location of the carrier's corporate headquarters; (3) the place where the ticket was issued; or (4) the point of destination for the journey, including the point of origin for a round-trip ticket. *Id.*

31. Warsaw Convention, *supra* note 5, art. 17. Article 17 provides:

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

Id.; see also *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1492 (1991) (stating that article 17 sets forth conditions by which air carrier is liable for passenger injury). The Convention also creates carrier liability for baggage loss and delay. Warsaw Convention, *supra* note 5, arts. 18-19.

disembarkation.³²

The provisions of the Warsaw Convention expressly create a presumption of carrier liability in any accident governed by its provisions.³³ Article 22 of the Convention initially limited the liability of an air carrier to \$8300 per passenger, however, unless the carrier and passenger contractually agreed to a higher liability limit.³⁴

In analyzing the potential recovery of punitive damages, perhaps the most significant provision of the Warsaw Convention is the "wilful misconduct" exception of article 25.³⁵ Under the exception, an

32. Warsaw Convention, *supra* note 5, art. 17; *see also supra* note 31 (quoting text of Article 17). There has been a significant amount of litigation focusing on what constitutes "embarking" under the Warsaw Convention. *Compare* *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 155-56 (3d Cir. 1977) (defining embarking as time when carrier begins to perform its contract obligation) *with* *Sweis v. Trans World Airlines, Inc.*, 681 F. Supp. 501, 505 (N.D. Ill. 1988) (finding that checking baggage and obtaining boarding pass does not constitute embarking) *and* *Rullman v. Pan Am. World Airways, Inc.*, 122 Misc. 2d 445, 445-46, 471 N.Y.S.2d 478, 481-82 (Sup. Ct. 1983) (finding failure to provide food, drink, and rest during delay at intermediate stop is not covered under Warsaw Convention as embarking).

33. *See In re Aircrash in Bali, Indonesia* on Apr. 22, 1974, 684 F.2d 1301, 1305 (9th Cir. 1982) (stating that Warsaw Convention, as amended by 1966 Montreal Agreement, imposes absolute liability on airlines for injuries to passengers). The court explained, however, that prior to the Montreal Agreement, an air carrier could rebut the presumption of liability by proving either that all necessary measures were taken or that it was impossible to take such measures. *Id.* at 1305.

34. Warsaw Convention, *supra* note 5, art. 22(1). Article 22(1) provides:

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 [French Poincaré] 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. The conversion of francs to dollars was calculated according to currency valuations based on the gold standard then in use. *See* *Silets, supra* note 19, at 332-33 (discussing conversion of francs into dollars); *Lowenfeld & Mendelsohn, supra* note 1, at 499 n.10 (indicating that conversion of 125,000 francs to \$8300 has been used by United States since devaluation of franc in 1933); *supra* note 8 (stating Warsaw Convention specifications for one French Poincaré franc).

The United States recognized from the onset that the \$8300 liability limitation of an air carrier to its passengers for death or injury was insufficient. *See* *Moore, Chan v. Korean Air Lines, Ltd.: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention*, 13 HASTINGS INT'L & COMP. L. REV. 229, 232 (1990) (maintaining that United States always judged \$8300 limit too low and noting intense criticism of provision). Membership in the Convention, however, has distinct advantages. *Lowenfeld & Mendelsohn, supra* note 1, at 498-500. First, the plaintiff does not bear the burden of proof on fault issues in claims against the airline. *See id.* at 500 (stating that under article 20, however, carrier can rebut presumption of liability by showing that all necessary measures to avoid damages were taken or that it was impossible to take such measures). Second, the Convention assures jurisdiction over foreign airlines in United States courts. *Id.* at 499. Third, plaintiffs are sheltered from unreasonably low liability limits imposed by some countries. *Id.* at 500 (reiterating that article 23 renders null and void any provision tending to relieve carrier of liability or to fix limit lower than one provided for in article 22). Finally, an airline cannot avail itself of the liability limitation if found guilty of wilful misconduct. *See infra* notes 35-36 and accompanying text (discussing article 25 wilful misconduct exception).

35. Warsaw Convention, *supra* note 5, art. 25(1). Article 25(1) provides:

The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or

air carrier cannot avail itself of any of the provisions of the Convention which limit liability if found guilty of wilful misconduct.³⁶

B. A Call for Revision

Almost immediately after completion of the Warsaw Convention, worldwide discussion ensued concerning a desire to increase the amount of damages passengers could recover from an air carrier.³⁷ The New York Court of Appeals decision in *Ross v. Pan American Airways, Inc.*³⁸ prompted the debate in the United States. Popular entertainer Jane Froman was critically injured in a plane crash while on a United Services Organization (USO) tour in Portugal in 1943.³⁹ The court instructed the jury that wilful misconduct was "an intentional act done with either intent to cause damage, or recklessly and with knowledge that damage would result."⁴⁰ The jury,

by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. *Id.*; see also *id.* art. 25(2) (extending carrier liability to acts by any agent of carrier acting within scope of employment).

36. See MINUTES, *supra* note 5, at 59-60 (noting that original French text of Convention contains language of two civil law concepts, *faute lourde* and *dol*, that have no precise counterpart in either English language or common law). The discrepancy in meaning between the French terms and the term wilful misconduct, used in the English translation, was a topic of discussion at the 1929 Convention. The Minutes of the Convention reflect the concern of Great Britain's delegate, Sir Alfred Dennis, as he explained to the Convention that he understood the common law concept of "wilful misconduct" to be compatible with the French terms in question. *Id.* Common law wilful misconduct, however, includes not only deliberate acts but also careless acts done without regard for the consequences. *Id.*; see 1 S. SPEISER & C. KRAUSE, *supra* note 4, § 11:37, at 771-74 (defining common law wilful misconduct to include intentional performance of act in way that implies reckless disregard of consequence). Mr. Arendt, the Luxembourg delegate, explained that the translation of *dol* into languages not versed in Roman law presented a problem because *dol* does not extend to careless acts done without regard for the consequences. MINUTES, *supra* note 5, at 59-60. The drafting committee considered this problem as they formulated the draft that became the basis for the Warsaw Convention. They preferred the word *dol* to be translated into English as an "intentional illicit act." *Id.* The delegates to the 1929 Convention rejected this formulation, however, and the civil law terms *dol* and *faute lourde* were reinserted without qualification. *Id.* Thereafter the term "wilful misconduct" was used in the official English translation and the unofficial American translation. *Id.* at v.

37. See Cohen, *supra* note 18, at 151 n.68 (citing proposals at CITEJA meetings to double, triple, and quadruple liability limit); Lowenfeld & Mendelsohn, *supra* note 1, at 502-03 (listing numerous proposals to amend liability limits).

38. 299 N.Y. 88, 85 N.E.2d 880 (1949).

39. *Ross v. Pan Am. Airways, Inc.*, 299 N.Y. 88, 89-90, 85 N.E.2d 880, 881 (1949). Ellen Jane Ross was known professionally as Jane Froman. For other litigation related to the injuries of Ms. Froman, see *Froman v. Pan Am. Airways, Inc.*, 284 A.D. 935, 135 N.Y.S.2d 619 (1954), *leave to appeal denied*, 285 A.D. 806, 137 N.Y.S.2d 821, *cert. denied*, 349 U.S. 947 (1955); *Ross v. Pan Am. Airways, Inc.*, 123 N.Y.S.2d 263 (Sup. Ct. 1953) (denying ex-husband's claim for partial apportionment of wife's recovery for loss of services).

40. See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 294 (1965) (reporting details of *Froman* jury instructions). *Froman* is the only American case in which wilful misconduct is so strictly defined. *Id.* The more common formulation of wilful misconduct does not require knowledge that the plane will probably crash; it only requires intent to cause damage or reckless disregard that damage will result. *Id.*; see, e.g., *Koninklijke Luchtvaart Maatschappij N.V. Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775, 778

not believing that the pilot would intentionally crash the plane and jeopardize his own life, awarded the plaintiff \$8300 in damages in accordance with the Warsaw Convention.⁴¹ The Froman tragedy was the first of many airline crashes to exacerbate the growing dissatisfaction in the United States with the Warsaw Convention's damages limitation.⁴² Passengers and politicians alike objected to the liability limitation afforded the airlines for death or injuries of passengers.⁴³ At the same time, the airlines objected to plaintiffs' recovery of damages in excess of the liability limitation under the wilful misconduct exception.⁴⁴ These concerns spawned several conferences aimed at revising the liability provisions of the Warsaw Convention.⁴⁵

1. *The Hague Protocol*

After several previously unsuccessful attempts at revision, diplomats reached an agreement at The Hague in September 1955.⁴⁶ Initially, a conflict between member nations emerged, centering on the wilful misconduct exception of article 25.⁴⁷ The United States desired a substantial increase in the article 22 liability limit, coupled with a restricted definition of wilful misconduct under article 25.⁴⁸ Other nations preferred only a moderate increase in the article 22

(D.C. Cir.) (defining wilful misconduct as intentional performance of act that results in injury or damage or reckless disregard of consequences of performance), *cert. denied*, 368 U.S. 921 (1961); *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 123-24 (2d Cir. 1951) (allowing jury instruction of wilful misconduct for negligent omission of safety check by mechanic); *American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533-34 (D.C. Cir. 1949) (holding that defendant does not have to be guilty of "well-nigh criminal intent" before finding wilful misconduct).

41. See Kreindler, *supra* note 40, at 294 (noting that decision resulted in public outcry against Warsaw system).

42. See Moore, *supra* note 34, at 232 (indicating that technical imperfections in Convention led to discrepancies in amount of recovery between passengers in same accident and also stirred dissatisfaction). For example, if an international flight crashes in international waters, all persons aboard are subject to the limitations of the Warsaw Convention. If, however, a flight from New York to Chicago crashes, only those victims whose journeys begin or end outside the United States are subject to the conditions and limitations of the Convention. *Id.*

43. See Cohen, *supra* note 18, at 147 (expressing frustration of United States citizens with recovery amounts from international airline accidents because American tort system favors full compensation to injured parties); Kreindler, *supra* note 40, at 293 (recognizing that Americans respect integrity of person and expect fair damages for violations of that integrity).

44. Cohen, *supra* note 18, at 147; see Lowenfeld & Mendelsohn, *supra* note 1, at 503-04 (reporting that airlines blame vagueness of Convention language for differing interpretations between courts).

45. Lowenfeld & Mendelsohn, *supra* note 1, at 502-03 (noting that International Civil Aviation Organization (ICAO) held interim conferences to discuss revising Warsaw system in 1946 (Cairo), 1951 (Madrid), 1952 (Paris), and 1953 (Rio de Janeiro)).

46. *Id.* at 504-05.

47. See Kreindler, *supra* note 40, at 295 (calling article 25 the "loophole sought to be plugged" at The Hague).

48. See Mankiewicz, *supra* note 1, at 242 (explaining that United States preferred tripling current liability limits and restricting carrier exposure to unlimited liability).

liability limits and no change in the definition of wilful misconduct.⁴⁹ In a compromise, the delegates agreed on two amendments to the original Warsaw Convention.⁵⁰ First, the article 22 liability limitation for air carriers was doubled to \$16,600.⁵¹ Second, the delegates amended the article 25 wilful misconduct clause to reflect the formulation developed in *Froman*, instructing that the liability limitation could not be invoked by the carrier if the injury or damage resulted from an act "done with the intent to cause damage, or recklessly and with the knowledge that damage would probably result."⁵²

Although delegates from the United States signed the Hague Protocol at the conference, it was never brought before the United States Senate for ratification.⁵³ A rash of air accidents involving prominent persons, including the son of the Chairman of the Senate Foreign Relations Committee, stalled the action for years.⁵⁴ A final attempt to bring the Hague Protocol before the Senate for a vote

49. See *id.* (explaining that other countries feared increase in liability limits would result in increase in air carrier liability insurance rates and correspondingly higher air fares). Economically deprived countries were not interested in subsidizing higher indemnity levels for American and European travelers. *Id.*; see Hickey, *Breaking the Limit: Liability for Wilful Misconduct Under the Guatemala Protocol*, 42 J. AIR L. & COM. 602, 603 (1976) (indicating most nations desired liability level that made participation in international air travel viable). The French delegate at The Hague expressed surprise at delegates who wished low liability limits coupled with a broader definition of article 25: "[t]o have very low limits and a very open door in order to go beyond the limits is a fallacious mechanism which should be examined by those who sponsor it." See Mankiewicz, *supra* note 1, at 243 (quoting French delegate).

50. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371, ICAO Doc. No. 7686—LC/140 [hereinafter Hague Protocol], *reprinted in* A. LOWENFELD, *supra* note 7, at 955.

51. Cohen, *supra* note 18, at 153 (stating that liability limit was increased from 125,000 to 250,000 Poincaré francs). The United States unsuccessfully argued to have the limit increased to 375,000 Poincaré francs, or \$25,000. *Id.*

52. Cohen, *supra* note 18, at 152; see *supra* notes 38-41 and accompanying text (discussing wilful misconduct formulation used in *Froman* decision). This rigid definition requires knowledge that a crash would result from actions, whereas the original article 25 definition did not. Kreindler, *supra* note 40, at 294-95.

53. Kreindler, *supra* note 40, at 295 (indicating that United States Senate objected that Hague Protocol made ability to prove wilful misconduct almost impossible). See *generally id.* at 294-302 (describing various roadblocks faced in bringing Hague Protocol to Senate vote). As the Hague conference ended, a United Airlines DC-4 crashed in Medicine Bow, Wyoming, resulting in the death of 66 persons, again illuminating the inadequacies of the Convention. N.Y. Times, Oct. 7, 1955, at A1, col. 1. Although the flight was totally within the United States, five members of the Mormon Tabernacle Choir had purchased their tickets in Europe and their claims were therefore governed by the Warsaw Convention. Cohen, *supra* note 18, at 153-54; see Lowenfeld & Mendelsohn, *supra* note 1, at 511 (discussing impact of Medicine Bow, Wyoming crash on United States reception of Hague Protocol).

54. See Lowenfeld & Mendelsohn, *supra* note 1, at 515 (citing death of son and daughter-in-law of Senator Homer Capehart of Indiana in Montego Bay plane crash as one reason for delay in bringing Hague Protocol to Senate vote). Other tragedies also occurred during this period. Members of the Atlanta Art Association died in a crash upon takeoff from Paris in 1962. *Id.* at 515 n.71. Furthermore, the entire United States Olympic Skating Team was killed in an air crash near Brussels in 1961. *Id.*

failed in 1965 when major air carriers refused to agree to a self-imposed \$100,000 liability limitation.⁵⁵

2. *The Montreal Agreement*

On November 15, 1965, the United States gave formal notice renouncing its participation in the Warsaw Convention, effective May 15, 1966.⁵⁶ Although reluctant to take this drastic action, the United States saw no other option.⁵⁷ The impact of a withdrawal from the Convention on air carriers flying to or from the United States would be significant. Carriers would be presumed liable under the doctrine of *res ipsa loquitur* and damage claims would be adjudicated under the applicable state or federal law of the forum.⁵⁸ In the denunciation notice, the United States expressed a desire to remain a part of the Warsaw Convention and promised to withdraw the notice if a "reasonable prospect" for a new international liability limit of approximately \$100,000 was imminent.⁵⁹

One day before the effective date of withdrawal from the Warsaw Convention, the United States Government, all United States air carriers, and most foreign air carriers signed the Montreal Agreement.⁶⁰ By the terms of the agreement, the signatories agreed to

55. Cohen, *supra* note 18, at 155-56 (explaining that airlines would not agree to limit of more than \$50,000, reasoning that "limit" becomes usual amount of recovery). The United States Government sought an agreement by air carriers to increase the liability limit to \$100,000 in order to balance what it thought were intolerably low liability limits of the Hague Protocol. *Id.*

56. Dep't of State Release No. 268 (Nov. 15, 1965), *reprinted in* 53 DEP'T STATE BULL. 923-24 (Dec. 6, 1965) (explaining that article 39 of Warsaw Convention allows any member country to denounce Convention with six months notice); *see* Mankiewicz, *supra* note 1, at 153-54 (discussing impact of denunciation).

57. *See* Silets, *supra* note 19, at 339 & n.91 (citing reasons for denunciation of Warsaw Convention). Since the Hague Protocol, which would have doubled the Warsaw Convention's original liability limits, was never ratified, Americans traveling abroad had only \$8300 in liability coverage. *Id.* Furthermore, the disparity between recoveries for domestic and international airline accidents was rapidly increasing and was considered too inequitable to ignore. *Id.* (reporting that between 1950 and 1964, average recovery in international accidents was \$6489, compared to \$38,499 in domestic aviation accidents, and by 1964, domestic average had risen to over \$52,000).

58. *See generally* W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 257-62 (5th ed. 1984) (explaining that doctrine of *res ipsa loquitur* applies when no direct evidence to show cause of injury exists, but circumstantial evidence makes defendant's negligence most plausible explanation). *Res ipsa loquitur* creates a permissible inference, which a jury is free to accept or reject, rather than a presumption of liability. *See* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 3.09[6] (1991).

59. Dep't of State Release No. 268, *supra* note 56, at 924 (stating motivation for denunciation lies solely with low liability limits and does not represent departure from longstanding commitment to international cooperation in aviation).

60. Montreal Agreement, *supra* note 7; *see* Silets, *supra* note 19, at 341 (noting that article 22 of Warsaw Convention expressly allows airlines to contract with each other to increase existing liability limits).

increase the \$8300 liability limit to \$75,000.⁶¹ The Montreal Agreement applies to all international flights in which the United States is a point of origin, a point of destination, or a scheduled stopping point.⁶² Furthermore, the air carriers no longer have the benefit of the due care defense formerly available to them.⁶³ To recover damages, a plaintiff need only prove the occurrence of an accident and resulting injuries.⁶⁴ This virtually makes air carriers strictly liable for damages up to \$75,000 for the death or injuries of passengers resulting from an accident.⁶⁵

The parties intended the Montreal Agreement to be a temporary solution until the Warsaw Convention could be formally modified.⁶⁶

61. Montreal Agreement, *supra* note 7, ¶ 1; *see also* Maignie v. Compagnie Nationale Air France, 549 F.2d 1256, 1259 n.6 (9th Cir.) (stating that Montreal Agreement is contract between carriers to modify Convention, but is not treaty), *cert. denied*, 431 U.S. 974 (1977); W. TURLEY, *supra* note 30, § 5.06, at 223 (explaining that Montreal Agreement, unlike treaties, did not require Senate ratification); Silets, *supra* note 19, at 341-42 (stating that Montreal Agreement is contract between United States and international air carriers and not treaty amending original Convention).

62. *See* Exec. Order No. 23,680, 31 Fed. Reg. 7302 (1966) (explaining provisions of Montreal Agreement). The Montreal Agreement requires that each passenger on an international flight be given notice of the liability limitations on the face of the ticket in no less than 10-point pica type. *Id.* This provision led to an interpretation of the Warsaw Convention known as the American Rule. Moore, *supra* note 34, at 229. Under the American Rule, the limitation on liability provided by the Warsaw Convention is unavailable if the air carrier fails to comply with the notice requirements. *Id.* at 230-31 (indicating that American Rule was loophole for passengers to defeat liability limitation). *See, e.g., In re Air Crash Disaster Near New Orleans, La.* on July 9, 1982, 789 F.2d 1092, 1098 (5th Cir. 1986) (affirming district court decision to deny defendant access to limitation for failure to use 10-point pica type); *In re Air Crash Disaster at Warsaw, Pol.* on Mar. 14, 1980, 705 F.2d 85, 91 (2d Cir. 1983) (holding that failure to give proper notice results in forfeiture of liability limitation); *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 513-14 (2d Cir. 1966) (noting that *quid pro quo* for limitation of liability is notice of its terms to give passenger opportunity to make other arrangements for financial security), *aff'd*, 390 U.S. 455 (1968) (upholding American Rule).

The United States Supreme Court recently eliminated the American Rule. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (holding Warsaw Convention does not void limitation on liability for failure to provide adequate notice); *see also* Moore, *supra* note 34, at 231 (noting that *Chan* decision reaffirms right of Congress to make treaties without modification by courts and restores order and predictability to airline damages in international cases).

63. Exec. Order No. 23,680, *supra* note 62 (stating that carrier shall not avail itself of article 20(1) "due care" defense of Warsaw Convention providing that all necessary measures were taken to avoid damage or that it was impossible to take such measures).

64. *See* Silets, *supra* note 19, at 342-43 (hypothesizing that mere proof of accident can result in automatic \$75,000 recovery as due care defense is no longer available to carriers); *see also* 1 S. SPEISER & C. KRAUSE, *supra* note 4, § 11:19, at 679 (explaining that fault is not litigated unless plaintiff seeks damages in excess of \$75,000 for carrier's wilful misconduct).

65. *See* Silets, *supra* note 19, at 342 (stating that Montreal Agreement goes beyond article 20 rebuttable presumption of liability in original Convention and common law doctrine of *res ipsa loquitur*). *But see* *Air France v. Saks*, 470 U.S. 392, 407 (1985) (calling characterization of Montreal Agreement as imposing absolute liability on air carrier not entirely accurate). The Court in *Saks* noted that while carriers waived the due care defense under the Montreal Agreement, other provisions in the Convention qualifying liability were not waived. *Id.* For instance, carriers can still invoke the contributory negligence defense of article 21. *Id.* Furthermore, plaintiffs must still prove that the damages claimed resulted from an "accident" under article 17. *Id.*

66. Dep't of State Release No. 268, *supra* note 56; Cohen, *supra* note 18, at 158. There

It has been in place, however, for more than twenty-five years. Unfortunately, as the Montreal Agreement does not supersede the Warsaw Convention, but rather coexists with it, problems arise in merging the two documents. Most significantly, the original wording of the article 25 wilful misconduct exception remains intact, making it possible for damages to be awarded in excess of the \$75,000 limit once a plaintiff proves wilful misconduct.⁶⁷

3. *The Warsaw Convention today*

Although the United States has been the driving force behind the movement to revise the liability limits of the Warsaw Convention for over thirty years, the Senate has never ratified any of the subsequent

have been several subsequent attempts to modify the Warsaw Convention. Realizing the temporary status of the Montreal Agreement, the International Civil Aviation Organization (ICAO) selected a panel of experts to revise the text of the Warsaw Convention. Cohen, *supra* note 18, at 158. The product of this panel's work was the Guatemala City Protocol. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at The Hague on Sept. 28, 1955, *done* Mar. 8, 1971, ICAO Doc. No. 8932 (1971) [hereinafter Guatemala City Protocol], *reprinted in* N. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 732-38 (1981). The Guatemala City Protocol raised the liability limitation of air carriers under article 22 to \$100,000. *See* Silets, *supra* note 19, at 344-45 (noting, however, that wilful misconduct exception is completely eliminated in Guatemala City Protocol, making \$100,000 liability limit absolute cap on recovery).

The Guatemala City Protocol incorporated two additional requirements to ensure that all nations would be subject to the same liability limits. First, any nation that ratified the Guatemala City Protocol also bound itself to the Warsaw Convention as amended by the Hague Protocol. Guatemala City Protocol, *supra*, art. XIX, *reprinted in* N. MATTE, *supra*, at 737; Cohen, *supra* note 18, at 158. Second, the Guatemala City Protocol would not be effective until ratified by 30 nations, including six whose airlines represented 40% of total scheduled international air travel. Guatemala City Protocol, *supra*, art. XX, *reprinted in* N. MATTE, *supra*, at 737; Cohen, *supra* note 18, at 158. This action guaranteed that the Guatemala City Protocol would not go into effect, as the Hague Protocol had, without the ratification of the United States. Cohen, *supra* note 18, at 158. Due to the elimination of the wilful misconduct exception, the United States Senate refused to ratify the Guatemala City Protocol, and, accordingly, the treaty never went into effect. *Id.*

The most recent attempt to revise the Warsaw Convention began in 1975 with the drafting of the Montreal Protocols. *See* Additional Protocols No. 3 & 4 Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* Sept. 25, 1975, ICAO Document Nos. 9147/9148 [hereinafter Montreal Protocols], *reprinted in* A. Lowenfeld, *supra* note 7, at 985. The Montreal Protocols consisted of four separate protocols that increased the liability limitation and completely eliminated the wilful misconduct exception, as had been done in the Guatemala City Protocol. *See* Silets, *supra* note 19, at 345-46 (noting that elimination of wilful misconduct exception was hotly contested issue in Senate hearings). As a result of these provisions, no matter how grossly negligent or blatantly culpable an airline is, its maximum liability under the Montreal Protocols for the death of or injury to a passenger would be capped and could not be surpassed. Silets, *supra* note 19, at 348; *see* Hollings, *The Montreal Protocols: A Threat to the American System of Jurisprudence*, TRIAL, Sept. 1982, at 69 (outlining objections to Montreal Protocols). Like its predecessors, the Montreal Protocols never went into effect. Silets, *supra* note 19, at 349 n.151 (noting that final Senate vote was less than required two-thirds approval).

67. Silets, *supra* note 19, at 342 (noting that as result of Montreal Agreement, plaintiff looking for unlimited liability under article 25 must prove that conduct of air carrier, its agents, or employees was proximate cause of damage).

revisions.⁶⁸ This illustrates the differing perspectives of diplomats who negotiate revisions on behalf of the United States and legislators charged with ratification responsibilities.⁶⁹ It further reflects a conflict in the United States between the desire for an international airline treaty limiting liability for air carriers and the American tort system that, as a matter of public policy, generally favors full compensation for provable damages.⁷⁰

The United States remains a signatory to the Warsaw Convention as modified by the Montreal Agreement.⁷¹ As an international treaty accepted by the United States, the Warsaw Convention remains binding on domestic courts.⁷² As a result, the United States court system is encumbered with applying and interpreting the sixty-year-old treaty.⁷³

The Supreme Court of the United States has not addressed the issue of punitive damages in any of its three Warsaw Convention decisions. In dicta, however, the Court has provided guidelines for interpreting the Convention. In *Trans World Airlines, Inc. v. Franklin Mint Corp.*,⁷⁴ the Court rejected a constitutional challenge to the enforceability of the Warsaw Convention. The Second Circuit held that when Congress repealed the Par Value Modification Act⁷⁵ in 1978, making the value of the United States dollar independent from the market price of gold, the Convention's liability limitation

68. See Cohen, *supra* note 18, at 147 (observing irony that United States promoted modifications of Warsaw Convention but never ratified any changes).

69. See Cohen, *supra* note 18, at 147 (predicting that keys to ratification of future revisions are realistic recovery limits and minimal delay between proposal and adoption).

70. *Id.*

71. *Treaties in Force*, *supra* note 6, at 284.

72. U.S. CONST. art. VI (providing that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby . . ."); see *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978) (stating that, as accepted treaty, Warsaw Convention is absolutely binding); *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971) (stating that Warsaw Convention has force of federal law as treaty of United States); *Hill v. United States*, 550 F. Supp. 1048, 1054 (D. Kan. 1982) (indicating that Warsaw Convention is supreme law of land and overrides and controls any conflicting state law).

73. See Note, *A Proposed Revision of the Warsaw Convention*, 57 IND. L.J. 297, 308 n.73 (1982) (discussing problems created when judiciary modifies international treaties). Only the legislature has the power to amend statutes. *Id.* When an international treaty is involved, the process is lengthy. *Id.* As a result, judges may creatively interpret outdated treaties to minimize their negative effects. *Id.* Such actions can embarrass the United States Government if the interpretation differs from that of other signatories. *Id.* To avoid this, the judiciary should not rewrite treaties—they should only enforce them as written. *Id.*

74. 466 U.S. 243 (1984). The Franklin Mint Corporation brought suit in federal district court against Trans World Airways (TWA) to recover \$250,000 in damages for packages lost in transport between Philadelphia and London. *Trans World Airways, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 246 (1984).

75. Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (1978).

provision was rendered unenforceable in the United States.⁷⁶ The Court rejected this holding, indicating that an ambiguous action by Congress or legislative silence is insufficient to repeal the Convention.⁷⁷

The Supreme Court also discussed the interpretation of international treaties in *Air France v. Saks*.⁷⁸ The Court noted that any analysis must first consider the context in which the text is used.⁷⁹ If necessary, a court may look to the drafting and negotiation history to clarify the meaning of the text.⁸⁰ Noting that the official language of the Warsaw Convention is French, the Court further cautioned that specific words of the treaty must be translated in a way that is consistent with the expectations of the contracting parties.⁸¹

In *Chan v. Korean Air Lines, Ltd.*,⁸² the Court emphasized that the

76. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 251 (1984). TWA admitted responsibility for the loss, but claimed that the amount of damages for which it was liable under the Warsaw Convention was only \$6475.98. *Id.* at 246. The Warsaw Convention set a limit on an air carrier's liability for lost cargo, absent a contract to the contrary, at 250 French francs per kilogram from which the \$6475.98 figure was derived. *Id.*; see Warsaw Convention, *supra* note 5, art. 22(2) (providing liability limits for checked baggage and goods being transported). Conversion from French francs to United States dollars was based on the par value of gold, \$35 per ounce, at the time the United States became a party to the Convention. *Franklin Mint*, 466 U.S. at 248; see also *supra* note 34 (discussing parameters for conversion). The repeal of the Par Value Modification Act disrupted the liability limitations of the Warsaw Convention as the price of gold escalated. See *Franklin Mint*, 466 U.S. at 255 (finding that liability limit set by Civil Aeronautics Board for lost baggage is consistent with intent of Convention framers, rather than limit that fluctuates with price of gold). The Second Circuit affirmed the amount, but held that the liability limit was prospectively unenforceable since Congress' repeal of the Par Value Modification Act left no conversion factor for converting liability limit to dollars. *Franklin Mint*, 466 U.S. at 246.

77. *Franklin Mint*, 466 U.S. at 252-53 (explaining that Convention itself lays out specific procedures to be followed if signatory wishes to withdraw from its terms); see *supra* note 56 and accompanying text (discussing procedures for denunciation of Warsaw Convention).

78. 470 U.S. 392 (1985). In *Saks*, a passenger on an international flight from Paris to Los Angeles suffered permanent deafness as a result of the normal maintenance and operation of the cabin pressurization system by Air France. *Id.* at 394. The district court granted summary judgment to Air France, holding that the normal operation of a pressurization system does not constitute an "accident" as required by article 17 of the Warsaw Convention. *Id.* at 395. Reviewing the language and history of the Montreal Agreement, however, the court of appeals reversed, concluding that the Agreement created a standard of absolute liability for all injuries that are proximately caused by the risks of air travel. *Saks v. Air France*, 724 F.2d 1383, 1384 (9th Cir. 1984) (holding malfunction or abnormality in operation of aircraft not required for "accident" status under Warsaw Convention), *rev'd*, 470 U.S. 392 (1985). The Supreme Court reversed. *Air France v. Saks*, 470 U.S. 392, 396 (1985) (considering French legal meaning of term "accident" and determining that passenger's injury must be caused by unexpected or unusual event, and cannot be due to normal operations of aircraft).

79. *Saks*, 470 U.S. at 397.

80. *Id.*

81. *Id.* at 399; see *supra* note 5 (discussing translation of original French text into English); see also *supra* note 36 (considering difficulty in translating French terms *faute lourde* and *dol* into English).

82. 490 U.S. 122 (1989). *Chan* arose from the downing of a commercial Korean Air Lines flight en route from New York City to South Korea. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 123 (1989). A Soviet military aircraft destroyed the plane when it strayed into Soviet territory over the Sea of Japan. *Id.*

text of the Warsaw Convention must govern.⁸³ The Court stated that when the text is clear and unambiguous, courts have no power to amend it.⁸⁴ In addition, the Court noted that the drafting history of a treaty is relevant only if the text is ambiguous.⁸⁵

Most recently, in *Eastern Airlines, Inc. v. Floyd*,⁸⁶ the Court reiterated its distaste for alteration of the Convention by judicial amendment as it declined to extend article 17 to include mental injuries unless unaccompanied by physical injury or physical manifestation of the mental injury. The Court indicated that an interpretation of specific words in the Convention must begin with an examination of the expectations of the contracting parties at the time of drafting.⁸⁷ In doing so, the Court considered drafting history and subsequent conventions, but noted that the latter are not dispositive since neither ratified by the United States nor prevalent in the international community.⁸⁸

II. THE RECENT TREND DISALLOWING PUNITIVE DAMAGES UNDER THE WARSAW CONVENTION

Although lower federal courts frequently apply and interpret the Warsaw Convention, relatively few courts have addressed the issue of whether a cause of action for punitive damages is cognizable under the Convention.⁸⁹ Since 1989, however, three courts of ap-

83. *Chan*, 490 U.S. at 134 (noting that text of treaty is what all signatories adopted and, therefore, text must govern). The case presented the issue of whether the defendant air carrier lost the benefit of the liability limitation by failing to provide notice to passengers in 10-point pica type as required by the Montreal Agreement. *Id.* at 124; see generally Moore, *supra* note 34 (discussing *Chan* overruling American Rule). In holding that inadequate notice does not remove the liability limitation, the Court rejected the plaintiff's speculation about the intent of the drafters and instead looked to the unambiguous text of the Convention itself. *Chan*, 490 U.S. at 134; see *supra* note 62 (discussing evolution and elimination of American Rule).

84. *Chan*, 490 U.S. at 134.

85. *Id.*

86. 111 S. Ct. 1489 (1991); see *infra* note 91 (discussing facts of *Floyd*).

87. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1493-94 (1991) (citing liberally *Saks* and *Chan* for instruction in treaty interpretation).

88. *Id.* at 1500.

89. Compare *In re Air Disaster at Lockerbie, Scot.* on Dec. 21, 1988, 733 F. Supp. 547, 554 (E.D.N.Y. 1990) (holding punitive damages not recoverable under Warsaw Convention because inconsistent with expectations of contracting parties), *aff'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991) and *In re Air Crash Disaster at Gander, Nfld.* on Dec. 12, 1985, 684 F. Supp. 927, 933 (W.D. Ky. 1987) (holding Warsaw Convention preempts plaintiff's state law claims for punitive damages) and *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (holding that wilful misconduct exception of article 25 cannot reasonably be interpreted to authorize damages not permitted elsewhere in Convention), *disapproved on other grounds*, *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, 484 U.S. 927 (1987) with *In re Hijacking of Pan Am. World Airways, Inc. Aircraft at Karachi Int'l Airport, Pak.* on Sept. 5, 1986, 729 F. Supp. 17, 20 (S.D.N.Y. 1990) (finding that wilful misconduct creates cause of action for punitive damages since such conduct violates Convention's liability limitations), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No.

peals have held that punitive damages are not recoverable under the Warsaw Convention.⁹⁰

A. *Floyd v. Eastern Airlines, Inc.*

In 1989, in *Floyd v. Eastern Airlines, Inc.*,⁹¹ the Eleventh Circuit became the first court of appeals to hold that punitive damages are not recoverable under the Warsaw Convention. In *Floyd*, the plaintiffs sought damages for the intentional infliction of emotional distress after the aircraft they were aboard temporarily experienced engine failure.⁹² They sought, *inter alia*, punitive damages on grounds that the defendant airline knowingly failed to correct maintenance problems.⁹³ The court in *Floyd*, however, held that the Warsaw Convention preempts state law causes of action that are inconsistent with its provisions.⁹⁴ Interpreting article 17 of the Convention as allowing only for compensatory damages, the court held that punitive damages must be preempted.⁹⁵ The court found that the purpose of punitive damages is to punish the wrongdoer and deter future misconduct, not to compensate the injured plaintiff.⁹⁶

Furthermore, the Eleventh Circuit held that article 25 of the Warsaw Convention does not create an independent cause of action for

91-259 (Aug. 12, 1991) and *Hill v. United States*, 550 F. Supp. 1048, 1055-56 (D. Kan. 1982) (defining wilful misconduct to include defendant's intentional misrepresentations and allowing punitive damages stemming therefrom) and *In re Korean Air Lines Disaster* on Sept 1, 1983, MDL 565 (D.D.C. 1989) (affirming jury award of \$50 million in punitive damages), *rev'd*, 932 F.2d 1475 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991).

90. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *In re Air Disaster at Lockerbie*, Scot. on Dec. 21, 1988, 928 F.2d 1267 (2d Cir. 1991) [hereinafter *Lockerbie Disaster*], *petition for cert. filed*, No. 91-259 (Aug. 12, 1991); *In re Korean Air Lines Disaster* on Sept. 1, 1983, 932 F.2d 1475 (D.C. Cir. 1991) [hereinafter *Korean Air Lines Disaster*], *petition for cert. filed*, No. 91-251 (Aug. 9, 1991).

91. 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991). The *Floyd* case arose from an incident aboard an Eastern Airlines flight in May 1983 between Miami, Florida and Nassau, Bahamas. After a series of engine failures, the crew advised passengers to prepare for an imminent crash in the Atlantic Ocean. *Id.* at 1466. The flight crew, however, succeeded in restarting the engines and the plane landed safely in Miami. *Id.* The plaintiffs brought suit against Eastern Airlines for the intentional infliction of emotional distress under Florida law. Plaintiffs sought both compensatory and punitive damages under the Warsaw Convention. *Id.*

92. *Id.* at 1466.

93. *Id.*

94. *Id.* at 1481. The court declined to decide whether all state law causes are preempted under the Convention. *Id.* at 1482. The court acknowledged, however, that other courts have found the Warsaw Convention cause of action to be exclusive. *See id.* at 1482 n.33 (listing findings of other courts on issue of whether Warsaw Convention cause of action is exclusive). *But see Korean Air Lines Disaster*, 932 F.2d at 1487 (suggesting that cases cited by courts in *Floyd* and *Lockerbie Disaster* are divided on exclusivity issue and not as one-sided as courts suggest).

95. *Floyd*, 872 F.2d at 1487.

96. *Id.*

punitive damages when a carrier is guilty of wilful misconduct.⁹⁷ In doing so, the court rejected the plaintiffs' argument that wilful misconduct bars the defendant from claiming the protection of either the monetary limitation of article 22 or the general scheme of limited liability afforded by the Convention.⁹⁸ In addition, the court in *Floyd* found the wording of the wilful misconduct exception in the Hague Protocol to clarify the original intent of the Warsaw Convention drafters to deny punitive damages.⁹⁹ The Hague Protocol amended article 25 so as to expressly apply only to the limitation on liability specified in article 22 and not to the compensatory damages provision in article 17.¹⁰⁰ Finally, the court in *Floyd* found that case law "unanimously" rejected the notion that article 25 creates an independent cause of action for punitive damages.¹⁰¹

B. In re Air Disaster at Lockerbie, Scotland on December 21, 1988

1. Procedural history

In March 1991, the Second Circuit, in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*,¹⁰² resolved a split among two of its lower courts as to whether a cause of action for punitive damages is cognizable under the Warsaw Convention. The two district court cases stemmed from separate terrorist incidents involving Pan American Airways (Pan Am) aircraft. In each case, defendant Pan Am presented a motion for summary judgment to the respective court on the issue of punitive damages. In *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986 (Karachi Hijacking)*,¹⁰³ Judge Sprizzo for the United States District Court for the Southern District of New York denied Pan Am's motion for summary judgment, stating that punitive damages may be recovered under the Warsaw Convention.¹⁰⁴

97. *Floyd*, 872 F.2d at 1483 (citing structure of Convention, interpretation of article 25 in later protocols, and case law as support for decision).

98. *Id.*

99. *Id.*

100. *See id.* (citing language of Hague Protocol). The amended article 25 stated that "[t]he 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" Hague Protocol, *supra* note 50, art. XIII.

101. *Floyd*, 872 F.2d at 1484-85.

102. 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

103. 729 F. Supp. 17 (S.D.N.Y. 1990), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

104. *In re Hijacking of Pan Am. World Airways, Inc. Aircraft at Karachi Int'l Airport, Pak.* on Sept. 5, 1986, 729 F. Supp. 17, 20 (S.D.N.Y. 1990) [hereinafter *Karachi Hijacking*] (finding that article 17 is a limitation on liability that is revoked upon finding of article 25 misconduct), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

The *Karachi Hijacking* litigation arose from the 1986 hijacking of Pan Am Flight 73 from

In *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*,¹⁰⁵ Chief Judge Platt for the United States District Court for the Eastern District of New York reached the opposite conclusion, granting partial summary judgment and dismissing the punitive damages claims against defendant Pan Am.¹⁰⁶

Chief Judge Platt, recognizing that the decision conflicted with the district court in *Karachi Hijacking* on a controlling issue of law, certified *Lockerbie Disaster* for immediate appeal to the Second Cir-

Bombay, India to New York's Kennedy Airport and the seventeen-hour hostage ordeal that followed on the tarmac at Karachi Airport in Pakistan. *Id.* at 18 n.1. The hijacking resulted in the deaths of 20 people and the wounding of 127 others. *Id.*; see also Chicago Tribune, Sept. 6, 1986, at 1, col. 3 (describing hijacking). The gunmen, disguised as airport security personnel, drove a van through the baggage area and then stormed the plane during a scheduled early morning fueling stop. Chicago Tribune, Sept. 6, 1986, at 1, col. 3 (suggesting that lax security measures may have been contributing factor in attack). Families of the victims sued Pan Am for compensatory and punitive damages. *Karachi Hijacking*, 729 F. Supp. at 18.

Pan Am based its motion for summary judgment on article 17 which creates the cause of action for injury claims under the Warsaw Convention. *Id.* Pan Am claimed that the wording of the official French text of article 17 indicates that the air carrier is only liable for *dommage survenu* or, as translated, damage sustained. See *id.* at 18 n.4 (noting that parties disagree as to translation of phrase "damage sustained" from French to English). Pan Am argued that this language is evidence of the drafters' intent to impose liability for compensatory damages, not punitive damages. See *id.* at 18 (explaining defendant Pan Am's argument that terms "damage sustained" and "bodily injury" must preclude recovery of punitive damages because accident cannot cause punitive damages and, therefore, punitive damages cannot be "sustained" in accident); cf. *France v. Saks*, 470 U.S. 392, 398 (1985) (equating "damage sustained" with "injury"). But see *In re Air Crash Disaster at Gander, Nfld.*, 684 F. Supp. 927, 931 (W.D. Ky. 1987) (noting plaintiff's contention that *survenu* should be translated as "happened" or "arisen" and not "sustained"). The court in *Karachi Hijacking* found that a translation of *dommage survenu* to "damage sustained" does not preclude an award of punitive damages. *Karachi Hijacking*, 729 F. Supp. at 18 n.4. The court, therefore, denied Pan Am's motion. *Id.*

105. 733 F. Supp. 547 (E.D.N.Y. 1990), *aff'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

106. *In re Air Disaster at Lockerbie, Scot.* on Dec. 21, 1988, 733 F. Supp. 547, 553-54 (E.D.N.Y. 1990) (noting that in order to meet expectations of contracting parties, court must hold that Warsaw Convention bars punitive damage claims whether or not wilful misconduct exists), *aff'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

On December 21, 1988, Pan Am Flight 103 departed from Frankfurt, West Germany for New York City's Kennedy International Airport with a scheduled intermediate stop at London's Heathrow Airport. *Id.* at 548-49. Minutes out of London, the plane exploded in midair and crashed near Lockerbie, Scotland. *Id.* at 549. A bomb, enclosed in checked luggage, caused the explosion. *Id.* Families of the victims sued for compensatory and punitive damages. *Id.*

Pan Am proffered two defenses in support of its motion for summary judgment on the punitive damages issue. First, it argued that article 17 of the Warsaw Convention restricts the measure of plaintiffs' recovery to compensatory damages. See *id.* at 552-53 (arguing that "damage sustained" language of article 17 refers to compensatory, not punitive damages). Defendant Pan Am argued again that punitive damages are not damages "sustained," but rather, an award in excess of damages actually sustained by the plaintiff designed to punish the defendant for misconduct. *Id.* at 553. Second, Pan Am argued that in the event of wilful misconduct, the "exclusion" from the liability limitation provisions of the Convention, indicated in the article 25 wilful misconduct exception, relates to the monetary limit afforded by article 22, and not to the general scheme under which a carrier may be found liable. *Id.* at 553. Pan Am argued that because article 17 creates plaintiff's cause of action, plaintiff may only receive compensatory damages. *Id.* at 552-53. Thus, article 25 does not create an independent cause of action for punitive damages. *Id.*

cuit.¹⁰⁷ The Second Circuit consolidated the appeals of the two cases and heard oral argument in September 1990. Without considering the specific facts of either case and assuming a finding of wilful misconduct, the Second Circuit examined whether a plaintiff may recover punitive damages in a wrongful death action governed by the Warsaw Convention.¹⁰⁸ Affirming *Lockerbie Disaster* and reversing *Karachi Hijacking*, the Second Circuit held that plaintiffs cannot seek punitive damages in claims arising under the Warsaw Convention.¹⁰⁹

2. *The Second Circuit opinion*

The Second Circuit reviewed the characteristics of punitive damages under both state and federal common law. In most states, the purpose of punitive damages is to punish wrongdoers or to deter wrongful conduct.¹¹⁰ A small number of states, however, recognize

107. *Lockerbie Disaster*, 736 F. Supp. 18 (E.D.N.Y. 1990). Chief Judge Platt certified the decision for interlocutory appeal on February 26, 1990 pursuant to his discretionary authority:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (1988).

In certifying *Lockerbie Disaster* for interlocutory appeal, Chief Judge Platt noted that there were substantial grounds for a difference of opinion as to whether punitive damages are allowed in claims governed by the Warsaw Convention. *Lockerbie Disaster*, No. MDL 799, 1990 WL 29764 (E.D.N.Y. Mar. 6, 1990). In support of this proposition, he cited the Eleventh Circuit's decision in *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1485-86 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991). Chief Judge Platt also noted two other district court decisions in support of his position. See *In re Aircrash Disaster at Gander*, Nfld. on Dec. 12, 1985, 684 F. Supp. 927, 932 (W.D. Ky. 1987) (maintaining that Convention allows for recovery of only compensatory damages); *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (striking claim for punitive damages on grounds that article 25 of Convention only removes ceiling on compensatory damages and does not justify awards of punitive damages), *disapproved on other grounds*, *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, 484 U.S. 927 (1987). He then cited two district courts opinions that created a conflict on a controlling issue of law. *Karachi Hijacking*, 729 F. Supp. 17 (S.D.N.Y. 1990), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991); *In re Korean Air Lines Disaster of Sept. 1, 1983*, MDL 565 (D.D.C. 1989) (affirming jury award of punitive damages without opinion), *rev'd*, 932 F.2d 1475 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991).

108. *Lockerbie Disaster*, 928 F.2d 1267, 1269-70 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

109. *Id.*

110. *Id.* at 1272. The Second Circuit, in *Lockerbie Disaster*, noted that the Supreme Court views punitive damages as penal in nature. *Id.*; see *Browning Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275-77 (1989) (conceding that while punitive damages advance interests of punishment and deterrence, eighth amendment's excessive fines clause does not apply to awards of punitive damages between private parties); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) for proposition that punitive damages are private fines used to punish "reprehensible conduct and deter future occurrence"). Some federal and state courts characterize punitive damages

a compensatory element in punitive damages.¹¹¹ As a result, if plaintiffs are permitted to pursue a state cause of action under the Warsaw Convention, then punitive damages might encompass a compensatory element.¹¹² If, however, the federal cause of action is exclusive, punitive damages would never include a compensatory element because federal law generally recognizes only the punishment and deterrent value of punitive damages.¹¹³

a. Exclusivity of state causes of action

Whereas the Eleventh Circuit in *Floyd* decided that the Warsaw Convention preempts state causes of action inconsistent with the Convention,¹¹⁴ the Second Circuit went further. Reviewing its own precedent, the Second Circuit examined whether the Warsaw Convention preempts state causes of action that fall within the scope of the Convention.¹¹⁵

as a means of deterrence. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1487 (11th Cir. 1989) (finding punitive damages serve society by deterring others from engaging in similar conduct in future), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); Harpalani v. Air-India, Inc., 634 F. Supp. 797, 799 (N.D. Ill. 1986) (noting that punitive damages punish and deter and thus, are unrelated to goals of Warsaw Convention to ensure adequate, minimum compensation); Andor v. United Air Lines, Inc., 303 Or. 505, 511-13, 739 P.2d 18, 22-23 (1987) (stating aim of punitive damages is punishment, deterrence, and vindication of social norms). See generally *supra* note 10 (explaining evolution of punitive damages in American law).

111. *Lockerbie Disaster*, 928 F.2d at 1272 (collecting cases); see, e.g., Peisner v. Detroit Free Press, 68 Mich. App. 360, 371, 242 N.W.2d 775, 780 (1976) (noting that, in Michigan, punitive damages are designed to compensate plaintiffs for full extent of injury, not to punish defendants for their misdeeds); Kelsey v. Connecticut State Employees Ass'n, 179 Conn. 606, 610, 427 A.2d 420, 425 (1980) (upholding right of jury to award punitive damages to cover litigation expenses since defendant acted with reckless indifference toward plaintiff's rights). In 1934, when the United States became a signatory to the Warsaw Convention, most states viewed punitive damages as compensatory. *Lockerbie Disaster*, 928 F.2d at 1272 (collecting cases); see *Bixby v. Dunlap*, 56 N.H. 456, 464-65 (1876) (arguing that compensatory damages are not considered punitive in nature, but rather "enhanced" damages); *Eshelman v. Rawalt*, 298 Ill. 192, 197, 131 N.E. 675, 677-78 (1921) (explaining that damages recovered by plaintiff are limited to compensation for injury received as result of defendant's misconduct).

In New York, where litigation in *Lockerbie Disaster* is ongoing, punitive damages combine penal and compensatory elements. See *Racich v. Celotex Corp.*, 887 F.2d 393, 396-97 (2d Cir. 1989) (holding that common law tort claims include element of punitive damages when factually appropriate and that legislative silence on punitive damages issue does not preclude such recovery). In *Racich*, the plaintiff sought punitive damages for an asbestos-related claim. *Id.* at 395. The court of appeals rejected defendant's contention that because punitive damages are not specifically enumerated in New York's revival statute for asbestos claims, they are unavailable once the statute of limitations runs out. *Id.* at 395-96; see also *Sharapata v. Islip*, 56 N.Y.2d 332, 335, 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348, (1982) (noting that availability of punitive damages is well-grounded in New York common law).

112. *Lockerbie Disaster*, 928 F.2d at 1273.

113. *Id.* at 1279-80.

114. *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1480 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); see *supra* note 94 (detailing *Floyd* holding on preemption issue).

115. Compare *Floyd*, 872 F.2d at 1482 (holding that Convention preempts state causes of action inconsistent with Warsaw Convention) with *Lockerbie Disaster*, 928 F.2d at 1273 (holding that Convention also preempts state causes of action within scope of Convention).

In *Benjamins v. British European Airways*,¹¹⁶ the Second Circuit established that the Warsaw Convention creates a cause of action that enables a plaintiff to sue directly under its terms.¹¹⁷ The court in *Lockerbie Disaster* addressed the question left open by *Benjamins*: whether independent state causes of action are still available under the Warsaw Convention. Although the Supreme Court has explicitly refused to address the exclusivity of the cause of action under the Warsaw Convention,¹¹⁸ the Second Circuit nonetheless held that the Convention does not preserve state law causes of action.¹¹⁹

Furthermore, the Second Circuit held that state causes of action are necessarily preempted by the Warsaw Convention so as not to

116. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

117. *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978) (overturning two previous Second Circuit decisions which rejected premise that article 17 creates cause of action for wrongful death or personal injury), *cert. denied*, 439 U.S. 1114 (1979).

Prior to *Benjamins*, the law in the Second Circuit was that the Warsaw Convention did not create a cause of action. *Id.* at 916. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir.) (agreeing with district court in *Komlos* that article 17 of Convention creates presumption of liability, not independent cause of action), *cert. denied*, 355 U.S. 907 (1957); *Komlos v. Compagnie Internationale Air France*, 209 F.2d 436, 438 (2d Cir. 1953) (agreeing with district court's decision that Warsaw Convention does not create an independent cause of action), *cert. denied*, 348 U.S. 280 (1954); see also *Lowenfeld & Mendelsohn, supra* note 1, at 517-19 (analyzing *Komlos* and *Noel*).

The court in *Benjamins* found that the drafters clearly desired to create a uniform body of law to govern air travel. *Benjamins*, 572 F.2d at 917. The court also found that the most reasonable interpretation of the Convention's provisions envisioned the creation of a cause of action. *Id.* at 918. Finally, the court indicated that other signatories of the Convention have interpreted its provisions to include the creation of a cause of action. *Id.* at 918-19; cf. *Salamon v. Koninklijke Luchtvaart Maatschappij N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951) (stating that "[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do"), *aff'd*, 281 A.D. 965, 120 N.Y.S.2d 917 (1953).

118. See *Air France v. Saks*, 470 U.S. 392, 408 (1984) (expressing no view on whether independent state causes of action for negligence are cognizable); *Lockerbie Disaster*, 928 F.2d at 1273 (explaining that Supreme Court has declined to address exclusivity issue). The Supreme Court also failed to address exclusivity in its most recent case, *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1502 (1991) (declining to address exclusivity because certiorari not granted on issue).

119. *Lockerbie Disaster*, 928 F.2d at 1273. The Second Circuit cited decisions in the Fifth and Ninth Circuits for support in finding exclusivity of the Warsaw Convention cause of action. See *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984) (finding that this area of law requires national uniformity, finding evidence of congressional design to preempt field, and noting that state statute conflicts with federal provision), *cert. denied*, 469 U.S. 1186 (1985); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) (stating that state causes of action may provide varying measures of damages consistent with Convention). *But see id.* (prefacing remark with statement that "best explanation for the wording of article 24(1) appears to be that the delegates did not intend the cause of action created by the Convention to be exclusive").

The Second Circuit also looked to the law of other signatories. England, Canada, and Australia have statutes in place to make the Warsaw Convention the exclusive cause of action, and French courts have decided likewise. *Lockerbie Disaster*, 928 F.2d at 1274 (listing legislation of other signatories). *But see Korean Air Lines Disaster*, 932 F.2d 1475, 1494 (D.C. Cir. 1991) (Mikva, C.J., dissenting) (reasoning that signatories' need to enact legislation to make cause of action exclusive illustrates that Convention does not do so), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991).

frustrate the Convention's goal of uniformity.¹²⁰ Diversity jurisdiction cases present the paradigm for potentially inconsistent application of the law. The Second Circuit explained in *Lockerbie Disaster* that "any attempt to construe the meaning of punitive damages under the laws of various states may easily become mired down in a morass of conflicting rules."¹²¹ If state causes of action are allowed, the liability of the air carrier could ultimately depend on the plaintiff's choice of forum.¹²² The Second Circuit also noted that the "more reasoned" opinions of the lower courts found state law claims for punitive damages to be inconsistent with the stated goals of the Convention.¹²³ The Second Circuit found the need for uniformity under the Convention significant enough to overcome a generally recognized presumption against preemption.¹²⁴ As a result, the court held that the Warsaw Convention preempts state law causes of action.¹²⁵

b. Federal common law

Having held that the Warsaw Convention, a federal treaty, creates an exclusive cause of action, the Second Circuit decided that the federal common law of torts is the appropriate substantive law to

120. See *Lockerbie Disaster*, 928 F.2d at 1274 (explaining that law can be preempted if state regulation frustrates national goals). Preemption of state laws can transpire in other ways as well. Congress can expressly preempt state law. *Id.* Congress can also impliedly preempt state law by enacting federal legislation so extensive as to leave no question of its breadth. *Id.* at 1274-75.

121. *Id.* at 1275.

122. *Id.* (noting that allowing state causes of action would lead to gross inconsistencies in application of Convention depending on trial court's choice of law analysis). The court indicated that allowing state causes of action would result in the application of differing state laws to various plaintiffs within the same case. *Id.*

123. *Id.* at 1276-77; see, e.g., *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (holding that punitive damages are inconsistent with Convention's implied goal of setting recovery limits at amount low enough to guarantee insurability against loss), *disapproved on other grounds*, *Wolgel v. Mexicana Airlines*, 821 F.2d 442 (7th Cir.), *cert. denied*, 484 U.S. 927 (1987); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1485 (11th Cir. 1989) (noting that since intent of Warsaw Convention is compensation, punitive damages conflict with overall scheme of liability), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *In re Air Crash Disaster at Gander*, Nfld. on Dec. 12, 1985, 684 F. Supp. 927, 931 (W.D. Ky. 1987) (preempting punitive damages claims in order to maintain liability scheme of Convention); *In re Aircrash in Bali, Indonesia* on Apr. 22, 1974, 684 F.2d 1301, 1308 (9th Cir. 1982) (disallowing punitive damages award to extent it defeats limitation of liability provision), *cert. denied*, 110 S. Ct. 277 (1989).

The Second Circuit, however, cited two lower court opinions that did not perceive a conflict between the goals of the Convention and punitive damages. See *Hill v. United Airlines*, 550 F. Supp. 1048, 1054 (D. Kan. 1982) (holding plaintiffs are entitled to punitive damages in addition to actual damages if defendant is found guilty of wilful misconduct under article 25); *In re Korean Air Lines Disaster of Sept. 1, 1983*, MDL 565(D.D.C. 1989) (affirming jury award of punitive damages without opinion), *rev'd*, 932 F.2d 1475 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991). The Second Circuit dismissed these holdings, finding them without merit because they lacked detailed reasoning. *Lockerbie Disaster*, 928 F.2d at 1277.

124. *Lockerbie Disaster*, 928 F.2d at 1278.

125. *Id.*

apply.¹²⁶ The federal common law of torts recognizes wrongful death actions and allows punitive damages designed to punish a defendant or deter certain kinds of conduct, but not those intended to compensate a victim.¹²⁷ In its analysis of the Warsaw Convention, therefore, the Second Circuit only considered whether the Warsaw Convention provides for punitive damages that are meant to punish or deter, ignoring those that are compensatory in nature.

c. The Warsaw Convention

Initially, the Second Circuit noted that the text of the Warsaw Convention does not expressly address whether punitive damages are available.¹²⁸ In holding that the Convention does not allow punitive damages, the court examined articles 17, 24, and 25.

i. Article 17

Article 17 is the source of a cause of action under the Warsaw Convention.¹²⁹ The official French text of article 17 provides that in the event of the death or wounding of a passenger, the carrier is liable for *dommage survenu*.¹³⁰ The Second Circuit, agreeing with Chief Judge Platt's district court decision in *Lockerbie Disaster*, determined that the legal meaning of the term *dommage survenu* is "damage sustained."¹³¹ Addressing the plaintiff's contention that a

126. *Id.* at 1279 (distinguishing application of tort law in lieu of contract law).

127. *Lockerbie Disaster*, 928 F.2d at 1279-80 (analyzing Convention to determine whether it permits punitive damages).

128. *Id.* at 1280.

129. *Id.* Article 17 provides:

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

Warsaw Convention, *supra* note 5, art. 17 (emphasis added).

130. *Lockerbie Disaster*, 928 F.2d at 1280. The official French text of article 17 reads as follows:

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

Warsaw Convention, *supra* note 5, art. 17 (emphasis added). The French text of the Warsaw Convention is included in *Statutes at Large*, 49 Stat. 3000-13. In the absence of expert testimony on the correctness of the translation, courts avoid speculating about the accuracy of the translation. See *Karachi Hijacking*, 729 F. Supp. 17, 18 n.4 (S.D.N.Y. 1990) (presenting arguments over proper translation), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991); see also *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 392-93, 314 N.E.2d 848, 852, 358 N.Y.S.2d 97, 103 (1974) (noting court may use testimony to make determination of correctness of translation).

131. *Lockerbie Disaster*, 928 F.2d at 1281. "Damage sustained" is the language used in the translation ratified by the Senate in 1934. *Id.* Furthermore, the Hague and Guatemala City Protocols retained the "damage sustained" language. *Id.* But see *infra* notes 199-215 and ac-

better translation is "damage occurred" or "damage happened," the court agreed with defendant Pan Am that the translation makes little difference because punitive damages do not "occur" or "happen" any more than they are "sustained."¹³² Rather, a court or jury levies punitive damages on the basis of the defendant's conduct.¹³³ As a result, only damages entirely compensatory in nature are recoverable under article 17.¹³⁴

ii. *Article 24*

Plaintiffs next asserted that, regardless of the translation of *dommage survenu*, damages recoverable under the Convention are ultimately determined according to article 24.¹³⁵ Article 24(1), providing for "any action for damages, *however founded*," indicates that a local cause of action can be brought as long as it does not exceed the limits of the Convention.¹³⁶ Article 24(2), providing that actions under the Convention are to be brought "*without prejudice*," indicates that local law governs the elements of an action.¹³⁷

The Second Circuit rejected the plaintiffs' interpretation of article 24, holding that the "however founded" clause of article 24(1) is analogous to the Convention's goal of establishing uniform liability limits.¹³⁸ As a result, article 24(1) precludes any other causes of action, including those founded in state law.¹³⁹ The court found the

companying text (indicating that since latter conventions are not dispositive of drafters' intent, to rely on this language is to judicially amend the Convention).

132. *Lockerbie Disaster*, 928 F.2d at 1281.

133. *Id.* (noting, therefore, that punitive damages are inconsistent with goals of Convention).

134. *Id.* at 1282.

135. *Id.*

136. *Id.* at 1282-83 (emphasis added). Article 24(1) provides: "In the cases covered by articles 18 and 19 any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention." Warsaw Convention, *supra* note 5, art. 24(1) (emphasis added).

137. *Lockerbie Disaster*, 928 F.2d at 1283 (emphasis added). Article 24(2) provides: "In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights*." Warsaw Convention, *supra* note 5, art. 24(2) (emphasis added).

See also *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987) (finding in wrongful death cases that Convention does not indicate how to calculate damages, but instead leaves issue to local law); *In re Aircrash in Bali, Indonesia* on Apr. 22, 1974, 684 F.2d 1301, 1306 (9th Cir. 1982) (stating that Convention specifically requires that local law govern some issues), *cert. denied*, 110 S. Ct. 277 (1989); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.) (holding that Warsaw Convention left issue of what damages plaintiffs can recover to local law), *cert. denied*, 382 U.S. 816 (1965); *Cohen v. Varig Airlines*, 62 A.D.2d 324, 334, 405 N.Y.S.2d 44, 49 (1978) (deciding that New York law governs damage claims under Convention because it is jurisdiction with dominant interest).

138. See *Lockerbie Disaster*, 928 F.2d at 1282 (finding persuasive evidence in article 24 that drafters of Warsaw Convention intended to preclude recovery of punitive damages).

139. *Id.*; cf. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1485 (11th Cir. 1989) (holding that punitive damages otherwise recoverable under state law are not permitted under Warsaw

“without prejudice” clause of paragraph (2) to be a mere restatement that personal injury or death claims brought under article 17 are subject to the same limitations of the Convention as actions under articles 18 and 19 for lost baggage and delay.¹⁴⁰ The Second Circuit interpreted article 24(2) to mean that local laws should be followed “without prejudice” only in matters of distribution of damages to heirs and the next of kin.¹⁴¹

iii. Article 25

According to the text of article 25, if the court determines that an air carrier’s misconduct is wilful, all provisions of the Warsaw Convention that seek to “limit” or “exclude” liability are inapplicable.¹⁴² Plaintiffs maintained that a finding of wilful misconduct strips the air carrier of both the monetary limitations provided for in article 22 and the Convention’s general scheme of liability allowing only compensatory damages.¹⁴³ The plaintiffs further contended that article 17 creates an independent cause of action for punitive damages when the air carrier is guilty of wilful misconduct.¹⁴⁴ This formulation is consistent with the express goal of the Convention to deter wilful misconduct.¹⁴⁵

The Second Circuit once again disagreed, concluding that wilful misconduct pursuant to article 25 does not lift the general scheme of liability or create a cause of action for punitive damages.¹⁴⁶ Instead, the Convention punishes wilful misconduct by lifting the \$75,000 cap on compensatory damages provided in article 22.¹⁴⁷ Allowing plaintiffs to recover full compensatory damages is deter-

Convention, as such finding would conflict with general scheme of liability provided by Convention), *rev’d on other grounds*, 111 S. Ct. 1489 (1991).

140. See *Lockerbie Disaster*, 928 F.2d at 1282 (interpreting paragraph cautiously). See generally Warsaw Convention, *supra* note 5, arts. 18-19 (addressing liability of airlines for lost baggage and delay).

141. See *Lockerbie Disaster*, 928 F.2d at 1283 (agreeing with Pan Am that “without prejudice” clause of article 24(2) refers to local laws of descent and distribution).

142. *Id.* at 1285; see Warsaw Convention, *supra* note 5, art. 25 (stating repercussions if carrier found guilty of wilful misconduct); *supra* note 35 (providing text of article 25).

143. See *Lockerbie Disaster*, 928 F.2d at 1285-86 (arguing that in order to deter wilful misconduct, drafters of Convention intended that all limits on liability provided by Convention be lifted when wilful misconduct occurs).

144. *Id.* at 1285.

145. See *id.* (citing article 25 of Convention to allow punitive damages for wilful misconduct).

146. See *id.* (reasoning that wilful misconduct does not subject air carrier to independent cause of action under article 17 because that would be inconsistent with uniform liability goals of Convention). The court in *Lockerbie Disaster* noted that because the Guatemala City Protocol limits compensatory damages, it follows that Convention drafters did not contemplate punitive damages—even in the face of wilful misconduct. *Id.* at 1287.

147. *Id.* at 1285 (stating that purpose of article 25 is not to punish defendant, but rather to ensure that defendant air carrier does not escape consequences of its wrongdoing).

rence enough; to allow punitive damages in addition would be unreasonable and superfluous.¹⁴⁸

d. Policy considerations

Finally, the Second Circuit found that policy considerations foreclose the possibility of punitive damages under the Convention.¹⁴⁹ Allowing punitive damages would severely cripple most of the original objectives of the Convention: limiting liability to foster the growth of the airline industry, creating uniformity of liability laws between nations, ensuring that air carriers can effectively insure against loss, and compensating injured passengers with a minimum of litigation.¹⁵⁰

C. In re Korean Air Lines Disaster on September 1, 1983

Less than one month after the decision by the Second Circuit in *Lockerbie Disaster*, the District of Columbia Circuit, in *In re Korean Air Lines Disaster of September 1, 1983*,¹⁵¹ joined its sister circuits and became the third court of appeals to disallow punitive damages in claims governed by the Warsaw Convention.¹⁵² The litigation arose from the downing of Korean Air Lines Flight 007 by a Soviet military interceptor aircraft over the Sea of Japan.¹⁵³ A jury found Korean Air Lines (KAL) guilty of wilful misconduct and awarded damages to the plaintiffs, including \$50 million in punitive damages.¹⁵⁴ On appeal, the District of Columbia Circuit upheld the jury's finding of wilful misconduct.¹⁵⁵ Over a vigorous dissent by Chief Judge Mikva, however, the District of Columbia Circuit vacated the jury's \$50 million punitive damages award, substantially relying on the Second Circuit opinion in *Lockerbie Disaster* and the Eleventh Circuit opinion in *Floyd*.¹⁵⁶ The District of Columbia Cir-

148. *Id.* at 1285-86 (finding that civil law concepts find full compensatory damages to be sufficient deterrence).

149. *Id.* at 1287-88.

150. *Id.*

151. 932 F.2d 1475 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991).

152. *See also Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1484 (11th Cir. 1989) (interpreting Warsaw Convention to preclude recovery of punitive damages), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *Lockerbie Disaster*, 928 F.2d 1267, 1281 (2d Cir. 1991) (concluding that Warsaw Convention intended compensatory damages only), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

153. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1479 (D.C. Cir. 1991), *petition for cert. filed*, No. 91-251 (Aug. 9, 1991). At the time of the shooting, the flight was more than 300 nautical miles off course and in Soviet territory. *Id.* at 1478.

154. *Id.* at 1479 (reporting that trial judge entered judgment on verdict against Korean Air Lines).

155. *Id.* at 1479-81 (denying KAL's motion for JNOV because fact scenario presented to jury could reasonably lead to finding of wilful misconduct).

156. *Id.* at 1490.

cuit held that punitive damages are not recoverable under the Warsaw Convention because the "damage sustained" clause in article 17 contemplates only compensatory damages.¹⁵⁷

The court also rejected the plaintiffs' second argument that article 24, allowing for damages "however founded," leaves the measure of damages to local law.¹⁵⁸ Instead, the District of Columbia Circuit interpreted article 24 to merely reiterate that actions falling within the scope of the Warsaw Convention must abide by its limitations—including the compensatory limitation of article 17.¹⁵⁹ Furthermore, the District of Columbia Circuit explained that contemplating whether local law allows punitive damages merely "begs the question" of whether article 17 allows any recovery beyond compensatory damages.¹⁶⁰

The court rejected the argument that, upon a finding of wilful misconduct, article 25 prohibits the carrier from availing itself of any exclusion or limitation on liability—including the general scheme of liability that restricts a plaintiff's recovery to compensatory damages.¹⁶¹ In dismissing this argument, the District of Columbia Circuit in *Korean Air Lines Disaster* adopted wholesale the reasoning of the Second Circuit in *Lockerbie Disaster* and the Eleventh Circuit in *Floyd*.¹⁶² Article 25 merely voids the article 22 limitation on compensatory damages; it does not authorize an independent cause of action for punitive damages.¹⁶³ Finally, the District of Columbia Circuit supported its conclusions by examining policy. The court found that the Warsaw Convention is an agreement between

157. *Id.* at 1487 (agreeing with Second Circuit that plaintiffs can only recover for actual injuries and losses). The District of Columbia Circuit did not embrace the exclusivity theory of the Second Circuit, however, since state causes of action were not at issue in the litigation. *Id.* at 1488. Rather, the plaintiffs in *Korean Air Lines Disaster* based their claims on the Warsaw Convention and federal maritime law. *Id.* at 1487-88. *But see id.* at 1492 (Mikva, C.J., dissenting) (initially praising majority opinion for not deciding exclusivity, but pointing out that reliance on *Lockerbie Disaster* is nevertheless flawed because premise of that decision is exclusivity).

158. *Korean Air Lines Disaster*, 932 F.2d at 1484.

159. *Id.* at 1485 (requiring liability assessment to rely on article 17, not article 24).

160. *Id.* at 1488 (stating that although article 24 leaves measure of damages recoverable under article 17 to local law, Convention is unclear on whether plaintiffs can recover punitive damages at all).

161. *Id.* (noting that finding of wilful misconduct under article 25 does not create right to punitive damages).

162. *Id.* at 1488-89 (explaining that "it is settled that willful misconduct negates the due care exclusion from liability contained in Article 20 and the monetary limitations contained in Article 22"). The majority opinion in *Korean Air Lines Disaster* cited *Lockerbie Disaster* for the proposition that article 17 is not among the provisions to which article 25 applies. *Id.* at 1488-89. The court cited *Floyd* for the proposition that subsequent modifications of the Convention clarify the original intent of article 25. *Id.* at 1489; *see supra* notes 91-101 and accompanying text (analyzing *Floyd* decision); *supra* notes 110-50 and accompanying text (reviewing *Lockerbie Disaster* decision).

163. *Korean Air Lines Disaster*, 932 F.2d at 1489.

the air carrier and passengers in which both parties gain.¹⁶⁴ While air carriers benefit from the limitation on liability, passengers benefit from a reduced burden in litigation because the Convention makes the air carrier presumptively liable.¹⁶⁵

III. ANALYSIS OF THE TREND REJECTING THE RECOVERY OF PUNITIVE DAMAGES

Neither the Warsaw Convention nor the Montreal Agreement expressly identifies whether punitive damages are recoverable in cases of wilful misconduct by the air carrier.¹⁶⁶ Furthermore, the Supreme Court has not addressed the issues of punitive damages or exclusivity of the cause of action under the Convention in any of its Warsaw Convention decisions.¹⁶⁷

The recent holdings of the Second, Eleventh, and District of Columbia Circuits, however, reflect a disturbing trend in Warsaw Convention interpretation. The decisions by the courts of appeals in *Floyd*, *Lockerbie Disaster*, and *Korean Air Lines Disaster* are flawed. A closer examination of the three decisions reveals where the courts went astray.

Floyd did not follow the guidelines for Convention interpretation laid out by the Supreme Court in *Air France v. Saks*.¹⁶⁸ Furthermore, because the Eleventh Circuit decided *Floyd* before the Supreme Court decision in *Chan v. Korean Air Lines, Inc.*,¹⁶⁹ it is entitled to less deference. The Second Circuit in *Lockerbie Disaster* based its conclusions on an erroneous premise of exclusivity—a premise that curiously ignores twenty years of Second Circuit precedent.¹⁷⁰

164. *Id.*

165. *Id.* (noting that it was these benefits that gave impetus to ratification of Convention in 1934); see *supra* note 34 and accompanying text (explaining other benefits from adherence to Warsaw Convention).

166. See *Floyd*, 872 F.2d at 1486 (acknowledging that Convention does not explicitly address punitive damages); *Lockerbie Disaster*, 928 F.2d at 1280 (agreeing that minutes and notes of Convention shed no light on whether punitive damages are allowable under Convention); *Korean Air Lines Disaster*, 932 F.2d at 1485 (explaining that Convention does not address punitive damages).

167. See *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489, 1502 (1991) (refusing to decide exclusivity since certiorari not granted on that issue); *Air France v. Saks*, 470 U.S. 392, 408 (1985) (declining to express view on whether state cause of action can go forward).

168. See *supra* notes 78-81 and accompanying text (discussing *Saks* decision).

169. See *supra* notes 82-85 and accompanying text (discussing *Chan* decision). The Court in *Chan* concluded that the text of a treaty must govern. When the text is clear and unambiguous, courts have no power to amend it. *Chan v. Korean Air Lines*, 490 U.S. 122, 134 (1989).

170. See *Korean Air Lines Disaster*, 928 F.2d at 1492 (Mikva, C.J., dissenting) (describing exclusivity finding of Second Circuit as "astounding"); see also *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980) (rejecting notion that Convention intended exclusivity); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978) (overruling longstanding precedent in concluding that Convention creates cause of action), *cert. denied*, 439 U.S. 1114 (1979).

Furthermore, the court in *Lockerbie Disaster* adhered to the arguments espoused in *Floyd* and, as a result, judicially amended the Warsaw Convention. Finally, the court in *Korean Air Lines Disaster* relied heavily on both *Lockerbie Disaster* and *Floyd*, added nothing new to Warsaw Convention jurisprudence, and merely perpetuated fallacious arguments.¹⁷¹

In contrast, the dissenting opinion in *Korean Air Lines Disaster* by Chief Judge Mikva of the District of Columbia Circuit is the better reasoned opinion.¹⁷² In formulating his dissenting opinion, Chief Judge Mikva rejected exclusivity of the cause of action under the Warsaw Convention, adhered to the plain meaning of the text of the Warsaw Convention, and abided by the intent of the drafters to leave damages issues to local law. Although not binding as law, Chief Judge Mikva's dissent illustrates that the arguments first articulated by Judge Sprizzo in the now-reversed holding of *Karachi Hijacking*¹⁷³ are still intellectually viable.

Chief Judge Mikva persuasively argued that the Warsaw Convention does not provide the exclusive remedy for injured international air passengers.¹⁷⁴ Criticizing the court in *Lockerbie Disaster* for basing its decision on exclusivity, Chief Judge Mikva noted that the Second Circuit rejected twenty years of precedent in order to do so.¹⁷⁵ He argued that, although the majority in *Korean Air Lines Disaster* was quick to reject exclusivity, the court's frequent citation of *Lockerbie Disaster* for the proposition that article 17 unequivocally precludes an independent cause of action for punitive damages is misguided in light of the Second Circuit's premise of exclusivity.¹⁷⁶

171. *Korean Air Lines Disaster*, 932 F.2d at 1486.

172. See *Korean Air Lines Disaster*, 932 F.2d at 1490-94 (Mikva, C.J., dissenting).

173. See *Karachi Hijacking*, 729 F. Supp. 17 (S.D.N.Y. 1990) (holding that punitive damages are recoverable under Warsaw Convention), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

174. See *Korean Air Lines Disaster*, 932 F.2d at 1492 (Mikva, C.J., dissenting) (discussing exclusivity doctrine).

175. See *id.* (expressing disbelief over Second Circuit's radical departure). Chief Judge Mikva also pointed out that, in addition to rejecting its own precedent, the Second Circuit mistakenly relied on legislation enacted by other signatories as support for its theory of exclusivity. *Id.* at 1492. The mere fact that countries had to legislate exclusivity is compelling evidence that the Convention itself does not do so. *Id.*

176. See *Korean Air Lines Disaster*, 932 F.2d at 1493 (Mikva, C.J., dissenting) (emphasizing flaws in *Lockerbie Disaster* reasoning). Chief Judge Mikva also undermines the majority's reliance in *Korean Air Lines Disaster* on the Eleventh Circuit's opinion in *Floyd*. *Id.* In *Floyd*, the court relied on a preemption theory to reject the plaintiff's attempt to obtain punitive damages. *Id.* Preemption, however, is inappropriate in *Korean Air Lines Disaster* because neither of the two bodies of law in question, the Warsaw Convention and federal maritime law, can preempt the other. *Id.* (citing Committee of United States Citizens v. Reagan, 859 F.2d 929, 936-37 (D.C. Cir. 1988) and proclaiming Warsaw Convention equal in stature to other domestic federal law because of its status as ratified treaty).

A. *Exclusivity: A Fundamental Error*

In *Lockerbie Disaster*, the Second Circuit asserted that the cause of action under article 17 of the Warsaw Convention is exclusive.¹⁷⁷ As a result, all state law causes of action are preempted. The premise of exclusivity is incorrect for two reasons. First, exclusivity circumvents longstanding Second Circuit precedent.¹⁷⁸ Second, article 24 expressly allows for independent causes of action as long as the conditions of the Convention are met.¹⁷⁹

As noted by Chief Judge Mikva in his *Korean Air Lines Disaster* dissent,¹⁸⁰ the Second Circuit, in *Benjamins v. British European Airways*,¹⁸¹ reversed twenty years of precedent and held for the first time that the Warsaw Convention creates a cause of action.¹⁸² In *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*,¹⁸³ moreover, the court suggested that the cause of action under the Convention is not necessarily exclusive.¹⁸⁴ Now, with *Lockerbie Disaster*, "the Second Circuit has gone full circle from believing that the Convention provides no cause of action to deciding that it provides the sole cause of action for plaintiffs."¹⁸⁵ The theory of exclusivity embraced by the court in *Lockerbie Disaster* is erroneous because it does not recognize that article 24 clearly leaves damages issues to local law.

B. *The Plain Meaning of the Text*

In interpreting article 25, the courts in *Floyd*, *Lockerbie Disaster*, and

177. *Lockerbie Disaster*, 928 F.2d at 1274.

178. See *Korean Air Lines Disaster*, 932 F.2d at 1492 (Mikva, C.J., dissenting) (calling exclusivity "fundamental error"); see *infra* notes 181-85 and accompanying text (restating Second Circuit precedent).

179. See *Korean Air Lines Disaster*, 932 F.2d at 1493-94 (Mikva, C.J., dissenting) (explaining drafters "clearly contemplated" other causes of action by insertion of "any action for damages, however founded" in article 24); *infra* notes 186-215 and accompanying text (discussing plain meaning arguments of articles 24 and 25).

180. See *supra* notes 172-76 and accompanying text (discussing Chief Judge Mikva's dissent).

181. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

182. *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Prior to *Benjamins*, the law of the Second Circuit was that while the Warsaw Convention created a presumption of carrier liability, it did not provide a cause of action. See *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir.) (stating that purpose of Convention was only to provide uniformity of procedure and remedy), *cert. denied*, 355 U.S. 907 (1957); *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436, 439 (2d Cir. 1953) (denying claim for "moral damages"), *cert. denied*, 348 U.S. 820 (1954); see also *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.) (following *Komlos/Noel* rule in Ninth Circuit), *cert. denied*, 431 U.S. 974 (1977).

183. 617 F.2d 936 (2d Cir. 1980).

184. See *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 941-42 (2d Cir. 1980) (indicating that if article 24 creates contract cause of action, then drafters did not intend cause of action to be exclusive).

185. *Korean Air Lines Disaster*, 932 F.2d at 1492 (Mikva, C.J., dissenting) (explaining that court dismissed *Tokio Marine* language as dicta in order to reach exclusivity conclusion).

Korean Air Lines Disaster ignore the plain meaning of the text of article 25.¹⁸⁶ Plaintiffs argued that if an air carrier is found guilty of wilful misconduct, the limitations on liability in the Convention are lifted, thereby clearing the way for a recovery of punitive damages.¹⁸⁷ This interpretation is appropriate in light of the Supreme Court's admonitions in *Chan v. Korean Air Lines, Ltd.* and *Air France v. Saks* that the text of the Convention must govern.¹⁸⁸ The text of article 25 of the Warsaw Convention states that an air carrier cannot "avail himself of the provisions of this Convention which *exclude* or *limit* his liability, if the damage is caused by wilful misconduct"¹⁸⁹ The meaning of this text is clear and unambiguous: while a primary purpose of the Warsaw Convention is to allow air carriers to insure against accidents that otherwise could bankrupt them, the Convention was not intended to protect air carriers from, or allow them to insure against, wilful misconduct or gross negligence.¹⁹⁰ If an air carrier is found guilty of such conduct, it cannot secure the benefit of the Convention's liability limitations.¹⁹¹ Any other reading of article 25 would be tantamount to a judicial alteration of the Convention's plain language—a conclusion clearly prohibited by *Chan*.¹⁹²

186. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (stating that clear meaning of treaty text must govern courts' interpretation); e.g., *Floyd*, 872 F.2d at 1483-85 (rejecting contention that article 25 authorizes action for punitive damages because intent of Convention is compensation); *Lockerbie Disaster*, 928 F.2d at 1285 (concluding that article 25 affects article 22 monetary limitations and does not pertain to creation of cause of action under article 17); *Korean Air Lines Disaster*, 932 F.2d at 1488 (finding that since article 17 neither excludes nor limits liability, article 25 does not apply to it); see also MINUTES, *supra* note 5, at 255 (deciding to leave determination of damages to local law).

187. See Brief for Appellants, *Lockerbie Disaster*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388) (explaining that language of article 25 is not ambiguous; a finding of wilful misconduct results in "ultimate sanction" of no liability limitation); *Korean Air Lines Disaster*, 932 F.2d at 1484 (restating plaintiff's argument that punitive damages are recoverable when wilful misconduct shown).

188. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (noting that since all governments adhering to Warsaw Convention adopted same text, that text must be binding on courts); *Air France v. Saks*, 470 U.S. 392, 396-400 (1985) (analyzing both French and English versions of text to determine meaning of term "accident").

189. Warsaw Convention, *supra* note 5, art. 25 (emphasis added).

190. See Hickey, *supra* note 49, at 606 (explaining that article 25 was added to Convention so as not to offend member States where public policy prohibited protection of persons guilty of wrongful acts).

191. Warsaw Convention, *supra* note 5, art. 25; see Lowenfeld & Mendelsohn, *supra* note 1, at 503 (stating that finding of wilful misconduct deprives air carrier of limited liability benefits); Kreindler, *supra* note 40, at 294 (noting that air carrier cannot avail itself of Convention provisions if accident caused by wilful misconduct).

192. *Chan*, 490 U.S. at 135 (emphasizing that whether text is clear or not, courts do not have authority to amend plain language of Convention in order to interpret parties' intentions). The Court in *Chan* quoted Justice Story:

[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court

The Second Circuit and District of Columbia Circuit flatly rejected the argument that a finding of wilful misconduct creates a cause of action for punitive damages.¹⁹³ Instead, both courts chose to follow the reasoning first put forth by the Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.*, emphasizing the compensatory intent of article 17.¹⁹⁴ As a result, in these three circuits, while a finding of wilful misconduct under article 25 will enable a plaintiff to recover compensatory damages in excess of the \$75,000 limitation, an independent cause of action for punitive damages is not available.

To reach this conclusion, the courts of appeals had to construe the wording of the wilful misconduct exception to reflect what they perceived to be the intention of the contracting parties.¹⁹⁵ As evidence of this intent, the court in *Floyd* utilized the Hague Protocol to support its conclusion.¹⁹⁶ Article 25, as amended by the Hague Protocol, provides that: "[t]he 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 . . ."¹⁹⁷ Concluding that this new formulation qualified as clarification of the original intent of the contracting parties, the court in *Floyd* held that article 25 only affects the monetary limits of article 22.¹⁹⁸

The courts in *Lockerbie Disaster* and *Korean Air Lines Disaster* readily embraced the Eleventh Circuit's inappropriate use of the unratified Hague Protocol to judicially amend the wilful misconduct excep-

supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Id. at 135 (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)).

193. *Lockerbie Disaster*, 928 F.2d at 1285 (finding that while wilful misconduct voids certain provisions of liability, article 17 is not among those affected); *Korean Air Lines Disaster*, 932 F.2d at 1485 (deciding that wilful misconduct does not affect limitation provided in article 17 for compensatory damages).

194. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1485-86 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

195. See *Floyd*, 872 F.2d at 1483 (claiming that Hague Protocol "casts no doubt" that delegates understood article 25 to refer only to limitations of article 22); *Lockerbie Disaster*, 928 F.2d at 1286-87 (explaining that construction of Convention precludes conclusion that article 25 lifts all limitations on carrier liability); *Korean Air Lines Disaster*, 932 F.2d at 1485 (explaining that punitive awards are contrary to expectations of drafters).

196. See *Floyd*, 872 F.2d at 1483 (arguing that language in Hague Protocol establishes that intent of article 25 is only to lift monetary limits of article 22).

197. See *id.* (emphasis added) (quoting language of Hague Protocol). In full, the amended wilful misconduct exception in the Hague Protocol states that "[t]he 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." Hague Protocol, *supra* note 50, art. XIII.

198. *Floyd*, 872 F.2d at 1483. The court in *Floyd* acknowledged in a footnote that the Hague and Montreal Protocols are only "instructive" because they were not ratified by the Senate. *Id.* at 1484 n.35.

tion.¹⁹⁹ Unfortunately, the Eleventh Circuit misinterpreted the example espoused by the Supreme Court in *Air France v. Saks*.²⁰⁰ In *Saks*, the Court needed to define the term "accident" in article 17 because neither the treaty nor the drafting records provided a concise definition.²⁰¹ In formulating a definition, the Supreme Court looked to the language of the unratified Guatemala City Protocol for clarification.²⁰² Facially, it appears the court in *Floyd* employed a similar methodology by relying on the language of the unratified Hague Protocol to define wilful misconduct.²⁰³

Floyd, however, is distinguishable from *Saks* in two ways. First, the Supreme Court in *Saks* used subsequent history to expand the scope of carrier liability, whereas the Eleventh Circuit in *Floyd* construed subsequent history to contract the scope of liability.²⁰⁴ In *Saks*, the Court broadened the term "accident" to include unexpected or unusual events that are external to the passenger, noting that the language of the Guatemala City Protocol also made this change.²⁰⁵ In contrast, the court in *Floyd* cited the Hague Protocol as support for narrowing the definition of wilful misconduct so that a carrier only loses the benefits of the monetary limits, but not the general scheme of liability.²⁰⁶ Thus, the court in *Floyd* improperly contracted the scope of carrier liability.²⁰⁷

Second, the Court in *Saks* clearly indicated that drafting history is only instructive, not dispositive.²⁰⁸ Accordingly, the Supreme Court gave only minimum credence to the Guatemala City Protocol.²⁰⁹ On the other hand, the courts in *Floyd*, and in turn *Lockerbie Disaster*

199. See *Lockerbie Disaster*, 928 F.2d at 1286-87 (declaring that later negotiations reflect that parties did not believe Convention allowed for punitive damages); *Korean Air Lines Disaster*, 932 F.2d at 1489 (citing *Floyd* and stating that subsequent protocols make it clear that limitation of article 22 is only provision affected by article 25).

200. *Air France v. Saks*, 470 U.S. 392, 403 (1985) (explaining that subsequent interpretations of Convention by signatories can only help clarify meaning of text).

201. *Id.* at 403; see *supra* notes 74-88 and accompanying text (discussing interpretation guidelines for Warsaw Convention).

202. See *Saks*, 470 U.S. at 403 (finding statements of Warsaw Convention signatories at Guatemala City conference instructive in interpreting Convention).

203. See *Floyd*, 872 F.2d at 1483-84 (looking to Hague Protocol language concerning liability limits).

204. See *id.* (considering provisions of Hague Protocol); cf. *Lockerbie Disaster*, 733 F. Supp. 547, 551 (E.D.N.Y. 1990) (referring to minutes of Hague Protocol negotiations to support position that wilful misconduct results only in loss of monetary liability limitations), *aff'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991).

205. *Saks*, 470 U.S. at 405.

206. *Floyd*, 872 F.2d at 1483.

207. *Id.*; see also text accompanying *infra* notes 214-15 (acknowledging that revising wilful misconduct definition may be necessary, but rejecting appropriateness of judicially amending the original Convention).

208. *Saks*, 470 U.S. at 403 (recognizing that because Guatemala City Protocol was never ratified, it could not govern disposition of case).

209. *Id.*

and *Korean Air Lines Disaster*, relied heavily on unratified protocols in holding that only the monetary limitation in article 22 is lifted in cases of wilful misconduct.²¹⁰

Chief Judge Mikva, dissenting in *Korean Air Lines Disaster* and employing similar reasoning to the district court in *Karachi Hijacking*, noted the improper use of the subsequent modifications of the Convention by the three courts.²¹¹ At best, the unratified Hague and Guatemala City Protocols and their drafting histories merely illustrate the ambiguity in the original wording of the wilful misconduct exception.²¹² Chief Judge Mikva found it more likely, however, that the amended article 25 represented a quid pro quo for the overall higher liability limits imposed by the Hague Protocol.²¹³

Accordingly, excessive reliance on subsequent modifications of the Convention is misplaced. Although member nations of the Warsaw Convention recognize that a clarification of the wilful misconduct exception might be necessary, the fact remains that such an alteration has not been made in a binding amendment.²¹⁴ The Supreme Court prohibits the judiciary from speculating about the intentions of the drafters when the text is clear and unambiguous.²¹⁵

210. See *Korean Air Lines Disaster*, 932 F.2d at 1489 (citing Hague and Montreal Protocols to support conclusion); *Lockerbie Disaster*, 928 F.2d at 1281 (looking to unratified Hague and Guatemala City Protocols); *Floyd*, 872 F.2d at 1483 (referring to minutes of Hague Protocol).

211. *Korean Air Lines Disaster*, 932 F.2d at 1493 (Mikva, C.J., dissenting); cf. *Karachi Hijacking*, 729 F. Supp. 18 (S.D.N.Y.), *rev'd*, 928 F.2d 1267 (2d Cir. 1991), *petition for cert. filed*, No. 91-259 (Aug. 12, 1991). Judge Sprizzo stated:

The fact that the Contracting Parties [of the Hague Protocol] saw the need to amend Article 25 to achieve precisely the same result that Pan Am would have this Court achieve by judicial interpretation affords additional support for the conclusion that the policy considerations underlying *Chan* preclude a judicial amendment of Article 25. This is especially true since the United States has refused to adopt that amendment.

Id. at 20.

212. See *Korean Air Lines Disaster*, 932 F.2d at 1493 (Mikva, C.J., dissenting) (stating that need for subsequent conventions to clarify article 25 demonstrates that Convention's text is ambiguous). The issue of ambiguity is critical to the guidelines expressed by the Supreme Court in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1985). If the text is clear, it alone must govern. If the text is ambiguous, however, courts may consult drafting history for assistance in the interpretation. *Chan*, 490 U.S. at 134.

213. See *Korean Air Lines Disaster*, 932 F.2d at 1494 (Mikva, C.J., dissenting) (explaining how Convention resembles exchange commonly found in workmen's compensation laws). The concept of quid pro quo is essential to the proposed recommendations of this Comment. See *infra* notes 228-32 and accompanying text (outlining balance between liability limitation and definition of wilful misconduct); *supra* note 49 and accompanying text (explaining need for wilful misconduct definition to balance with liability limit).

214. See *Saks*, 470 U.S. at 403 (finding Guatemala City Protocol not binding in the United States because not ratified); *Floyd*, 872 F.2d at 1484 & n.35 (recognizing that Hague and Montreal Protocols have never been ratified by Senate); *Lockerbie Disaster*, 928 F.2d at 1287 (acknowledging that Guatemala City Protocol was never ratified); *Korean Air Lines Disaster*, 932 F.2d at 1493 (stating that protocols not binding because not ratified); Cohen, *supra* note 18, 146-47 (stating that United States failed to ratify attempts to update Warsaw Convention).

215. See *Chan*, 490 U.S. at 134.

It is not within the power of the courts, therefore, to effect a judicial amendment of the Warsaw Convention when the United States Senate has not chosen to do so.

C. Damages Issues Left to Local Law

The official title of the Warsaw Convention is "Convention for the Unification of Certain Rules Relating to International Transportation by Air."²¹⁶ The title emphasizes that it addresses only "certain" rules relating to international air travel.²¹⁷ Other rules, therefore, are left to local law. During the preparatory meetings for the 1929 Convention, the drafting committee decided that the scope of the Convention would not encompass damages issues.²¹⁸ Instead, the drafters added article 24 to the Convention to provide coverage under the Convention for damages actions "however founded"²¹⁹ and "without prejudice as to who are the persons who have the right to bring suit and what are their respective rights."²²⁰

The Convention also leaves issues other than damages to local law. For example, article 28(2) requires a court to apply forum law on issues of procedure.²²¹ Article 21 defers to a court's application of local law in cases of contributory negligence.²²² Article 29 defers to local law to set the statute of limitations.²²³ The Convention,

216. See *supra* note 5 and accompanying text (explaining title of Warsaw Convention).

217. See *Floyd*, 872 F.2d at 1481 n.30 (emphasizing that drafters deliberately made adjustment to title of Convention to emphasize that not all issues are to be governed by Convention; some are to be governed by local law).

218. See MINUTES, *supra* note 5, at 255 (reporting that delegates realized it would be impossible to agree on universal set of recoverable damages or who would have standing to bring suit in case of death, so these issues were left to local law). In the report of the CITEJA to the Warsaw Convention, the issue of damages was addressed:

The question was asked of knowing if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independently from the present Convention.

Report of Henri DeVos, CITEJA Reporter (Sept. 1928), *reprinted in*, MINUTES, *supra* note 5, at 255.

219. Warsaw Convention, *supra* note 5, art. 24(1).

220. Warsaw Convention, *supra* note 5, art. 24(2); see Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 323, 327-28 (1959) (explaining that early drafts of Warsaw Convention inserted language of article 24 to provide mechanism for tort actions to be brought outside of Convention). The possibility of tort actions was contemplated and specifically raised in preliminary discussions. *Id.* But see *Lockerbie Disaster*, 928 F.2d at 1283-85 (finding that article 24 only serves to facilitate distribution to heirs and next of kin).

221. See Warsaw Convention, *supra* note 5, art. 28(2) (providing that "questions of procedure shall be governed by the law of the court to which the case is submitted").

222. See Warsaw Convention, *supra* note 5, art. 21 (providing that if "carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provision of its own law, exonerate the carrier wholly or partly from his liability").

223. See Warsaw Convention, *supra* note 5, art. 29(2) (providing that "method of calculat-

therefore, does not preempt all state legislation.²²⁴ Accordingly, a court's deference to local law in cases of wilful misconduct is consistent with the Convention drafters' intentions to defer some issues to local law.

IV. RECOMMENDATIONS

As the twenty-first century approaches, the inability of the sixty-year-old Warsaw Convention to protect the interests of international airline passengers is apparent.²²⁵ If the disturbing trend of denying recovery of punitive damages continues in the courts, injured plaintiffs will have little recourse against an air carrier guilty of wilful misconduct. There are two possible remedies to this dilemma.

The first alternative is a judicial remedy. The Supreme Court should grant a Petition for Writ of Certiorari on the issues raised in this Comment and put an end to the misinterpretation and alteration of the Warsaw Convention by the courts of appeals. The Supreme Court should hold that the cause of action under the Convention is not exclusive. Furthermore, following its own precedent in *Saks* and *Chan*, the Court should hold that article 25 creates an independent cause of action for punitive damages upon a finding of a carrier's wilful misconduct.

The second alternative is a legislative remedy. As public outcry and congressional opinion turn increasingly negative, pressure to revise the Warsaw Convention will surely follow.²²⁶ Negotiators for the United States must balance the interests and rights of American travelers with the purposes of the 1929 treaty.²²⁷ To accomplish

ing the period of limitation shall be determined by the law of the court to which the case is submitted").

224. See *In re Aircrash at Bali, Indonesia* on Apr. 22, 1974, 684 F.2d 1301, 1307 (9th Cir. 1982) (stating that because Convention requires application of local law to some issues, it was not intended to preempt all state legislation).

225. See Gam, *Liability Damages for Injuries Sustained by Passengers in the Event of Hijacking of Aircraft and Other Violations of Aviation Security*, LLOYD'S MARITIME & COM. L.Q. 217, 234 (May 1988) (noting difficulties of imposing old system onto new phenomena such as terrorism).

226. See Kreindler, *supra* note 40, at 294 (hypothesizing that public shock and indignation over publicized accidents helped begin movement in United States to withdraw from Warsaw Convention in 1965).

227. See Hollings, *supra* note 66, at 69 (pronouncing most recent attempt at revision "manifestly unfair" and violating basic tenets of American jurisprudence). Senator Hollings argued that the Convention's limitations on liability are outmoded and inadequate in light of the rising popularity of air travel and the increased risks faced by international travelers. *Id.* at 70. He noted that American citizens represent over one-half of all international air passengers. *Id.* Accordingly, American negotiators should have the best interest of Americans in mind when considering revisions. *Id.*

The Warsaw Convention was widely accepted because it was innovative for its time. *Id.*; see also Mankiewicz, *supra* note 1, at 239 (noting that Warsaw Convention is one of most success-

this task, negotiators should consider three principles for any contemplated revision of the Warsaw Convention. Most importantly, they must recognize that the three principles are interdependent and should take steps to ensure that a compromise on one precept does not ultimately undermine the effectiveness of the other two.

First, drafters should increase the article 22 liability limitation of air carriers for accidents under article 17.²²⁸ The formulation of the wilful misconduct definition will necessarily affect the amount of the increase. For example, the more restrictive the definition of wilful misconduct, the higher the liability limit should be.²²⁹ Once a passenger proves the occurrence of an accident, as required by article 17, the carrier should be strictly liable for any provable injuries up to the liability limitation.²³⁰ It is essential, however, that the liability limitation not be an absolute cap on recovery.²³¹ The possibility of expensive litigation and potential damages awards far in excess of the limitation provides the best real incentive for the air carrier to act with care.²³²

ful uniform law conventions ever enacted). Few nations had laws governing air carrier liability in 1929. Thus, there were very few obstacles to prevent acceptance of uniform rules. *Id.* The same is not true today, and negotiators will not have the benefit of "novelty" as they revise the provisions of the Convention. *See id.* at 239 n.1 (stating that many States have adopted their own aviation legislation using the Warsaw Convention as guide).

228. *See Moore, supra* note 34, at 239 (noting that \$75,000 limit was considered inadequate in 1966 when United States signed Montreal Agreement and is even more inadequate now). Increasing the liability limitation may prove difficult. If past attempts at revision are any indication, a conflict will exist between the United States, which seeks an increase, and other member nations that resist an increase. *Id.*; *see Cohen, supra* note 18, at 167 (suggesting that if uniformity is "mortar" holding Convention together, member nations should be able to agree on world-wide liability limit); *supra* notes 48-49 and accompanying text (discussing conflict between United States and other nations over liability limitations). If on the other hand, uniform liability limits are unimportant, the parties should abolish them. *Id.* Cohen suggests as an alternative that each state or nation could establish its own liability level. *Id.*

229. One objection to the Guatemala City Protocol was that because the wilful misconduct exception was eliminated, the \$100,000 limitation became an absolute cap on recovery. *See supra* note 66 (discussing Guatemala City Protocol).

230. *See Cohen, supra* note 18, at 163 (noting that air carriers agreed in Montreal Agreement to waive defenses to liability in cases where plaintiff seeks damages within liability limitation). The plaintiff must still prove that the injury for which damages are claimed resulted from an accident within the meaning of article 17. *See Air France v. Saks*, 470 U.S. 392, 405 (1985) (holding that air carrier is liable under provisions of Warsaw Convention only if passenger's injury is "caused by an unexpected or unusual event or happening that is external to the passenger"); Hickey, *supra* note 49, at 606-07 (discussing strict liability in public transportation). Hickey argues that the inclusion of a strict liability provision in the Montreal Agreement amounts to a recognition of the early tort principle that the actor should be liable, regardless of fault, for his injury-producing conduct. *Id.* This argument is justified on the grounds that the defendant is usually the more efficient risk bearer and can distribute losses among community members who benefit from these activities. *Id.*

231. *See Hickey, supra* note 49, at 611 (noting that if limitation is absolute, most airlines will eliminate insurance because risk is no longer factor); Kennelly, *A Novel Rule of Liability: Its Implications*, 37 J. AIR L. & COM. 343, 350 (1970) (arguing that absolute liability cap negates airlines' need for insurance because insurance is only necessary to compensate for risks).

232. *See Hickey, supra* note 49, at 618-19 (arguing that fear of wilful misconduct claims

Second, drafters should retain the wilful misconduct exception to the liability limitation. This is compatible with the Warsaw Convention's original goal of protecting airlines from inevitable accidents and negligent human error, but not wilful, wanton misbehavior.²³³ The drafters must clarify the definition of wilful misconduct in article 25 as to what behavior activates it²³⁴ because the current formulation of wilful misconduct addresses only deliberate, intentional acts.²³⁵ The drafters should incorporate a term that also encompasses careless acts done without regard for the consequences.²³⁶ This formulation would ensure that airlines institute strict security measures to protect passengers from the hazards of international air travel, such as terrorist attacks.²³⁷ Furthermore, the drafters should

forces airlines to be more safety conscious); Hollings, *supra* note 66, at 70 (indicating that mere threat of recovery above stated limit increases settlement value of claims in cases of wilful misconduct).

233. See MINUTES, *supra* note 5, at 58 (explaining that wilful misconduct clause upholds common law concept that each person is liable for personal error).

234. See W. TURLEY, *supra* note 30, § 5.09, at 231 (recognizing "wilful misconduct" as one of the most frequently litigated of Convention's terms); Hickey, *supra* note 49, at 605 (discussing confusion surrounding meaning of wilful misconduct); Mankiewicz, *supra* note 1, at 243 (noting difficulty and ambiguity involved with wilful misconduct exception); *supra* notes 35-36 and accompanying text (discussing wilful misconduct exception of Warsaw Convention).

235. See Kreindler, *supra* note 40, at 294-95 (noting that Hague Protocol and court in *Froman v. Pan Am. Airways, Inc.* define wilful misconduct in identical manner). Kreindler argues that under this definition, a plaintiff will never prevail because it is impossible to prove intent and virtually impossible to prove knowledge that damage would result. *Id.* at 295.

236. See, e.g., *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775, 778 (D.C. Cir.) (approving definition of wilful misconduct as covering deliberate acts, as well as careless acts done without regard for consequences), *cert. denied*, 368 U.S. 921 (1961); *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 124 (2d Cir.) (affirming jury instructions allowing for reckless disregard of probable consequences in definition of wilful misconduct), *cert. denied*, 341 U.S. 951 (1951); *American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949) (refusing to agree with interpretation of article 25 requiring intent to cause injury to passengers); MINUTES, *supra* note 5, at 59-60 (stating that in Great Britain, "wilful misconduct" covers not only deliberate acts, but also careless acts done without regard for consequences); Hickey, *supra* note 49, at 294-95 (arguing that flexible definition of "wilful misconduct" provides benefit of settlement value because airlines fear possibility of "wilful misconduct" determination).

237. See Note, *The Emotional Trauma of Hijacking: Who Pays?*, 74 Ky. L.J. 599, 601 (1986) [hereinafter Note, *Emotional Trauma*] (noting that airlines owe high duty of care to prevent hijackings). This duty extends to all reasonably foreseeable events, including some terrorist activity. *Id.*; see also Note, *Terror in the Skies: Who Should Pay the Price?*, 14 SYRACUSE J. INT'L L. & COM. 209, 210 (1987) (noting that airlines are particularly susceptible to terrorist attacks because of vulnerability, visibility, and mobility). Failure of a company to secure adequately either an aircraft or airport premises is a breach of duty not deemed superseded by the hijackers intervening criminal act. Note, *Emotional Trauma, supra*, at 601.

An airline's liability can be measured in various ways. Initially, it is necessary for a court to examine the security measures in place. Gam, *supra* note 225, at 226. The absolute minimum measures required for an airline to secure the premises include using a magnetometer to detect metal on persons and screening hand baggage. *Id.* Other methods include the use of hijacker behavioral profiles and the screening of baggage in the cargo hold. *Id.* The airline must also determine whether individual security staff members are performing adequately. *Id.* at 226. Examples of inadequate performance include misreading equipment and inattentiveness. *Id.* If an air carrier's security procedures at an airport are judged by a jury to be inadequate, a finding of wilful misconduct is not unfair. Consequently, the airline should not be

formulate an exclusion that would deprive the guilty air carrier of article 22's monetary limitation as well as the general liability limitation provided by the Convention.²³⁸

Third, the plaintiff who alleges wilful misconduct by an air carrier, and therefore seeks to recover damages in excess of the liability limitation of article 22, should bear the burden of proof.²³⁹ The concept of absolute liability is appropriate for claims up to the liability limit, but not for claims alleging wilful misconduct and seeking more than that amount. In the latter case, the plaintiff should be required to show proximate cause between the injury and the alleged wrongful conduct of the defendant.²⁴⁰ The defendant should then have the benefit of all defenses not available for claims within the liability limit, including the due care defense.²⁴¹ If wilful misconduct is proven, the court should allow an independent cause of action for punitive damages if allowed by the local law governing the claim.

These guidelines for revision preserve the original goals of the Convention while protecting the interests of international air travelers. If the guidelines are implemented, airlines will retain the benefits of limited liability for most injuries to passengers resulting from human error or terrorist acts. In cases where an air carrier is found guilty of wilful misconduct, however, the liability limitation will rightfully be denied. Finally, in egregious cases of wilful misconduct, the plaintiff can recover punitive damages if available under local law.

CONCLUSION

If the interests of international air travelers are to be adequately protected, the Warsaw Convention must be revised. Until it is re-

afforded the protection of limited liability under the Convention. See Silets, *supra* note 19, at 371-72 (noting that inadequate security measures may result in unlimited liability depending on jurisdiction's definition of wilful misconduct).

238. See Hickey, *supra* note 49, at 608 (stating that compensation system establishing absolute limited liability is morally indefensible when conduct causing injury or damage is performed intentionally, wantonly, or with reckless disregard of consequences); Hollings, *supra* note 66, at 70 (recognizing no justifiable excuse for limiting passengers' rights to recover provable damages).

239. See Silets, *supra* note 19, at 363 (explaining that plaintiff must prove that air carrier's wilful misconduct contributed to or caused accident resulting in injury); see also *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir. 1965) (stating that jury decided plaintiffs failed to prove wilful misconduct); *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955) (finding plaintiff has burden of proving wilful misconduct).

240. See Gam, *supra* note 225, at 232 (stating that burden of proof on proximate cause issue lies with plaintiff).

241. See Silets, *supra* note 19, at 332 (discussing due care defense as where carrier took all necessary measures to avoid damage or where it was impossible to do so).

vised or denounced, the Warsaw Convention, as amended by the Montreal Agreement, remains binding law in the United States.

Punitive damages claims, although firmly established in American tort law, are relatively new under the Warsaw Convention. The issue rose to prominence as highly visible and mobile airplanes became terrorist targets. While the drafters of the Convention could not have contemplated the heinous acts that have become almost commonplace, they did foresee a need for flexibility in the Convention and drafted the articles broadly to allow for the inevitable changes in civil aviation.

Although punitive damages are not expressly allowed under the Convention, neither are they expressly proscribed. Article 25 of the Convention provides that an air carrier guilty of wilful misconduct cannot avail itself of any provision of the Convention that seeks to exclude or limit liability. Furthermore, the Convention expressly leaves several issues, including damages, to local law. Following the mandate of the United States Supreme Court established in *Chan v. Korean Air Lines, Ltd.* and *Air France v. Saks*, the text of the Convention must govern judicial decisions. Accordingly, if an air carrier is guilty of wilful misconduct, it should lose both the liability limitation of article 22 and the general liability scheme of the Convention. If local law provides for them, punitive damages should be recoverable under the Warsaw Convention.