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# Terror in the Sky: Does Terrorism Return Airlines to an Infant Industry? Does the Warsaw Convention Liability Limit Fly High again to Protect Vulnerable Airlines?

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# COMMENTS

## TERROR IN THE SKY: DOES TERRORISM RETURN AIRLINES TO AN INFANT INDUSTRY? DOES THE WARSAW CONVENTION LIABILITY LIMIT FLY HIGH AGAIN TO PROTECT VULNERABLE AIRLINES?

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## I. INTRODUCTION

"Agent X, carry the explosive device through the passenger lounge and the preboarding metal detector. Keep the triggering device on your person. Allow the airline authorities to inspect you and the device. Do not worry; they will not discover our plan."

This dialogue sounds like part of a movie script. Unfortunately, movies are not the only place where such instructions may be heard today. Terrorist advice may be given to anyone with a state-of-the-art explosive device who intends to board an airline in any country. Terrorism no longer knows international borders.<sup>1</sup>

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1. The United States is generally considered to be a fortress against aviation terrorists, but has been unable to live up to this status lately. As of March 1997, terrorist involvement had not been ruled out as a cause of the July 17, 1996 explosion of Trans World Airlines Flight 800 off New York's Long Island. See John J. Goldman & Eric Malnic, *Investigators Deny Report of Missile Hitting TWA Jet*, L.A. TIMES, Mar. 11, 1997, at A26. Interestingly, terrorist prevention equipment at New York's John F. Kennedy Airport inspects only incoming luggage, not outgoing luggage like the luggage that possibly caused the Flight 800 disaster. See Otis Port, *Where Are the Bomb Sniffers?*, BUS. WK., Aug. 5, 1996, at 78, 78.

A successful terrorist attack may kill or injure many people under the airline's control.<sup>2</sup> Such a disaster naturally leads to grave tragedy and loss, which subsequently may lead to multiple wrongful death claims against the airline. These claims may bring any airline to the brink of bankruptcy, especially if courts allow traditional damages.<sup>3</sup>

Although the framers of the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention)<sup>4</sup> did not consider terrorism during the drafting process, they did share a concern for all airlines' financial ability to survive a single unfortunate event.<sup>5</sup> This concern hinged on the common view that airlines could be the key to any nation's economic expansion.<sup>6</sup> Thus, the framers recognized that international air carriers could not operate under the constant risk of traditional damage awards.<sup>7</sup>

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2. The term "airline" here specifically refers to passenger air carriers. Throughout the remainder of this Comment, "airline" includes both passenger air carriers and cargo air transports, consistent with article 1 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, done Oct. 12, 1929, art. 1(1), 49 Stat. 3000, 3014 [hereinafter Warsaw Convention].

3. For example, on December 15, 1993, three executives of In-N-Out Burger died after their plane encountered wake turbulence and crashed during its approach to John Wayne Airport in Irvine, California. See Telephone Interview with Joseph Scully, Aviation Attorney Representing the Plaintiffs in *West v. Management Activities, Inc.* (Oct. 20, 1996) [hereinafter Scully Interview]. The aircraft was not on an international flight as defined by the Warsaw Convention. See Warsaw Convention, *supra* note 2, art. 1(2), at 3014. The parties settled for \$20 million. See Scully Interview, *supra* note 3.

4. See Warsaw Convention, *supra* note 2.

5. See *Onyeausi v. Pan Am. World Airways, Inc.*, 767 F. Supp. 654, 656 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992); *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 98-99 (W.D. Pa. 1975), *rev'd on other grounds*, 550 F.2d 152 (3d Cir. 1977) (stating that one objective of the Warsaw Convention was to provide uniform rules to limit an air carrier's liability for aircraft accidents).

6. See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499-500 (1967); see also discussion *infra* Part V.B.

7. See Lowenfeld & Mendelsohn, *supra* note 6, at 499-500. Recently, on November 12, 1996, 350 people died when a Saudi Arabian passenger jet and an Indian passenger jet, both on international flights, collided in mid-air. See Barry Bearak, *2 Jets Collide in Air Over India; 350 Are Dead*, L.A. TIMES, Nov. 13, 1996, at A1. If willful misconduct is judicially determined and traditional damage awards are deemed proper, at least one of the airlines may face bankruptcy. See Scully Interview, *supra* note 3. With the Warsaw Convention liability limits and absent a finding of willful misconduct, the airlines stand a

To alleviate this financial risk, the framers incorporated into the Warsaw Convention a limit on liability awards.<sup>8</sup> This limit applies to damages compensable to victims of an international air travel mishap or disaster and their survivors in cases where a court finds the carrier free of willful misconduct.<sup>9</sup> Although subsequent agreements have raised the liability limit,<sup>10</sup> many commentators have vigorously debated eliminating it.<sup>11</sup>

This Comment explores the Warsaw Convention framers' concern for financially vulnerable airlines and their decision to place a limit on airline liability. Part II of this Comment explains the Warsaw Convention's general purpose and analyzes how that purpose is realized in the Convention's many provisions, most notably the liability limit provision. Part III discusses the main criticisms of the liability limit. Part IV discusses U.S. federal courts'<sup>12</sup> analyses of the term "willful misconduct" and the courts' progressive lowering of the burden of proof necessary to prove such conduct in recent cases involving airborne bombs, terrorist attacks, hijackings,<sup>13</sup> and other international catastrophes. Part V exam-

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better chance of continuing operations.

8. See Warsaw Convention, *supra* note 2.

9. The Warsaw Convention was originally written in French. See *id.* art. 36, at 3022. The term "willful misconduct" is a translation of the original French word "dol," which has no literal English equivalent. Courts today generally accept willful misconduct as the proper translation. See 8 AM. JUR. 2D *Aviation* § 117 (1980).

10. In 1966, the Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol (Montreal Agreement) increased the liability limit from \$8,300 to \$75,000 per victim or survivor of a decedent in an international aviation accident. This limit does not apply if the "willful misconduct" exception applies. See Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, *reprinted in* 49 U.S.C. app. § 1502 (1988) [hereinafter *Montreal Agreement*]; see also Henry J. Reske, *Putting a Price on Life*, A.B.A. J., Jan. 1997, at 23, 23 (stating that the U.S. Department of Transportation worked out a series of agreements with 19 U.S. and 58 foreign airlines to raise the limit to \$146,000). Article 22 of the Warsaw Convention authorizes carriers and passengers to agree to a higher liability limit. See Warsaw Convention, *supra* note 2, art. 22 (1), at 3019.

11. See discussion *infra* Part III.

12. Because the Warsaw Convention is a treaty, judicial resolution of its provisions in the United States is exclusively within the jurisdiction of the federal courts and it preempts any conflicting state law. See U.S. CONST. art. III, § 2, cl. 1, art. VI; see also *Hill v. United Airlines*, 550 F. Supp. 1048, 1054 (D. Kan. 1982). The Warsaw Convention is the plaintiff's exclusive remedy. See *Onyeausi v. Pan Am*, 952 F.2d 788, 793 (3d Cir. 1992).

13. Courts have considered the hijacking of an airliner to be an accident under article 17 of the Warsaw Convention. See *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975).

ines the sobering threat of today's state-of-the-art explosive devices, the extent of their ability to pass undetected through porous and incomplete security measures,<sup>14</sup> and the inadequacy of airlines' and governmental responses. Part VI evaluates proposed alternatives to the Warsaw Convention's liability limit. In Part VII, this Comment concludes that the Warsaw Convention's liability limit benefits international air carrier passengers and all other participants in the global marketplace, and thus, should be maintained in order to ensure readily available and safe international air transportation in the future.

## II. THE PURPOSE OF THE WARSAW CONVENTION

When a passenger receives injuries while under an airline's control,<sup>15</sup> these injuries are generally the result of negligence.<sup>16</sup> Damage awards in wrongful death actions for multiple passengers in a single air tragedy can easily force an airline into dire financial straits.<sup>17</sup> Awareness of this danger, an appreciation for the value of transnational air transportation, and a desire to mutually protect future economic health brought the international community to-

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14. Because of the orientation of X-ray machines, machine operators can easily overlook small amounts of explosives, especially if the explosives are in sheet form. See Karyn Hodgson, *Two Technologies Are Better than One in Bomb Detection*, SECURITY ACCESS CONTROL (Quantum Magnetics, San Diego, Cal.). X-ray machines are used alone mostly at U.S. airports with international flights.

15. Article 17 of the Warsaw Convention imposes liability for damage sustained in an accident aboard an aircraft or "in the course of any of the operations of embarking or disembarking." See Warsaw Convention, *supra* note 2, art. 17, at 3018. Courts have interpreted this language to include activity that occurs while the passenger is under an airline's "control." See *Upton v. Iran Nat'l Airlines Corp.*, 450 F. Supp. 176, 178 (S.D.N.Y. 1978), *aff'd without opinion*, 603 F.2d 215 (2d Cir. 1979). In *Upton*, the court found that passengers were not under the airline's "control" because they were in a public waiting area, not in a restricted area reserved for departing passengers . . . [and] were free to proceed to the airport's restaurant, to visit with nonpassengers, or to exit the building. *Id.*

16. See *infra* notes 129-130 and accompanying text. See generally RESTATEMENT (SECOND) OF TORTS § 282 (1965).

17. This is particularly true for airlines in Third World countries that lack substantial assets, as well as airlines in developed countries that operate in fiercely competitive markets with low profit margins. See, e.g., SOUTHWEST AIRLINES CO., 1995 ANNUAL REPORT F3, F18 (1996); UAL CORP., 1995 ANNUAL REPORT 22 (1996) (stating that costs are calculated to hundredths of a cent per available passenger seat mile and that a nine percent rise or fall in oil prices can mean the difference between a profitable year and a losing year).

gether in Paris in 1925 and again in Warsaw in 1929.<sup>18</sup>

### *A. International Air Travel at the Time of the Warsaw Convention*

In 1925, during the first stage of what was later called the Warsaw Convention, and in 1929, during the Warsaw Convention itself, the world brimmed with optimism over air travel and its potential for economic expansion.<sup>19</sup> Charles Lindbergh and Amelia Earhart had recently introduced the prospects of air travel to the world by flying across the Atlantic in 1927 and 1928, respectively.<sup>20</sup> Many foresaw that aircraft could replace the much slower waterborne methods of developing overseas markets.<sup>21</sup> At the time, Air France, KLM Royal Dutch Airlines, and Pan American World Airways (Pan Am) were the world's major airlines.<sup>22</sup> Although they operated on a very limited international scale, they desired to expand their operations.<sup>23</sup> Despite the economic challenge of meeting daunting initial capital outlays that were required to start international operations, numerous fledgling domestic carriers similarly wanted to expand into the international market.<sup>24</sup>

### *B. The Warsaw Convention's Objectives*

Concerns about international air transportation brought national representatives together in Paris in 1925 and later in Warsaw in 1929.<sup>25</sup> One concern was that liability for a single international air disaster could easily render an airline bankrupt, thereby reducing the airline's lifespan to a matter of luck.<sup>26</sup> More impor-

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18. See Lowenfeld & Mendelsohn, *supra* note 6, at 498.

19. See LAWRENCE B. GOLDBIRSCHE, *THE WARSAW CONVENTION ANNOTATED* 5 (1988). See generally 8 AM. JUR. 2D *Aviation*, *supra* note 9, § 117 (discussing the framers' awareness of air transportation's potential uses, current milestones in aviation history, and the monopoly potential for airlines able to meet initial outlays).

20. See 8 AM. JUR. 2D *Aviation*, *supra* note 9, § 117.

21. See *id.*

22. See *id.*

23. See *id.*

24. See *id.*

25. See *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 99 (W.D. Pa. 1975), *rev'd on other grounds*, 550 F.2d 152 (3d Cir. 1977); see also *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (1974) (interpreting part of the Warsaw Convention's primary objective as limiting air carrier liability for accidents).

26. See Scully Interview, *supra* note 3.

tantly, airline and national representatives feared that such liability would be the proverbial "straw that broke the camel's back" in discouraging airlines from initiating international air travel, especially to countries where negligence law worked in favor of accident victims and harshly against airlines.<sup>27</sup> Without a cap on an airline's potential liability, worldwide economic development would polarize between countries that could bear the formidable liability risk and countries with airlines that could not.

Realizing the need to promote the aviation industry and protect airlines, the Warsaw Convention framers decided that the Convention's "overriding goal" would be to provide "necessary protection of a financially weak industry and [to ensure] that catastrophic risks would not be borne by the air carriers alone."<sup>28</sup> The Warsaw Convention states that its provisions shall be applied to all cases worldwide, regardless of local tort law, whenever an aircraft is hired to transport someone or something on an international route.<sup>29</sup> The Convention also provides uniform rules relating to air transportation documents, such as tickets, baggage checks, and air waybills.<sup>30</sup>

### *C. The Warsaw Convention's Significant Provisions and Their Practical Application*

Overall, the Warsaw Convention limits the acceptable theories of liability and the permissible amounts of damages for air disasters.<sup>31</sup> First, the signatories made the Warsaw Convention the exclusive remedy to equalize differing legal treatment of aviation disasters in various countries.<sup>32</sup> The Convention provides an independent cause of action, thereby preempting state law.<sup>33</sup>

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27. See *Onyeanusi v. Pan Am.*, 952 F.2d 788, 792 (3d Cir. 1992).

28. *Onyeanusi v. Pan Am. World Airways, Inc.*, 767 F. Supp. 654, 656 (E.D. Pa. 1990), *aff'd*, 952 F.2d 788 (3d Cir. 1992) (quoting *Floyd v. Eastern Airlines*, 872 F.2d 1262, 1467 (11th Cir. 1989)) (alteration in original).

29. See Warsaw Convention, *supra* note 2, art. 1(1), at 3014.

30. See *id.* arts. 3-8, at 3015-17; see also *Evangelinos*, 396 F. Supp. at 98-99.

31. See *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1308 (9th Cir. 1982) (stating that, under the U.S. Constitution, the Warsaw Convention preempts state law, and thus, the Warsaw Convention's limitation on liability was applicable).

32. See *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456, 458 (5th Cir. 1984).

33. See *id.*



Second, the Warsaw Convention limits the amount and types of damages recoverable for air tragedies.<sup>34</sup> Article 17 of the Warsaw Convention limits recovery to compensatory damages.<sup>35</sup> Article 25 does not allow punitive damage awards even if plaintiffs establish that damages resulted from the carrier's willful misconduct.<sup>36</sup> Because the Warsaw Convention preempts substantive state law, the Convention also preempts any claim for punitive damages under state law—anything else would be contrary to the Convention's basic premises.<sup>37</sup>

Article 17 of the Warsaw Convention 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.<sup>38</sup>

Courts have interpreted article 17 as making liability, and therefore damages, dependent on three factors: (1) location of the accident; (2) activity in which the injured person was engaged; and (3) the defendant's control over the injured person at the location of the accident and during the activity taking place at the time of the accident.<sup>39</sup> The airline's control of a passenger extends from the passenger's embarkation onto the aircraft to disembarkation from the aircraft, but not to when the airline no longer controls a

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34. See Warsaw Convention, *supra* note 2, arts. 17, 19, 22, 25, at 3018-20; see also *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986); *In re Air Disaster at Lockerbie, Scot.*, 733 F. Supp. 547, 550-51 (E.D.N.Y. 1990), *aff'd*, 928 F.2d 1267 (2d Cir. 1991) (holding that representatives of the hundreds killed over Scotland could not recover punitive damages because the Warsaw Convention, with its original purpose to promote the then-fledgling civil aviation industry, barred punitive damage claims regardless of whether there was willful misconduct).

35. See Warsaw Convention, *supra* note 2, art. 17, at 3018.

36. See *id.* art. 25, at 3020; see also *Harpalani*, 634 F. Supp. at 799 (stating that no court has awarded punitive damages under the Warsaw Convention); *In re Air Disaster at Lockerbie, Scot.*, 928 F.2d at 1285.

37. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1484-85 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991).

38. Warsaw Convention, *supra* note 2, art. 17, at 3018.

39. See *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir. 1977) (stating the generally accepted analysis for determining liability).

passenger's safety.<sup>40</sup>

The framers defined "bodily injury" to include only physical manifestations of harm.<sup>41</sup> Although emotional trauma cannot constitute "bodily injury," the Warsaw Convention allows loss of consortium claims.<sup>42</sup> For example, the husband of a passenger, who was injured when an airline attendant spilled coffee on her during an international flight, was allowed to assert an independent cause of action under the Warsaw Convention for loss of consortium due to his wife's injuries.<sup>43</sup>

A plaintiff pursuing a claim for physical injuries, on a theory of liability under the Warsaw Convention, must adhere to a two-year statute of limitations.<sup>44</sup> This statute of limitations may exceed

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40. See Warsaw Convention, *supra* note 2, art. 17, at 3018. For example, a court found an airline not liable for injuries to passengers resulting from a terrorist attack in the airport's baggage claim area. See *Martinez Hernandez v. Air Fr.*, 545 F.2d 279, 279 (5th Cir. 1976). The court reasoned that the passengers were no longer disembarking because they were free to roam through the terminal with no direction from airline personnel. See *id.* at 283; see also *Berman v. Trans World Airlines*, 421 N.Y.S.2d 291, 292-93 (Civ. Ct. 1979) (holding that the Warsaw Convention's "transportation by air" is complete when passengers are allowed to enter an unrestricted area of the terminal). In *Berman*, the court stated that the airline could not revive control, once relinquished, for the liability limit on baggage damage. See *id.* Thus, the airline's subsequent election to retake control of plaintiff's luggage did not cap liability. See *id.*

41. In one case, emotional trauma resulting from abduction by hijackers was found not to constitute bodily injury. See *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152, 1157 (D.N.M. 1973); see also *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 855 (1974) (holding that "'bodily injury' as used in article 17 [of the Warsaw Convention] connotes palpable, conspicuous physical injury, and excludes mental injury with no observable 'bodily', as distinguished from 'behavioral,' manifestations"). In *Rosman*, Arab guerrillas in the Jordanian desert held passengers captive near the aircraft. See 314 N.E.2d at 850. The defendant carrier was liable for the passengers' "palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries." *Id.* at 857. The carrier was not liable, however, for the trauma or nonbodily injuries or possible behavioral manifestations of the trauma. See *id.* In contrast, seemingly transitory but certain physical harm suffered as a result of food poisoning from an inflight meal does constitute "injury" under the Warsaw Convention. See *Halmos v. Pan Am. World Airways, Inc.*, 727 F. Supp. 122 (S.D.N.Y. 1989).

42. See *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 551 (1991) (stating that the Warsaw Convention does not allow emotional distress claims); *Diaz Lugo v. American Airlines, Inc.*, 686 F. Supp. 373, 376 (D.P.R. 1988) (stating that the Warsaw Convention does allow a loss of consortium claim).

43. See *Diaz Lugo*, 686 F. Supp. at 376.

44. The two-year statute of limitations in article 29(1) of the Warsaw Convention applies to actions based upon negligence and willful misconduct. See *Stone v. Mexicana*

a state's statute of limitations on similar causes of action.<sup>45</sup> The lengthened statute of limitations gives potential plaintiffs more opportunity to bring a lawsuit, thereby denying defendant airlines equal protection of the laws.

Upon balancing the Warsaw Convention's provisions against current terrorist threats, it is clear that the Convention's liability limit must remain in effect.<sup>46</sup> The cost of anti-terrorism devices and a plaintiff's ability to recover over \$75,000 following a finding of willful misconduct have erected new barriers to potential entrants in the airline industry. Existing and potential airlines, especially in Third World countries, with minimal financial strength, have been reduced to financially vulnerable units. The threat of and precautions against terrorist activity have renewed the relevance of the purpose of the Warsaw Convention's liability limit.

### III. WORLDWIDE OUTRAGE AT THE WARSAW CONVENTION

The Warsaw Convention created immediate outrage in its signatory countries.<sup>47</sup> The main criticism regarded the liability

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Airlines, Inc., 610 F.2d 699, 700 (10th Cir. 1979). The Warsaw Convention's drafters did not intend the statute of limitations in article 29(1) to result in different periods of limitation depending upon the type of conduct giving rise to a cause of action. *See id.* Because airplanes often travel through many jurisdictions, the framers determined that a uniform statute of limitations was desirable. *See id.*

45. *See* CAL. CIV. PROC. CODE § 340(3) (West 1982) (stating that the statute of limitations on a negligence action for personal injuries is one year); *id.* § 340(99) (stating that the statute of limitations on a cause of action for loss of consortium is one year).

46. The U.S. Transportation Department does not share this view. Recently, it declared that it would allow airlines to lift the limit on liability for people killed or injured on an international flight. *See Liability Limit Lifted on International Crashes*, L.A. TIMES, Nov. 13, 1996, at D3. The change, effective November 12, 1996, allows passengers and their families to recover unlimited damages if the defendant airline voluntarily joins in the agreement. *See id.* Approximately 65 airlines worldwide have already joined in the agreement. Airlines may choose, however, to remain under the protections of the Warsaw Convention. Over one hundred airlines have chosen to remain under the limit. *See* Scully Interview, *supra* note 3.

47. Over 120 countries, including both highly industrialized countries and struggling Third-World countries, are signatories. The signatories are Afghanistan, Algeria, Antigua, Australia [extended to Norfolk Island], Austria, the Bahamas, Bangladesh, Barbados, Barbuda, Belgium, Benin, Botswana, Brazil, Bulgaria, Burma, Cameroon, Canada [with reservation], Chile [with reservation], China, Colombia, Congo, Cuba [with reservation], Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Ethiopia, Fiji, Finland, France, Gabon, Gambia, German Democratic Republic, Ghana, Greece, Grenada, Guinea, Guyana, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kiribati, Democratic People's Re-

limit. Criticism has grown louder and stronger as inflation has raced ahead of increases in the limit.<sup>48</sup> In addition, the willful misconduct exception has sparked cries of equal protection and due process violations.<sup>49</sup> Indeed, \$75,000 is often inadequate compensation for victims of an international flight mishap or their surviving family members.<sup>50</sup>

Nevertheless, numerous erroneous assumptions underlie the contentions of opponents to the liability limit. Opponents first lash out at "corporate America,"<sup>51</sup> falsely assuming that U.S. airlines can afford any judgment amount. Another assumption relies on a stereotype of airline executives as lazy, insensitive, and so-

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public of Korea, Kuwait, Laos, Latvia, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Nauru, Nepal, Netherlands [extended to Curacao], New Zealand, Niger, Nigeria, Norway, Oman, Pakistan [with reservation], Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, St. Lucia, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa [extended to Namibia], Spain, Sri Lanka, Sudan, Surinam, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Tonga, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, [former] Union of Soviet Socialist Republics, United Kingdom [extended to Ascension Islands, Bermuda, British Virgin Islands, Brunei, Caicos, Cayman Islands, Channel Islands, Falkland Islands and dependencies, Gibraltar, Hong Kong, Isle of Man, Montserrat, St. Christopher-Nevis, St. Helena, Turks, and Belize (application not yet determined)], United States [with reservation], Upper Volta, Uruguay, Venezuela, Republic of Vietnam, Western Samoa, Yemen, Yugoslavia, Zaire, Zambia, and Zimbabwe. See Warsaw Convention, *supra* note 2, at 3014. This wide range of signatory nations demonstrates that the Warsaw Convention appealed and continues to appeal to nations that have stronger economic means as well as those that need its protections.

48. See Lee S. Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965). See generally Lowenfeld & Mendelsohn, *supra* note 6 (reviewing the main criticisms of the Warsaw Convention).

49. For example, the Warsaw Convention does not assure the right to a jury trial. See *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359, 361 (S.D.N.Y. 1956). But see *In re Korean Air Lines Disaster*, 798 F. Supp. 750, 752 (D.D.C. 1992) (holding that wrongful death claims arising out of the 1983 Korean Air Lines Flight 007 disaster, in which a Soviet military jet shot down a civilian airline, could be tried before a jury for resolution of damage issues, even though the location of the plane crash satisfied the admiralty case requirements of the Death on the High Seas Act (D.O.H.S.A.), 46 U.S.C. app. § 761-768 (1994). In *In re Korean Air Lines Disaster*, the court had jurisdiction concurrently based on article 28(2) of the Warsaw Convention and the D.O.H.S.A. See 798 F. Supp. at 755. Furthermore, the entire case could have been tried before a jury because the plaintiff combined the arguably non-jury wrongful death claims under the Warsaw Convention with the D.O.H.S.A. claims that could be tried before a jury. See *id.*

50. See Warsaw Convention, *supra* note 2, art. 1, at 3014 (requiring a flight to be international in order for plaintiffs to recover).

51. See generally Kreindler, *supra* note 48.

cially irresponsible individuals, selfishly pursuing personal wealth at the expense of public safety. Liability limit opponents believe that examples should be made of these corporations. Thus, they believe that other similarly-minded corporations seeking to hide behind well-paid corporate defense counsel, who cleverly use the law to squeeze out less wealthy plaintiffs, will become weary.<sup>52</sup>

Opponents also misinterpret the willful misconduct exception to mean that willful misconduct only occurs when an airline knowingly and purposely sabotages its own aircraft or equipment.<sup>53</sup> Because such self-inflicted acts would be rare, opponents believe that the \$75,000 liability cap will almost always shelter an airline. This perception of a high burden of proof is, however, inconsistent with current law. U.S. federal courts interpret the Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol (Montreal Agreement) as amending the Warsaw Convention to foreclose even the due care defense,<sup>54</sup> making the burden of proof lower than in traditional negligence actions.<sup>55</sup> Thus, on a practical level, plaintiffs have to meet a lower burden when involved in an international aviation accident than when involved in a domestic aviation accident.

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52. For example, suppose a Los Angeles-based husband and wife purchase airline tickets to Europe. The wife, possibly because of ticket sale promotions, buys a series of one-way tickets, first to New York and then to London, while the husband purchases a single round-trip ticket. If the aircraft exploded over Ohio, absent willful misconduct, the airline would be insulated from damages exceeding \$75,000 for the husband, but a claim brought by the wife's survivor would not be subject to the Warsaw Convention limit. Thus, the wife's survivor could collect much more than \$75,000. Survivors may not, however, be able to afford the potentially costly litigation due to the airline's legal tactics, such as propounding "mountains" of discovery requests and deposition notices. See Scully Interview, *supra* note 3.

53. These opponents often rely on a holding that, when somewhat distorted, does support this view. See *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532, 536-37 (2d Cir. 1965) (stating that knowledge of the fact that damage would probably result is a necessary element of "willful misconduct" within the meaning of article 25(1) of the Warsaw Convention).

54. See *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 100 (W.D. Pa. 1975), *rev'd on other grounds*, 550 F.2d 152, 159 (3d Cir. 1977); see also *Air Fr. v. Saks*, 470 U.S. 392, 407 (1985) (stating that the Montreal Agreement does not impose absolute liability on air carriers, except that "an airline cannot defend a claim on the ground that it took all necessary measures to avoid the injury").

55. See RESTATEMENT (SECOND) OF TORTS § 282 (1965) (asserting that the law recognizes the due care defense in a negligence action).

*A. Due Process: Critics Claim that the Presumption of Liability Limit Violates an Airline's Due Process Rights*

In negligence actions in the United States, a plaintiff must show facts that the defendant owed a duty to the plaintiff and subsequently breached that duty.<sup>56</sup> Determining whether the defendant has breached that duty is a decision for the trier of fact.<sup>57</sup> The plaintiff must also prove causation by showing that the defendant's breach was both the actual and proximate cause of the plaintiff's damages.<sup>58</sup>

The Warsaw Convention, effectively eliminates a defense of due care, thus establishing a presumption of liability in exchange for a low liability limit when a mishap occurs.<sup>59</sup> Thus, the Warsaw Convention deprives airlines of the ability to plead facts that show a duty of care has not been breached. The only remaining issue is whether the airline can prove that it did not engage in willful misconduct.<sup>60</sup> This presumption essentially shifts the burden of proof to the defendant and raises substantive and procedural due process concerns for defendant airlines.

Unlike other defendants in negligence actions, airlines are unable to contest the existence of a breach. For example, an airline was unable to defend against a pregnant passenger's claim that she miscarried due to a bomb threat received after she boarded the aircraft by stating that it took all available responsive actions.<sup>61</sup>

An airline may only overcome the presumption of liability by showing that it did not proximately cause the passenger's injuries. For example, in *Margrave v. British Airways*,<sup>62</sup> the defendant airline successfully demonstrated that it was not liable for a passenger's back injuries allegedly resulting from sitting through a two-

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56. *See id.*

57. *See id.*

58. *See id.*

59. The Warsaw Convention "essentially created a presumption of liability on the part of [an] air carrier for injury or death . . . without proof of fault." *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 221 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975).

60. *See generally id.*

61. *See Salerno v. Pan Am. World Airways, Inc.*, 606 F. Supp. 656, 657-58 (S.D.N.Y. 1985).

62. 643 F. Supp. 510 (S.D.N.Y. 1986).

hour flight delay due to a bomb threat.<sup>63</sup> In that case, the plaintiff was unable to produce sufficient evidence to show that the airline, and not her pre-existing back problem, was the proximate cause of her injury, and therefore, could not rebut the airline's causation defense.<sup>64</sup> Thus, under the Warsaw Convention, airlines can only hope for a defense verdict by pleading lack of proximate cause.

*B. Equal Protection: Critics Claim that the Convention Arbitrarily Classifies Plaintiffs by Its Definition of International Flight*

The amount potentially recoverable by a plaintiff residing in a Warsaw Convention signatory nation entirely depends on whether the flight is domestic or international.<sup>65</sup> The Warsaw Convention covers international flights but not domestic flights.<sup>66</sup> Thus, the locations of a passenger's embarkation and disembarkation determines the amount the plaintiff may recover.<sup>67</sup>

A flight's international status, generally has, however, little effect on the air carrier's negligence. French ice and turbulence are no more or less challenging to a pilot's control of an aircraft originating from France than are Spanish ice and turbulence to the same pilot. U.S. runways are no more or less difficult to land on or to take off from than are Japanese runways. Baggage and personnel scanners become no more or less effective when used in Canada for domestic flights than when used in Mexico for international flights. Nonetheless, an Italian citizen who is injured while flying to England or walking in an English baggage area and while still under an Italian airline's control is limited in recovery because the passenger is on an international flight under the Warsaw Convention. The Warsaw Convention's liability limit does not govern that same Italian if the negligent airline is on a domestic flight,<sup>68</sup>

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63. See *id.* at 513.

64. See *id.* at 514-15.

65. See Warsaw Convention, *supra* note 2, art. 1, at 3014.

66. See *id.*

67. See *id.*

68. Extending the liability limit to cover domestic flights arguably may further the Warsaw Convention's purpose of safeguarding the future of international air travel. Indeed, many international flights rely on a healthy system of domestic air transportation. U.S. courts have held, however, that a rationally related statute may be underinclusive. See *New Orleans v. Dukes*, 427 U.S. 297, 303-05 (1976) (holding that tourism benefits justified classification favoring pushcart vendors of certain longevity); *Railway Express*

even though the risks are substantially the same on both flights. This type of distinction can easily be seen as arbitrary line-drawing.<sup>69</sup> Although it seems like a denial of equal protection, U.S. courts have consistently ruled otherwise.<sup>70</sup>

As passengers on international flights, victims from signatory nations are not made whole by today's generally accepted personal injury recovery principles.<sup>71</sup> Compensatory damages of \$75,000 may not even cover hospital fees.<sup>72</sup> Neither emotional distress damages<sup>73</sup> nor punitive damages are allowed.<sup>74</sup> The Warsaw Convention is the exclusive remedy for citizens in the signatory nations.<sup>75</sup> Given its liability limit, the Warsaw Convention is consid-

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Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949) (holding that potential traffic hazards justified exemption of vehicles advertising the owner's products from protection under exception to the general advertising ban). In these cases, the factual context and scope of the statutes were sufficient to uphold the statutes.

69. Admittedly, the classification does not merit heightened scrutiny because it involves neither a fundamental right nor a suspect class, such as race, alienage, nationality, gender, or illegitimacy. The line arguably, however, is arbitrarily drawn. Furthermore, countervailing public policy interests strongly suggest that applying the Warsaw Convention liability limit to domestic flights would more effectively protect airlines.

70. See *Indemnity Ins. Co. v. Pan Am. Airways, Inc.*, 58 F. Supp. 338, 339-40 (S.D.N.Y. 1944) (holding that, in ratifying the Warsaw Convention, Congress acted within its power to regulate commerce, and thus, the treaty is neither an unconstitutional denial of equal protection or due process in the deprivation of property); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (holding that a basic tenet of equal protection law is that a classification does not fail "merely because it is not made with mathematical nicety or because in practice it results in some inequality"). Although this Comment deals with U.S. courts' treatment of the Warsaw Convention, it is fair to posit that the world will and does generally follow the United States in its legal interpretation of treaties because of U.S. military and economic strength.

71. See Scully Interview, *supra* note 3 (stating that, in *West v. Management Activities, Inc.*, if the flight had been defined as international under the Warsaw Convention, the executives' heirs would have received only \$75,000 each).

72. Hospital fees may approach \$150,000 for care related to multiple broken bones, bruises, internal injuries, and *reasonable* complications, assuming that there are complications. See Interview with Dr. Thomas Chambers, Veterans' Administration, San Diego, Cal., in San Diego, Cal. (Jan. 17, 1997).

73. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1478-80 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) (holding that the Warsaw Convention originally intended to deny emotional distress damages); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (defining the damages required for a plaintiff to recover for emotional distress).

74. See *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986); see also discussion *supra* Part II.C.

75. See *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 134 (3d Cir. 1984). This restriction is arguably unjust considering the damages that decedents' survivors could claim for an entire professional sports team killed aboard an international flight that crashes.



ered only a partial remedy.

#### IV. COURTS HAVE PROGRESSIVELY LOWERED THE STANDARD OF PROOF NECESSARY TO SHOW WILLFUL MISCONDUCT

Since the enactment of the Warsaw Convention, courts progressively have eased the standard for plaintiffs to prove defendant airlines liable of willful misconduct. The defendant's duty of care has progressively risen, effectively lowering the plaintiff's burden of proof.<sup>76</sup> Consequently, the \$75,000 ceiling has been increasingly pierced. Thus, the Warsaw Convention's liability limit must remain in effect to prevent potentially enormous judgments against airlines.

In 1949, just twenty years after the Warsaw Convention's signing, only proof of a pilot's flagrant willful misconduct would sustain a jury verdict above the liability limit. For example, in 1949, a court found willful misconduct by a defendant airline's pilot when a passenger carrier crashed after flying at an altitude of only 4000 feet where charts showed that nearby mountains were between 3500 and 4000 feet high.<sup>77</sup> The aircraft also violated civil air regulations that required scheduled air carriers to fly no less than 1000 feet above the highest obstacle.<sup>78</sup>

Today, proving willful misconduct is relatively easy.<sup>79</sup> For ex-

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See Scully Interview, *supra* note 3.

76. Current law directs courts to liberally define an "accident" under article 17 of the Warsaw Convention after assessing all the circumstances. See *Air Fr. v. Saks*, 470 U.S. 392, 405 (1985). If an injury indisputably results from a passenger's own internal reaction to an aircraft's usual, normal, and expected operation, however, courts will not find that an accident occurred, and article 17 will not apply. See *id.* at 403.

77. See *American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533-34 (D.C. Cir. 1949).

78. See *id.* This point is not intended to suggest that courts cannot find willful misconduct absent concurrent violation of an aviation regulation. In the case regarding the explosion of a Pan Am jet over Lockerbie, Scotland, however, the court found that Pan Am's failure to comply with minimum Federal Aviation Administration (FAA) baggage handling procedures, which may have allowed the bomb to pass undetected, constituted willful misconduct. See *In re Air Disaster at Lockerbie, Scot.*, 37 F.3d 804, 811-12 (2d Cir. 1994), *cert. denied*, *Pan Am. World Airways, Inc., v. Pagnucco*, 115 S. Ct. 934 (1995).

79. One of many factors contributing to this trend is the Montreal Agreement's removal of the due care defense. See *Montreal Agreement*, *supra* note 10. Another factor may simply be judicial recognition that the liability limit provides minimal recovery to successful plaintiffs. In addition, the harsh treatment that noncarriers have received in product liability actions arising from the same crash supports this point. The liability cap does not shelter non-carriers, such as engine manufacturers and airframe builders. See Interview with Ted Green, Aviation Insurance Agent, in Beverly Hills, Cal. (Dec. 17,

ample, one court held that in an action to recover damages for personal injuries arising out of a hijacking, the plaintiffs were entitled to recover \$75,000 under article 17 of the Warsaw Convention without any proof of the carrier's negligence.<sup>80</sup> In addition, if the plaintiffs could prove damages in excess of \$75,000, they would be permitted to attempt to prove willful misconduct by showing the inadequacy of the airline's anti-hijacking procedures.<sup>81</sup>

More commonly, courts have expanded the means available for a plaintiff to prove willful misconduct.<sup>82</sup> For example, a plaintiff can prove willful misconduct from a defendant's intentional misrepresentation.<sup>83</sup> In addition, a plaintiff who is injured while standing in line to board an aircraft may attempt to prove willful misconduct in defendant's inadequate security provisions.<sup>84</sup> Further, the family of a victim who drowns incident to a crash may as-

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1996) [hereinafter Green Interview].

80. See *Harari-Raful v. Trans World Airlines, Inc.*, 341 N.Y.S.2d 655, 658 (App. Div. 1973). Although *Harari-Raful* suggests that the willful misconduct requirement is becoming nothing more than a pleading formality, this rule is not consistently reflected in other decisions. For a different treatment of the willful misconduct requirement, see *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d Cir. 1992), which held there was that insufficient evidence to support a finding of willful misconduct. In *Ospina*, the airline complied with FAA procedures and other countries' laws regarding the search of the aircraft's cabin and cockpit, but failed to discover a bomb in the cockpit that exploded and killed four people. See *id.*

81. See *Ospina*, 975 F.2d at 38.

82. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1473 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) ("The terms of the [Warsaw] Convention must be construed broadly in order to advance its goals."); *Onyeausi v. Pan Am*, 952 F.2d 788, 793 (3d Cir. 1992) ("[T]he purposes of the [Warsaw] Convention must be furthered 'to the greatest extent possible, even if that entails rejecting a literal reading' of the Convention." (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978))).

83. See *Hill v. United Airlines*, 550 F. Supp. 1048, 1054 (D. Kan. 1982).

84. Courts have held that passengers were "embarking" within the meaning of article 17 of the Warsaw Convention when a terrorist attack took place. See *Leppo v. Trans World Airlines, Inc.*, 392 N.Y.S.2d 660, 661-62 (App. Div. 1977); *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 221-22 (S.D.N.Y.), *aff'd*, 528 F.2d 31, 33-34 (2d Cir. 1975). In *Leppo*, the passengers had submitted their tickets, received boarding passes, checked in their baggage, and passed through passport inspection. See 392 N.Y.S. 2d at 661. They were lined up in front of the departure gate to participate in boarding searches when the terrorist attack took place. See *id.* at 661-62. In *Day*, the passengers had surrendered their tickets, passed through passport control and entered an area reserved exclusively for passengers about to depart on international flights. See 528 F.2d at 33. They were not free to roam through the terminal because the carrier's agents required them to stand in line and undergo a weapons search before boarding. See *id.*

sert the defendant's willful misconduct.<sup>85</sup> For example, KLM Royal Dutch Airlines Holland (KLM) could not benefit from the liability cap in a wrongful death suit.<sup>86</sup> In that suit, a passenger drowned after a KLM plane crashed.<sup>87</sup> The jury found that KLM's failure "to establish and execute [instructions for] passengers as to the location and use of life vests was a conscious and willful omission to perform a positive duty and constituted reckless disregard of the consequences."<sup>88</sup>

Similarly, in recent years, U.S. federal courts have allowed damages that previous courts would likely have denied.<sup>89</sup> In addition, courts have broadened the class of potential plaintiffs who may bring a claim under the Warsaw Convention. For example, in the shooting down of Korean Air Lines Flight 007 over the former Soviet Union by a military jet, the court broadly interpreted article 24(2) of the Warsaw Convention which provides that a suit for "damages sustained" may be brought "however founded" and "without prejudice to questions as to who are persons who have the right to bring suit,"<sup>90</sup> and held that the mother and sis-

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85. See *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775, 779 (D.C. Cir. 1961).

86. See *id.*

87. See *id.*

88. *Id.*

89. For example, in *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens, Greece*, the court upheld an \$85,000 jury award for the conscious pain and suffering that an air passenger experienced between his physical wounding and death as appropriate under the Warsaw Convention. See *In re Inflight Explosion on Trans World Airlines, Inc., Aircraft Approaching Athens, Greece*, 778 F. Supp. 625, 641 (E.D.N.Y. 1991), *rev'd on other grounds and remanded, sub nom. Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35 (2d Cir. 1992). The passenger was seated on top of a bomb, and when the bomb exploded, the passenger did not die immediately from the blast. See *id.* at 626. Experts estimated that the passenger probably lived five to ten seconds after the blast and realized that he was plunging to his death. See *id.* at 627. The court allowed damages for conscious pain and suffering because they "were neither speculative nor punitive, but rather to compensate the survivor for the actual harm the decedent experienced," and were consistent with the Warsaw Convention. *Id.* at 644. In *Husserl v. Swiss Air Transportation Co.*, the court held that a passenger, who was forced to spend time in a hotel as a result of a terrorist hijacking, was considered to have spent time "on board the aircraft" within the meaning of article 17 of Warsaw Convention. See *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1247 (S.D.N.Y. 1975). "The time 'on board the aircraft' included all of the time between embarkation at the origin of [the] flight and disembarkation at [the] scheduled destination of [the] flight." *Id.*

90. Warsaw Convention, *supra* note 2, art. 24(2), at 3020; see *In re Korean Air Lines*

ter/executrix of a passenger aboard the airplane could "recover for decedent's conscious pain and suffering, for loss of support, mental injury and grief . . . , loss of love, affection and companionship, loss of inheritance, and lost services."<sup>91</sup> Another court handling this tragedy determined that willful misconduct caused the aircraft's poor navigation.<sup>92</sup>

The courts have even accommodated inflationary concerns by allowing prejudgment interest on damage awards both not exceeding and exceeding the Warsaw Convention \$75,000 liability limit.<sup>93</sup> Prejudgment interest is computed by discounting the entire award back to the date of the accident and then compounding that amount at the prime interest rate.<sup>94</sup>

Because courts have significantly decreased the threshold for proving willful misconduct and broadened the areas of recovery, the Warsaw Convention's liability limit must remain to prevent potentially enormous judgments against airlines.

#### V. THE INCREASED THREAT FROM THE IMPROVED ABILITY OF EXPLOSIVE DEVICES TO PASS UNDETECTED THROUGH SECURITY SYSTEMS

The courts' flexibility in recent airline disaster cases demonstrates courts' recognition that the willful misconduct determination tremendously affects an airline's liability and a victim's recovery. The increased threat from the improved ability of explosive devices to pass undetected through security systems brings into fo-

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Disaster, 807 F. Supp. 1073, 1080 (S.D.N.Y. 1992).

91. *In re Korean Air Lines Disaster*, 807 F. Supp. at 1089. *But see* *Zicherman v. Korean Air Lines, Co.*, 116 S. Ct. 629, 636 (1996) (holding that victims of the flight could not recover non-pecuniary damages under the D.O.H.S.A.); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978) (holding that plaintiffs could not recover non-pecuniary damages, such as loss of society, under the D.O.H.S.A.). It remains unclear, however, if a case under only the Warsaw Convention will follow *Zicherman*.

92. *See In re Korean Air Lines Disaster*, 932 F.2d 1475, 1478 (D.C. Cir. 1991).

93. *See Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984) (stating that prejudgment and postjudgment interest are recoverable under the Warsaw Convention beyond the damage limit); *Zicherman v. Korean Air Lines Co.*, 814 F. Supp. 605, 611 (S.D.N.Y. 1993) (holding that prejudgment interest was appropriate given the compensatory purpose of the Warsaw Convention, especially in light of a finding of willful misconduct, and given the nine years that had passed between the accident and the judgment).

94. *See Zicherman*, 814 F. Supp. at 612.

cus the competing interests of protecting airlines from economic ruin and adequately compensating victims of such terrorism and their survivors.<sup>95</sup>

### A. The Terrorist's Ability to Make Explosive Devices Virtually Undetectable

Terrorism is expanding at an unprecedented rate. Terrorists have proven their ability to penetrate international borders by passing explosives through security systems in thin sheets disguised as suitcase lining, distributing them within a bag,<sup>96</sup> and hiding them in frozen food.<sup>97</sup> In addition, airlines sometimes fail to perform security checks. Prior to the July 17, 1996 explosion of Trans World Airlines Flight 800 over Long Island, New York, TWA, for example, failed to check luggage for explosive devices.<sup>98</sup> Furthermore, outgoing baggage and passengers are often searched only for drugs and drug money, not bombs.<sup>99</sup>

Even when an aircraft's passengers and luggage are scanned for explosives, aircraft still fall victim to explosive devices.<sup>100</sup> Exacerbating attempts to solve this elusive problem is the fact that no security provider can publicly estimate the capacity of terrorists without exposing potential vulnerabilities.<sup>101</sup> Similarly, security

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Yr.	No. Bombings	Killed	Injured	Property Damage (in millions)
1989	1,065	74	495	\$48.9
1990	1,275	64	385	\$16.3
1991	1,585	75	695	\$27.1
1992	1,911	45	469	\$22.6
1993	1,880	70	1,375	\$526.0

Hodgson, *supra* note 14, tbl. (U.S. Bombing Statistics).

96. See Michael O. Lavitt, *Luggage Inspection System Uses Resonance Technology*, AVIATION WK. & SPACE TECH., Feb. 5, 1996, at 92, 92.

97. See David Windle, *Atom Scanner Joins War on Drugs*, TIMES (London), Apr. 7, 1996, at 1.

98. See Port, *supra* note 1, at 78.

99. See *id.*

100. The aircraft explosion over Lockerbie, Scotland occurred despite the departure airport's security scan for explosive devices. See *In re Air Disaster at Lockerbie, Scot.*, 776 F. Supp. 710, 714 (E.D.N.Y. 1991).

101. See Telephone Interview with Tom Sage, Electronics Engineer, Quantum Magnetics, San Diego, Cal. (Oct. 14, 1996).

firms cannot confidently share information without the risk that the information will find its way into terrorists' hands.<sup>102</sup> Nevertheless, security systems continue to improve, driven by the progression of explosive devices' improved stealth.<sup>103</sup>

### *B. Inadequacy of Airline and Governmental Responses*

Despite knowing that nitrogen-based compounds are a key ingredient in all explosive devices, engineers have yet to produce a reliable method of unobtrusively scanning luggage and passengers for explosive devices without picking up harmless components.<sup>104</sup> Compounding this problem is a lack of worldwide bomb scanning standards governing international flights.<sup>105</sup>

Nevertheless, if a prominent nation in international aviation, such as the United States, established updated standards, the world would likely follow.<sup>106</sup> If the United States implemented these higher standards, U.S. carriers would first install scanning devices within U.S. airports according to the standards. Insurance companies would then encourage compliance by offering discounted incentive rates based on the carrier's compliance beyond its borders, where the carrier's insurance is in effect but U.S. law does not apply. Presumably, carriers from other countries would then need to conform to these standards to avoid losing market

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102. *See id.*

103. *See* Windle, *supra* note 97. For example, bomb detection equipment at TWA's international terminal at John F. Kennedy International Airport recently detected traces of nitrogen-based compounds on shoes in a passenger's bag. *See Bomb Fears Clear Airport Terminal*, L.A. TIMES, Nov. 10, 1996, at A21. This finding shut down TWA's international flights for an hour and caused the evacuation of all passengers. *See id.* This event demonstrates how a terrorist could tactically direct bomb units to a harmless piece of fertilizer on a shoe and pass lethal explosives devices through security of another terminal during the distraction.

104. *See* Bruce V. Bigelow, *Scanning for Explosives*, SAN DIEGO UNION-TRIB., Mar. 9, 1995, at C1 (stating that X-ray machines developed in the 1960s are designed only to detect metal objects, such as knives, guns, and hacksaws, but only with the skilled eye of a trained operator, and that explosive devices hidden in the above-described manners are difficult to detect).

105. *See* Port, *supra* note 1, at 78.

106. *See id.* (stating that, "[i]n Europe, airport security is the responsibility of a government agency or an independent for-profit operation. . . . [b]ut in the [United States], the airlines themselves handle security" and that airlines hesitate to buy expensive security systems because they may not meet yet-to-be announced FAA standards).

share.<sup>107</sup> In effect, such standards could lead to global standards. The United States must recognize this leadership responsibility.

Current U.S. regulations lack adequate direction.<sup>108</sup> After the July 17, 1996 explosion of TWA Flight 800, President Bill Clinton created the White House Aviation Safety and Security Commission headed by Vice President Al Gore (Gore Commission).<sup>109</sup> The Gore Commission gave its final report on airport security systems on February 11, 1997, but failed to recommend minimum bomb scanning requirements.<sup>110</sup> In addition, President Clinton proposed a \$1.1 billion package to combat terrorism, of which \$429.4 million was earmarked to improve security at U.S. airports.<sup>111</sup> President Clinton also signed into law the Federal Aviation Reauthorization Act of 1996, which tightened airport security against terrorism, but failed to mandate updated minimum standards for explosive device scanning equipment.<sup>112</sup> Unfortunately, the minimum standards for explosive scanning equipment were promulgated in September 1993 and require updating to reflect improved terrorist technology,<sup>113</sup> thus making the purchase of upgraded equipment premature and improvident. Although it ap-

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107. See generally David Field, *Detector Makers Wait for Go-Ahead*, USA TODAY, Aug. 5, 1996, at D1 (stating that the U.S. House of Representatives passed a bill that would require the FAA to "push for detectors like those used outside the [United States]").

108. See Jennifer From, *Bomb-Detection Firms Await U.S. Move*, WALL ST. J., Sept. 23, 1996, at A6; Port, *supra* note 1, at 78 (highlighting the FAA's plans to continue field testing bomb detection equipment through 2000, at which time the FAA may recommend, and even statutorily mandate, a standard).

109. See From, *supra* note 108.

110. See *Airline Passengers Face Tighter Security*, SAN DIEGO UNION-TRIB., Feb. 13, 1997, at A-8; see also From, *supra* note 108; David Evans, *Safer Skies*, SAN DIEGO UNION-TRIB., Feb. 23, 1997, at G-1.

111. See *Airline Passengers Face Tighter Security*, *supra* note 110; see also From, *supra* note 108.

112. This \$19 billion law "calls for upgrading bomb-detecting luggage scanners at major airports, requires background and fingerprint checks for workers with access to airport security areas, . . . and increases mail and international air cargo inspections," but does not set forth specific security system standards for spending funds. See *Clinton Enacts Tougher Airport Security Measures*, L.A. TIMES, Oct. 10, 1996, at A22. It was anticipated that the Gore Commission would promulgate these standards, but it did not. See *Airline Passengers Face Tighter Security*, *supra* note 110.

113. See Field, *supra* note 107 ("lowering FAA detection standards 'means that [the airlines] may catch the amateur and the sloppy but not the dedicated or professional terrorist.'").

pears that the United States is rising to the leadership challenge in this area, its actions are hollow because the Gore Commission failed to specify revised standards, and thus, airlines likely will not purchase updated equipment.<sup>114</sup>

### 1. Airlines' Reactions

Unwilling to wait for governmental direction, some airlines are buying the best equipment available. Unfortunately, the U.S. airlines are using that equipment only outside the United States because they fear that the equipment will become obsolete once the Federal Aviation Administration (FAA) promulgates new standards.<sup>115</sup> This domestic passivity effectively sends the message worldwide that the United States is vulnerable to terrorism.<sup>116</sup>

Although an airline can speculate as to existing equipment that is likely to meet future minimum standards,<sup>117</sup> the equipment is extremely expensive.<sup>118</sup> The expense of these machines imposes

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114. See *Clinton Enacts Tougher Airport Security Measures*, *supra* note 112; see also *Airline Passengers Face Tighter Security*, *supra* note 110. Although the Gore Commission recommended 54 machines for 450 airports, this effort "falls far short of what is needed" and is "ludicrous." Evans, *supra* note 110 (quoting Victoria Cummock, a member of the Gore Commission who also served as a member of the Security Baseline Work Group, an advisory body to the FAA, and as president of Families of Pan Am 103/Lockerbie). "The administration is not facing up to the issue of funding". *Id.* (quoting Neilson Bertholf, Jr., chairman of the American Association of Airport Executives). The Gore Commission has proposed, however, "at least \$500 million in extra federal funding over the next five years to pay for high priority airport security projects," including 1,182 security force personnel, which is a 173% increase over 1997's security work force. Asra Q. Nomani & Andy Pasztor, *Aviation Panel Urges Security Spending*, WALL ST. J., Feb. 10, 1997, at A3.

115. "'It's ironic,' says Thermedics President John W. Wood Jr. 'If you want to be screened with the latest in U.S. explosive-detection technology, you need to fly out of a European airport.'" Port, *supra* note 1, at 79; see also Evans, *supra* note 110 (stating that the FAA has certified only one scanning machine, the CTX-5000SP, but that it "can only examine medium-size bags and smaller - leaving up to 40 percent of the larger bags on some international flights unexamined").

116. Maine Senator William Cohen states, "If we continue to wait for the perfect system . . . terrorism will flock to the United States just as a burglar goes for the open window." Field, *supra* note 107.

117. See From, *supra* note 108 (stating that President Clinton's proposed \$1.1 billion dollar package to combat terrorism, of which \$429.4 million is earmarked for airport security, requests the purchase of 54 InVision Technologies Inc. CTX 5000s, 489 unnamed companies' trace detectors, and 5 quadrupole-resonance systems, which Quantum Magnetics will likely supply).

118. For example, the machines referenced in *supra* note 117 are priced as follows:



a barrier to a fledgling airline's survival in or entrance into the international market, thus making the Warsaw Convention's liability cap more appealing.<sup>119</sup> Although technology continues to advance and has become more accessible, for example, via the Internet, terrorists will inevitably find a way to bypass even the most sophisticated scanners. Many hope, however, that if all explosives contain nitrogen-based compounds and all passengers and baggage can be scanned, the combination of Quantum Magnetics' quadrupole technology and Thermedics' explosive sniffing technology will, in addition to similar products, prevent terrorists from bombing airlines.<sup>120</sup>

## 2. Governmental Responses

Until this scanning technology becomes mandatory, the U.S. government's response will be to encourage airlines to conduct more thorough passenger and luggage searches. Although intended to improve air traffic safety, these searches will produce a host of problems. First, air travel will become less convenient due to search time requirements.

Second, airlines will encounter legal difficulties when enacting

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approximately \$1,000,000 for one CTX 5000; \$125,000 to \$300,000 for the American Science & Engineering (AS & E) 101-ZZ trace detector, depending on the automation level; \$250,000 to \$400,000 for the Vivid Technologies twin-beam X-ray system, depending on the automation level; \$165,000 for the Thermedics explosive sniffer; and \$300,000 for the Quantum Magnetics Qscan 2000 Quadrupole Resonance scanner. See From, *supra* note 108; Field, *supra* note 107.

119. For many plaintiffs, proving inadequate anti-hijacking procedures is not difficult. In *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), plaintiffs, in their attempt to avoid the limit on recovery in article 25(1) of the Warsaw Convention, had the burden of proving willful misconduct by "a fair preponderance of the credible evidence." *Id.* at 285. The court stated that this standard "required proof of a 'conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.'" *Id.* (quoting the district court's jury instructions). Given the extensive media coverage of recent airline mishaps, today's public is undoubtedly aware of the hazards of inadequate personnel and baggage screening.

120. Quantum Magnetics' quadrupole resonance scanner emits radio waves that stimulate only the cigar- or disk-shaped nuclei common in explosives' molecules. See Port, *supra* note 1, at 79. The scanner then detects the molecules as they reform into their original shape. See Hodgson, *supra* note 14. This procedure is completely unrelated to detecting nitrogen-based molecules. See Port, *supra* note 1, at 79. The Thermedics explosive sniffer can detect even "a few molecules of explosive left on a terrorist's shoes or hands." *Id.*

these more intrusive search methods.<sup>121</sup> Despite the fact that virtually all passengers are not terrorists, sufficient probable cause exists under U.S. law for every passenger to be subject to an extensive and intrusive search. Such a search, however, could be a significant cultural challenge in other countries. This new characteristic of international air transportation could make air travel less appealing, thus undermining the financial certainty intended by the Warsaw Convention.

Third, many existing X-ray machines will become obsolete once the new standards are adopted, thereby requiring purchases of conforming equipment. This requirement alone may cause airlines financial difficulties because they may be unable to pass along the costs directly to customers due to existing fare wars and market competition. The General Accounting Office estimates that costs to develop, buy, install, and begin operating explosive detection systems at the seventy-five busiest airports could reach \$6 billion over ten years.<sup>122</sup> Eventually, however, passengers would have to pay for the improved security safeguards.

## VI. ANALYSIS OF ALTERNATIVES TO THE WARSAW CONVENTION'S PROVISIONS

Proponents of amending or adding conditions to the Warsaw Convention often underestimate the legal and economic effects of their suggestions. Although some proposals have merit if carefully implemented, changing the Warsaw Convention's primary provisions will create more problems than it will solve.

### *A. Raising the Liability Limit*

Advocates of raising the liability limit resemble high school sweethearts determined to wed. They unduly minimize the risks and the ramifications that follow. Many scholars and plaintiffs' attorneys have argued, however, for increasing the Warsaw Conven-

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121. The AS & E X-ray screener basically performs a strip search without requiring the removal of a person's clothing. See Port, *supra* note 1, at 78 photo. Although obtaining a waiver or consent may be a solution, no careful terrorist could be expected to consent to a thorough search with the available technology discussed above. See *Airline Passengers Face Tighter Security*, *supra* note 110 (noting that American Civil Liberties Union counsel Gregory Nojeim objected to the Gore Commission's recommendations because such surveillance techniques are "'invasive and likely to be discriminatory'").

122. See Field, *supra* note 107.

tion's liability limit.<sup>123</sup> They advocate for raising the liability limit to a figure calculated as: (1) the original \$8,333 adjusted by an agreed upon worldwide inflationary average since 1929, or (2) the \$75,000 inflated by an agreed upon worldwide inflationary average since 1966.<sup>124</sup> Both methods would raise the cap to approximately \$335,000.<sup>125</sup> Either way, pandemonium would erupt for most airlines because future costs are predicted and calculated in accordance with existing liability limits. If the limit is increased, airline insurance premiums would skyrocket, costs would be passed along to passengers, and ultimately, fewer people would be able to afford either domestic or international air travel.<sup>126</sup>

### *B. Amending the Warsaw Convention to Make Airlines Strictly Liable for Any Mishap*

Proponents of an amendment to the Warsaw Convention invite the signatory countries to change the standard for determining liability from negligence to strict liability.<sup>127</sup> These proponents myopically base their argument on the media-instilled assumption that pilot errors in judgment or management deficiencies always cause aviation mishaps.<sup>128</sup> While this assumption may be true, following a more careful examination of the issue, these proponents would likely conclude that pilot error often occurs after an unforeseeable mechanical problem not mentioned by the press<sup>129</sup> and/or undiscovered in the crash analysis.<sup>130</sup> Arguably, most pilot

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123. See generally Lowenfeld & Mendelsohn, *supra* note 6 (discussing the general arguments in favor of raising the liability limit).

124. See *id.* at 544-52.

125. See Reske, *supra* note 10, at 23.

126. See Telephone Interview with Jeff Worth, Aviation Attorney (Jan. 7, 1997) [hereinafter Worth Interview].

127. The *res ipsa loquitur* doctrine is no longer applied to all aviation accidents. With recent improvements in technology, however, the doctrine has renewed appeal. See generally *Newing v. Cheatham*, 540 P.2d 33 (Cal. 1975).

128. See generally *id.*

129. For example, the May 11, 1996 crash of ValuJet Flight 592 over the Florida Everglades was first attributed to pilot error and only later did the theory of exploding oxygen containers come to light. See Patrick Harden, *A Year in the Life of America; Even Fear of Flying Couldn't Dampen Spirits in an Upbeat Election Year*, TORONTO SUN, Dec. 22, 1996, at C6; Evans, *supra* note 110.

130. This statement is based on prepared studies of military and civilian aviation mishaps that the author analyzed in Naval Flight School, Pensacola, Florida, as well as on

error is a product of an unprecedented mechanical failure to which the pilot reasonably responds, but in an unsuccessful manner.

The advocates for a strict liability standard simplistically believe, however, that airplanes rarely fall from the sky due to pure mechanical failure, and in this sense, the overinclusive nature of the liability determination is harmless. Indeed, airplanes rarely explode spontaneously in midair or on the ground. To follow such reasoning, however, is ludicrous. Strict liability would deprive carriers of due process because mechanical defects beyond a carrier's control sometimes cause mishaps. Holding an airline accountable for these problems therefore misappropriates liability.

Furthermore, a negligence standard is vital to an airline's insurance selection and overall financial strategy.<sup>131</sup> Airlines and their insurance companies use historical data to roughly predict how often the airline is likely to be deemed negligent in the future.<sup>132</sup> Predicting how often new equipment will fail and how often those failures will result in injuries, however, is difficult and less certain.<sup>133</sup> Thus, an implementation of a strict liability standard would immediately require an airline to allocate more funds to insurance coverage.<sup>134</sup> Ultimately, the costs would be passed along to passengers or beneficiaries of any cargo transported by air.<sup>135</sup>

More insidiously, strict liability under the Warsaw Convention would have far-reaching and unpredictable domino effects. The signatories should decline this invitation. It is akin to a proposal to alter the atmospheric content of important life-sustaining elements.

### *C. Adding a Small Surcharge to All Plane Ticket Prices*

Several members of Congress point to a flying tax of one dollar per passenger ticket that funded the completed modernization of the U.S. Customs Agency and propose that a similar flying tax

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accident reports that the author reviewed as a Marine aviator. The author has flown over 1000 hours in tactical jets in the U.S. Marine Corps, including 35 combat missions in Desert Storm.

131. See Worth Interview, *supra* note 126.

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.*

could be used to fund a future modernization of explosive device scanners.<sup>136</sup> After all, over one million suitcases are shipped daily aboard U.S. passenger aircraft.<sup>137</sup> This tax could erase the feared future cost of improved security systems for struggling airlines. The proposal, overlooks the fact, however, that after the improved security systems are in place, the tax would be lifted.<sup>138</sup>

To remedy the Warsaw Convention liability limit, the "flying" tax should instead continue even after improved security systems are in place. Excess tax revenues should then be deposited into a general fund accessible to airlines found liable for damages exceeding the Warsaw Convention liability limit. Airlines could withdraw funds in amounts proportional to their international passenger contributions at the time of a mishap. If the damages exceed the airline's passenger contribution, the airline would be accountable for the difference.<sup>139</sup>

Criticism that willful wrongdoers would actually escape accountability by having the judgments against them ironically paid by the victims has not gone unnoticed. When balanced with the original intent of the Warsaw Convention to help struggling airlines, however, the general fund suggestion has merit. Manufacturers utilize a similar system in insuring themselves against products liability judgments, although the fund is handled privately on an individual company-by-company basis.

#### *D. Amending the Warsaw Convention to Allow Passengers the Option of Buying Flight Insurance*

A fourth possible option is amending the Warsaw Convention to exempt all signatory country airlines from liability beyond an amount lower than the current \$75,000 limit. As amended, the Warsaw Convention would require that each passenger show proof of medical and life insurance before flying, similar to car rental

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136. See Port, *supra* note 1, at 79; see also Evans, *supra* note 110 (stating that the Gore Commission rejected the idea of a security surcharge).

137. See Bigelow, *supra* note 104.

138. The U.S. Customs tax was lifted when collected revenues equaled the needed amount. See *id.*

139. In a typical airline insurance policy against willful misconduct judgments, the airline bears a substantial deductible. See Worth Interview, *supra* note 126. The general fund would help the airline meet its deductible.

agencies requiring proof of automobile insurance. The Warsaw Convention would then provide each passenger with the option of buying additional life and/or medical insurance from the airline beyond a mandatory minimum amount included in the purchase price of each ticket, perhaps to cover funeral expenses or basic hospital care.<sup>140</sup> Such a plan would mimic the additional insurance made available by car rental agencies.

No society would likely tolerate this plan. Although the airlines would embrace such a scheme because of enormous cost savings, they would not want to be perceived as encouraging their respective governments to amend the Warsaw Convention into this form. Furthermore, no airline, would want to participate first in the amended provisions, as the public relations effect would be an implicit admission that the airline expects crashes in the future. The obvious result is that the airline would face consumer reluctance to fly on that particular airline.

Global, simultaneous implementation of this option, however, may have promise. This alternative would avoid the negative public relations spotlight focusing on one airline and would allow individual passengers the freedom to choose increased life and medical insurance coverage.

#### *E. Individual Countries Could Withdraw as Signatories*

A country could withdraw as a signatory from the Warsaw Convention to avoid the liability presumptions that the Warsaw Convention deprives signatories. The consequential insurance cost increase and the subsequent passage of these costs to passengers, however, would be financial suicide.<sup>141</sup> These costs could effectively isolate a country from future economic development. They could also result in increased litigation costs as plaintiffs fight for every cent of recovery and defendant airlines are forced to incur additional legal defense expenses.

Alternatively, a country could withdraw as a signatory, install state-of-the-art security measures in an attempt to avoid insurance cost increases, and remain uncertain about preventing all terrorist

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140. Each airline ticket would have a warning, similar to the U.S. Surgeon General's warning on cigarettes, stating that a passenger assumes the risks inherent in flying, and furthermore, agrees to hold the airline liable for the damages set forth in the ticket.

141. See Worth Interview, *supra* note 126.

activity.<sup>142</sup> Predicting when and where terrorist activity will occur is still a gamble. Only one international airline, Quantas Airways, can claim that it has never been a victim of terrorism.<sup>143</sup>

## VII. THE EXISTING LIABILITY LIMIT IS THE BEST AVAILABLE OPTION

As no one today can predict the future course of terrorism, all airlines remain vulnerable. The consequences of little or no international air travel, however, can easily be predicted. International air travel must continue at an economically accessible level so that global economic integration continues. Failing to protect airlines with the Warsaw Convention liability limit would undoubtedly hamper economic development and isolate all countries. Therefore, the existing liability limit must remain in effect.

### *A. Comparison to International Maritime Law, the U.S. Military's Gonzalez Act, and U.S. Worker's Compensation Recovery Plans*

The Warsaw Convention's liability limits have parallels in other contexts. International maritime law,<sup>144</sup> the U.S. military's Gonzalez Act,<sup>145</sup> and U.S. workers compensation laws<sup>146</sup> limit the

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142. See discussion *supra* Part V.A.

143. See Telephone Interview with Julie Lima, Employee, Quantas Airways (Feb. 12, 1997).

144. See Jones Act, 46 U.S.C. app. § 883 (1988); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (discussing the general intent to limit liability in maritime accidents); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) (stating that victims or survivors of maritime mishaps are limited in their recoveries).

145. See Gonzalez Act, 10 U.S.C.A. § 1089; (1974) (stating that suits for traditional damage awards against military medical personnel are not allowed); see also *United States v. Smith*, 499 U.S. 158, 167 (1991) (stating that the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C.A. §§ 1346, 2671-2679(b)(1), 2680, immunizes federal government physicians from malpractice liability even when the Federal Tort Claims Act precludes recovery against the United States); *Expeditions Unlimited Aquatic Enters., Inc., v. Smithsonian Inst.*, 566 F.2d 289 (D.C. Cir. 1977) (stating that the government and its employees while working in an official capacity enjoy general tort immunity from suits brought by other government employees).

146. See CAL. CIV. PROC. CODE § 3601 (West 1989) (stating that employees injured on the job are not subject to a liability determination regardless of whether they are entitled to medical expenses incident to that injury); see also *Benjamin v. Ricks*, 132 Cal. Rptr. 758, 760 (Ct. App. 1976) (stating that "[t]he limitation upon an employee's right to recover from his employer damages for pain and suffering is rationally related to a legitimate governmental interest").

amount that a potential plaintiff may recover because of varying competing interests. These laws are designed to shelter affected organizations from litigating each claim and to facilitate prompt recovery by victims.<sup>147</sup> The laws also promote an industry's continued existence by preventing a "survival of the fittest" effect in which companies that can handle all claims grow stronger and those that cannot file bankruptcy.<sup>148</sup>

The parallels to the international aviation industry are clear. The Warsaw Convention recognizes the same concerns by limiting recovery in cases of presumed liability. Like international sea transportation, U.S. military medical malpractice immunity, and U.S. workers compensation law, the air transportation system's survival cannot be torpedoed without sacrificing the benefits to all. Thus, the Warsaw Convention liability limit should be maintained for the economic greater good.

*B. Terrorism Has Created a Barrier to Third World Countries Trying to Enter the International Air Transportation Industry*

The economic integration of all nations is vital for the future. Most countries would find it difficult, if not impossible, to grow in an international economy without an adequate capacity for international aviation.<sup>149</sup> Yet terrorism can discourage investors from developing an airline.<sup>150</sup>

When an airline cannot be found liable for an incident, the airport may shoulder the blame and its associated costs. As a non-carrier, the airport is not protected under the Warsaw Convention's liability limit. For example, an airport, not an airline, was found liable for a passenger's death during a terrorist attack in the airport where the passenger was still in a public area at the time of the attack and had not passed through immigration control or a security inspection.<sup>151</sup> Similarly, because a court held that passengers were not "in the course of any of the operations of embarking or disembarking" when they were killed during a terrorist attack in the baggage area of an international airport, the Warsaw Conven-

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147. See generally sources cited *supra* notes 144-146.

148. See generally sources cited *supra* notes 144-146.

149. See discussion *supra* Part II.B.

150. See discussion *supra* Part V.B.1.

151. See *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 9-10 (2d Cir. 1990).



tion could not offer its protective liability cap to the airline, and thus, the court held the airport liable for the passengers' deaths.<sup>152</sup> Similarly, Trans World Airlines (TWA) was found free of liability under the Warsaw Convention for injuries that its passengers suffered at the Rome airport while they were in line to receive boarding passes and to check in their luggage when terrorists attacked with machine guns and grenades because the passengers were not yet engaged in the "operation of embarking" under the Warsaw Convention.<sup>153</sup>

### *C. Insurance Costs with and Without the Warsaw Convention Liability Limit*

With protection from unlimited liability absent a finding of willful misconduct, an airline will pay an annual insurance premium that is "significantly" higher than it would pay without such protection.<sup>154</sup> The added cost could run out of business an international carrier not covered by the Warsaw Convention if it competes with carriers paying lower insurance premiums and similar costs.<sup>155</sup> The carrier not covered by the Warsaw Convention would be forced to pass the added costs to passengers in the form of increased ticket prices, resulting in decreased profits and possible bankruptcy for the airline.

This analysis unfortunately applies to established airlines with fixed costs much lower than a newer entrant to the international air travel market. Start-up costs vary tremendously; however, insurance rates for an unproven airline that is not covered by the Warsaw Convention and is seeking to fly internationally "substantially" exceed the rates for an established international carrier.<sup>156</sup> These higher insurance rates impose a huge disadvantage on potential new market entrants in an already low profit margin industry.

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152. See *In re Tel Aviv*, 405 F. Supp. 154, 155-56 (D.P.R. 1975), *aff'd*, sub nom., *Matinez Hernandez v. Air Fr.*, 545 F.2d 279 (1st Cir. 1976).

153. See *Sweis v. Trans World Airlines, Inc.*, 681 F. Supp. 501, 505 (N.D. Ill. 1988).

154. See *Green Interview*, *supra* note 79.

155. See *Interview with Michael Kribel, Commercial Airline Insurance Underwriter* (Feb. 3, 1997) [hereinafter *Kribel Interview*].

156. See *id.*

Self-insurance is an alternative.<sup>157</sup> An airline can set aside money regularly; however, the enormous sums necessary to reasonably protect investments and liability interests are prohibitive for most airlines. For example, it is estimated that, if TWA is found liable for damages above the Warsaw Convention limit for its possible willful misconduct in Flight 800, victims' damages could amount to \$500 million.<sup>158</sup> Problems also exist with potential internal commingling of operating funds with retirement funds guaranteed at a predetermined interest rate that the airline later finds which is later found unaffordable.<sup>159</sup> This problem occurs to the detriment of many employees vested in an airline's pension plan.<sup>160</sup>

#### *D. Costs of Minimum Passenger and Baggage Monitoring Staff and Equipment*

Although the FAA has claimed that staff requirements for mandated scanning equipment will decrease because the equipment would be fully automatic,<sup>161</sup> costs nevertheless remain fixed for minimum passenger and baggage monitoring staff and equipment. Adding the possibility of unlimited liability, it is likely that airlines would chose to monitor their baggage and personnel scanners with more staff despite the automatic nature of the machines. Training costs would increase concomitantly as airlines sought to protect themselves from terrorist attacks and meet minimum standards to avoid findings of willful misconduct.

An option always exists for airlines to operate beyond the reach of U.S. laws without the minimum required equipment to scan passengers and luggage. Increased insurance rates may, however, discourage pursuit of this option. Insurance rates for an airline with the anticipated minimally mandated scanning equipment should run lower than the rates for an airline operating without the minimally mandated scanning equipment.<sup>162</sup>

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157. See Worth Interview, *supra* note 126.

158. See Edward H. Phillips, *Willful Misconduct Charges May Loom*, AVIATION WK. & SPACE TECH., Aug. 19, 1996, at 87, 87.

159. See Worth Interview, *supra* note 126.

160. See *id.*

161. See Port, *supra* note 1, at 78.

162. See Kribel Interview, *supra* note 155.

*E. Protracted Litigation Would Not Facilitate Maximum Recovery Amounts*

Litigation is shortened when the plaintiff in an aviation mishap case makes no claim that the airline engaged in willful misconduct. Consequently, the plaintiff is limited in his recovery to \$75,000. Without limits on recoverable amounts, however, both parties would have every incentive to litigate vigorously, consequently delaying a party's recovery. Likewise, airlines would have every incentive to defend themselves by utilizing their often superior capital resources.<sup>163</sup> The airline's insurance company supplies these financial resources, but only after the airline pays an increased premium with funds made available from higher ticket prices charged to all passengers.<sup>164</sup>

*F. No Feasible Alternative Exists Without Destroying Global Economic Interdependence*

Today, airline competition worldwide has driven down profit margins so that any airline burdened by excessive costs is at a significant disadvantage. Costs are forecast years in advance and deviations from expectations incur domino effects throughout the company, industry, and often country. Usually, the ripple effect of unexpected costs is unknowable in scope and magnitude. In short, no feasible alternative exists.

## VIII. CONCLUSION

Although technology may have closed the door on nitrogen-based explosives finding their way through luggage and personnel scanners, it is not certain that terrorism will never again affect international air travel through some other newly developed means. To encourage worldwide economic development and airline participation in the global marketplace, the barriers to entering the international air travel market must be minimal. The threat of unlimited damages for a single unfortunate air mishap is undoubtedly the most significant economic deterrent for airlines contemplating entrance into the international market. As economic globalization and the need for international access to air travel increases, air-

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163. See Scully Interview, *supra* note 3.

164. See *id.*

lines should be encouraged to expand into overseas travel, not dissuaded from doing so. Although the Warsaw Convention's liability limit has its drawbacks, it must remain unchanged to ensure a future with worldwide access to international air transportation.

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