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## Casenotes and Statute Notes

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## Casenotes and Statute Notes

**CIVIL PROCEDURE — PERSONAL JURISDICTION** — Mere purchases, even occurring at regular intervals, are insufficient as contacts and do not justify a state's claim of *in personam* jurisdiction over a nonresident corporation in a claim not related to the purchase transactions. *Helicopteros Nacionales de Columbia v. Hall*, 104 S. Ct. 1868 (1984).

Four United States citizens died in a helicopter crash in Peru on January 26, 1976.<sup>1</sup> *Helicopteros Nacionales de Columbia, S.A. (Helicol)* owned and operated the helicopter.<sup>2</sup> Helicol is a Colombian corporation in the business of providing helicopter transportation for oil and construction companies in South America.<sup>3</sup> Helicol's principal place of business is Bogota, Columbia.<sup>4</sup> At the time of the crash,<sup>5</sup> Helicol was transporting the four United States citizens, who worked for Consorcio,<sup>6</sup> which was constructing a pipeline for Petro Peru.<sup>7</sup> Because of the

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<sup>1</sup> *Helicopteros Nacionales de Columbia v. Hall*, 104 S. Ct. 1868, 1870 (1984) [hereinafter cited as *Helicol*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Helicol's helicopter crashed into a tree in a fog, and all aboard were killed. Brief for Respondents at 7-8, *Helicopteros Nacionales de Columbia v. Hall*, 104 S. Ct. 1868 (1984) [hereinafter cited as Brief for Respondent]. The jury found that Helicol's pilot had been negligent. *Id.*

<sup>6</sup> *Helicol*, 104 S. Ct. at 1870. Consorcio is a Peruvian consortium, which is a joint venture of Williams International Sudamerica, Ltd., a Delaware corporation; Sedco Construction Corporation, a Texas corporation; and Horn International, Inc., a Texas corporation. Williams-Sedco-Horn is based in Houston, Texas, and formed Consorcio because Peruvian law required construction of the pipeline to be done by a Peruvian entity. *Id.* at 1870 n.1.

<sup>7</sup> *Id.* Petro Peru is the Peruvian state-owned oil company with which Consorcio contracted to construct a pipeline from the jungles of Peru westward to the Pacific

rugged terrain Consorcio needed transport into and out of the construction area in Peru.<sup>8</sup>

A member of Consorcio contacted Helicol, asking Helicol to send an officer to Houston, Texas, to negotiate a contract.<sup>9</sup> In addition to negotiating the contract in Houston, Helicol had other contacts with Texas.<sup>10</sup> Between 1970 and 1977 Helicol bought 80% of its fleet of helicopters from Bell Helicopter Company in Fort Worth, Texas.<sup>11</sup> Helicol's purchases of equipment, parts and services in Texas totaled approximately \$4,000,000.<sup>12</sup> During that time Helicol's pilots and maintenance personnel were trained in Texas.<sup>13</sup> Consorcio's payments of over \$5,000,000 were drawn on a Houston bank and deposited in Helicol's New York and Florida bank accounts.<sup>14</sup> Helicol had no other contacts with Texas.<sup>15</sup>

The survivors and representatives of the four decedents in question brought wrongful death actions against Helicol in the District Court of Harris County, Texas.<sup>16</sup> Helicol's motion to dismiss for lack of personal jurisdiction was denied.<sup>17</sup> A judgment of \$1,141,200 was entered against Helicol in favor of representatives of the

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Ocean. *Hall v. Helicopteros Nacionales de Columbia*, 638 S.W.2d 870, 871 (Tex. 1982) [hereinafter cited as *Hall*].

<sup>8</sup> *Id.*

<sup>9</sup> *Helicol*, 104 S. Ct. at 1870. Helicol had previously done business in South America with Williams International, a member of Consorcio. Brief for Petitioner at 3-4, *Helicopteros Nacionales de Columbia v. Hall*, 104 S. Ct. 1868 (1984). Helicol's chief executive, Francisco Restrepo, went to Houston for the contract negotiations. *Helicol*, 104 S. Ct. at 1870. The contract stated, *inter alia*, that all the parties were residents of Lima, Peru, and that all controversies arising out of the contract would be dealt with in Peruvian courts. *Id.*

<sup>10</sup> *Hall*, 638 S.W.2d at 870.

<sup>11</sup> *Helicol*, 104 S. Ct. at 1870.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1870-71.

<sup>16</sup> *Id.* None of the plaintiffs or the crash victims were residents of Texas. *Id.* Those bringing suit included the Hall family, the Porton family, the Lewallen family and the Moore family. Brief for Respondent at 7 n.6. The Halls resided in Arizona, the Lewallens in Illinois, and both the Moores and the Portons resided in Oklahoma. *Id.* at 7 n.5.

<sup>17</sup> *Helicol*, 104 S. Ct. at 1871.

decendents.<sup>18</sup> The court of civil appeals reversed the trial court's judgment and dismissed the case,<sup>19</sup> holding that Texas lacked *in personam* jurisdiction over Helicol.<sup>20</sup>

The Texas Supreme Court reversed the appellate court,<sup>21</sup> holding that the Texas courts did have *in personam* jurisdiction over Helicol. The Texas Supreme Court reasoned that Helicol's contacts with the state constituted sufficient minimum contacts under the Due Process Clause of the Fourteenth Amendment to justify the exer-

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<sup>18</sup> *Id.* The plaintiffs also sued Consorcio and Bell Helicopter Company. *Id.* Both defendants were granted instructed verdicts, and Bell Helicopter was granted a directed verdict on Helicol's cross-claim. *Id.* at 1871 n.6. Judgment in the amount of \$70,000 was entered against Helicol in favor of Consorcio as cross-plaintiffs. *Id.*

<sup>19</sup> *Helicopteros Nacionales de Columbia v. Hall*, 616 S.W.2d 247 (Tex. App. - Houston [1st Dist.] 1981).

<sup>20</sup> *In personam* jurisdiction (personal jurisdiction) used to be based on physical power: unless a defendant was served with process while he was physically present within the forum state, a court lacked the power to adjudicate a matter involving that defendant. 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1064-1069 (1969). Currently the determination of the validity of the forum state's assertion of personal jurisdiction rests upon minimum contacts between the state, the defendant, and the cause of action. See *infra* notes 42-54 and accompanying text; see also Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 93-95 (1983).

Jurisdiction *in rem* is distinguished from *in personam* jurisdiction in that a judgment rendered by a court with *in rem* jurisdiction does not bind the defendant personally. Comment, *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 948 (1960). The basis for *in rem* jurisdiction is that a state has the power to determine title to or status of property within its borders. *Id.* One commentator stated, "[T]he requirements imposed by the due-process clauses are seizure of the *res* [thing] and notice to all who have or may have interests therein." *Id.* at 949.

Another type of proceeding, commonly called *quasi in rem*, adjudicates the interests of certain known defendants, rather than the whole world's interests in property in the state. *Id.* An example of a *quasi in rem* proceeding is a bill to remove a cloud on title, which determines interests in specific property. *Id.* In a second type of *quasi in rem* action, the plaintiff has a personal claim against a nonresident defendant, and any property the defendant may own in the state is attached and brought within the court's jurisdiction. *Id.* The plaintiff may satisfy his judgment out of the attached property. *Id.* Like *in rem* actions, the basis of jurisdiction in both *quasi in rem* proceedings is the power of the state over a *res* situated within its borders. *Id.* at 950. See also Lilly, *supra*; Note, *Personal Jurisdiction in Oregon*, 49 J. AIR L. & COM. 399, 403 (1984).

<sup>21</sup> *Hall*, 638 S.W.2d at 870. Initially, the Supreme Court of Texas affirmed the court of civil appeals, but on a motion for rehearing, the court withdrew its prior opinion and reversed the appellate court, with three justices dissenting. *Helicol*, 104 S. Ct. at 1871.

cise of personal jurisdiction over the company.<sup>22</sup>

The Supreme Court of the United States granted *certiorari* to decide whether the Supreme Court of Texas correctly ruled that Helicol's contacts with the state of Texas were sufficient to allow it to assert jurisdiction over Helicol, a foreign corporation, in a cause of action not arising out of or related to Helicol's activities in Texas.<sup>23</sup> *Held, reversed.* Mere purchases, even occurring at regular intervals, are insufficient as contacts and do not justify a state's claim of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions. *Helicopteros Nacionales de Columbia v. Hall*, 104 S. Ct. 1868, 1874 (1984).

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<sup>22</sup> *Id.* The Texas Supreme Court held that the Texas long-arm statute reaches as far as due process permits. *Hall*, 638 S.W.2d at 872 (citing *U-Anchor Advertising, Inc. v. Burt*, 553 S.W. 2d 760 (Tex. 1977)). The statute reads in relevant part:

Sec. 3. Any foreign corporation . . . that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment

Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation . . . shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

Tex. Rev. Civ. Stat. Ann. art. 2031b (Vernon 1964 & Supp. 1984). The Supreme Court of the United States stated it had no power to determine whether the Supreme Court of Texas was correct in its interpretation of the state's long-arm statute, so the Court accepted the Texas court's holding that the statute reached as far as due process allows. *Helicol*, 104 S. Ct. at 1872 n.7. The issue before the Court, therefore, was whether due process allowed the exercise of jurisdiction under these facts. *See id.* at 1871-72.

<sup>23</sup> *Id.* at 1869-70.

## I. HISTORY OF PERSONAL JURISDICTION — NONRESIDENT CORPORATIONS

A. *Early Theories of Personal Jurisdiction*

The American doctrine of personal jurisdiction has undergone major changes throughout its history.<sup>24</sup> The traditional grounds for assertion of jurisdiction over defendants originated in *Pennoyer v. Neff*,<sup>25</sup> which was based on the common law doctrines of presence and consent.<sup>26</sup> In that case, the Supreme Court of the United States held that the Due Process Clause of the Fourteenth Amendment operates to limit a state's power to assert *in personam* jurisdiction over a nonresident defendant.<sup>27</sup> The Court applied a mechanical "territorial power" theory of jurisdiction<sup>28</sup> that grants a court the power to exercise jurisdiction over a nonresident defendant only if he had been personally served with process while physically present within the boundaries of the forum state, or if he has consented to that court's adjudication.<sup>29</sup>

After *Pennoyer v. Neff*, states asserted jurisdiction over natural persons in four situations:<sup>30</sup> first, where the defendant's residence was within the forum;<sup>31</sup> second, where the defendant was in the forum when served;<sup>32</sup> third,

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<sup>24</sup> von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

<sup>25</sup> 95 U.S. 714 (1877). For a more detailed look at the development of the American law of personal jurisdiction and the history of the various doctrines, see Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241 (1965); Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Comment, *supra* note 20.

<sup>26</sup> Comment, *supra* note 20. See also *infra* notes 28-29 and accompanying text.

<sup>27</sup> *Pennoyer v. Neff*, 95 U.S. at 733.

<sup>28</sup> Casad, *Shaffer v. Heitner; An End to Ambivalence in Jurisdiction Theory?* 26 U. KAN. L. REV. 61 (1977).

<sup>29</sup> *Pennoyer v. Neff*, 95 U.S. at 727.

<sup>30</sup> Woods, *Pennoyer's Demise; Personal Jurisdiction After Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 863 (1978).

<sup>31</sup> See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (out of state service of process was valid where the absent defendant is domiciled in the forum state).

<sup>32</sup> See *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (jurisdiction asserted over defendant served while flying in airspace above the forum).

where the defendant consented to the forum's assertion of jurisdiction;<sup>33</sup> and fourth, where the defendant owned property within the forum which was attached before adjudication of the claim.<sup>34</sup> Following *Pennoyer v. Neff*, states were able to assert jurisdiction over domestic corporations as being "present" for jurisdictional purposes, or as having "consented" to jurisdiction, or even as being "domiciled" within the borders of the state that created it.<sup>35</sup> Courts, however, experienced difficulties in applying this traditional territorial doctrine of jurisdiction to foreign corporations.<sup>36</sup> Thus, courts began to assert jurisdiction under their own theories.<sup>37</sup>

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<sup>33</sup> See *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (defendants consented to jurisdiction of the forum state by agreeing to designate a third person to receive process for them in that state).

<sup>34</sup> See *Harris v. Balk*, 198 U.S. 215, 226 (1905) (asserting *quasi in rem* jurisdiction over a debt owed to the absent, nonresident defendant), *overruled in Shaffer v. Heitner*, 433 U.S. 186 (1977). See also *supra* note 20 for an explanation of this type of *quasi in rem* proceeding.

<sup>35</sup> Comment, *supra* note 20, at 919.

<sup>36</sup> *Id.*

<sup>37</sup> Courts began to apply the consent to adjudication theory to nonresident corporations. See *Ex Parte Schollenberger*, 96 U.S. 369, 377 (1877) (jurisdiction asserted over foreign corporation because it consented to being "found" within the territorial limits of the state as a condition to doing business there).

Theorizing that it was inconsistent to determine that a corporation which did not exist except in its charter state could consent to be sued or bring suit (see *Bank of United States v. Devereaux*, 9 U.S. (5 Cranch) 61 (1809) (allowing a corporation in one state to sue a citizen of another state in federal court)), the New Jersey Supreme Court held a court could assert jurisdiction over a nonresident corporation "doing business" within the forum. *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N.J.L. 57, 60-61 (1855) (enforcing a judgment obtained against New Jersey corporation in New York because the corporation had transacted business in New York and the cause of action arose from the contract made there between the parties).

Most states, however, continued to use the consent theory by restricting a foreign corporation's ability to do business in that state until the nonresident consented to that forum's adjudicatory powers, whether or not the corporation complied with the statute requiring it to appoint an agent. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) (allowing the interpretation of Missouri consent-to-service statute to include consent to service in an action in Missouri on a policy issued in Colorado insuring buildings in Colorado); *Simon v. Southern Ry.*, 236 U.S. 115 (1915) (state may provide for service to be made when nonresident corporation fails to comply with state statute requiring foreign corporations doing business therein to appoint agents upon whom service may be made).

The inconsistencies resulting from the fictional consent and presence theories

Today, the Supreme Court recognizes two types of personal jurisdiction: "general" and "specific."<sup>38</sup> "General" jurisdiction exists where the defendant is required to defend against claims made by the plaintiff without regard to the defendant's contacts with the state.<sup>39</sup> The exercise of "specific" jurisdiction over a defendant exists when he is called upon to defend against claims arising out of or related to his contacts with that state.<sup>40</sup> A defendant subject to general jurisdiction, therefore, may be called upon to defend against all claims that a plaintiff in that state may hold against him, but under specific jurisdiction the defendant may only be called upon to defend against claims arising out of the transactions upon which the assumption of jurisdiction is based.<sup>41</sup>

B. *Modern Treatment of Personal Jurisdiction — Rejection of Traditional Territorial Power Theory.*

The Supreme Court turned away from the traditional territorial power theory in *International Shoe Co. v. Washington*.<sup>42</sup> In that case the state of Washington sued the International Shoe Company for unpaid unemployment insurance contributions.<sup>43</sup> The defendant, a Delaware corporation based in Missouri, had no offices in Washing-

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were strongly objected to by commentators. Comment, *supra* note 20, at 920-23. Eventually these theories were rejected by the United States Supreme Court in favor of a new rationale in *International Shoe Co. v. Washington*. See *infra* notes 42-56 and accompanying text.

<sup>38</sup> *Helicoid*, 104 S. Ct. at 1872 nn.8,9. The Court cites two commentaries for this terminology: von Mehren & Trautman, *supra* note 24, at 1144-64; and Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81.

For an example of general jurisdiction see *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) (permitting general jurisdiction where defendant's contacts with forum were "continuous and systematic" but unrelated to the dispute). See also *infra* notes 79-84 and accompanying text.

For an example of specific jurisdiction see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See also *infra* notes 42-53 and accompanying text.

<sup>39</sup> *Helicoid*, 104 S. Ct. at 1872.

<sup>40</sup> *Id.*

<sup>41</sup> Woods, *supra* note 30, at 863.

<sup>42</sup> 326 U.S. 310 (1945).

<sup>43</sup> *Id.* at 311.



ton and entered into no contracts there. International Shoe employed salesmen who lived in Washington, but who were supervised and paid from the defendant's office in St. Louis.<sup>44</sup> International Shoe challenged the court's assertion of personal jurisdiction, arguing that its activities in Washington were insufficient to manifest its presence there.<sup>45</sup>

The Supreme Court held that Washington had jurisdiction to enforce the obligations which the defendant had incurred there. In doing so the Court replaced the presence and consent theories<sup>46</sup> with a new test for compliance with the Due Process Clause of the Fourteenth Amendment: whether the corporation had such minimum contacts with the state that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>47</sup> The Court declared that the proper focus for determining the sufficiency of the contacts must be not merely on the quantity of a corporation's activities within the state, but rather on the "quality and nature" of the activities and their connection with the activities sued upon.<sup>48</sup> The Court noted that the defendant's activities in Washington were continuous activities creating a large volume of shoe sales in the state, and that the claim against the defendant arose from that large volume of business.<sup>49</sup> Accordingly, the Court held that the state of

<sup>44</sup> *Id.* at 313-14.

<sup>45</sup> *Id.* at 315.

<sup>46</sup> See *supra* notes 26-37 and accompanying text.

<sup>47</sup> *International Shoe*, 326 U.S. at 319 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>48</sup> *International Shoe*, 326 U.S. at 319. The Court rejected the "presence" theory stating that term merely symbolized those contacts a corporation has with a state that are sufficient to satisfy the due process standard. *Id.* at 316-17.

<sup>49</sup> *Id.* at 320. The Court stated:

[t]he test is not merely . . . whether the activity . . . is a little more or less. [cites omitted] Whether due process is satisfied must depend rather upon the quality and the nature of the activity . . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations *arise out of* or are connected with the activities within the state, a procedure which re-

Washington had jurisdiction over International Shoe.<sup>50</sup>

In *International Shoe* the Court analyzed *Rosenberg Brothers & Co. v. Curtis Brown Co.*<sup>51</sup> to further explain the new juris-

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quires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

*Id.* at 319 (emphasis added).

<sup>50</sup> *Id.* at 320-21.

<sup>51</sup> 260 U.S. 516 (1923). In *Rosenberg*, a small retailer in Oklahoma purchased goods in New York for resale in Oklahoma. *Id.* at 517-18. The New York company filed a suit against the Oklahoma retailer in New York. *Id.* at 517. The defendant appeared specially and moved to quash the summons arguing that the corporation was not "present" in New York. *Id.* The Supreme Court agreed with the defendant and held that purchases and related trips, without more, are insufficient to warrant the inference that the corporation is present in a forum state. *Id.* The defendant had no contacts in New York except for visits there to make purchases. *Id.* at 518. The Court held that these visits, even if they occurred regularly, would not be sufficient to infer defendant's presence in New York. *Id.* The Court indicated that it was immaterial to the case that the cause of action arose from the defendant's purchases in New York. *Id.* The Supreme Court in *Helicol*, however, declined to "decide the continuing validity of *Rosenberg* with respect to an assertion of specific jurisdiction, *i.e.*, where the cause of action arises out of or relates to the purchases by the defendant in the forum state." *Helicol*, 104 S. Ct. at 1874 n.12. See *supra* notes 38-41 and accompanying text.

Some courts followed *Rosenberg*, concluding purchases do not constitute "doing business." See *Blount v. Peerless Chemicals Inc.*, 316 F.2d 695, 698-99 (2d Cir.), *cert. denied*, 375 U.S. 831 (1963) (parent corporation not subject to jurisdiction of another state based on activities of its subsidiary in that state); *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141-42 (2d Cir. 1930) (infrequent visits to New York by nonresident corporation's officer did not constitute continuous dealings required for state to have jurisdiction); *Tillay v. Idaho Power Co.*, 425 F. Supp. 376, 380-82 (E.D. Wash. 1976) (foreign power company's purchase of equipment was insufficient as minimum contacts where the claim did not arise out of those purchases); *Storie v. Beech Aircraft Corp.*, 417 F. Supp. 141, 145 (E.D. Mich. 1976) (foreign corporation's purchases through mail and telephone insufficient to give Michigan courts general personal jurisdiction over corporation); *Lichtenberg v. Bullis School, Inc.*, 68 A.2d 586, 587 (D.C. 1949) (foreign corporation was not doing business in District of Columbia so as to become amenable to process there by maintaining bank account, making purchases, and placing advertisements in newspapers in that state); *Berube v. White Plains Iron Works, Inc.*, 211 F. Supp. 457, 459 (D. Me. 1962) (renting equipment in the forum for use outside the forum was not "doing business").

Those courts that did not follow *Rosenberg* stated that systematic and continuous purchases in a state allowed that state to exercise its jurisdiction over a defendant "doing business" in that forum. See *Duluth Log Co. v. Pulpwood Co.*, 137 Minn. 312, 163 N.W. 520, 520-21 (1917) (sending agent to Minnesota to purchase pulpwood constituted doing business so as to render the foreign corporation amenable to service of process); *Sterling Novelty Corp. v. Frank & Hirsch Distr. Co.*, 299 N.Y. 208, 86 N.E.2d 564, 565-67 (1949) (South African corporation held to be doing business in New York where its exclusive purchasing agent bought merchandise in New York). The courts did not discuss the relationship between the

diction doctrine. The Court stated that the "commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the State [the] authority to enforce it . . . ."<sup>52</sup> A state would, however, have jurisdiction over a corporation when the corporation's acts met the new test.<sup>53</sup> The Court's focus thus shifted from an emphasis on territoriality to an emphasis on minimum contacts and fairness.<sup>54</sup>

Twelve years after *International Shoe*, the Supreme Court in *McGee v. International Life Ins. Co.*,<sup>55</sup> focused on state interest while shedding some light on the new test for per-

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purchases and the cause of action, therefore the courts did not consider the relationship to be important in determining the jurisdictional issue. *Id.*

In other cases where courts concluded that systematic and continuous buying in a state constituted "doing business" in the forum, the courts noted the additional factor that the cause of action arose out of the defendant's purchases. *See* Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 F. 352, 356, 359 (9th Cir. 1912) (service of process on foreign corporation's agent visiting California to discuss contract for the purchase of goods held to be valid since such purchases constituted transaction of business in California); *Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co.*, 102 F. Supp. 258, 259 (E.D. Ky. 1951) (foreign coal sales agency held amenable to service of process in Kentucky where defendant's agents made purchases of coal there); *Dungan, Hood & Co. v. C.F. Bally Ltd.*, 271 F. 517, 519 (E.D. Pa. 1921) (foreign corporation's agent's acts held to constitute doing of business by the corporation in Pennsylvania where agent was negotiating contract to buy leather); *Payne & Joubert v. East Union Lumber Co.*, 109 La. 706, 33 So. 739, 740-41 (1903) (foreign corporation signing a contract for sale in Mississippi held to be amenable to service of process in Louisiana since defendant consented to accept delivery of goods in that state). Although the courts mentioned the relationship between the purchases and the cause of action, the relationship does not appear to be the basis for the courts' jurisdictional findings. *Id.*

The Supreme Court of California determined that *Rosenberg* was obsolete in light of the minimum contacts test of *International Shoe*. *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437, 440 (1958). In *Jahn*, the plaintiff sued to enjoin the defendant from inducing breaches of its distributorship contracts and from using confidential materials the defendant had obtained as the plaintiff's former exclusive export agent. The court held the defendant was doing business in the state where it made regular purchases of goods in that state, and where the cause of action was directly related to defendant's dealings with the California plaintiffs. *Id.* at 323 P.2d 441-42.

<sup>52</sup> *International Shoe*, 326 U.S. at 318.

<sup>53</sup> *Id.*

<sup>54</sup> Norenburg, *State Courts, Personal Jurisdiction And the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 593 (1978-1979).

<sup>55</sup> 335 U.S. 220 (1957).

sonal jurisdiction. In *McGee*, the nonresident corporation had assumed the insurance obligations of the deceased's previous insurer and had sent the deceased, a California resident, an offer of reinsurance which was accepted.<sup>56</sup> The Supreme Court held that this sole contact between the defendant and the State warranted California's assertion of personal jurisdiction over the insurance company.<sup>57</sup> The Court stated that, "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum state] . . . ." <sup>58</sup>

Justice Black's opinion for the Court was reminiscent of his dissent in *International Shoe*.<sup>59</sup> Although Justice Black referred to the "minimum contacts" test of *International Shoe*,<sup>60</sup> he emphasized the state's concern in protecting its citizens' interests:

It cannot be denied that California has a manifest interest in providing effective means of redress for its citizens when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.<sup>61</sup>

Black also discussed fairness to the corporation, stating that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activ-

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<sup>56</sup> *Id.* at 221-22. International Life had no other contacts with California beyond the offer of reinsurance and the insurance contract. *Id.* at 222. California courts asserted personal jurisdiction over International Life, but Texas courts (the defendant resided in Texas) refused to give the California judgment full faith and credit, holding that the defendant's contacts with California did not allow such an assertion of jurisdiction. *Id.* at 221.

<sup>57</sup> *McGee*, 355 U.S. at 221-24.

<sup>58</sup> *Id.* at 223.

<sup>59</sup> *International Shoe*, 326 U.S. at 322-26. Justice Black indicated there was no need to formulate such broad rules for the exercise of personal jurisdiction at that time. *Id.* at 322.

<sup>60</sup> *McGee*, 355 U.S. at 222.

<sup>61</sup> *Id.* at 223. Justice Black emphasized the state's interest by pointing out that the state had a strong state regulatory interest in the insurance field. *Id.*

ity,"<sup>62</sup> but the Justice's main concern was with the state's interest in the adjudication, rather than with the defendant.<sup>63</sup> Thus Justice Black added the element of state interest to the new test of jurisdiction.<sup>64</sup>

The Court abandoned the traditional theories of presence and consent in *International Shoe* and *McGee*.<sup>65</sup> In both cases the Court expounded the minimum contacts theory, which requires that a defendant have relationship with the forum state before that state may assert jurisdiction over the defendant.<sup>66</sup> The Court in *International Shoe* stated that a corporation will be subject to a state's jurisdiction when the corporation's activities in that state are continuous;<sup>67</sup> the Court added the element of state interest to the minimum contacts theory in *McGee*.<sup>68</sup>

### C. Defendant's Activities Within Forum State as a Consideration in the Due Process Analysis

One year after *McGee*, the Supreme Court decided *Hanson v. Denkla*,<sup>69</sup> a case in which it invalidated a state's exercise of personal jurisdiction over a foreign corporation. *Hanson v. Denkla* involved conflicting decisions of a Florida court and a Delaware court concerning the disposition of the funds from a trust in Delaware.<sup>70</sup> In holding the

<sup>62</sup> *Id.* at 223.

<sup>63</sup> *Id.* at 223-24. State interest in adjudicating a cause of action is an important factor in the due process analysis. See *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935) (allowing exercise of personal jurisdiction based on the state's power to regulate the nonresident's activities of selling stocks in that state, and the state's interest in protecting its own citizens); *Hess v. Pawloski*, 274 U.S. 352 (1927) (allowing exercise of personal jurisdiction based on state's interest in protecting its citizens from automobile accidents involving nonresidents).

<sup>64</sup> See *McGee*, 355 U.S. at 223-24. Later the Court limited a state's ability to assert jurisdiction based on state interest. See *infra* notes 76-78 and accompanying text.

<sup>65</sup> See *supra* notes 42-58 and accompanying text.

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* note 48 and accompanying text.

<sup>68</sup> See *supra* notes 55-58 and accompanying text.

<sup>69</sup> 357 U.S. 235 (1958).

<sup>70</sup> *Id.* at 238. The decedent set up a trust while she was domiciled in Pennsylvania. *Id.* The assets of the trust and the trustee were in Delaware. *Id.* Ten years later, she moved to Florida, where she exercised her power of appointment,

trustee's contacts with Florida to be insufficient, the Court emphasized the fact that the foreign corporation had never done any other business in Florida,<sup>71</sup> and that the cause of action did not arise from any business done in Florida.<sup>72</sup>

The Court placed great emphasis on the fact that the defendants' contacts with the forum were initiated by the creator of the trust, not the trustee.<sup>73</sup> Writing the opinion for the Court, Chief Justice Warren stated:

The unilateral activity of those who claim some relationship with a nonresident cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.<sup>74</sup>

The "purposeful availment" requirement added a subjective element to the Court's analysis of minimum contacts.<sup>75</sup> The Court's focus moved from state interest in the litigation to the defendant's actions.<sup>76</sup> The Court con-

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assigning the remainder of the trust to her grandchildren in trust. *Id.* at 239. When she died her daughters sought a declaratory judgment in Florida regarding the assets of the trust. *Id.* at 242. The Florida courts decided to assert jurisdiction over both the assets of the trust and the trustee, a foreign corporation. *Id.* The trustee's only contacts with Florida were its dealings with the decedent. *Id.* at 251, 253. The Supreme Court of the United States reversed the Florida Supreme Court, holding that Florida did not have jurisdiction. *Id.* at 256.

<sup>71</sup> *Id.* at 251. The Court noted that the defendant had no office in Florida, had never solicited business there, and had never transacted business there or held or administered trust assets in Florida. *Id.*

<sup>72</sup> *Id.* at 251-52. The Court stated, "[t]he cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state . . . [T]his action involves the validity of an agreement that was entered into without any connection with the forum State." *Id.*

<sup>73</sup> *Id.* The Court also distinguished *Hanson* from *McGee* by noting that the state of Florida showed no strong interest in this kind of situation by failing to enact a special long-arm statute. *Id.* at 252. See generally *supra* notes 59-63 and accompanying text.

<sup>74</sup> *Hanson*, 357 U.S. at 253 (citing *International Shoe*, 326 U.S. at 319) [emphasis added].

<sup>75</sup> Woods, *supra* note 30, at 885.

<sup>76</sup> The *Hanson* majority stressed that a nonresident defendant would remain

tinued to insist on contacts between the state and the non-resident defendant, noting that although *McGee* recognized the trend of expanding personal jurisdiction over nonresidents, restrictions still existed as a consequence of territorial limitations on the power of the respective states.<sup>77</sup> The Court expressly rejected the argument that when a state is the "center of gravity" of a controversy, it should have jurisdictional authority over the controversy.<sup>78</sup>

All of the cases discussed up to this point deal with claims related to the defendants' activities within the forum state. *Perkins v. Benguet Consolidated Mining Co.*,<sup>79</sup> however, involved a suit in Ohio against a nonresident mining company on a cause of action not arising from the company's activities in the state.<sup>80</sup> The Court held that where the cause of action does not arise from business done within the forum state,<sup>81</sup> due process requires that the activities in the state be conducted "systematically and continuously" so as to make it "fair and reasonable to subject that corporation to proceedings *in personam* in that state."<sup>82</sup> Thus the Court focused on fairness to the non-

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outside of a state's jurisdictional reach unless he had minimum contacts with the state because those contacts were a "prerequisite to its exercise of power over him." *Id.* at 251.

<sup>77</sup> *Hanson*, 326 U.S. at 251. The requirement that the defendant's activities in the state be conducted purposefully was ignored by some courts, and it caused consternation in others. Woods, *supra* note 30, at 855 (citing *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966) (refusing to apply the *Hanson* language literally)); Hazard, *supra* note 25, at 243-44.

<sup>78</sup> *Hanson*, 357 U.S. at 254. Some commentators suggest the Court in *Hanson* substituted "minimum contacts" for presence and consent to jurisdiction, without explaining the underlying motives of the decision. Lilly, *supra* note 20, at 93.

<sup>79</sup> 342 U.S. 437 (1952).

<sup>80</sup> The company's mining operations in the Philippines were suspended during World War II. During that time, the president of the company went to Ohio where he maintained an office, did business for the company, and kept records. The plaintiff's cause of action did not involve the company's activities in Ohio. She was, instead, suing for dividends based on the company's profits from its Philippine operations. *Id.* at 439, 447-48.

<sup>81</sup> The mining in the Philippines had recommenced when suit was brought in Ohio in 1947, a fact which the Supreme Court did not point out. Lilly, *supra* note 20, at 1144.

<sup>82</sup> *Perkins*, 342 U.S. at 445.

resident defendant to determine if its activities within the state are so substantial and of such a nature as to allow a state to adjudicate a cause of action against the nonresident defendant.<sup>83</sup> The Court added fairness to the defendant as another element of the minimum contacts theory of jurisdiction, which at this point consisted of the quality and nature of the defendant's activities in the forum state, and the forum state's interest in those activities.<sup>84</sup>

From 1958 until 1977 the Supreme Court was silent on the issue of personal jurisdiction. Then in *Shaffer v. Heitner*,<sup>85</sup> the Supreme Court recharacterized *International Shoe*'s minimum contacts standard and applied it to certain assertions of *quasi in rem* jurisdiction.<sup>86</sup> In *Shaffer*, a nonresident brought a shareholder's derivative suit in Delaware against Greyhound, a Delaware corporation, and against twenty-eight of the corporation's nonresident directors and officers.<sup>87</sup> The plaintiff took advantage of a Delaware statute allowing stock in a Delaware corporation to be attached to provide *quasi in rem*<sup>88</sup> jurisdiction over its owner.<sup>89</sup> The Court held that an assertion of jurisdiction over property was an assertion of jurisdiction over the

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<sup>83</sup> *Id.* at 447. The Court in *Helicor* cites *Perkins* as an example of general jurisdiction. 104 S. Ct. at 1872. See *supra* note 38 and accompanying text.

<sup>84</sup> See *supra* notes 65-68 and accompanying text.

<sup>85</sup> 433 U.S. 186 (1977).

<sup>86</sup> *Shaffer*, 433 U.S. at 195. For an explanation of *quasi in rem*, *in rem*, and *in personam* jurisdiction, see *supra* note 20.

<sup>87</sup> *Shaffer*, 433 U.S. at 189-90. The plaintiff alleged that in Oregon the directors and officers had caused the corporation to be liable for large antitrust damages and fines in violation of their duties to Greyhound. *Id.*

<sup>88</sup> See *supra* note 20.

<sup>89</sup> *Id.* The statute provides:

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the state of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

DEL. CODE ANN. tit. 8, § 169 (1983). The plaintiff in this case was able to sequester stock valued at approximately \$1.2 million. *Shaffer*, 433 U.S. at 192 n.7. The plaintiff alleged the defendants breached their duties to Greyhound, resulting in the imposition of the corporations being held liable in an antitrust suit and a criminal contempt action. *Id.* at 190.



property's owner, and that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."<sup>90</sup>

The Court added new elements to the minimum contacts doctrine by stating that "the central concern of the inquiry into personal jurisdiction"<sup>91</sup> is the relationship "among the *defendant*, the *forum*, and the *litigation*, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest."<sup>92</sup> Reformulating the doctrine the Court in this way raised the question of whether in certain cases state interest could be so strong as to create the proper personal jurisdiction over a non-resident defendant.<sup>93</sup>

Applying the recharacterized *International Shoe* standards of minimum contacts to the facts in *Shaffer*, the Court noted that the cause of action arose outside of the state and that the record failed to show that the defendant officials had ever been in Delaware.<sup>94</sup> The Court stated that the defendants "simply had nothing to do with the state of Delaware" and thus Delaware had no jurisdiction over the property's owner, and that the claims were unconnected to the property sequestered.<sup>95</sup> The Court concluded that Delaware lacked the power to assert jurisdiction over the nonresident Greyhound officials.<sup>96</sup>

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<sup>90</sup> *Id.* at 212.

<sup>91</sup> *Id.* at 204.

<sup>92</sup> *Id.* (emphasis added).

<sup>93</sup> Dorsaneo, *Due Process, Full Faith and Credit and Family Law Litigation*, 36 Sw. L. J. 1085, 1097, 1001 (1983). Professor Dorsaneo notes that the Court in *Shaffer* failed to set forth the weight to be given to the relationship between the forum and the litigation. *Id.* at 1097. However, later Supreme Court opinions indicate that the defendant must have some relationship with the forum. *Id.* at 1097 n.69. See also *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); see also *infra* note 122 and accompanying text.

<sup>94</sup> *Shaffer*, 433 U.S. at 216.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 216-17. The Court did leave the door open for the presence of property within the state to grant jurisdiction *in rem* in certain situations. *Id.* at 208. A noted commentator states that such suits are still permissible because of "(1) the nonresident's claimed interest in the property at issue; (2) the conferral of benefits and protection by the forum state; and (3) the state's interest in the marketability of property located within its boundaries. These factors combine to satisfy

In actuality, the Court again looked to the defendant in its analysis of jurisdiction, and re-emphasized the subjective element that it had first recognized in *Hanson*.<sup>97</sup>

The Supreme Court again used a defendant-biased analysis of personal jurisdiction in *Kulko v. Superior Court of California*.<sup>98</sup> In that case the Court held that, by merely allowing his daughter to move to California to live with her mother, a father residing in New York did not have minimum contacts with California.<sup>99</sup> The children lived with each parent during different times of the year.<sup>100</sup> When both children decided to stay in California, the mother brought a suit to gain custody and increase child support.<sup>101</sup> The Supreme Court conceded that California had a strong interest in the children's financial welfare, but found that the defendant had not purposefully availed himself of California's benefits and privileges, and thus could not reasonably have foreseen being called to California to defend against a claim there.<sup>102</sup>

The Court gave two reasons that California's state interest was insufficient to allow its exercise of jurisdiction.<sup>103</sup> First, California failed to enact a special jurisdictional statute asserting an interest in this kind of litigation.<sup>104</sup> Second, the Court concluded that the wife could obtain a New York adjudication on the support issue without having to leave California, through the Uniform

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the 'contacts' and 'fairness' elements of *International Shoe*." Lilly, *supra* note 20, at 98 n.57. Because some kinds of *in rem* proceedings survive *Shaffer*, Lilly states, "the obvious impact of *Shaffer* is to limit jurisdiction where the property of a non-resident is seized in order to provide a basis for prosecuting an unrelated claim." *Id.* at 98.

<sup>97</sup> See Woods, *supra* note 30, at 885-88. Justice Stevens concluded the defendant's contacts must be such that a reasonable defendant would foresee the possibility of defending a suit in that state, thus having "fair notice." *Shaffer*, 433 U.S. at 218 (Stevens, J. concurring).

<sup>98</sup> 436 U.S. 84 (1978)

<sup>99</sup> *Id.* at 87-88.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 97-98.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 98.

<sup>104</sup> *Id.*

Reciprocal Enforcement of Support Act in force in both states.<sup>105</sup>

In *World-Wide Volkswagen Corp. v. Woodson*,<sup>106</sup> the Supreme Court reaffirmed the "purposeful availment" element of *Hanson* required for the minimum contacts standard. The plaintiffs, residents of New York, purchased an Audi automobile in New York from Seaway Volkswagen.<sup>107</sup> A year later the plaintiffs decided to move.<sup>108</sup> While driving through Oklahoma on the way to their new home in Arizona, the plaintiffs were involved in an automobile accident.<sup>109</sup> They brought a products liability suit in Oklahoma state court against the dealer and a regional automobile distributor that served only northeastern states.<sup>110</sup> These defendants objected to Oklahoma's assertion of personal jurisdiction because there was no evidence that either defendant conducted business activity in Oklahoma.<sup>111</sup> The Oklahoma Supreme Court upheld jurisdiction over the distributor based on the foreseeability that a car will be driven in other states.<sup>112</sup> That court also noted the cost of the automobile, concluding that the defendants enjoyed profits derived from sales in New York of automobiles that from time to time were used in Oklahoma.<sup>113</sup>

The United States Supreme Court reversed, holding that even if it were foreseeable that the plaintiffs would drive their car into Oklahoma, foreseeability alone was insufficient to support jurisdiction in that state.<sup>114</sup> The Court emphasized that a state has personal jurisdiction

<sup>105</sup> *Id.*

<sup>106</sup> 444 U.S. 286 (1980).

<sup>107</sup> *Id.* at 288.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 289.

<sup>112</sup> *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351, 354 (Okla. 1978).

<sup>113</sup> *Id.* at 354. Based on this conclusion the Oklahoma court was able to hold that the state's long-arm statute, which reached defendants deriving substantial revenue from goods used in that state, authorized jurisdiction in that case. *Id.*

<sup>114</sup> *World-Wide Volkswagen*, 444 U.S. at 296.

over a nonresident only if certain minimum contacts exist between the defendant and the state.<sup>115</sup> The Court also identified three separate interests that could be considered in an appropriate case:<sup>116</sup> first, the plaintiff's interest in obtaining effective relief where that interest is not adequately protected by the plaintiff's ability to choose the forum;<sup>117</sup> second, the interstate judicial system's interest

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<sup>115</sup> *Id.* at 293-94. The Court made clear that minimum contacts has two dimensions: (1) limitations prescribed by the Constitution which distributes judicial power among the states ensuring co-equal sovereignty, *id.*, and (2) limitations prescribed by the Constitution which protect the defendant, through fairness, from being called to defend against claims in inconvenient forums. *Id.* at 297. *See also*, Lilly, *supra* note 20, at 104.

The Court in *World-Wide Volkswagen* stated that although it noted in *McGee* the changes taking place in the development of the personal jurisdiction doctrine, the Court "never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293. The Court then explained that the Framers wrote the Constitution with a desire to give the states economic interdependence as well as "many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." *Id.* The Court concluded that every state's own sovereignty thus limits the sovereignty of all of the other states — with that limitation being in both the original Constitution and the Fourteenth Amendment. *Id.* The Court recognized it abandoned the traditional "presence" theory of *Pennoy* in *International Shoe*. *Id.* In *World-Wide Volkswagen* the Court stressed that assessing the reasonableness of exercising jurisdiction over a defendant must be done in light of "our federal system of government." *Id.* at 293-94 (citing *International Shoe*, 326 U.S. at 317).

The Court went on to explain that the Due Process Clause acts as an instrument of interstate federalism by requiring a defendant to have contacts, ties, or relations with a state before that state may assert jurisdiction over him. *World-Wide Volkswagen*, 444 U.S. at 294 (citing *International Shoe*, 326 U.S. at 317 and *Hanson*, 357 U.S. at 254). The Court stated this element of due process may sometimes act to divest a state of its adjudicatory power even if it would not inconvenience the defendant to defend itself against a claim in that state, even if the state has a strong state interest, and even if the most convenient location for the litigation is the forum state. *World-Wide Volkswagen*, 444 U.S. at 294 (citing *Hanson*, 357 U.S. at 251, 254). The Court continued to focus on the defendant in analyzing personal jurisdiction: "[It] is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

The Court looked at the fairness element of minimum contacts and recognized the need to consider several relevant factors "including the interests of the plaintiff in a convenient forum and of the state in adjudicating the dispute." Lilly, *supra* note 20, at 104.

<sup>116</sup> *World-Wide Volkswagen*, 444 U.S. at 292.

<sup>117</sup> *Id.* (citing *Kulko*, 436 U.S. at 93; *Shaffer*, 433 U.S. at 211 n.37).

in resolving conflicts efficiently;<sup>118</sup> and third, the forum state's interest in adjudicating the dispute.<sup>119</sup>

Even with these considerations the Court required some contacts to result from the defendant's activities. In this case, the plaintiff's unilateral activity was the only reason that the defendant's products caused injury in Oklahoma.<sup>120</sup> The Court added that only where a defendant made efforts to serve directly or indirectly the market for its products in the state would the state be reasonable and fair in choosing to exercise jurisdiction over such a defendant.<sup>121</sup> The defendant, according to the Court, will not be found to have purposefully availed itself of a state's benefits unless the defendant has clear notice that it is subject to suit in that state.<sup>122</sup> This notice is clear where a corporation delivers its products "into the stream of commerce"<sup>123</sup> with the expectation that [the product will] be purchased by consumers in the forum state."<sup>124</sup>

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<sup>118</sup> *World-Wide Volkswagen*, 444 U.S. at 291 (citing *Kulko*, 436 U.S. at 93, 98).

<sup>119</sup> *World-Wide Volkswagen*, 444 U.S. at 292.

<sup>120</sup> *Id.* at 298.

<sup>121</sup> *Id.* at 297. Requiring the defendant to conduct such purposeful activities prevents constrictions on commerce which might result if jurisdiction were based solely on foreseeability that a single tortious act outside the forum would result in an injury within the forum. See *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956).

<sup>122</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

<sup>123</sup> One commentator states this "stream of commerce" language allows courts to assert jurisdiction over businesses that market their products widely among the states. Lilly, *supra* note 20, at 105 n.76. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In that case jurisdiction was asserted over an Ohio corporation which manufactured valves that were incorporated into boilers by another company. The boiler company sold one of its products to the plaintiff in Illinois. The plaintiff was injured when the boiler exploded. The plaintiff then brought suit in Illinois against the Ohio manufacturer. The Illinois courts interpreted the state's long-arm statute to include tortious conduct outside the state producing in-state injury. *Id.* at 762-63.

<sup>124</sup> *Id.* *World-Wide Volkswagen* is criticized as being unconvincing in its denial of Oklahoma's power over the defendant, since Oklahoma was the most "reasonable" state for this litigation. Lilly, *supra* note 20, at 106. The Court's emphasis on the defendant's contacts with the forum through the defendant's "purposeful availment" may overshadow the interests of both the state and the litigation. *Id.* at 107.

For further discussion of *World-Wide Volkswagen*, see Note, *Civil Procedure — Personal Jurisdiction*, 46 J. AIR L. & COM. 541 (1981).

The court recently gave great consideration to the state's interest over that of the defendant in two libel cases. In *Keeton v. Hustler Magazine, Inc.*<sup>125</sup> the Court held the alleged act of libel occurred within the forum state.<sup>126</sup> The defendant circulated thousands of copies of *Hustler* magazine in New Hampshire every month.<sup>127</sup> The Court stated this activity was "sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire."<sup>128</sup>

The Court stated that the proper test to use in judging minimum contacts is the *Shaffer v. Heitner* test, which focuses on "the relationship among the defendant, the forum, and the litigation."<sup>129</sup> The Court found New Hampshire's interest was to discourage the deception of its citizens and to redress injuries actually taking place within the state.<sup>130</sup> The Court also noted that New Hampshire expressed its interest in protecting non-resident plaintiffs from libel through the state's long-arm statute.<sup>131</sup>

Even with the Court's focus on New Hampshire's interest in the litigation, the Court still required that the contacts between the defendant and the forum must be such that it is "fair" to compel the defendant to defend in that forum.<sup>132</sup> The Court demonstrated that state interest alone is not sufficient to grant jurisdiction over a non-resident defendant. In this case the defendant had purposefully availed itself of New Hampshire's benefits, and the Court stated the defendant "must reasonably anticipate being haled into court there in a libel action based on the

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<sup>125</sup> 104 S. Ct. 1473 (1984).

<sup>126</sup> *Id.* at 1479, 1481.

<sup>127</sup> *Id.* at 1477.

<sup>128</sup> *Id.* at 1481. The Court noted the degree of activity was not sufficient to support general jurisdiction but it was sufficient for specific jurisdiction. *Id.*

<sup>129</sup> *Id.* at 1478 (citing *Shaffer v. Heitner*, 433 U.S. 186, 204).

<sup>130</sup> *Keeton*, 104 S. Ct. at 1479. The tort of libel occurs wherever the libelous material is circulated. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

contents of the magazine."<sup>133</sup>

In *Calder v. Jones*,<sup>134</sup> a companion case to *Keeton*, the Court allowed California to assert jurisdiction over a non-resident where the cause of action did not arise directly out of the defendant's activities in California, but where the libel was clearly foreseeable as to its effect in California. The plaintiff, a professional entertainer, sued in California, although the allegedly libelous article was written and edited by the defendants in Florida.<sup>135</sup> Neither defendant had relevant contacts with California.<sup>136</sup> However, the Court found that the article would have a "potentially devastating impact" on the plaintiff in California, where the magazine has its largest circulation, leading to the conclusion that the defendants must have reasonably anticipated being "haled into court there" to defend the truth of the article.<sup>137</sup>

Even though the Court focused primarily on California's relation to the suit, *Calder* cannot be read to mean that substantial state interest alone can create personal jurisdiction over a defendant. The Court noted that if the defendants' article injured the plaintiff, intentional wrongdoing directed at a California resident created sufficient contacts, and jurisdiction was proper over them on that basis.<sup>138</sup> The Court used the *International Shoe* test to again assert that there must be minimum contacts between the defendant and the forum state before a state court may exercise jurisdiction.<sup>139</sup>

At the time *Helicor* came to trial the Supreme Court had developed a due process test that required the existence of certain minimum contacts between the defendant and

<sup>133</sup> *Id.* at 1481.

<sup>134</sup> 104 S. Ct. 1482 (1983).

<sup>135</sup> *Id.* at 1485. The defendants wrote and edited the article for the *National Enquirer*. *Id.* The article portrayed the plaintiff, actress Shirley Jones, as a problem drinker. *Id.* at 1487 n.9.

<sup>136</sup> *Id.* at 1485.

<sup>137</sup> *Id.* at 1487.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

the forum state before a state could exercise jurisdiction over a nonresident defendant.<sup>140</sup> In determining whether a state had jurisdiction over a defendant's activities within the forum state,<sup>141</sup> the Court emphasized relevant factors such as the state's interest in those activities,<sup>142</sup> the state's use of a special statute concerning those activities,<sup>143</sup> fairness to the defendant in requiring him to defend himself in the forum state,<sup>144</sup> and the plaintiff's interest in obtaining effective relief.<sup>145</sup> The Court favored the defendant in its application of the minimum contacts test by requiring, for jurisdictional purposes, that the defendant purposefully avail himself of the forum state's benefits,<sup>146</sup> and by requiring that the defendant have sufficient contacts with the state, even if the state has a great interest in the litigation.<sup>147</sup>

## II. *HELICOPTEROS NACIONALES DE COLUMBIA V. HALL*

The Supreme Court in *Helicopteros Nacionales de Columbia v. Hall* had to determine if the Texas Supreme Court was correct in asserting jurisdiction over a nonresident defendant whose only contacts with the state were frequent purchases of helicopters and related training sessions in Texas, one visit to the state to negotiate a contract, and acceptance of checks drawn on a Texas bank.<sup>148</sup> Texas courts invoked jurisdiction even though the cause of ac-

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<sup>140</sup> See *supra* notes 42-54 and accompanying text.

<sup>141</sup> *Id.*

<sup>142</sup> See *supra* notes 55-68 and accompanying text.

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* notes 79-84 and accompanying text.

<sup>145</sup> See *supra* notes 117-120 and accompanying text.

<sup>146</sup> See *supra* note 102 and notes 121-123 and accompanying text.

<sup>147</sup> See *supra* notes 126-139 and accompanying text.

<sup>148</sup> *Helicol*, 104 S. Ct. at 1871-72. *Helicol* had no other contacts with Texas. *Helicol* had no agent for service of process within the state and it was not authorized to do business in Texas. *Id.* at 1871. It never solicited business in the state, never performed helicopter operations in Texas, and never sold any product that reached Texas. *Id.* *Helicol* never had an office in Texas, had no records there, had no shareholders there, had no employees based there, and had never recruited employees in Texas. *Id.*



tion did not arise out of these contacts.<sup>149</sup> The Texas Supreme Court, relying on the "reasonableness" test in *World-Wide Volkswagen*, determined that it would not be inconvenient for Helicol to defend in Texas.<sup>150</sup> The United States Supreme Court, however, held that the defendant's contacts did not constitute such continuous and systematic general business contacts<sup>151</sup> as to allow Texas to exercise jurisdiction over Helicol where the cause of action did not arise out of nor was related to those contacts.<sup>152</sup>

The Court stated that the Due Process Clause operates to limit a state's power over nonresident corporate defendants, and that due process requirements are satisfied only where a defendant has minimum contacts with a state such that the state's assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice."<sup>153</sup> The Court pointed out that, based on *Shaffer v. Heitner*,<sup>154</sup> there must be some relationship between the defendant, the forum state, and the litigation when a cause of action is related to or rises out of a defendant's contacts.<sup>155</sup> But if the cause of action does not arise out of or relate to the defendant's activities in the state, *Perkins v. Benguet Consolidated Mining Co.*<sup>156</sup> stands for the proposition that "due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation."<sup>157</sup>

The Court determined that all of the parties agreed that

<sup>149</sup> *Hall*, 638 S.W.2d at 872.

<sup>150</sup> *Id.*

<sup>151</sup> For a discussion of general jurisdiction see notes 38-41 and accompanying text.

<sup>152</sup> *Helicol*, 104 S. Ct. at 1873.

<sup>153</sup> *Id.* at 1872 (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

<sup>154</sup> 433 U.S. 186 (1977).

<sup>155</sup> *Helicol*, 104 S. Ct. at 1873. This kind of assertion of power is called specific jurisdiction. See *supra* note 38.

<sup>156</sup> See *supra* notes 79-83 and accompanying text.

<sup>157</sup> *Helicol*, 104 S. Ct. at 1873.

Respondent's claim against Helicol did not arise out of and were not related to Helicol's contacts with Texas.<sup>158</sup> In his dissenting opinion, Justice Brennan noted that there could be a distinction between claims that relate to a defendant's contacts with the forum and claims that arise out of such contacts.<sup>159</sup> The Court declined to address that distinction as the issue was not presented in the case.<sup>160</sup> In so declining, the Court left open the possibility that the required contacts between the defendant and the forum need only be related in some way for a state to have specific jurisdiction over the defendant.<sup>161</sup> Although Justice Brennan admitted that the respondents' claim "did not formally 'arise out of' specific activities initiated by Helicol . . . the wrongful death claim . . . [was] significantly related to the undisputed contacts between Helicol and the forum."<sup>162</sup> Because the Court found no jurisdiction based on specific grounds, it looked to the nature of Helicol's activities in Texas to determine whether Texas courts could assert general jurisdiction over Helicol.<sup>163</sup> The Court held that Helicol's activities were not "the kind of continuous and systematic general business contacts" which were found in *Perkins*.<sup>164</sup>

In determining whether Helicol had established general business contacts in Texas, the Court first examined the

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<sup>158</sup> *Helicol*, 104 S. Ct. at 1872-73.

<sup>159</sup> *Id.* at 1875. For example, the Court could have stated that the plaintiffs' claims of negligence were related to the training which Helicol's pilots received through its contacts with Bell Helicopter in Texas, and that the defendant's contacts with Texas were sufficient for jurisdictional purposes.

<sup>160</sup> *Id.* at 1873 n.10. The Court stated that the plaintiff's failed to argue that their claims against Helicol either arose out of or were related to Helicol's contacts with Texas. *Id.* Justice Brennan disagreed that the respondents had admitted that their claims were not related to Helicol's activities in Texas. *Id.* at 1877-78 n.3. He admitted that the respondents' position before the Court lacked clarity but stated that the Court should have addressed the specific jurisdiction question due to the relation between Helicol's contacts and the cause of action involved. *Id.*

<sup>161</sup> The Court stated that Texas did not have specific jurisdiction over Helicol. *Id.* at 1873.

<sup>162</sup> *Id.* at 1878.

<sup>163</sup> *Id.* at 1873.

<sup>164</sup> *Id.*

nature of Helicol's payments received from Texas banks. The Court, relying on *Kulko v. California Superior Court*<sup>165</sup> and *Hanson v. Denkla*,<sup>166</sup> concluded that such unilateral activity of the plaintiff is insufficient as a contact for jurisdictional purposes.<sup>167</sup> The Court then analyzed Helicol's purchases as contacts with Texas.<sup>168</sup> Citing *Rosenberg*,<sup>169</sup> the Court stated purchases alone are not sufficient as a basis for a state's exercise of jurisdiction.<sup>170</sup> The Court further stated that mere purchases, even if continuous and systematic, are not sufficient contacts to permit a state to assert personal jurisdiction over a nonresident corporation in a cause of action not related to the purchase transactions.<sup>171</sup> The Court also refused to hold that the brief presence of Helicol's employees in Texas for training in connection with the purchase of helicopters and equipment resulted in a jurisdictional contact with the state.<sup>172</sup> The Court stated that training was included in the package of goods and services purchased by Helicol.<sup>173</sup> Holding that Helicol lacked sufficient contacts with the forum state to allow Texas to assert personal jurisdiction the Supreme Court reversed.<sup>174</sup>

Justice Brennan advocated giving states more leeway in

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<sup>165</sup> See *supra* notes 98-105 and accompanying text.

<sup>166</sup> See *supra* notes 69-78 and accompanying text.

<sup>167</sup> *Helicol*, 104 S.Ct. at 1873. The Court additionally relied on *Lilly*, *supra* note 20, at 99.

<sup>168</sup> *Helicol*, 104 S.Ct. at 1873.

<sup>169</sup> See *supra* note 52 and accompanying text. Noting that the *Rosenberg* holding survived the transition from traditional concepts of jurisdiction to the modern minimum contacts test, the Court stated that *Rosenberg* was acknowledged and not repudiated in *International Shoe*. *Id.* See *supra* notes 51-54 and accompanying text.

<sup>170</sup> *Helicol*, 104 S. Ct. at 1874. In his dissent, Justice Brennan criticized the Court's use of *Rosenberg*. *Id.* at 1875. He stated that the Court failed to "ascertain whether the narrow view of *in personam* jurisdiction adopted by the Court in *Rosenberg* compares with 'the fundamental transformation of our national economy' that has occurred since 1923." *Id.* at 1876.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* The Court noted that it is arguable that *Rosenberg* would not allow purchases to be sufficient contacts for either general or specific jurisdiction. *Id.* at 1874 n.12. Thus the Court implied that *Rosenberg* is no longer valid as to assertions of specific jurisdiction.

asserting jurisdiction over nonresident defendants who have substantial commercial contacts with the forum.<sup>175</sup> He stated that the recent growth of the national economy has created the need to expand the scope of person jurisdiction.<sup>176</sup> He further argued that expanding the permissible scope of state jurisdiction over foreign corporations comports with *International Shoe* standards of the "traditional notions of fair play and substantial justice."<sup>177</sup> Applying these standards to the instant case, Justice Brennan argued that Texas properly asserted jurisdiction over *Helicol*.<sup>178</sup> Noting that the petitioner received many benefits from its business dealings in the state, he concluded that *Helicol* should be required to "face the obligations that attach to its participation in such commercial transactions."<sup>179</sup>

### III. IMPLICATIONS

Because the facts and circumstances surrounding *Helicol* are unusual and distinct, the Court's holding should be narrowly construed. The most apparent difference between *Helicol* and other personal jurisdiction cases is that *Helicol* is a foreign-country corporation. Choosing *Helicol* to broaden the scope of the minimum contacts test might have placed a burden on international commerce by demonstrating that buying products in the United States could leave a foreign country corporation open to an unrelated suit in the United States. Perhaps the Court viewed the facts of *Helicol* as unique and therefore chose to defer making substantial changes in the personal jurisdiction

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<sup>175</sup> *Id.* at 1876.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1877. Justice Brennan pointed to language in *McGee*, 355 U.S. at 222-23 and *World-Wide Volkswagen*, 444 U.S. at 293, to show that this trend is not a new idea. *Id.* at 1876. Both opinions discuss historical developments in modern transportation and communication which enable a defendant to defend himself more easily in a state where he does business. *Id.*

<sup>178</sup> *Id.* at 1877.

<sup>179</sup> *Id.*

test until a future case.<sup>180</sup>

The Court may also have found little in the case to allow it to further develop the state interest element of the minimum contacts test as reformulated in *Shaffer v. Heitner*.<sup>181</sup> Texas evidently had no substantial interest in the litigation, since none of the respondents were residents of Texas<sup>182</sup> and the accident occurred in Peru.<sup>183</sup> The Court pointed out that the respondents failed to carry their burden of demonstrating, under the doctrine of necessity, that all three defendants could not be sued in a single forum.<sup>184</sup> Therefore, the instant case lacked the facts to allow the Court to develop the state interest branch of the minimum contacts test.<sup>185</sup>

Only one principle can be safely extracted from *Helicol*. The Court clearly held that purchases in a state do not establish minimum contacts unless the underlying cause of action relates to or arises out of those contacts. The Court left for a later date any discussion of possible differences between a cause of action relating to and a cause of action arising out of the defendant's contacts with the forum state.<sup>186</sup>

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<sup>180</sup> The case could probably have been handled more efficiently under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(c), & 1332(d) (1982).

<sup>181</sup> See *supra* notes 85-97 and accompanying text.

<sup>182</sup> See *supra* note 16.

<sup>183</sup> See *supra* note 1 and accompanying text.

<sup>184</sup> *Helicol*, 104 S. Ct. at 1874 n.13. For discussion of the necessity theory of jurisdiction see Brilmayer, *supra* note 38, at 108-10 and von Mehren & Trautman, *supra* note 38 at 1173-74.

<sup>185</sup> As discussed earlier, the Court recognized that state interest is an important factor in determining jurisdiction. See *supra* notes 126-139 and accompanying text discussing *Keeton v. Hustler Magazine, Inc.* and *Calder v. Jones*. Although an argument could be made that state interest could be a surrogate for a defendant's connection to the forum, it seems unlikely that the Court is willing to grant jurisdiction over a defendant unless he has some contacts with the state.

The Court also refused to consider the plaintiff's interest element of the minimum contacts test, ostensibly because of the availability of Peruvian courts to the claimants. *Helicol*, 104 S. Ct. at 1874 n. 13. See also *supra* notes 117-120.

<sup>186</sup> *Helicol*, 104 S. Ct. at 1874.

## IV. CONCLUSION

The Supreme Court in *Helicol* gave further definition to the minimum contacts boundary of state personal jurisdiction. By holding that the defendant's commercial dealings with Texas were insufficient to allow the state to assert jurisdiction, the Court has placed mere purchases outside of the jurisdictional purview of state courts. Therefore, unless the claim arises out of or is related to purchases, foreign buyers of a state's goods or services cannot be compelled to defend in that state.

There is very little language in the majority opinion clarifying when a cause of action relates to or arises out of the defendant's contacts with the forum state. It is difficult to predict other fact situations where the holding in *Helicol* will apply. It is possible that the narrowness of the holding will allow the Supreme Court to limit its application in future cases where the facts fall in the gray area between *International Shoe* and *Helicol*.

The Supreme Court has drawn the constitutional line in requiring a nexus between defendant's purchases and plaintiff's cause of action before a state may assert jurisdiction over a nonresident defendant. Without such nexus, a state may claim jurisdiction only if the nonresident defendant is carrying on its general business in that forum. Although the Court has not recently used the "presence" language of earlier procedure cases, there remains that principle from the past that, for jurisdictional purposes, the defendant must in some way be present within the boundaries of the forum state. It remains to be seen whether the Supreme Court will apply the "arise out of" and "relate to" terminology, either to retain strong roots in traditional doctrines, or to expand the scope of state personal jurisdiction.

*R. Dyann McCully*



**TORTS — DAMAGES FOR MENTAL ANGUISH OVER THE INJURIES OF A THIRD PERSON — Louisiana Law Prohibits a Bystander from Recovering Damages for Mental Anguish Suffered Because of Another's Injury or Death. *LeConte v. Pan American World Airways, Inc.*, 736 F.2d 1019 (5th Cir. 1984).**

On July 9, 1982, Pan Am flight 759 crashed in Kenner, Louisiana, shortly after takeoff from New Orleans International Airport.<sup>1</sup> The plane came down in a Kenner residential neighborhood.<sup>2</sup> Thirteen homes were damaged or destroyed when the Boeing 727-200 crashed or by the subsequent explosions and fires.<sup>3</sup> All 145 passengers plus 11 Kenner residents were killed in the accident.<sup>4</sup>

Fire and rescue equipment from the surrounding area was rushed to the scene of the crash.<sup>5</sup> Law enforcement, fire, and rescue personnel were ordered to report to the crash site<sup>6</sup> and Civil Defense officials issued an urgent appeal for volunteers to help search for bodies and clear debris.<sup>7</sup> Off-duty police officers Alfred O. LeConte, Jr. and Peter A. Engman responded to the request.<sup>8</sup> During the next twenty-seven hours, LeConte searched for survivors and placed victims into body bags.<sup>9</sup> Engman spent several hours at the crash site and photographed victims

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<sup>1</sup> *LeConte v. Pan American World Airways*, 736 F.2d 1019 (5th Cir. 1984); N.Y. Times, July 10, 1982, at 1, col. 6. See also NEWSWEEK, July 19, 1982, at 28; TIME, July 19, 1982, at 42.

<sup>2</sup> N.Y. Times, July 10, 1982, at 1, col. 5.

<sup>3</sup> *Id.* at 29, col. 1; *Id.*, July 11, 1982, at 21, col. 1.

<sup>4</sup> *LeConte*, 736 F.2d at 1019; N.Y. Times, July 10, 1982, at 1, col. 6.

<sup>5</sup> N.Y. Times, July 10, 1982, at 1, col. 6.

<sup>6</sup> *LeConte*, 736 F.2d at 1020.

<sup>7</sup> N.Y. Times, July 10, 1982, at 1, col. 6.

<sup>8</sup> *LeConte*, 736 F.2d at 1020.

<sup>9</sup> *Id.* The remains of the 156 victims filled over 170 body bags. Only one survivor, a baby from one of the houses destroyed by the crash, was found in the wreckage. N.Y. Times, July 11, 1982, at 21, col. 1.



of the crash.<sup>10</sup> Both men contend that they suffer severe nausea, vomiting, insomnia, nightmares, nervousness and anxiety as a result of their activities at the crash site.<sup>11</sup>

LeConte and Engman sued Pan Am and United States Aviation Underwriters for mental anguish arising from handling or photographing the bodies of the crash victims.<sup>12</sup> Pan Am did not deny liability for the accident,<sup>13</sup> but filed a motion for judgment on the pleadings and, in the alternative, for summary judgment for failure to state a cause of action.<sup>14</sup> The District Court for the Eastern District of Louisiana, applying Louisiana law, granted the motion for summary judgment.<sup>15</sup> The plaintiffs appealed the district court's judgment to the Fifth Circuit Court of Appeals.<sup>16</sup> *Held, affirmed*: Louisiana law prohibits recovery by a bystander for mental anguish suffered as a result of another's injury or death. *LeConte v. Pan American World Airways, Inc.*, 736 F.2d 1019 (5th Cir. 1984).

## I. HISTORICAL BACKGROUND — MENTAL ANGUISH DAMAGE RECOVERY

### A. Louisiana Negligence Law

Louisiana's legal system differs from the legal systems in the rest of the United States.<sup>17</sup> Louisiana was governed

<sup>10</sup> *Le Conte*, 736 F.2d at 1020.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Pan Am also did not contest liability in the only other reported case arising from this air crash. *Marks v. Pan American World Airways*, 591 F. Supp. 827 (E.D. La. 1984).

<sup>14</sup> *LeConte*, 736 F.2d at 1020.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1019.

<sup>17</sup> See generally, McMahon, *The Louisiana Code of Civil Procedure*, 21 LA. L. REV. 1 (1960). Rather than adopting the English Common law, Louisiana chose to retain its system of jurisprudence which was patterned after the Code Napoleon and influenced by the Spanish system and by the English-style systems of the surrounding states. *Id.* Louisiana's Constitution of 1812 provided that "The existing laws in this territory, when this constitution goes into effect, shall continue to be in force until altered or abolished by the Legislature". LA. CONST. of 1812, art. IV, § 11. The Constitution further provided that "the Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact."

by the French Civil Code when the territory was purchased by the United States in 1803.<sup>18</sup> After the Louisiana Purchase, Louisiana citizens chose to retain their existing legal system, which was based substantially upon the Code Napoleon.<sup>19</sup> This choice was codified in the Louisiana Constitution of 1812 which was adopted just prior to Louisiana's statehood.<sup>20</sup> Louisiana is, in essence, a civil code jurisdiction.<sup>21</sup> Thus, the rights of Louisiana citizens are more heavily dependent upon the express language of the state's statutes and constitution than are the rights of citizens of other states.<sup>22</sup>

The right to recover damages for injuries caused by the acts of others is defined through interpretation of three articles in the Louisiana Civil Code.<sup>23</sup> First, article 2315 requires every citizen to pay for the damage which he

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*Id.* In addition, "[t]he Judges of all courts within [Louisiana], shall, as often as it may be possible to do, in every definitive judgment, refer to the particular law, in virtue of which such judgment may have been rendered, and in all cases adduce the reasons on which their judgment is founded." *Id.* at art. IV, § 12. Similar intent to inhibit the creation of judge-made law can be found in succeeding Louisiana constitutions. See, e.g., LA. CONST. of 1974; LA. CONST. of 1921, art. VII, § 1; LA. CONST. of 1898, art. 91. Thus, the Louisiana courts have been left to interpret the statutes and codes passed by the Louisiana Legislature.

Louisiana judges were not forbidden from following precedent as they were in the Code Napoleon. Comment, *Stare Decisis in Louisiana*, 7 TUL. L. REV. 100 (1933). The courts will not, however, disturb long standing interpretations of law without legislative guidance. *Thompson v. East Baton Rouge Parish School Bd*, 303 So. 2d 855 (La. Ct. App. 1974). "Law is a solemn expression of legislative will," LA. CIV. CODE ANN. art. 1 (West 1952), and the courts are expected to consider the "reason and spirit" of the law. LA. CIV. CODE ANN. art. 18 (West 1952). See generally LA. CIV. CODE ANN. art. 13-21 (West 1952). The effective result of this approach has been the development of two parallel bodies of law (one of statutes and one of judicial interpretation), neither having precedential value to the other. See also Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law*, 56 TUL. L. REV. 479 (1982); Deak, *The Place of the "Case" in the Common and the Civil Law*, 8 TUL. L. REV. 337 (1934).

<sup>18</sup> McMahon, *supra* note 17.

<sup>19</sup> *Id.*

<sup>20</sup> LA. CONST. of 1812, art IV, § 11 (adopted 3 months before Louisiana was admitted as a state by Act of April 8, 1812, ch. 50, 1 Stat. 701).

<sup>21</sup> See generally J. Dainow, *CIVIL CODE OF LOUISIANA* (1947); see also McMahon, *supra* note 17.

<sup>22</sup> See *supra* note 20.

<sup>23</sup> *Id.*

causes.<sup>24</sup> Second, article 2316 extends liability to damage caused by a person's negligence, imprudence or want of skill.<sup>25</sup> Third, article 1934 provides for damages in cases of contract, quasi-contract, offenses, or quasi-offenses.<sup>26</sup> Article 1934 specifically recognizes that damages may be assessed without calculating specific pecuniary losses of the party<sup>27</sup> and that the judge and jury must have substantial discretion when quantifying damages.<sup>28</sup> Despite the broad language of these statutes, Louisiana courts have not compensated plaintiffs who suffer mental anguish over the negligently caused injuries of a third party.<sup>29</sup> These so-called "bystander"<sup>30</sup> injuries arise in a variety of contexts.<sup>31</sup>

### B. *Recovery of Mental Anguish Damages in Louisiana*

The Louisiana Supreme Court first addressed the issue of a bystander's recovery for mental anguish over a third

<sup>24</sup> LA. CIV. CODE ANN. art. 2315 (West Supp. 1984). Article 2315 has remained substantially unchanged since 1800. *Id.*

<sup>25</sup> LA. CIV. CODE ANN. art. 2316 (West 1979). Article 2316 has remained substantially the same since 1825 when "want of skill" was added. Other than the 1825 addition, there has been no substantive change since 1800. *Id.*

<sup>26</sup> LA. CIV. CODE ANN. art 1934(3) (West 1977)(renumbered effective January 1, 1985 to LA. CIV. CODE ANN. art 1998 (West Supp. 1985).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* See also LA. CIV. CODE ANN. art 1999 (West Supp. 1985).

<sup>29</sup> For example, Louisiana courts frequently denied "loss of consortium, service, and society" damages to a plaintiff whose spouse has been injured. See, e.g., *Lanham v. Woodward, Wight & Co.*, 386 So. 2d 131 (La. Ct. App. 1980). A 1982 amendment to the Louisiana statutes finally created the right to these damages. LA. CIV. CODE ANN. art. 2315 (West Supp. 1984).

<sup>30</sup> "Bystander," as used in this Note, refers to an individual whose injury, either in whole or in part, arises from observation of, or empathetic reaction to, another person's physical injury, indignity or death or the injury to or destruction of the individual's property.

<sup>31</sup> *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (child was run over by car as mother and sister watched); *Pearce v. L.J. Earnest, Inc.*, 411 So. 2d 1276 (La. Ct. App. 1982) (homeowner's ornamental trees destroyed by contractor); *Deblieux v. P.S. & Sons Painting, Inc.*, 405 So. 2d 600 (La. Ct. App. 1981) (rancher's cattle died from lead poisoning due to defendant's negligence); *Waldrop v. Vistron Corp.*, 391 So. 2d 1274 (La. Ct. App. 1980) (husband contracted cancer allegedly as result of contact with chemicals at work). For a more complete discussion of the bystander problem, see Comment, *Negligent Infliction of Emotional Distress and Bystander Recovery: A New Tort and a New Plaintiff for Ohio*, 15 U. Tol. L. Rev. 273 (1983).

party's injury in the seminal case of *Black v. Carrollton Railroad*.<sup>32</sup> In *Black*, the plaintiff was a father whose fourteen year-old son had been a passenger on the defendant's regularly scheduled train between Carrollton and New Orleans.<sup>33</sup> A switchman employed by the railroad left a switch out of place which caused the car carrying the boy to topple.<sup>34</sup> Both of the boy's legs were broken.<sup>35</sup> The father brought suit under articles 1934 and 2315 to recover the medical and surgical costs incurred in treating the boy and the costs related to the father's neglect of his business while caring for the boy.<sup>36</sup> The jury awarded \$10,000 in damages to the father.<sup>37</sup> On appeal, the Louisiana Supreme Court reduced the damage award to \$5000.<sup>38</sup>

The supreme court found that the plaintiff proved actual damages of \$2500 and that the prospective probable damage could be estimated at an additional \$2500.<sup>39</sup> The court observed that the jury seemed to have taken the parent's shock, anxiety and solicitude into account when computing damages.<sup>40</sup> The court was not disposed to allow "vindictive" or punitive damages to a relative of the sufferer, but was careful to distinguish anxiety awards to the victim himself.<sup>41</sup> The court indicated that had the award been to the boy the court might not have reduced the award.<sup>42</sup>

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<sup>32</sup> 10 La. Ann. \*33 (1855).

<sup>33</sup> *Id.* at \*37.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* Today's article 1934 was article 1928 in Louisiana's Civil Code of 1855. LA. CIV. CODE ANN. art. 1934 (West 1977) (Louisiana renumbered article 1934 effective January 1, 1985 to LA. CIV. CODE ANN. art. 1998-99 (West Supp. 1985); Today's article 2315 was article 2294 in Louisiana's Civil Code of 1855. LA. CIV. CODE ANN. art. 2315 (West Supp. 1984).

<sup>37</sup> *Black*, 10 La. Ann. at \*38.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* "[W]e do not understand the object of the law to be, the punishment of an offending party for having been the cause of unpleasant emotions in the family . . . of the party offended." *Id.*

<sup>42</sup> *Id.* "In that case, the bodily pain and suffering, the deformity of person, the

Some fifty years after *Black*, in 1906, the Louisiana Supreme Court reiterated its stance against anxiety awards to bystanders. In *Sperier v. Ott*,<sup>43</sup> a mother witnessed the unlawful arrest of her two sons, aged thirteen and fourteen.<sup>44</sup> The incarceration of her sons so "shocked and affected" her that it became necessary to place her in a mental hospital.<sup>45</sup> She died eleven days later.<sup>46</sup> The plaintiff father, on behalf of himself and his sons, sought damages for the mother's wrongful death, her medical and funeral expenses, her physical and mental suffering and her mental anguish over the arrest of her sons.<sup>47</sup> The father also sought exemplary damages for the unlawful arrest of his sons.<sup>48</sup> The trial court dismissed the father's petition for failure to state a cause of action.<sup>49</sup>

The Louisiana Supreme Court reversed and remanded the cause of action for unlawful arrest but affirmed the dismissal of the claims arising out of the mother's mental anguish over the unlawful arrest.<sup>50</sup> The supreme court relied on *Black* for their denial of the mental anguish claim.<sup>51</sup> Writing for the court, Judge Land recognized that the line which they were drawing was an arbitrary one.<sup>52</sup> Thus, Louisiana law was clear by the early 1900's: a person had no right to recover for mental anguish suf-

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diminished capacity for laborious exertion, might reasonably justify damages of the class called vindictive or exemplary, . . ." *Id.*

<sup>43</sup> 116 La. 1087, 41 So. 323 (1906).

<sup>44</sup> 41 So. at 323-24.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 324. The mother died of a brain hemorrhage. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (quoting *Black*, 10 La. Ann. at \*42 (Slidell, C.J., dissenting)). Chief Judge Slidell agreed that *Black*'s father should not recover for mental anguish over his son's injuries. This dissent concerned insufficient evidence of business losses. *Black*, 10 La. Ann. at \*41.

<sup>52</sup> 41 So. 2d 324. "Moreover, let us bear in mind the difficulty which would result from recognizing the mental suffering of the third party as an element of damages. Where is any but arbitrary limit to be found in extending its benefit." *Id.* (quoting *Black*, 10 La. Ann. at \*41 (Slidell, C.J., dissenting)).

ferred solely as a result of another person's injuries.<sup>53</sup>

In wrongful death cases, Louisiana has allowed parents to recover for the loss of a deceased child's affection since at least 1901.<sup>54</sup> In the 1908 case of *Bourg v. Brownell-Drews Lumber Co.*,<sup>55</sup> the Louisiana Supreme Court affirmed a father's right of recovery for the death of his son but reduced the size of the award.<sup>56</sup> The action in *Bourg* was brought under articles 1934 and 2315, as was the action in *Black*.<sup>57</sup> In *Bourg*, a father's 14 year-old son was killed in the lumber yard where the boy was working.<sup>58</sup> The father had agreed to his son's employment upon an understanding with the foreman that the boy was not to work around the engine or any other dangerous machinery.<sup>59</sup> The father claimed damages for losing his son's service and society and for his sorrow over the untimely death of his son.<sup>60</sup> The trial court awarded \$15,000 to the father.<sup>61</sup>

The lumber company appealed to the Louisiana Supreme Court, arguing that the lad had been injured because of his own imprudence and that no employment

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<sup>53</sup> See *supra* notes 32-51 and accompanying text. The last time the Louisiana Supreme Court addressed the issue of "bystander" mental anguish was in *Kaufman v. Clark*, 141 La. 316, 75 So. 65 (1917). In that case, the defendant had had sexual relations with the plaintiff's daughter which caused the plaintiff to suffer "great humiliation, shame, mental anguish, and degradation." *Id.* at 66. The court rejected the plaintiff's claim, stating that "[w]e have never had any law which authorized one to recover damages for injuries to his feelings, as a consequence of injury sustained by another, still living, whether in his person, character, or feelings." *Id.* A similar case, heard by the Louisiana Court of Appeals in 1979, also denied recovery to the mother of a rape victim. *Brauninger v. Ducote*, 381 So. 2d 1246 (La. Ct. App. 1979) (minor daughter raped by the defendant's son). In *Brauninger*, the court criticized Louisiana's position on the matter, but felt compelled to deny recovery until the supreme court changed its position. *Id.* at 1248.

<sup>54</sup> See *LeBlanc v. Sweet*, 107 La. 355, 31 So. 766 (1901) (negligence of defendant caused death of sixteen-year old). The court stated that "[parents] might reasonably have expected a continuation . . . of the filial and kindly offices which the deceased . . . owed to her parents." *Id.* at 773.

<sup>55</sup> 120 La. 1009, 45 So. 972 (1908).

<sup>56</sup> 45 So. at 978-79.

<sup>57</sup> *Id.* at 976; see *Black*, 10 La. Ann. at \*33; see also *supra* notes 24 & 36.

<sup>58</sup> 45 So. at 974.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 978-79.

<sup>61</sup> *Id.* at 976.

contract requiring the boy to be kept from dangerous machinery existed.<sup>62</sup> The supreme court reduced the damage award to \$5,000.<sup>63</sup> The court concluded that not only were mental anguish damages appropriate in wrongful death cases<sup>64</sup> but that (i) injury to feelings is an element of actual rather than punitive damages, and (ii) "articles 1934 and 2315 of the [Louisiana] Civil Code are broad enough to authorize the recovery . . . for mental suffering inflicted upon one person by the negligent killing of another."<sup>65</sup>

In cases other than bystander tort cases Louisiana courts recognize that breach of a duty owed by the defendant to the plaintiff<sup>66</sup> combined with the foreseeability of harm arising from that breach<sup>67</sup> forms the fundamental base upon which damages may be awarded.<sup>68</sup> If the defendant breaches a duty to the plaintiff, damages for foreseeable mental anguish may be recovered by the plaintiff despite the absence of any physical injury.<sup>69</sup> For example, the Louisiana Supreme Court allowed recovery for mental anguish arising out of a breach of contract in the 1903 case of *Graham v. Western Union Tel. Co.*<sup>70</sup> In that case, the defendant telegraph company failed to promptly transmit and deliver a telegram informing a mother of her son's serious illness and impending death.<sup>71</sup> The trial court rendered judgment for the mother and awarded damages

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<sup>62</sup> *Id.* at 974.

<sup>63</sup> *Id.* at 979.

<sup>64</sup> *Id.* at 978.

<sup>65</sup> *Id.* at 977. Statute has been renumbered see *supra* notes 26 & 28.

<sup>66</sup> *Id.* at 979.

<sup>67</sup> See, e.g., *Todd v. Aetna Casualty & Sur. Co.*, 219 So. 2d 538 (La. Ct. App. 1969) (decedent's heart attack caused by mental distress was not a foreseeable result of negligent collision with parked car). But see *Speight v. Southern Farm Bureau Ins. Co.*, 254 So. 2d 485 (La. Ct. App. 1971) (plaintiff's anguish was a foreseeable result of negligently driving into plaintiff's house).

<sup>68</sup> See *supra* note 67; see also, e.g., *Hill v. Lundin & Assoc.*, 260 La. 542, 256 So. 2d 620 (1972) (defendant could not have foreseen that a third person would move his ladder so as to create a hazard to the plaintiff).

<sup>69</sup> *Holland v. St. Paul Mercury Ins. Co.*, 135 So. 2d 145 (La. Ct. App. 1961).

<sup>70</sup> 109 La. 1069, 34 So. 91 (1903).

<sup>71</sup> 34 So. at 91.

of \$250.<sup>72</sup> The Louisiana Court of Appeals reversed the trial court and dismissed the case for failure to state a cause of action.<sup>73</sup>

The Louisiana Supreme Court reversed the Court of Appeals, holding that there are cases in which damages may be assessed without calculating pecuniary loss.<sup>74</sup> The supreme court found no good reason why mental pain and suffering could not be a basis for breach of contract damages and remanded the appeal for further determination on the merits.<sup>75</sup> The court found authority for its decision directly in articles 1934 and 2315 after tracing their origins back to the Code Napoleon.<sup>76</sup> Thus, the court suggested that a plaintiff may recover for mental anguish occasioned by the injuries of a third party if the defendant's breach of an independent duty owed to the plaintiff is the cause of the plaintiff's mental anguish.<sup>77</sup>

More recently, in *Holland v. St. Paul Mercury Ins. Co.*,<sup>78</sup> the Louisiana Court of Appeals affirmed the principle that breach of an independent duty constitutes sufficient cause for awarding damages for mental anguish.<sup>79</sup> In that case, an exterminator placed poison in the Hollands' home.<sup>80</sup> The Hollands' minor son ate some of the poison and became ill.<sup>81</sup> The exterminator was unable to identify the poison he had used for some hours after being asked for that information.<sup>82</sup> The Hollands claimed damages for two causes of action: (i) for the physical injuries of their

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 92. Statute has been renumbered see *supra* notes 26 & 28.

<sup>77</sup> See, e.g., *id.* at 93.

<sup>78</sup> 135 So. 2d 145 (La. Ct. App. 1961).

<sup>79</sup> *Id.* Other Louisiana Court of Appeals circuits have interpreted *Holland* as being limited to breach of contract actions. See, e.g., *Brauninger v. DuCote*, 381 So. 2d 1246, 1247 n.1 (La. Ct. App. 1979); *LaPlace v. Minks*, 174 So. 2d 895 (La. Ct. App. 1965).

<sup>80</sup> The exterminator placed the poison in the home as part of a regular service contract. 135 So. 2d at 148.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*



son, and (ii) for their worry over his health.<sup>83</sup> The trial court dismissed the Holland's claim for mental anguish damages for failure to state a cause of action.<sup>84</sup> The jury later found that the exterminator had not been negligent in placing the poison and thus denied the physical injury claim.<sup>85</sup>

The Louisiana Court of Appeals reversed the dismissal of the mental anguish claim.<sup>86</sup> In allowing the Hollands' claim for mental anguish over the illness of their son, the court of appeals stated that Louisiana courts have "consistently permitted recovery in such cases provided . . . the worry and anguish for which damages are sought [are] occasioned by the breach of a duty owed [to the] plaintiff by [the] defendant, and provided the recovery is not predicated solely upon [the] breach of duty owed a party other than [the] plaintiff."<sup>87</sup> The court of appeals decided that the Hollands' mental anguish was a reasonably foreseeable result of the exterminator's breach of its contractual duty.<sup>88</sup> The *Holland* court was careful to point out, however, that in the absence of a breach of a primary legal duty owed directly to the plaintiff by the defendant, the rule in *Black* would apply.<sup>89</sup> The court also cautioned against extending liability in favor of third persons whom the defendant has no reason to know were endangered.<sup>90</sup>

Thus, by the end of the nineteenth century, the arbitrary limit mentioned by Judge Slidell in *Black*<sup>91</sup> had been redefined in Louisiana law. If a plaintiff's loved one was fortunate enough to live, plaintiff's mental anguish over the loved one's injuries was not compensable unless the

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<sup>83</sup> *Id.* at 148.

<sup>84</sup> *Id.* at 147.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 159.

<sup>87</sup> *Id.* at 157.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 158; see *supra* notes 32-42 and accompanying text.

<sup>90</sup> *Id.* The court used guests as an example of persons who might be outside the foreseeability range and compared them to spectators. *Id.*

<sup>91</sup> See *supra* note 52 and accompanying text.

defendant owed an independent duty to plaintiff.<sup>92</sup> Conversely, if the victim died, plaintiff's mental anguish over the loved one's death was compensable.<sup>93</sup>

### C. *The Impact and Zone-of-Danger Rules*

At the turn of the century, the "impact rule" was the majority doctrine for awarding mental anguish damages.<sup>94</sup> Under the "impact rule," a plaintiff may not recover for mental anguish relating to an event unless some observable physical injury has also been suffered.<sup>95</sup> The impact requirement was believed to guarantee the genuineness of the psychic injury.<sup>96</sup>

The rationale supporting the impact requirement is grounded in fears of fraud<sup>97</sup> and unlimited litigation.<sup>98</sup> The existence and cause of mental anguish injury is difficult to prove conclusively,<sup>99</sup> as is the foreseeability of emotional harm arising out of a negligent act.<sup>100</sup> These difficulties are present whether the plaintiff is a "direct" or bystander victim.<sup>101</sup> The "impact rule" has been over-

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<sup>92</sup> See *supra* notes 32-42 and 69-89 and accompanying text.

<sup>93</sup> See *supra* note 54 and accompanying text.

<sup>94</sup> M. MINZER, J. NATES, C. KIMBALL, D. AXELROD & R. GOLDSTEIN, DAMAGES IN TORT ACTIONS §§ 5.21-22 (1984)[hereinafter cited as DAMAGES IN TORT ACTIONS].

<sup>95</sup> P. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER & KEETON ON THE LAW OF TORTS 363-64 (1984)[hereinafter cited as PROSSER & KEETON ON TORTS]. Impact "has been found to mean any physical contact, however slight." *Id.* See, e.g., *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); *Christy Bros. Circus v. Turnage*, 38 Ga.App. 581, 144 S.E. 680 (1928) (horse "evacuating his bowels" into plaintiff's lap); *Homans v. Boston Elevated Ry.*, 180 Mass. 456, 62 N.E. 737 (1902) (a slight blow).

<sup>96</sup> *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982). The case of *Spade v. Lynn & Boston Ry.*, 168 Mass. 285, 47 N.E. 88 (1897) is frequently cited as a typical opinion of the era on the subject of mental anguish damages. *Id.*

<sup>97</sup> *Blackwell v. Oser*, 436 So. 2d 1293, 1295 (La. Ct. App. 1983). For a good discussion of the arguments against recovery, see *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982)(suit by daughters of women who took DES to prevent miscarriages who now have a statistically higher probability of cancer).

<sup>98</sup> See *Blackwell*, 436 So. 2d at 1293 (father had no right to damages for mental anguish over child's birth defects due to medical malpractice: breach of duty to mother, however, did permit recovery of mental anguish damages).

<sup>99</sup> *Id.* at 1295.

<sup>100</sup> *Id.*

<sup>101</sup> DAMAGES IN TORT ACTIONS, *supra* note 94, at § 5.13.

whelmingly rejected by the courts because of these difficulties, except possibly in bystander cases.<sup>102</sup>

Louisiana has rejected the "impact" rule for both bystander and non-bystander claims.<sup>103</sup> In *Smith v. Manchester Insurance and Indemnity Co.*,<sup>104</sup> which has a bystander element, Milton Smith and his granddaughter were out for a motorcycle ride on Thanksgiving.<sup>105</sup> A taxicab ran a stop sign and hit the motorcycle.<sup>106</sup> Mr. Smith suffered severe injuries from which he died sixteen days later.<sup>107</sup> The granddaughter received only minor physical injuries but she suffered substantial mental anguish both from the accident and from witnessing her grandfather's fatal injuries.<sup>108</sup> The trial court awarded the granddaughter \$7500 in damages which included \$6500 for anguish over her grandfather's death.<sup>109</sup> The Louisiana Court of Appeals amended the granddaughter's award to allow \$1000 for mental anguish arising from the girl's personal injuries but denied the award for mental anguish suffered as a result of seeing her grandfather gravely injured.<sup>110</sup> Thus, despite the fact that the defendant's negligence caused an impact to both plaintiffs in a single accident, one plaintiff was not allowed to recover for mental anguish over the injuries of the other.

As the "impact rule" was abandoned by most courts, it was replaced by the "zone of danger" rule.<sup>111</sup> Under this

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<sup>102</sup> *Id.* at § 5.22[1]. Five jurisdictions still adhere to the impact rule. *Payton*, 437 N.E.2d at 176 n.6.

<sup>103</sup> See *Cooper v. Christensen*, 212 So. 2d 154 (La. Ct. App. 1968) (defendant's car crashed into plaintiff's house causing mental anguish despite absence of physical impact). See also cases cited in *Todd v. Aetna Casualty & Sur. Co.*, 219 So. 2d 538, 542-43 (La. Ct. App. 1969); but cf. *Stone, Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 TUL. L. REV. 782, 83 (1974) (recovery for fright may be had without physical injury).

<sup>104</sup> 299 So. 2d 517 (La. Ct. App. 1974).

<sup>105</sup> *Id.* at 520.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 524.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> DAMAGES IN TORT ACTIONS, *supra* note 94, at § 5.23.

theory a bystander may recover for mental anguish over the injuries of a third party suffered while the bystander reasonably fears for his or her own safety and well-being.<sup>112</sup> This doctrine is similar to the rule adopted by the Restatement (Second) of Torts which would allow recovery for mental anguish suffered by the plaintiff in situations where the defendant has created an unreasonable risk of bodily harm to the plaintiff.<sup>113</sup>

Louisiana courts have rejected the "zone of danger" rule in bystander cases.<sup>114</sup> In *Warr v. Kemp*<sup>115</sup> a man and his pregnant wife had an automobile accident.<sup>116</sup> Mrs. Warr suffered a "whiplash" injury; Mr. Warr suffered no physical injury.<sup>117</sup> The trial court awarded \$600 in damages for Mrs. Warr's anxiety over a possible miscarriage, \$1500 in general damages to Mrs. Warr and \$300 to Mr. Warr for his mental anguish over his wife's possible miscarriage.<sup>118</sup> The Louisiana Court of Appeals reversed the award of mental anguish damages to Mr. Warr, who was

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<sup>112</sup> PROSSER & KEETON ON TORTS, *supra* note 95, at 365.

<sup>113</sup> The Restatement rule is:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

(a) should have realized that, his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in Subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

RESTATEMENT (SECOND) TORTS, § 313, comment d (1966). See *id.* § 436, caveat, comments f, g, h (1965). See also *id.* § 435 (1965).

<sup>114</sup> See, e.g., *Dudley v. State Farm Mut. Auto. Ins. Co.*, 255 So. 2d 462 (La. Ct. App. 1971)(father denied recovery for mental anguish over son's injury); *Sabatier v. Travelers Ins. Co.*, 184 So. 2d 594 (La. Ct. App. 1966)(daughter denied recovery for mental anguish over father's injury in an automobile accident where both were passengers).

<sup>115</sup> 208 So. 2d 570 (La. Ct. App. 1968).

<sup>116</sup> *Id.* at 571.

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

<sup>118</sup> *Id.*

clearly in the "zone of danger,"<sup>119</sup> and affirmed the award to Mrs. Warr.<sup>120</sup>

#### D. Dillon v. Legg — California Allows Bystander Recovery

Prior to 1968, bystander recovery for mental anguish over the injuries of another was generally denied except in those jurisdictions where the "zone of danger" analysis was extended<sup>121</sup> or where an independent cause of action could be sustained.<sup>122</sup> In 1968, the California Supreme Court decided *Dillon v. Legg*.<sup>123</sup> In *Dillon*, Erin Dillon was run over by a car in full view of her mother and sister.<sup>124</sup> Her mother sued on behalf of herself and Erin's sister for their "great emotional disturbance and shock" suffered as a result of seeing the accident.<sup>125</sup> The sister had been within the "zone of danger" at the time of the accident and the mother was nearby.<sup>126</sup> The trial court granted a summary judgment against the mother because she was outside the "zone of danger" at the time of the accident and thus had no cause of action.<sup>127</sup> The California Supreme Court reversed the trial court because the supreme court was unable to justify denying an award to the mother while permitting recovery by the sister "because of a happenstance that the sister was a few yards closer to the accident."<sup>128</sup>

The *Dillon* court rejected the "zone of danger" and "im-

<sup>119</sup> RESTATEMENT (SECOND) TORTS § 313(2) comment d (1965)(adopting the "zone of danger" rule). The "zone of danger" encompasses the area in proximity to the accident where the plaintiff actually fears for his own safety. *Id.*

<sup>120</sup> 208 So. 2d at 572.

<sup>121</sup> PROSSER & KEETON ON TORTS, *supra* note 95, at 365-66; DAMAGES IN TORT ACTIONS, *supra* note 94, at § 5.20.

<sup>122</sup> See, e.g., *Holland v. St. Paul Mercury Ins. Co.*, 135 So. 2d 145 (La. Ct. App. 1961) (parents allowed to recover for mental anguish over son's health when exterminator breached duty to know composition of poison used). For further discussion see *supra* notes 78-90 and accompanying text.

<sup>123</sup> 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

<sup>124</sup> 441 P.2d at 914.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 915.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

pact" concepts because of their theoretical inconsistency<sup>129</sup> and turned to an analysis of duty.<sup>130</sup> After reviewing the progress of negligence liability through the California courts and refuting most of the major arguments against bystander mental anguish damages<sup>131</sup> the court returned to a fundamental principle: defendants should be liable for injuries which are a foreseeable result of their negligent actions.<sup>132</sup> The court thus held that if the risk of either physical or emotional injury is a foreseeable consequence of the defendant's act, the defendant will be liable for the damage which results.<sup>133</sup>

The *Dillon* court stressed that the ordinary man standard should be used to determine the reasonable foreseeability of harm on a case-by-case basis.<sup>134</sup> The factors to be taken into account include:

- (1) Whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it.
- (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
- (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.<sup>135</sup>

Having thus circumscribed the doctrine, the court allowed the mother and the sister to recover for their mental anguish.<sup>136</sup>

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<sup>129</sup> *Id.* at 915-16.

<sup>130</sup> *Id.* at 916. For a complete discussion of duty in tort contexts, see M. SHAPO, *THE DUTY TO ACT* (1977).

<sup>131</sup> *Dillon*, 441 P.2d at 917-20.

<sup>132</sup> *Id.* at 920. Louisiana courts have traditionally used a foreseeability analysis. See, e.g., *Hill v. Lundin & Assoc.*, 260 La. 542, 256 So. 2d 620 (1972) (defendant could not have foreseen that a third person would move his ladder so as to create a hazard to the plaintiff); *Blackwell v. Oser*, 436 So. 2d 1293 (La. Ct. App. 1983) (scrutinizing denial of bystander mental anguish damages).

<sup>133</sup> *Dillon*, 441 P.2d at 919-20.

<sup>134</sup> *Id.* at 920-21.

<sup>135</sup> *Id.* at 920.

<sup>136</sup> *Id.* at 925. Louisiana has not adopted *Dillon*. In fact, diligent research re-

E. *The Rescue Doctrine — An Independent Duty to the Rescuer*

The law imposes a duty on all persons to avoid conduct which creates an unreasonable risk of damage to other persons or property.<sup>137</sup> This duty extends to those known to be depending upon the actor's conduct and to those who are foreseeably endangered by the actor's conduct.<sup>138</sup> Rescuers who risk their own lives or safety to protect the interests of others are foreseeable and are to be encouraged.<sup>139</sup> Thus, there is a duty owed by all actors to those rescuers who would dash in to save the lives or property endangered by the actor's conduct.<sup>140</sup>

Ordinarily, a person who acts in such a way as to unreasonably increase the risk of his own injury in a given situation can be precluded from recovering for all or part of his injuries for one or more reasons:<sup>141</sup> first, because the person had assumed the risk of his own injury, or second, because the person had been the contributory or superseding cause of his own injury.<sup>142</sup> Under the "rescue doctrine," however, a person who attempts to rescue a person or property from peril caused by a third party cannot be charged with either assumption of the risk or contributory negligence.<sup>143</sup> The rescuer will be allowed to recover for his injuries so long as the interest he was seeking to protect exceeded the probable gravity of the rescuer's injury.<sup>144</sup> Thus, an actor who has negligently endangered the property or safety of another will be held liable for injuries sustained by a rescuer so long as the

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vealed only one reported Louisiana case that even referred to *Dillon* and its analysis. See *Blackwell v. Oser*, 436 So. 2d 1293, 1297 (La. Ct. App. 1983).

<sup>137</sup> PROSSER & KEETON ON TORTS, *supra* note 95, at 307-10.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 307.

<sup>140</sup> *Id.* at 308.

<sup>141</sup> *Id.* at 451.

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

<sup>143</sup> *Id.* at 308-10. *Gambino v. Lubel*, 190 So. 2d 152 (La. Ct. App. 1966) (policeman allowed to recover for injuries suffered while assisting motorist).

<sup>144</sup> PROSSER & KEETON ON TORTS, *supra* note 95, at 308-10.

rescue attempt is not reckless or rash.<sup>145</sup>

Louisiana recognizes the rescue doctrine. In *Lynch v. Fisher*,<sup>146</sup> for example, the plaintiff rescued a driver and his gravely injured wife from a burning car.<sup>147</sup> The car had hit the defendant's negligently parked truck.<sup>148</sup> During the rescue, the rescuer found a gun and handed it to the driver who was delirious.<sup>149</sup> The driver shot the rescuer in the ankle.<sup>150</sup> The trial court dismissed the rescuer's suit for failing to state a cause of action.<sup>151</sup> The Louisiana Court of Appeals reversed the trial court's judgment and held that (i) the proximate cause of a rescuer's injuries is the negligence which caused the rescuer to act,<sup>152</sup> and (ii) a rescuer is not restrained by the doctrines of contributory negligence and last clear chance.<sup>153</sup> The case was then remanded to determine damages.<sup>154</sup>

Thus, in Louisiana, the law concerning recovery for mental anguish damages is well-defined and consistently

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<sup>145</sup> *Id.* See *Lynch v. Fisher*, 34 So. 2d 513 (La. Ct. App. 1948) (rescuer shot by gun he gave to rescuee was allowed to recover physical injury damages).

<sup>146</sup> *Lynch*, 34 So. 2d at 513.

<sup>147</sup> *Id.* at 515.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 514.

<sup>152</sup> *Id.* at 515.

<sup>153</sup> *Id.* at 516.

<sup>154</sup> *Id.* at 518. The fact that the plaintiff is paid to do rescue work will not defeat recovery as a "rescuer" in Louisiana. In *Gambino v. Lubel*, a policeman stopped to investigate an automobile that was stopped in the middle of a street. 190 So. 2d 152, 154 (La. Ct. App. 1966). The driver of the car was unconscious because of a diabetic insulin reaction. *Id.* The driver aroused as the policeman was trying to aid him and hit the accelerator of the still-running car, causing an accident. *Id.* The driver argued that the policeman had been contributorily negligent because he had failed to turn off the engine. *Id.* at 156. The court held that the officer was a rescuer and could not be contributorily negligent "merely because he failed to make the wisest choice." *Id.* at 157. The court noted that the policeman was under a duty to investigate and decided that "he was not a volunteer rescuer which would seem to fit more the ordinary conception of a rescue situation, but simply because he was performing his duty would not remove him from being classified as a 'rescuer'." *Id.* at 156. The court stated that "[t]he cause of an injury to a rescuer is the fault which created the peril to those whom he attempts to aid." *Id.* at 157. See also *Grigsby v. Coastal Marine Service of Texas, Inc.*, 235 F.Supp. 97, 109 (W.D. La. 1964).



applied. To recover for mental anguish because of the injuries of a third person, the plaintiff must first show that the defendant owed him a duty.<sup>155</sup> Such a duty must be owed directly to the plaintiff.<sup>156</sup> A negligent defendant owes a direct duty to all persons who foreseeably may be injured by his conduct, including rescuers who come to the aid of persons who have been endangered by the defendant's acts.<sup>157</sup> Second, the plaintiff must show that his mental anguish is a foreseeable result of the defendant's negligent acts.<sup>158</sup> The plaintiff need not suffer a physical impact, or be within a "zone of danger" at the time of his injury, or suffer any physical symptoms to recover for mental anguish injuries.<sup>159</sup> All that is required is that the plaintiff's mental anguish be a foreseeable result of the defendant's acts and that the cause of plaintiff's anguish not be any injuries to a third person.

## II. *LECONTE V. PAN AMERICAN*

The District Court for the Eastern District of Louisiana denied LeConte's and Engman's claim for mental anguish suffered as a result of handling the crash victims' bodies.<sup>160</sup> LeConte and Engman appealed to the Fifth Circuit Court of Appeals in *LeConte v. Pan American World Airways, Inc.*<sup>161</sup> The Fifth Circuit affirmed.<sup>162</sup>

The Fifth Circuit held that Louisiana prohibits recovery

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<sup>155</sup> See *supra* notes 66-90 and accompanying text.

<sup>156</sup> *Id.*

<sup>157</sup> See *supra* notes 148-154 and accompanying text.

<sup>158</sup> See *supra* notes 79-90 and accompanying text.

<sup>159</sup> See *supra* notes 103-120 and accompanying text.

<sup>160</sup> 736 F.2d 1019 (5th Cir. 1984).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* Under the Erie Doctrine, a federal court sitting in a diversity action is obligated to apply the substantive law of the state in which the federal court is located. C. WRIGHT, LAW OF FEDERAL COURTS §§ 55-60 (1983). The federal court is allowed to consider any factors which a state court could use to determine the exact position of the state law and whether a change in state law is indicated. *Id.* at 373. In *LeConte*, however, the plaintiffs made no attempt to distinguish their claim from the *Black* line of cases. *LeConte*, 736 F.2d at 1021. Thus, the Fifth Circuit was bound by Louisiana's previous decisions. *Id.* See also C. WRIGHT, LAW OF FEDERAL COURTS §§ 58-59 (1983).

for mental anguish occasioned by the injuries of a third party except in two well-defined circumstances.<sup>163</sup> The first exception is when the cause of action arises under Louisiana's wrongful death statute which allows certain close relatives to recover for their personal anguish over the wrongfully caused death of a loved one.<sup>164</sup> This exception is illustrated by *Bourg v. Brownell-Drews Lumber Co.*, where a father recovered for his sorrow over his son's death.<sup>165</sup> The second exception occurs in situations where the defendant's breach of an independent duty owed to the plaintiff aggravates the plaintiff's mental anguish.<sup>166</sup> This exception is illustrated by *Holland v. St. Paul Mercury Insurance Co.*<sup>167</sup> where an exterminator breached his duty to know the composition of a poison he was spreading around the Hollands' home.<sup>168</sup> The exterminator's breach of his duty aggravated the Hollands' anguish over the health of their son, who had eaten some of the poison.<sup>169</sup> The Fifth Circuit noted that Louisiana had not adopted an exception to their general rule that denies recovery for mental anguish occasioned by the injuries of a third party for cases where the mental anguish is accompanied by objective physical symptoms.<sup>170</sup> Thus, the fact that LeConte and Engman were suffering objective symptoms was irrelevant to the vitality of their claim.

LeConte and Engman relied upon a Missouri case, *Bass v. Nooney Co.*<sup>171</sup> to support their claim for damages.<sup>172</sup> In *Bass* a woman claimed she suffered severe emotional distress from being trapped in an elevator.<sup>173</sup> The Missouri Supreme Court reviewed the progress of Missouri law

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<sup>163</sup> *LeConte*, 736 F.2d at 1021; see *supra* notes 1-18 and accompanying text.

<sup>164</sup> *LeConte*, 736 F.2d at 1021; see *supra* notes 1-18 and accompanying text.

<sup>165</sup> *Bourg*, 45 So. at 972, 976-77; see *supra* notes 55-65 and accompanying text.

<sup>166</sup> *LeConte*, 736 F.2d at 1021.

<sup>167</sup> 135 So. 2d 145 (La. Ct. App. 1961).

<sup>168</sup> *Id.* at 145; see *supra* notes 78-90 and accompanying text.

<sup>169</sup> *Holland*, 135 So. 2d at 147.

<sup>170</sup> *LeConte*, 736 F.2d at 1021.

<sup>171</sup> 646 S.W.2d 765 (Mo. 1983).

<sup>172</sup> *LeConte*, 736 F.2d at 1021.

<sup>173</sup> *Bass*, 646 S.W.2d at 766.

concerning mental anguish damages and then adopted the position that the woman's emotional distress should be compensated so long as the damage was foreseeable and measureable.<sup>174</sup> LeConte and Engman sought to analogize their situation to that of the woman trapped in the elevator and claimed that they were in peril.<sup>175</sup> The Fifth Circuit, however, held that LeConte and Engman were purely bystanders outside any zone of danger created by Pan Am's negligence.<sup>176</sup> *Bass*, therefore, did not apply.<sup>177</sup> Moreover, the court probably recognized the historical bias against awards for mental anguish suffered as a consequence of injuries to third persons and was unwilling to allow an award where it was clear that Louisiana courts would not.<sup>178</sup>

LeConte and Engman also argued that they could recover under the precepts of the rescue doctrine.<sup>179</sup> The Fifth Circuit assumed *arguendo* that LeConte and Engman came within the rescue doctrine but concluded that they would still be precluded from recovering.<sup>180</sup> The court held that Louisiana does not recognize a cause of action for mental anguish suffered as a result of another's injury.<sup>181</sup> Accordingly, the Fifth Circuit denied recovery.

### III. CONCLUSION

The Fifth Circuit, constrained by the Erie Doctrine and 129 years of Louisiana decisions, could not have arrived at any other decision. Louisiana courts have followed *Black*<sup>182</sup> despite their disagreement with its policy and its

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<sup>174</sup> *Id.* at 767-74.

<sup>175</sup> *LeConte*, 736 F.2d at 1021.

<sup>176</sup> *Id.* This finding seems unusual because of newspaper reports of the fires and explosions which followed the crash. The fires were not extinguished quickly enough to eliminate potential harm to the rescue workers. N.Y. TIMES, July 10, 1982, at 1, col. 1.

<sup>177</sup> *LeConte*, 736 F.2d at 1021.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1021 n.4.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Blackwell v. Oser*, 436 So. 2d 1293, 1294 (La. Ct. App. 1983). The only

theoretical inconsistency.<sup>183</sup> Thus, *LeConte v. Pan American World Airways, Inc.* was correctly decided. Can it be said though that *LeConte* was *rightly* decided?

In the sixteen years since *Dillon* was decided, only one Louisiana appellate court has referred to its analysis.<sup>184</sup> One reason for this may be the unique nature of Louisiana's statute based legal system.<sup>185</sup> Another reason may be that Louisiana courts have traditionally used foreseeability analysis, as did *Dillon*, to determine which injuries to compensate.<sup>186</sup> In most situations, psychic injuries are treated on equal footing with physical injuries.<sup>187</sup> Thus, a plaintiff may recover for mental anguish suffered as a result of negligent or intentional injury to his property,<sup>188</sup> his reputation,<sup>189</sup> or, in proper circumstances, his child.<sup>190</sup>

As a general policy, *LeConte's* and *Engman's* injuries should be compensated if Pan Am breached its duty to

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maverick cases (none of which have been overturned, but all of which involve pregnant women) have been: *Jordon v. Fidelity & Cas. Co.*, 90 So. 2d 531 (La. Ct. App. 1956); *Champagne v. Hearty*, 76 So. 2d 453 (La. Ct. App. 1954); and *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. Ct. App. 1951).

<sup>183</sup> *Blackwell*, 436 So. 2d at 1298-99. "[S]uch an absolute bar obliterates the importance of 'foreseeability of harm,' and this does violence to our long-held notion of 'duty.'" *Id.* at 1298.

<sup>184</sup> The lone Louisiana appellate court to have cited *Dillon* is the Louisiana Court of Appeals, Fourth Circuit, in *Blackwell*, 436 So. 2d at 1297 (La. Ct. App. 1983). For a discussion of *Dillon* see *supra* notes 121-138 and accompanying text.

<sup>185</sup> See *supra* note 17 and accompanying text.

<sup>186</sup> See, e.g., *Hill v. Lundin & Assoc.*, 260 La. 542, 256 So. 2d 620, 622 (1972); *Todd v. Aetna Casualty & Sur. Co.*, 219 So. 2d 538, 544 (La. Ct. App. 1969).

<sup>187</sup> *Dawson v. James H. Stuart and Deaton, Inc.*, 437 So. 2d 974, 976 (La. Ct. App. 1983) (mental anguish during an ordeal is legally compensable); *Richard v. Guillory*, 392 So. 2d 777 (La. Ct. App. 1980) (depression caused by accident is a compensable item of damages).

<sup>188</sup> See, e.g., *Pearce v. L.J. Earnest, Inc.*, 411 So. 2d 1276 (La. Ct. App. 1982) (ornamental trees negligently destroyed by contractor); *Deblieux v. P.S. & Sons Painting, Inc.*, 405 So. 2d 600 (La. Ct. App. 1981) (cattle killed by negligent handling of a lead-based paint).

<sup>189</sup> See, e.g., *Lewis v. Holmes*, 109 La. 1030, 34 So. 66 (1903) (wedding dress not delivered on time); *Quina v. Roberts*, 16 So. 2d 558 (La. App. 1944) (creditor sent letter complaining of overdue bills to plaintiff's employer).

<sup>190</sup> See, e.g., *Holland*, *supra* notes 78-90 and 167-168 and accompanying text (parent's anguish over child's consumption of poison extended due to exterminator's failure to know composition of poison). *Bourg v. Brownell-Drews Lumber Co.*, 120 La. 1009, 45 So. 2d 972 (1908) (wrongful death of child working in lumber yard).

prevent their injury.<sup>191</sup> The critical, though not always controlling, element in assessing the breach of a duty owed by a defendant to a plaintiff is the foreseeability of the harm which could result from the defendant's negligent act.<sup>192</sup> Had the Fifth Circuit used a pure foreseeability analysis, as the *Holland* court did,<sup>193</sup> LeConte and Engman might have had their chance before the jury. If a negligent act causes a major air disaster, rescue workers will foreseeably arrive at the crash site before all risks of personal injury are extinguished. The stress reactions of such rescue workers are well known.<sup>194</sup> Particularly in cases where rescue workers spend hours combing through dozens of dismembered bodies, the likelihood of some psychic injury must be reasonably foreseeable. Assuming that the extent and cause of the injury is provable, the damages should be compensable.

LeConte and Engman, however, would be unlikely to recover for their injuries in any jurisdiction given their circumstances. Some states would reject their claim because they were professional rescue workers.<sup>195</sup> Other states would reject their claim because they suffered no impact.<sup>196</sup> Even states which have adopted *Dillon v. Legg*<sup>197</sup> would deny recovery. Using a *Dillon* analysis, a court could find that LeConte and Engman were sufficiently close to the scene of the accident and that the injuries were sufficiently linked to a contemporaneous perception of the accident to support a damage award.

<sup>191</sup> PROSSER & KEETON ON TORTS, *supra* note 95, at § 53.

<sup>192</sup> *Hill v. Lundin & Assoc.*, 260 La. 542, 256 So. 2d 620 (1972); PROSSER & KEETON ON TORTS, *supra* note 95, at §§ 42-43.

<sup>193</sup> *Holland*, 135 So. 2d at 155.

<sup>194</sup> See, e.g., NEWSWEEK, *When Cops Can't Cope*, September 14, 1981, at 59.

<sup>195</sup> See, e.g., *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979); *Gillespie v. Washington*, 395 A.2d 18 (D.C. 1978); *Black Industries, Inc. v. Emco Helicopters, Inc.*, 19 Wash. App. 697, 577 P.2d 610 (Wash. Ct. App. 1978).

<sup>196</sup> *Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171, 176 n.6 (1982). Five jurisdictions still adhere to the impact rule. *Id.* But see *Bass*, *supra* notes 171-177 and accompanying text.

<sup>197</sup> 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

Thus, the first two tests of *Dillon* could be met.<sup>198</sup> The third test, however, that LeConte and Engman be closely related to the victims, could not be met.<sup>199</sup> A *Dillon* state, therefore, would deny recovery.

The *Dillon* tests were developed to limit the class of bystander plaintiffs who could recover mental anguish damages.<sup>200</sup> As Judge Slidell suggested in 1855,<sup>201</sup> however, the line at which the court or the legislature cuts off recovery is arbitrary. Louisiana faced this decision squarely in *Holland*.<sup>202</sup> In that case, recovery for mental anguish over the injuries of a third party was limited by a sound foreseeability test.<sup>203</sup> The test in *Holland* is whether the plaintiff's mental anguish over the injuries of a third person is a foreseeable consequence of the defendant's breach of the duty he owed to the plaintiff.<sup>204</sup> The mental anguish must be a parasite to the breach of duty owed to the plaintiff.<sup>205</sup> Using this analysis, LeConte and Engman might not have recovered either. LeConte's mental anguish could be a foreseeable result of Pan Am's breach of duty to him, but it might not be foreseeable that his anguish would be greater than the anguish he would have suffered from merely observing the accident rather than participating in the rescue. In other words, LeConte's anguish was not a parasite to the breach of duty; LeConte's injury was the breach of duty. As such it cannot be compensated under Louisiana law.

*LeConte v. Pan American World Airways*<sup>206</sup> is important, not because it changes any rule of law or because a particularly appealing plaintiff has been grievously wronged, but

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<sup>198</sup> See *supra* note 135 and accompanying text. For a list of cases which have adopted *Dillon*, see DAMAGES IN TORT ACTIONS *supra* note 94 at § 5.20-.21.

<sup>199</sup> See *supra* note 135 and accompanying text.

<sup>200</sup> *Dillon*, 441 P.2d at 919.

<sup>201</sup> See *supra* note 52.

<sup>202</sup> *Holland v. St. Paul Mercury Ins. Co.*, 135 So. 2d 145, 155 (La. Ct. App. 1961).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> 736 F.2d 1019 (5th Cir. 1984).

rather because *LeConte* forces us to reexamine the rationality of our line-drawing. The *Black* rule is not particularly compelling in a theoretical sense, but Louisiana has applied it consistently.<sup>207</sup> As various jurisdictions rely more heavily upon a foreseeability analysis, however, the day may come when plaintiffs like *LeConte* and *Engman* will be allowed to recover for their injuries. One could argue that *LeConte* and *Engman*, as trained trauma professionals, should never recover for mental anguish suffered in the "line of duty," but this argument avoids the question. Should the passerby, who is often first on the scene, or the Red Cross or Civil Defense volunteer also be denied recovery? Training is no guarantee that a person will not be affected by an extraordinary event. Eventually, we must examine this question because the trend in the United States, as in many other jurisdictions, is toward compensating all foreseeable injuries.<sup>208</sup>

*Charles N. Bell*

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<sup>207</sup> See *supra* note 182.

<sup>208</sup> PROSSER & KEETON ON TORTS, *supra* note 95, at 366.

**TORTS — PRE-JUDGMENT AND POST-JUDGMENT INTEREST — THE WARSAW CONVENTION AND MONTREAL AGREEMENT PERMIT THE AWARD OF PRE-JUDGMENT AND POST-JUDGMENT INTEREST IN ADDITION TO THE \$75,000 LIABILITY LIMITATION.** *Domangue v. Eastern Airlines*, 722 F.2d 256 (5th Cir. 1984).

On June 24, 1975, Eastern Airline's Flight 66, en route from New Orleans, crashed on its approach to Kennedy International Airport in New York.<sup>1</sup> Of the 124 persons aboard, 113 were killed.<sup>2</sup> One fatality was Barry Joseph Domangue, the husband of Evelyn H. Domangue and father of two children.<sup>3</sup>

On September 25, 1975, Mrs. Domangue, individually and on behalf of her two minor children, filed a wrongful death action against Eastern Airlines (Eastern) in the federal court for the Eastern District of Louisiana.<sup>4</sup> By order of the Judicial Panel on Multidistrict Litigation,<sup>5</sup> all suits arising from the air disaster, including Mrs. Domangue's, were consolidated<sup>6</sup> and transferred to the federal district

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<sup>1</sup> *Domangue v. Eastern Airlines*, 531 F. Supp. 334, 335 (E.D. La. 1981). For a discussion of the cause of the crash see *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 69 (2d Cir. 1980).

<sup>2</sup> *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 407 F. Supp. 244, 245 (J.P.M.D.L. 1976).

<sup>3</sup> *Domangue v. Eastern Airlines*, 542 F. Supp. 643, 648 (E.D. La. 1982). Barry Domangue, 29, was on the first leg of a trip to the North Sea, where he was returning to work for several months on a barge as an anchor operator. *Id.*

<sup>4</sup> *Domangue v. Eastern Airlines*, 531 F. Supp. 334, 335 (E.D. La. 1981).

<sup>5</sup> Eastern Airlines moved that the Judicial Panel on Multidistrict Litigation transfer all of the proceedings to the Eastern District of New York pursuant to 28 U.S.C. § 1407 (1976) which reads: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." *Id.*

<sup>6</sup> *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 407 F. Supp. 244, 245 (J.P.M.D.L. 1976). At the time the cases were consolidated there were 37 actions relating to the air disaster which were filed in four federal district courts. *Id.*



court for the Eastern District of New York.<sup>7</sup> The panel stipulated that the federal district court was to coordinate pre-trial procedures and determine liability.<sup>8</sup> The panel further decided that the issue of damages, unique to each case, should be tried before the court in which each action originated.<sup>9</sup>

In the New York district court Mrs. Domangue, joined by 14 other plaintiffs,<sup>10</sup> moved that her claim be considered under the absolute liability privilege of the Warsaw Convention and Montreal Agreement.<sup>11</sup> The district court held the Warsaw Convention applicable to Mrs. Domangue's suit<sup>12</sup> and entered summary judgment

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<sup>7</sup> *Id.* at 246. The Multidistrict Litigation Panel transferred the combined plaintiff's suits to the federal district court for the Eastern District of New York because New York was the site of the crash and the most convenient place for discovery. *Id.*

<sup>8</sup> *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. 1118, 1121-23 (E.D.N.Y. 1978). Upon a claim that the crash was caused in part by the negligence of the air traffic controllers at Kennedy International Airport, the United States was joined as a defendant pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674 (1976). The Act provides in pertinent part that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1976). *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. at 1120-21.

<sup>9</sup> *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 479 F. Supp. at 1120-21.

<sup>10</sup> *Id.* at 1121.

<sup>11</sup> *Id.* The Civil Aeronautics Board, Agreement 18900, Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (1966), approved by Civil Aeronautics Board, Order No. E23680 (May 13, 1966), *reprinted in* 31 Fed. Reg. 7302 (1966) and in 49 U.S.C. § 1502 note (1982) [hereinafter cited as Montreal Agreement] is actually a waiver by adhering airlines of the defenses available to them under the original Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 1502 note (1982) [hereinafter cited as Warsaw Convention]. The Montreal Agreement provides in part: "[t]he parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the [Warsaw] Convention or the [Warsaw] Convention as amended by the [Hague] Protocol." Montreal Agreement. The absolute liability privilege, however, is not available to persons who have intentionally or willfully caused damages. *Id.*

<sup>12</sup> There are six conditions for application of the Warsaw Convention and Montreal Agreement: 1) the passenger's travel must be "international" within the meaning of Article 1 (1) of the Convention (in Domangue's case, his final destina-

against Eastern as to liability only.<sup>13</sup>

Based upon Eastern's appeal, the United States Court of Appeals for the Second Circuit reversed the judgment and remanded the case to the district court on grounds of procedural error.<sup>14</sup> Before the New York district court had a chance to hear the case on remand, however, Mrs. Domangue and Eastern stipulated to a transfer of the case back to the federal district court for the Eastern District of Louisiana.<sup>15</sup> Thus, the parties appeared before the original court in which the action had commenced six years earlier, with liability and damages still undetermined.<sup>16</sup>

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tion was outside the United States, and thus he was an "international" traveler); 2) the passenger ticket must be "delivered" according to Article 3 (1) of the Convention (Mr. Domangue, according to evidence introduced by Eastern, received his ticket on the day prior to departing, thus having sufficient time to purchase additional insurance to compensate for the limited liability, if necessary); 3) the ticket must have a statement in ten point type stating that transportation is subject to the liability limit of the Warsaw Convention and Montreal Agreement (Eastern produced evidence that the tickets issued to passengers on Flight 66 contained such a statement); 4) the accident must have occurred while the passenger was on board or in the course of embarking or disembarking from the aircraft (Mr. Domangue was a passenger on board Flight 66 when it crashed on its landing approach); 5) the passenger must not have contributed to the accident (no evidence was introduced to suggest that Mr. Domangue contributed to or had any part in the accident); and 6) the accident must not have been due to the willful misconduct of the airline (although Mrs. Domangue argued that the crash was due to the willful misconduct of Eastern, her claim was unsupported by any evidence). Warsaw Convention, *supra* note 11; Domangue v. Eastern Airlines, 531 F. Supp. 334, 338-41 (E.D. La. 1981).

<sup>13</sup> Winbourne v. Eastern Airlines, 479 F. Supp. 1130, 1141 (E.D.N.Y. 1979). The court reserved the issue of damages for the Louisiana district court in which the case originated. *Id.*

<sup>14</sup> Winbourne v. Eastern Airlines, 632 F.2d 219, 223 (2d Cir. 1980); *see also* Domangue v. Eastern Airlines, 531 F. Supp. 334, 335-36 (E.D.N.Y. 1981). Eastern's appeal was based on the district court's entry of summary judgment from the bench without allowing Eastern the requisite opportunity to submit written opposition to the motion. Winbourne, 632 F.2d at 223. Before Eastern could make its appeal to the Second Circuit, the New York district court amended its judgment allowing Eastern to raise any defenses it might have at the trial for determining damages. Domangue v. Eastern Airlines, 531 F. Supp. at 336. Nevertheless, once the Second Circuit gained jurisdiction of the case, it reversed the judgment on grounds of procedural error. Winbourne, 632 F.2d at 223.

<sup>15</sup> Domangue v. Eastern Airlines, 531 F. Supp. at 336-37. The New York district court did not oppose the transfer of the case because it felt it would be simply a procedural matter to reinstate Eastern's liability, because in the court's opinion, there was no question that the Warsaw Convention applied. *Id.*

<sup>16</sup> *Id.*

By this time, Eastern had been found liable in other cases arising from the crash, but not proceeding under the absolute liability provision of the Warsaw Convention.<sup>17</sup> Because liability had been established and plaintiffs in those actions were able to collect unlimited damages from Eastern, Mrs. Domangue, before offering proof for her damages, completely reversed her position and began arguing that the Warsaw Convention and Montreal Agreement were *not* applicable to her cause of action.<sup>18</sup> Mrs. Domangue contended that her husband was not aware of the applicability of the Warsaw Convention to his flight<sup>19</sup> and that any damages limitation was waived by Eastern when it entered into a contribution agreement with the United States.<sup>20</sup> Eastern moved for partial sum-

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<sup>17</sup> *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67 (2d Cir. 1980). The Warsaw Convention and Montreal Agreement did not apply to those plaintiffs representing passengers who were not travelling internationally. Warsaw Convention, *supra* note 11, at art. 1; *Domangue v. Eastern Airlines*, 531 F. Supp. at 338, 340. Those plaintiffs, therefore, had the burden of proving that Eastern was negligent, but if they succeeded, the liability of Eastern would be unlimited. *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d at 70. The plaintiffs proceeded to try the case before the New York district court and a jury held Eastern liable. *Id.*

<sup>18</sup> *Domangue v. Eastern Airlines*, 531 F. Supp. at 337. Those plaintiffs to whom the Warsaw Convention and Montreal Agreement applied would be limited in their recovery against Eastern to a maximum award of \$75,000 each, whereas those plaintiffs outside the scope of the Convention would be able to recover damages far in excess of that, provided the damages could be proven. *Domangue v. Eastern Airlines*, 542 F. Supp. at 652-55.

<sup>19</sup> *Domangue v. Eastern Airlines*, 531 F. Supp. at 338-41.

<sup>20</sup> *Id.* at 341. Mrs. Domangue advanced three arguments as to why the Warsaw Convention and Montreal Agreement did not apply:

- 1) The passenger ticket was not "delivered" within the meaning of Article 3 of the Warsaw Convention. She contended that the page in the ticket warning that the travel was subject to the Warsaw Convention could have been torn out inadvertently by a ticket manager. The claim was dismissed because Mrs. Domangue could not produce any evidence that such was the case and Eastern was able to reproduce the type of ticket given to Mr. Domangue which contained an unperforated page with the necessary warning. *Id.* at 339-40.

- 2) There was "willful misconduct" by Eastern in causing the damage and thus the limit of liability is inapplicable according to Article 25 of the Warsaw Convention. The court also dismissed the claim in the absence of any such evidence. *Id.* at 341.

- 3) Eastern waived the damage limitation of the Warsaw Convention

mary judgment as to the applicability of the Warsaw Convention and Montreal Agreement.<sup>21</sup> In the absence of any genuine issues of fact, the Louisiana district court granted Eastern's motion.<sup>22</sup> Hence, with damages still not litigated, Mrs. Domangue's recovery from Eastern was limited to \$75,000, the limit imposed under the Montreal Agreement modifying the Warsaw Convention.<sup>23</sup> Before Mrs. Domangue could complete her proof of damages,<sup>24</sup> Eastern confessed judgment of \$75,000 and deposited that amount in the registry of the court.<sup>25</sup>

Mrs. Domangue, displeased with the limited recovery from Eastern, consequently argued in the Louisiana district court that she was entitled to collect pre-judgment and post-judgment interest in addition to the \$75,000 award.<sup>26</sup> She argued that if the members of the Warsaw

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by entering into an agreement with the United States to contribute 60 percent toward settlement or payment of damage awards of claims not yet settled with the United States. The claim was dismissed because the agreement made no mention of the Warsaw Convention. Furthermore, the limitation of liability of Article 22 of the Warsaw Convention affects only the rights and remedies available to the plaintiff and is strictly applicable only to the relationship between the plaintiff and defendant. It does not affect what defendants may do among themselves. *Id.* at 341-42.

<sup>21</sup> *Domangue v. Eastern Airlines*, 531 F. Supp. at 337.

<sup>22</sup> *Id.*; see *supra* note 17 and accompanying text.

<sup>23</sup> Warsaw Convention, *supra* note 11, as modified by the Montreal Agreement, *supra* note 11.

<sup>24</sup> The parties stipulated that Louisiana law would control the trial on damages; consequently, damages were awarded for loss of love, affection, and companionship; loss of support; and funeral expenses. The total judgment for all past and future damages was \$639,446.50. *Domangue v. Eastern Airlines*, 542 F. Supp. at 654.

<sup>25</sup> *Id.* at 645. Because Eastern's liability was limited by the Warsaw Convention and Montreal Agreement to \$75,000, Eastern chose to simply deposit the total amount into the registry of the court knowing that the damages would obviously be much greater than that. *Id.* Thus, the United States, which had earlier stipulated to its liability, was left with the sole burden of defending against Mrs. Domangue's claim for damages. *Id.* The only limit to damages recoverable from the United States was that placed by the court at \$2,500,000, the amount originally sought by Mrs. Domangue. *Id.* Because the United States would have to pay any damages above \$75,000 and up to a maximum of \$2,500,000, it obviously had a much greater interest than Eastern in trying to mitigate Mrs. Domangue's damages.

<sup>26</sup> *Id.* at 652. Interest has been defined as "compensation for the use or

Convention had intended interest to be included as an element of the \$75,000 limit, it would have been specified in Article 22 of the Warsaw Convention.<sup>27</sup> Mrs. Domangue also cited comments by other district court judges ruling on Warsaw suits arising from the same incident and awarding interest in addition to the \$75,000 limit.<sup>28</sup> One such judge said "in order to effectuate the

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forebearance of money." *Rosen v. United States*, 288 F.2d 658, 660 (3d Cir. 1976) (holding difference between amount paid by taxpayer on investment certificate and maturity value realized by the taxpayer constitutes interest). Post-judgment interest is generally calculated from the date final judgment is entered until payment is made. *Gele v. Wilson*, 616 F.2d 146, 149 (5th Cir. 1980) (holding that post-judgment interest begins accruing on an appealed case only after the case has been remanded and a final judgment rendered, rather than on the date of the original trial court judgment). The date at which pre-judgment interest begins accruing can vary from the date of the tort or breach to the date of judicial demand, depending upon the circumstances surrounding the case. *Union Bank of Benton v. First Nat'l Bank of Mt. Pleasant*, 677 F.2d 1074, 1079 (5th Cir. 1982) (stating that pre-judgment interest may be awarded from the time at which the measure of recovery, and not necessarily the amount of damages, is fixed by the conditions existing at the time of the injury); *Vallee v. Hyatt Corp.*, 433 So. 2d 1070, 1075 (La. Ct. App. 1983) (holding under Louisiana law that in tort actions, interest attaches from the date of judicial demand); *Commercial Standard Ins. Co. v. Bryce St. Apts., Ltd.*, 703 F.2d 904, 909 (5th Cir. 1983) (awarding pre-judgment interest in contractual setting from date when construction hold backs on projects financed by the Department of Housing and Urban Development - insured mortgages should have been released). In *Domangue*, the date of the tort was June 24, 1975, and the date of judicial demand was September 25, 1975. *Domangue v. Eastern Airlines*, 531 F. Supp. at 335.

<sup>27</sup> *Domangue v. Eastern Airlines*, 542 F. Supp. at 652. Article 22 of the Warsaw Convention states:

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

Warsaw Convention, *supra* note 11.

<sup>28</sup> *Domangue v. Eastern Airlines*, 542 F. Supp. at 652-54. Mrs. Domangue referred to three cases, all concerning the same incident and awarding interest despite being regulated by the Warsaw Convention and Montreal Agreement. *Id.* citing *Hickey v. Eastern Airlines*, No. 76-237F (E.D. La. 1981) (where the judge said he would allow interest, but the case eventually settled); *Dispenza v. Eastern Airlines*, No. 75-2412E (E.D. La. 1982) (where interest was allowed, but without explanation by the judge); *Winbourne v. Eastern Airlines*, No. 75-2715C (E.D. La. 1982) (where interest was allowed with the judge explaining that one of the purposes of the Warsaw Convention and Montreal Agreement is prompt recovery to the passenger and to disallow the award of interest would frustrate that purpose).

purposes of the Warsaw Convention and Montreal Agreement, plaintiff must be awarded pre-judgment and post-judgment interest.”<sup>29</sup> The district court, however, accepted Eastern’s argument that the purpose of the Convention is to protect airlines by establishing a limit to their liability, and anything in excess of that limit would be contrary to the intent of the adhering nations.<sup>30</sup> The district court considered interest an element of damages, and because the Convention expressly limits damages to \$75,000, the court held that any amount above \$75,000 is not recoverable.<sup>31</sup> This holding by the district court prompted Mrs. Domangue’s appeal to the United States Court of Appeals for the Fifth Circuit, contesting the interpretation of the Warsaw Convention and denial of interest on the judgment against Eastern. HELD: Reversed, The Warsaw Convention and Montreal Agreement permit the award of pre-judgment and post-judgment interest in addition to the \$75,000 liability limitation. *Domangue v. Eastern Airlines*, 722 F.2d 256 (5th Cir. 1984).

### I. A BALANCE OF OBJECTIVES

The Fifth Circuit Court of Appeals in *Domangue v. Eastern Airlines* stated that in order to resolve the issue presented it must “balance” the objectives sought to be accomplished by the drafters of the Warsaw Convention with the principles supporting the award of interest on judgments.<sup>32</sup> On one end of the scale the court saw the need to maintain a fixed and definite level of liability, a primary objective of the Warsaw Convention.<sup>33</sup> Weighing on the other end of the scale was the principle behind awarding interest: encouraging speedy compensation of damages and maximizing the recovery of injured parties

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<sup>29</sup> *Winbourne v. Eastern Airlines*, No. 75-2715C (E.D. La. 1982), cited in *Domangue v. Eastern Airlines*, 542 F. Supp. at 653.

<sup>30</sup> *Domangue v. Eastern Airlines*, 542 F. Supp. at 653.

<sup>31</sup> *Id.*

<sup>32</sup> *Domangue v. Eastern Airlines*, 722 F.2d 256, 262 (5th Cir. 1984).

<sup>33</sup> *Id.* at 262. See *infra* notes 36-98 and accompanying text.

or their survivors.<sup>34</sup> The appeal in *Domangue* brought to issue whether the objectives of the Warsaw Convention can be preserved while also accommodating the principles underlying the awarding of interest.<sup>35</sup> This casenote will examine the development of these two objectives and their proclaimed reconciliation by the Fifth Circuit.

### A. *Defining the Objectives of Warsaw*

Only two years after Lindbergh made the first flight across the Atlantic, legal scholars from around the world met in Warsaw to prepare the law for a new era of international aviation.<sup>36</sup> Although intercontinental flying had just begun, representatives of 23 countries<sup>37</sup> met on October 12, 1929, and established the Warsaw Convention, a set of laws they hoped would provide the legal foundation for all future international flights.<sup>38</sup> The Convention was guided by two objectives: (1) the development of a uniform system of law for international air carriers,<sup>39</sup> and (2) the limitation of airline liability.<sup>40</sup>

The potential for uniformity in the realm of international air transportation was an attractive feature of the

<sup>34</sup> *Id.*; see *infra* notes 102-145 and accompanying text.

<sup>35</sup> See *infra* notes 136-167.

<sup>36</sup> Lowenfeld & Mendlesohn, *The United States and the Warsaw Convention*, 80 HARV. L.J. 497, 498 (1967). The Warsaw Convention was organized because of the realization that international air travel would create new legal questions for which the law had yet to develop an answer. This need to accommodate the law with growing technology prompted the statement at the opening of the convention that "what the engineers are doing for machines, we must do for the law." *Id.* at 498; *Trans World Airlines v. Franklin Mint Corp.*, 104 S. Ct. 1776, 1789 (1984).

<sup>37</sup> The United States did not participate in the Warsaw Convention, composed primarily of European nations, but did have an observer in attendance. S. SPEISER & C. KRAUSE, 1 AVIATION TORT LAW § 11:4 (1978).

<sup>38</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 499. The authors of the Warsaw Convention were aware that the airline industry would undergo tremendous changes that were unforeseeable to them at that time, but they were determined to provide a foundation on which amendments and new laws could be added. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977); *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975) and *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967) all identify uniformity and limited liability as the two primary objectives of the Warsaw Convention.

Convention.<sup>41</sup> Not only would there be uniformity in tickets, way bills, and the like, but international travelers would be assured of a uniform set of laws to be used by foreign jurisdictions.<sup>42</sup> This would greatly simplify the enormous potential that existed for conflicts of laws in cases arising from international air travel.<sup>43</sup>

The concept of limiting the airline's liability and thus restricting the recovery of an injured party stimulated much debate,<sup>44</sup> and was considered the most important of the two objectives of the Convention.<sup>45</sup> Supporters of limited liability pointed to the early stages of development which the airline industry was undergoing.<sup>46</sup> They argued that by limiting liability, insurance for airlines would be less expensive and businessmen would be encouraged to invest more capital in the growing industry.<sup>47</sup> Opponents of the liability limit objected to the concept of not allowing a plaintiff the total damages that were due and argued that the airline industry should not be singled out from other businesses to enjoy the privilege of limited liability.<sup>48</sup>

In exchange for the benefit given to airlines by limiting their liability, the drafters of the Convention shifted the burden of proof in negligence actions to the airlines.<sup>49</sup>

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<sup>41</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 498. The uniformity aspect of the Warsaw Convention was one of the motivating factors behind the United States' adherence to the Convention. *Id.*

<sup>42</sup> S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:4.

<sup>43</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 498-99. Without the Warsaw Convention, a court would be faced with chaotic conflicts between the laws of the country in which the passenger was a citizen, the country in which the accident occurred, the country in which the airline was incorporated, and the countries from which the plane was to depart and arrive. *Id.*

<sup>44</sup> See *id.* at 504-09.

<sup>45</sup> *Id.* at 499.

<sup>46</sup> *Id.* at 498-99.

<sup>47</sup> *Id.* at 494-500. At this time, airline accidents were much more common than today, although there were fewer passengers in each plane. *Id.* at 498. Without a limit to liability, it was argued that an airline disaster would force a developing airline into bankruptcy. *Id.* See S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:4.

<sup>48</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 498-99.

<sup>49</sup> *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967); see also Warsaw Convention, *supra* note 11 at art. 20.



Thus, making the airline prove lack of negligence improved the ability of the passenger plaintiff to establish liability.<sup>50</sup> With this compromise reached between the airlines and the passenger, the airline's liability was limited to 125,000 Poincare francs per passenger (\$8,300).<sup>51</sup> Despite the criticisms that the liability limitation was either too high or too low,<sup>52</sup> the Warsaw Convention was ratified or adhered to by most of the world's industrial nations, including the United States.<sup>53</sup>

As the airline industry grew, so did amounts recoverable in domestic personal injury suits not regulated by the Warsaw Convention.<sup>54</sup> Soon the stronger economic nations (United States, Great Britain, France) began seeking an increase of the \$8,300 limit to liability.<sup>55</sup> Accordingly, a conference was called at the Hague in 1955 to consider a Protocol which would revise the Warsaw Convention.<sup>56</sup> The United States approached the Hague Conference

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<sup>50</sup> *Block*, 386 F.2d at 327.

<sup>51</sup> S. SPEISER & C. KRAUSE, *supra* note 37 at § 11:36. The amount of recovery is based on the gold standard and thus fluctuated, until recently, in its conversion to the American dollar. For example, in 1974, the equivalent amount of recovery in American dollars was closer to \$10,000. *Id.* This fluctuation stopped, however, when the United States went off the gold standard in 1978. *Trans World Airlines v. Franklin Mint Corp.*, 104 S.Ct. 1776, 1781-82 (1984) (holding the 1978 repeal of the Par Value Modification Act does not render the Warsaw Convention's cargo liability limit unenforceable in the United States). Although the United States went off the gold standard, the Civil Aeronautics Board still uses the last official price of gold (\$42.22 per ounce as established in 1972 Par Value Modification Act) to translate the Warsaw Convention's cargo liability limit. *Id.* at 1781-84.

<sup>52</sup> Even at this early stage of development, the differences in the economic strengths of the participating nations created a delicate balance of the interests between the high income nations and third world countries. Lowenfeld & Mendlesohn, *supra* note 36, at 504.

<sup>53</sup> *Id.* at 502. The United States adhered to the Warsaw Convention on July 31, 1934, with little debate in Congress and the Convention was adopted in 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1982). *Id.*

<sup>54</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 554. For example, from 1950-1964, the average settlement per passenger fatality not regulated by the Warsaw Convention was \$38,499. In comparison, during the same period the average settlement per passenger fatality subject to the Warsaw Convention was \$6,489. *Id.*

<sup>55</sup> *Id.* at 553-55. While the \$8,300 limit was far below the level of average settlements in the United States (which in 1955 was \$19,945 for non-Warsaw fatalities), *id.* at 554, it was still above the average settlement in lesser-developed nations. *Id.*

<sup>56</sup> *Id.* at 504.

with a proposal to increase the limit of liability to \$25,000.<sup>57</sup> As one basis of support for an increased limitation, the United States complained that attorney fees in this country were often awarded on a contingency basis, being deducted from the limited judgment and greatly reducing the plaintiffs' actual recovery.<sup>58</sup> However, a \$25,000 limit was considered much too high by most countries represented, and the delegates reduced the limit to \$16,600, double the original Warsaw amount.<sup>59</sup> To induce the United States' acceptance of this figure, the delegates approved an amendment allowing attorney fees to be awarded in addition to the limited judgment.<sup>60</sup>

The refusal of other nations to increase the liability limit above \$16,600 not only raised questions regarding whether the United States should ratify what became known as the Hague Protocol,<sup>61</sup> but also sparked serious consideration of United States withdrawal from the Warsaw Convention altogether.<sup>62</sup> Although the United States enjoyed the uniformity of law and ticketing which the Warsaw Convention offered,<sup>63</sup> the liability limit of only

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<sup>57</sup> *Id.* at 506. Because of the outdated restraints on plaintiff recoveries imposed by the Warsaw Convention, United States legislators were very interested in the results of the Hague Conference. This attention was a dramatic change from the low level of interest that was expressed during ratification of the original Warsaw Convention. *Id.* at 510. See *supra* note 53 and accompanying text.

<sup>58</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 507-10. The United States found itself as the only country suffering from this problem because all other countries award attorney fees extraneous of the judgment and not on a contingency basis. *Id.* at 508.

<sup>59</sup> *Id.* at 507.

<sup>60</sup> *Id.* at 508. Beaumont, *The Warsaw Convention of 1929, As Amended by the Protocol Signed at the Hague on September 28, 1955*, 22 J. AIR L. & COM. 414, 418 (1955).

<sup>61</sup> The modifications to the Warsaw Convention produced from the conference at the Hague became known as the Hague Protocol. Beaumont, *supra* note 60 at 414; See S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:18. Although the United States officially became a party to the Protocol on June 28, 1956, the United States Senate refused to ratify it. *Reed v. Wiser*, 555 F.2d 1079, 1087 (2d Cir. 1977).

<sup>62</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 510.

<sup>63</sup> By this time, the Warsaw Convention was a well-recognized, long-standing agreement that the United States wanted to avoid disapproving. The Kennedy administration feared that such withdrawal would isolate the United States and injure its reputation as well as its foreign diplomacy. Lowenfeld & Mendlesohn, *supra* note 36, at 533-54.

\$16,600 still greatly undercompensated American plaintiffs.<sup>64</sup> Consequently, on November 15, 1965, the United States announced its denunciation of the Convention, although actual withdrawal would not officially become effective until six months later.<sup>65</sup>

The possibility of American withdrawal from the Convention prompted another conference, this time in Montreal, where those in attendance hoped a compromise with the United States could be reached.<sup>66</sup> The United States was the country most active in international air traffic, and it was feared the entire Warsaw Convention might become meaningless and collapse if the United States withdrew.<sup>67</sup> The United States asked that the liability limit be raised to no less than \$100,000, but it failed to gain the support of the other nations needed to effectuate such a drastic change from \$16,600.<sup>68</sup> One day before the denunciation was to become effective, a temporary compromise agreement was hastily reached in which airlines flying to or from the United States agreed to waive the liability limitation up to \$75,000 and relinquish any defenses they had available under the Warsaw Convention.<sup>69</sup> The practical effect of this agreement was to impose absolute liability upon an airline<sup>70</sup> and to limit a plaintiff's recovery to \$75,000, including attorney fees.<sup>71</sup> Although

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<sup>64</sup> See *supra* note 55 and accompanying text. By 1964, the average settlement for a non-Warsaw fatality was \$76,652. Lowenfeld & Mendlesohn, *supra* note 36, at 554.

<sup>65</sup> *Id.* at 551. According to Article 39 of the Warsaw Convention, a six month notice of denunciation or withdrawal is required. Warsaw Convention, *supra* note 11.

<sup>66</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 549-52.

<sup>67</sup> *Id.* at 510, 514, 590.

<sup>68</sup> *Id.* at 563-75.

<sup>69</sup> *Id.* at 586-96; S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:19.

<sup>70</sup> Under the original Warsaw Convention, although an airline had the burden of proof in a negligence action, it was not held strictly liable. Warsaw Convention, *supra* note 11, at arts. 18, 21. The feature of absolute liability and promise of encouraging earlier dispositions of suits was added to induce United States acceptance of the \$75,000 limit. Lowenfeld & Mendlesohn, *supra* note 36, at 586-96. Such a change had been earlier considered by the United States, but rejected by the airline industry. *Id.*

<sup>71</sup> Lowenfeld & Mendlesohn, *supra* note 36, at 596-99. The earlier Hague Pro-

intended as only a temporary measure, the Montreal Agreement is still in effect in the United States today.<sup>72</sup>

### B. *Application of the Warsaw Objectives*

While one of the goals of the drafters of the Convention was uniformity, the varying economic natures of the adhering countries has made absolute uniformity impossible.<sup>73</sup> The attempt to limit liability to a single monetary amount has resulted in a total of three different agreements, each with a different limitation.<sup>74</sup> Although different monetary limits of recovery may apply in certain instances, the Warsaw Convention is still the cornerstone of all other issues regarding limited liability.<sup>75</sup>

A challenge for the courts has been application of the Warsaw objectives of uniformity and limited liability to is-

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toloc amendment allowing recovery of attorney fees in addition to the limited judgment, *see supra* note 58 and accompanying text, was abolished and the attorney fees were made a part of the larger \$75,000 recovery. For those nations that do not award attorney fees on a contingency basis, the limit agreed to was \$58,000. Lowenfeld & Mendlesohn, *supra* note 37.

<sup>72</sup> *See O'Rourke v. Eastern Air Lines*, 730 F.2d 842, 851 (2d Cir. 1984) (upholding the Montreal Agreements, \$75,000 liability limit).

<sup>73</sup> *See supra* note 51 and accompanying text. *See generally* Lowenfeld & Mendlesohn, *supra* note 36. Establishing a single dollar figure (based on the gold standard) to be used by all adhering nations, rich and poor, was perhaps too optimistic a goal for the Convention. The limit set for liability has generated by far the most controversy over the Warsaw Convention. *Id.*

<sup>74</sup> Lowenfeld & Mendlesohn, *supra* note 36 at 596-601; *see also supra* notes 36-73 and accompanying text. Depending upon which country was a party to a suit, a court could be faced with having to apply the Warsaw Convention limit of \$8,300, the Hague Protocol amended limit of \$16,600, or the Montreal Agreement limit of \$75,000. Lowenfeld & Mendlesohn, *supra* note 36 at 596-601. This situation exists because some nations, having never signed the Hague Protocol or Montreal Agreement, are still limited by the original Warsaw Convention amount. *Id.* Other countries have agreed to the Hague Protocol, but not the Montreal Agreement, and vice versa. *Id.* It should be noted that the Montreal Agreement is only applicable to flights which have some connection with the United States such as the place of departure or arrival. *Id.* *See also* S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:19.

<sup>75</sup> *Evangelinos v. Trans World Airlines*, 396 F. Supp. 95, 100 (W.D. Pa. 1975) (the Montreal Agreement could not and did not change the terms of the Warsaw Convention, but rather was an agreement by the airlines to accept a higher limit of liability and waive the defenses available under the Convention), *rev'd on other grounds*, 550 F.2d 152 (3d Cir. 1977); *see supra* note 74 and accompanying text.

sues on which the Convention is silent.<sup>76</sup> In such instances, the courts attempt to give the Convention as uniform an application as possible, consistent with the "genuine shared expectations of the contracting parties."<sup>77</sup> The Fifth Circuit Court of Appeals developed one of the earliest guidelines for interpreting the Warsaw Convention in the absence of a specific provision addressing the issue at bar.<sup>78</sup> In *Block v. Compagnie Nationale Air France*,<sup>79</sup> the Atlanta Art Society chartered an Air France plane for a flight to and from Paris.<sup>80</sup> The plane crashed at Orly Field in Paris, killing everyone aboard.<sup>81</sup> The plaintiffs argued that the Warsaw Convention was inapplicable to "chartered" planes, thus leaving the Fifth Circuit to determine, in the Convention's silence, whether to broaden or restrict the scope of the Warsaw Convention.<sup>82</sup> The Fifth Circuit concluded that in interpreting the Warsaw Convention it should inquire into (1) the circumstances

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<sup>76</sup> *Block*, 386 F.2d 323 (5th Cir. 1967) (holding the Warsaw Convention applicable to private, chartered international flights). The United States Supreme Court has heard only two cases requiring application of the Warsaw Convention. In the first, a lower court held the Warsaw Convention not applicable to the crash of an international flight because the passenger's ticket camouflaged or hid the limited liability provisions required by the Convention so that the passenger had no actual warning that his flight was subject to limited liability. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 514 (1966). On appeal, the Supreme Court affirmed in a divided opinion with Justice Marshall absent, and therefore did not publish an opinion. *Alitalia-Linee Aeree Italiane v. Lisi*, 390 U.S. 455 (1968). The case which provides the most recent guidelines for application of the Warsaw Agreement is *Trans World Airlines v. Franklin Mint Corp.*, 104 S.Ct. 1776, 1782 (1984) (holding that the 1978 repeal of legislation setting an "official" price of gold in the United States does not affect the enforceability of the Warsaw Convention's cargo liability limit). With the Supreme Court giving little attention to the Warsaw Convention, a great majority of the interpretation has been left to the federal courts of appeal. S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:4.

<sup>77</sup> S. SPEISER & C. KRAUSE, *supra* note 37, at § 11:6; *Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir. 1979) (citing *Maximov v. United States*, 299 F.2d 565, 468 (2d Cir. 1962), *aff'd* 373 U.S. 49 (1963)).

<sup>78</sup> *Block*, 386 F.2d 323 (5th Cir. 1967). The court stated that "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention." *Id.* at 336.

<sup>79</sup> 386 F.2d 323 (5th Cir. 1967).

<sup>80</sup> *Id.* at 324-25.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 325-26.

under which the Convention was entered into, (2) the subsequent application of the Convention, and (3) the conditions existing at the time of the interpretation.<sup>83</sup> Thus, not only did the court recognize the current status of the airline industry, but it also recognized that reliance should be placed on the legislative history of the Warsaw Convention.<sup>84</sup> Based upon these considerations, the court extended the scope of the Warsaw Convention to include "chartered" airlines and the plaintiffs' recovery was limited to \$8,300 each.<sup>85</sup> In a dissenting opinion, one of the justices opposed the court's interpretation of the Warsaw Convention on public policy<sup>86</sup> grounds. Such public policy, the justice argued, is the basis for a rule in the United States that, if different meanings can be placed upon a treaty, the one adopted should be that which is least restrictive of the rights of individuals.<sup>87</sup>

In 1977, the Second Circuit Court of Appeals was asked to interpret the silences of the Warsaw Convention in *Reed v. Wiser*.<sup>88</sup> *Reed* involved damage claims arising from a bomb explosion on a Trans World Airline (TWA) aircraft.<sup>89</sup> The next of kin and representatives of the passengers killed brought a cause of action against the employees of TWA, as well as the TWA corporation itself. The plaintiffs in *Reed* claimed the employees of TWA were personally negligent in maintaining security.<sup>90</sup> The court considered the issue of whether the Convention limited the liability of airline employees as well as the liability of the airline corporation.<sup>91</sup> The court began its analysis by

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<sup>83</sup> *Id.* at 337.

<sup>84</sup> *Id.* at 336-48. The Fifth Circuit cited the United States Supreme Court opinion of *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), which stated that treaties are construed more liberally than private agreements and that courts must look beyond the written word to the history of the treaty. *Block*, 386 F.2d at 337.

<sup>85</sup> *Block*, 386 F.2d at 353.

<sup>86</sup> *Id.* at 354.

<sup>87</sup> *Id.*

<sup>88</sup> 555 F.2d 1079 (2d Cir. 1977).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1081.

<sup>91</sup> *Id.*

looking to the official French text of the Convention and to the plain meaning of the words.<sup>92</sup> In the absence of an express provision in the convention addressing the issue, and following the analysis used in *Block*, the court then reviewed the legislative history of the Convention.<sup>93</sup> The court found that the purpose of the Warsaw Convention was to develop a uniform set of world-wide liability rules to govern air transportation.<sup>94</sup> In addition, the court considered the long-term effect of its interpretation on the objectives of the Convention.<sup>95</sup> Based on this analysis, the court concluded that employees as well as airline corporations were entitled to enjoy the limited liability protections of the Warsaw Convention.<sup>96</sup>

In its review of the legislative history of the provision of the Convention limiting liability to \$8,300, the Second Circuit issued the strongest proclamation to date that the limit should be strictly adhered to, stating: "[i]t is beyond

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<sup>92</sup> *Id.* at 1082-85. The court stated that if the provision's language accurately reflects the Convention's purpose, the literal meaning of the words should be strictly adhered to. However, if the words do not completely manifest the purpose, then a more liberal reading is required. *Id.*

<sup>93</sup> *Id.* at 1088. The Second Circuit stated that "[a] court faced with this problem of interpretation . . . can well begin with an inquiry into the purpose of the provision that requires interpretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry, but it should never become a verbal prison." *Id.* (quoting *Eck v. United Arab Airlines*, 360 F.2d 804, 812 (2d Cir. 1966)).

<sup>94</sup> *Reed v. Wiser*, 555 F.2d at 1090. The court stated that "[a]nother fundamental purpose of the signatories [the other purpose being to limit liability] to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation." *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1093. The courts in both *Block* and *Reed* were called upon to make the most extreme extrapolations of the Warsaw Convention. Their line of interpretive analysis has been followed by many other jurisdictions. See *Evangelinos v. Trans World Airlines*, 396 F. Supp. 95 (W.D. Pa. 1975) (holding the Warsaw Convention inapplicable to passengers injured while waiting in line to proceed to the last gate of the airline terminal); *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975) (holding the Warsaw Convention applicable to passengers waiting in airport area exclusively reserved for those about to board international flights); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975) (holding the Warsaw Convention inclusive of mental injuries and holding airlines liable for injuries included in the Warsaw Convention regardless of their ultimate cause).

dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages.”<sup>97</sup> Furthermore, the court stated that “at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay more than a fixed and definite sum for passenger injuries sustained in international air disasters.”<sup>98</sup> On the basis of this rationale, the court held the plaintiff’s recovery against the airline employees, as well as the corporation itself, was limited by the Warsaw Convention.<sup>99</sup>

In summary, the Warsaw Convention goals of uniformity and limited liability serve as guidelines for judicial interpretations of the treaty.<sup>100</sup> Those cases in which the text of the Warsaw Convention is of little aid are decided primarily on the basis of the analysis developed in *Block* and subsequently applied in *Reed*.<sup>101</sup> The circumstances under which the Convention was drafted, the Convention’s subsequent applications, and existing conditions surrounding the issue at bar are all factors considered by the courts.<sup>102</sup>

### C. *Principles Underlying Awards of Pre-Judgment and Post-Judgment Interest*

The theory of fully compensating wronged parties for

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<sup>97</sup> *Reed v. Wiser*, 555 F.2d at 1089 (emphasis in original). This language has been criticized as dictum because the issue before the court was the applicability of the liability limitation to employees of an airline corporation and not the amount of such liability. *Domangue v. Eastern Airlines*, 722 F.2d 256 (5th Cir. 1984).

<sup>98</sup> *Reed v. Wiser*, 555 F.2d at 1089. The court noted that the only exception to the airline paying a fixed sum would be willful misconduct by the airline, which would not entitle it to the protections of the Warsaw Convention. *Id.* See also Warsaw Convention, *supra* note 11, at art. 25.

<sup>99</sup> *Reed v. Wiser*, 555 F.2d at 1093.

<sup>100</sup> See *supra* notes 78-98 and accompanying text for a discussion of the application of the Warsaw objectives.

<sup>101</sup> *Id.*

<sup>102</sup> See *supra* note 83 and accompanying text for a discussion of the *Block* approach to interpreting the Warsaw Convention.



the injuries they have suffered led to the concepts of pre-judgment and post-judgment interest. Interest in the legal sense has been defined as "compensation allowed by law for the use or forbearance or detention of money."<sup>103</sup> The time at which interest should begin to accrue, before the judgment or after, is either a discretionary matter for the court or a matter of right to the parties.<sup>104</sup>

Because a court's judgment represents both a finding of liability and of damages owed, there has been little dispute in non-Warsaw cases regarding the award of interest from the date of judgment until payment is made.<sup>105</sup> A

<sup>103</sup> TEX. REV. CIV. STAT. ANN. art. 5069-1.01a (Vernon 1976).

<sup>104</sup> 22 AM. JUR. 2d *Damages* § 190 (1965). Post-judgment interest in federal cases is required by law and is therefore a matter of right for the plaintiff. 28 U.S.C. § 1961 (1982). Pre-judgment interest, unless required by statute as in Louisiana (LA. REV. STAT. ANN. § 13:4203 (West 1968) (legal interest attaches from the date of judicial demand in actions ex delicto), *Probst v. Wroten*, 433 So. 2d 734, 744 (La. Ct. App. 1983) (awarding interest pursuant to Louisiana statutory law from date of judicial demand in action resulting from two automobile accidents); *Vallee v. Hyatt Corp.*, 433 So.2d 1070, 1075 (La. Ct. App. 1983) (holding the theft of a car while under the negligent control of hotel sounds in tort and thus pre-judgment interest is awarded from date of judicial demand according to LA. REV. STAT. ANN. § 13:4203 (West 1968)) is generally a matter within the discretion of the courts. *See, e.g., Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285, 1290 (10th Cir. 1983) (holding the award of pre-judgment interest is a question of law solely within the sound discretion of the court); *Cavic v. Grand Bahama Development Co.*, 701 F.2d 879, 888 (11th Cir. 1982) (upholding the trial court judge's decision not to allow the jury to consider pre-judgment interest because of the uncertainty of plaintiff's damages); *Marshall v. Burger King Corp.*, 509 F. Supp. 353, 355 (C.D.N.Y. 1981) (holding federal courts are authorized to award pre-judgment interest as part of their equitable powers for violations of the Fair Labor Standards Act of 1938). *But see, Union Bank of Benton v. First Nat'l Bank of Mt. Pleasant*, 677 F.2d 1074, 1076 (5th Cir. 1982) (citing as the well-settled rule in Texas that interest is recoverable as a matter of right to the parties from the date of injury where damages are established as of a definite time and the amount is definitely ascertainable). In admiralty cases, pre-judgment interest is the rule rather than the exception, but the trial court maintains the discretion to deny pre-judgment interest in "peculiar circumstances" that would make the award inequitable. *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401, 414 (5th Cir. 1982) (finding no "peculiar circumstances" in the record to justify the trial court's withholding of pre-judgment interest and thus remanding the case to the trial court to award such interest); *Masters v. Transworld Drilling Co.*, 688 F.2d 1013, 1014 (5th Cir. 1982) (stating that pre-judgment interest is well-nigh automatic in admiralty suits).

<sup>105</sup> *Reeves v. International Tel. & Tel. Corp.*, 705 F.2d 750, 752 (5th Cir. 1983) (holding that post-judgment interest does accrue on award of wages under the Fair Labor Standards Act of 1976, although prejudgment interest does not); *see*

judgment clearly establishes a debt between parties and thus post-judgment interest provides compensation for the detention of money lawfully belonging to the party for whom judgment was rendered.<sup>106</sup> Indeed, Congress has passed legislation requiring the award of post-judgment interest in federal civil cases.<sup>107</sup>

The awarding of pre-judgment interest has presented a more difficult problem.<sup>108</sup> In deciding whether to impose pre-judgment interest, courts originally drew a distinction between contract cases, in which the damages are more likely to be liquidated, and tort actions, in which damages sought are usually unliquidated.<sup>109</sup> Courts have considered it an undue hardship to require a party to pay interest on an unliquidated debt because both liability and

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also 28 U.S.C. § 1961 (1982). Most of the controversy surrounding awards of post-judgment interest concerns defining "final judgment". *Gele v. Wilson*, 616 F.2d 146, 149 (5th Cir. 1980) (holding that post-judgment interest begins accruing on an appealed case only after the case has been remanded or modified and a final judgment rendered, rather than on the date of the original trial court judgment); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 545 (5th Cir. 1983) (awarding interest on attorney's fees and costs because the court felt it would more nearly compensate the victor for the expense of litigation).

<sup>106</sup> *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971) (awarding interest from the date of the original judgment against a shipper held liable for knowingly receiving an illegal rebate); *Reeves v. International Tel. & Tel. Corp.*, 705 F.2d 750, 752 (5th Cir. 1983) (holding that post-judgment interest does accrue on award of wages under the Fair Labor Standards Act of 1976, although pre-judgment interest does not).

<sup>107</sup> 28 U.S.C. § 1961 (1982) provides that:

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where by the law of the state in which such court is held, execution may be levied for interest on judgments recovered in the courts of the state. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by state law.

*Id.*

<sup>108</sup> See *infra* notes 109-115 and accompanying text.

<sup>109</sup> See *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 856 (D.C. Cir. 1981) (holding that neither the common law nor the District of Columbia Code provides for the award of pre-judgment interest in tort actions); *Peterson v. Crown Financial Corp.*, 661 F.2d 287, 293 (3d Cir. 1981) (stating that it is clear in contract actions that pre-judgment interest is properly awarded at the legal rate while in tort cases, pre-judgment interest is not allowable as a matter of law, although the courts may award compensation for delay).

amount have yet to be established.<sup>110</sup> Because of this threatened hardship the common law rule does not allow pre-judgment interest on unliquidated tort claims.<sup>111</sup> As a practical consequence, this rule envelops nearly all personal injury cases.<sup>112</sup> Plaintiffs wishing to recover pre-judgment interest in a personal injury case have attempted to avoid the common law rule by disguising their unliquidated claims as liquidated.<sup>113</sup> Furthermore, many courts make exceptions to the common law rule and allow pre-judgment interest provided the damages at the time of the injury are ascertainable by computation or reference to an established market value, even though the damages may still be termed "unliquidated".<sup>114</sup>

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<sup>110</sup> See *Oliver-Elec. Mfg. v. I.O. Teigen Constr.*, 183 F. Supp. 768, 769 (D. Minn. 1965) ("As to such claims, the general rule is that interest is not allowed as a part of the damages because the party liable cannot establish the amount of his liability and therefore should not be held in default for nonpayment.").

<sup>111</sup> See *supra* note 109 and accompanying text; Hare and Meelheim, *Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness*, 5 Am. J. Trial Advoc. 81, 84 (1981) (making the argument that pre-judgment interest should be allowed in tort cases to the same extent as in contract cases).

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 575 (1973). To avoid the common law rule, plaintiffs have strained the concept of a "liquidated" sum by arguing that at the time of the tort the damages were established and all injuries sustained so that a defendant was on notice of the probable amount he would be owing. *Id.* See also *Broward County v. Sattler*, 400 So.2d 1031, 1033 (Fla. Dist. Ct. App. 1981) (stating that a claim is only unliquidated for purposes of pre-judgment interest when the amount of damages cannot be computed except on conflicting evidence, inferences, and interpretations); *Cavic v. Grand Bahama Dev. Co.*, 701 F.2d 879, 888 (11th Cir. 1983) (upholding the trial court's refusal to award pre-judgment interest where there existed a genuine dispute between the parties as to the right of recovery and amount of damages).

<sup>114</sup> See, e.g., *Union Bank of Benton v. First Nat'l Bank in Mt. Pleasant*, 677 F.2d 1074, 1079 (5th Cir. 1982) (awarding pre-judgment interest in action resulting from bank's failure to timely return checks received from another bank); *J.M. Hollis Constr. Co. v. Paul Durham Co.*, 641 S.W.2d 354, 357 (Tex. App. - Corpus Christi 1982, no writ) (upholding award of pre-judgment interest to subcontractor in construction contract action); *E.M. Melahn Constr. Co. v. Village of Carpenter-ville*, 427 N.E.2d 181, 187 (Ill. App. Ct. 1981) (allowing pre-judgment interest on recovery by contractor for extra work performed under roadway and sewer contract because the amount due was ascertainable and subject to computation); *Price v. Amoco Oil Co.*, 524 F.Supp. 364, 372 (S.D. Ind. 1981) (awarding pre-judgment interest in action arising from a personal injury and protected by an indemnity agreement). *Oliver-Elec. Mfg. Co. v. I.O. Teiger Constr. Co.*, 183 F. Supp. 768, 769 (D. Minn. 1965) (awarding interest on basis of court's discretion

The theory that the defendant has been enjoying the free use of money, which in accord with the ensuing judgment rightfully belongs to the plaintiff, has formed the basis for awards of pre-judgment interest by the Fifth Circuit Court of Appeals in a wide variety of cases.<sup>115</sup> In *Whiting v. Jackson State University*<sup>116</sup> the Fifth Circuit held that minorities were being discriminately discharged from their jobs.<sup>117</sup> In awarding the plaintiff employees their back pay as damages incurred, the Fifth Circuit also allowed interest on that back pay because it was money owed to the plaintiffs that was benefitting the defendant employer.<sup>118</sup>

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despite claim for unliquidated damages). An example of the broadening use of pre-judgment interest for both liquidated and unliquidated damages is the Texas case of *McDaniel v. Tucker*, 520 S.W. 2d 543 (Tex Civ. App. - - Corpus Christi 1975, no writ). Although in *McDaniel*, the contractor's cause of action was for breach of contract (and alternatively for recovery in quantum meruit), *id.* at 546, the state court of appeals stated that pre-judgment interest is allowed as damages upon unliquidated demands, whether they arise out of an action for breach of contract or tort. *Id.* at 543. The court held that if the measure of recovery is fixed by the conditions existing at the time of the injury, interest should be awarded from that time until judgment, regardless of whether the amount of damages is fixed. *Id.* at 549.

A rule adopted by the New Jersey Supreme Court imposing pre-judgment interest in tort actions was challenged in *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), as representing a matter of "substantive" law, and thus beyond the scope of the rule-making authority of the court. 307 A.2d at 573. The New Jersey Supreme Court upheld the rule as a valid exercise of its power to establish procedural rules. The court reasoned that "interest" represents "damages" for delay in payment; "damages", in turn is considered a "remedy", and a "remedy" is a procedural matter within the court's power. *Id.* at 580. The court added that interest is not punitive, but rather compensatory to indemnify the claimant for the loss of the money he would have earned had payment not been delayed. *Id.* at 575. The court concluded by abolishing any distinction between liquidated and unliquidated claims, saying: "[i]t has been recognized that a distinction . . . simply as between cases of liquidated and unliquidated damages is not a sound one." *Id.* at 575 (citing *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168 (1933)). The court reasoned that in both situations, the defendant and not the plaintiff has had the use of monies which the eventual judgment finds the plaintiff is due. *Busik v. Levine*, 307 A.2d at 575.

<sup>115</sup> *Domangue v. Eastern Airlines*, 722 F.2d 256 (5th Cir. 1984); *Whiting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980); *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (5th Cir. 1975); *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1959).

<sup>116</sup> 616 F.2d 116 (5th Cir. 1980).

<sup>117</sup> *Id.* at 123-24.

<sup>118</sup> *Id.* at 127, n. 8.

In *Phillips Petroleum Co. v. Adams*,<sup>119</sup> the defendant utility company had collected "suspense money"<sup>120</sup> from its customers based on a pending rate increase that subsequently failed.<sup>121</sup> The Fifth Circuit charged interest on the "suspense money" from the time it was collected from the customers until the day Phillips tendered the funds into the registry of the court.<sup>122</sup> The court additionally held that once a defendant makes an unconditional offer to give up the disputed funds, interest liability ceases.<sup>123</sup>

Nearly 25 years prior to *Domangue v. Eastern Airlines*,<sup>124</sup> the Fifth Circuit addressed the issue of whether to award pre-judgment interest as a part of damages regulated by statute.<sup>125</sup> In *National Airlines v. Stiles*,<sup>126</sup> the plaintiff's damages were limited by the Death on the High Seas Act to "fair and just compensation for the pecuniary loss sustained."<sup>127</sup> Thus, in order to insure that the injured party was fully and fairly compensated for its loss, pre-judgment interest was allowed as part of the damages.<sup>128</sup> The Fifth Circuit, quoting the United States Supreme Court, stated that "[d]amage is sustained as of a certain date. What the

<sup>119</sup> 513 F.2d 355 (5th Cir. 1975).

<sup>120</sup> "Suspense money" is that money collected by a utility from customers who have been charged a higher rate that has yet to be approved by the regulating authorities. If the rate increase is approved, the money has already been collected, but if it is not approved, the utility owes its customers a partial refund. Such a procedure is usually used for accounting purposes. *Id.* at 360.

<sup>121</sup> *Id.* at 369.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 370.

<sup>124</sup> 722 F.2d 256 (5th Cir. 1984).

<sup>125</sup> *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1959).

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

<sup>127</sup> *Id.* at 402. The Death on the High Seas Act, 46 U.S.C. § 762 (1976) states in part:

the recovery in such suit shall be a *fair and just compensation* for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

46 U.S.C. § 762 (1976) (emphasis added).

<sup>128</sup> *National Airlines v. Stiles*, 268 F.2d at 405. Interest on an award of the \$250,000 was calculated beginning with the date the plaintiff's husband was killed. *Id.* at 402.

damage is may not be and is not affected by the time when estimated, but the damage is as found, and an award made on one date is not the equivalent of an award made at an earlier date.”<sup>129</sup> The court further stated that a party suffering a financial loss from the death of a bread winner can only be placed in the same position he or she previously enjoyed if the award is made at the time of the loss or if interest for the interim between payment is allowed.<sup>130</sup> The dissenting judge, on the other hand, disagreed on the basis that the interest award was contrary to the well-recognized common law rule that “judgments for unliquidated damages do not carry interest prior to their rendition.”<sup>131</sup>

The dissolution of the distinction between unliquidated and liquidated damages in determining whether to award pre-judgment interest and the broadening use of pre-judgment interest has been motivated by two common objectives: (1) the desire to avoid dilatory tactics, and (2) the encouragement of early out-of-court settlements.<sup>132</sup> Opponents of pre-judgment interest argue that a plaintiff's unreasonable rejection of a settlement offer or purposeful delay at trial make the award of interest inequitable.<sup>133</sup> In response to this argument, awards of pre-judgment interest are generally left to the discretion of the trial court.<sup>134</sup> Considerations such as who caused the delay and the elapsed time between the injury and fi-

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<sup>129</sup> *Id.* at 405 quoting *The Manhattan*, 85 F.2d 427, 429 (3d Cir.), *cert. denied*, *United States v. The Bessemer*, 300 U.S. 654 (1936).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 408.

<sup>132</sup> *Busik v. Levine*, 307 A.2d at 575-76. *See also* *McDaniel v. Tucker*, 520 S.W.2d 543, 549 (Tex. Civ. App. — Corpus Christi 1975, no writ) (for a discussion of these cases *see supra* note 114 and accompanying text).

<sup>133</sup> *Busik v. Levine*, 307 A.2d at 589.

<sup>134</sup> 22 AM. JUR. 2D *Damages* § 192 (1965). In some states, such as Louisiana, pre-judgment interest awards are regulated by statute. *See supra* note 104 and accompanying text. In admiralty law, awards of pre-judgment interest on unliquidated claims lie within the discretion of the court. *See United States v. M/V Zoe Colocotroni*, 602 F.2d 12 (1st Cir. 1979).

nal judgment guide the court's decision.<sup>135</sup>

## II. *DOMANGUE V. EASTERN AIRLINES*

The crash of Eastern Flight 66, and the ensuing litigation which lasted for more than six years, brought to issue the application of the liability limitation of the Warsaw Convention, as modified by the Montreal Agreement, and the award of pre-judgment and post-judgment interest. The Fifth Circuit, in approaching the issue, followed the interpretive analysis of the Warsaw Convention established in *Block and Reed*.<sup>136</sup> The court noted in reviewing the legislative history of the Convention that the goal of limiting liability was to protect the infant airline industry and reduce insurance costs and passenger fares.<sup>137</sup> The court stated that as early as 1955 at the Hague, the United States expressed its discontent with the liability limitation and its desire for more substantial recoveries for injured plaintiffs.<sup>138</sup> In the court's view, the Montreal Agreement which followed achieved two objectives: (1) an increase in liability and (2) encouragement of speedy disposition of claims.<sup>139</sup>

The court found that encouragement of early settlements was an "important additional American objective" of the Montreal Convention.<sup>140</sup> The court cited United States co-sponsorship of the proposal to impose absolute liability on the airlines as support for this conclusion.<sup>141</sup> The court noted that the United States argued that eliminating fault in establishing liability would expedite and reduce litigation costs because settlement negotiations would not have to be delayed until the completion of acci-

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<sup>135</sup> *Busik v. Levine*, 307 A.2d at 589-90; *Domangue v. Eastern Airlines*, 722 F.2d 256 (5th Cir. 1984).

<sup>136</sup> See *supra* notes 79-98 and accompanying text.

<sup>137</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 261.

<sup>138</sup> *Id.*

<sup>139</sup> See *supra* notes 66-72 and accompanying text; Lowenfeld & Mendlesohn, *supra* note 36, at 507-09, 570-71, 593, 600.

<sup>140</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 261.

<sup>141</sup> *Id.*; see also *supra* note 70 and accompanying text.

dent investigations.<sup>142</sup> Having concluded that a motivating objective of the Montreal Convention was to expedite the disposition of claims, the court was able to find that the award of interest was in accord with the objectives of the Convention.<sup>143</sup>

The Fifth Circuit also found support for its decision to award interest by citing to the eventual treatment of attorney fees by the Montreal Agreement as a separate and distinct cost from damages. The court stated that interest in America is often awarded in addition to and distinct from a damages judgment.<sup>144</sup> The court concluded that because the Warsaw drafters failed to comprehend that attorney fees in the United States were awarded as a part of the final judgment, it must also have failed to comprehend how American courts award interest.<sup>145</sup> In the court's opinion, the silence of the Convention indicates that interest is allowed in addition to the limited liability.<sup>146</sup> For, as the court stated, "if the drafters of the Montreal Agreement had wanted interest to be included within the \$75,000 limitation, they could have so stipulated."<sup>147</sup>

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<sup>142</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 261; see *supra* note 139 and accompanying text.

<sup>143</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 263. The court, by finding consistency in the objectives of interest and the Warsaw Convention, stated that awarding interest in this case would "well serve" the objectives of the Warsaw Convention. *Id.* at 262.

<sup>144</sup> *Id.* at 262. The court reasoned that because an amendment allowing attorney fees in addition to the limited recovery under the Warsaw Convention was at one time adopted, it signified that silence by the original drafters as to attorney fees meant attorney fees were not to be included in the amount specified. *Id.*

<sup>145</sup> *Id.* The court argues that the limit on liability is purely to reflect compensatory damages, and that when it was learned that attorney fees were coming out of that amount, the limit was increased to accommodate those fees. *Id.* at 262. Under the same reasoning, the ceiling on liability must not include interest because of the accepted American practice of awarding interest distinct from the normal damages. *Id.*

<sup>146</sup> *Id.* The district court in *Domangue* held that the silence of the Convention meant interest was to be included in the limited amount and, in the court's opinion, if the drafters of the Convention had intended to award interest separately in addition to the limit, they would have so specified. *Domangue v. Eastern Airlines*, 542 F. Supp. at 654: The district court viewed interest as an element of damages and because the Convention specifically limited "damages," any interest above the \$75,000 limit would not be allowed. *Id.*

<sup>147</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 262.



The court, identifying post-judgment interest as a "relatively routine policy," found the objectives of the Warsaw Convention well served by allowing such a claim.<sup>148</sup> The court cited three basic reasons for its decision: (1) post-judgment interest is easily calculable and places a defendant on notice of what he owes; (2) the goal of maintaining a definite level of liability will still be maintained because interest is so easily calculable; and (3) the amount of interest owed is entirely within the control of the airline because the airline determines how long it will withhold payment following a judgment.<sup>149</sup> Because the airline has control of the post-judgment interest liability it will incur, the court concluded that the airline cannot complain that its level of liability is being artificially inflated.<sup>150</sup>

The court began analyzing the issue whether to allow pre-judgment interest by noting that because the Warsaw Convention is uniform law, state statutes and common law are not binding.<sup>151</sup> Nevertheless, the court cited cases which make exceptions to the common law rule of not allowing pre-judgment interest on unliquidated claims.<sup>152</sup> The court also cited cases from its own bench in which pre-judgment interest was allowed.<sup>153</sup> Referring to the discrimination cases such as *Whiting v. Jackson State University*<sup>154</sup> and the "suspense" money case of *Phillips Petroleum Co. v. Adams*,<sup>155</sup> the Fifth Circuit emphasized that pre-judgment interest should be awarded because the defendant should not be able to use someone else's money for years and then pay nothing for such use.<sup>156</sup>

The Fifth Circuit found the strongest support for its holding by analogizing to its reasoning in *National Airlines*

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<sup>148</sup> *Id.*; see also *supra* notes 102-135 and accompanying text.

<sup>149</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 262.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 262-63.

<sup>152</sup> *Id.* at 263 (citing cases discussed *supra* notes 102-135 and accompanying text).

<sup>153</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 263.

<sup>154</sup> 616 F.2d 116 (5th Cir. 1980).

<sup>155</sup> 513 F.2d 355 (5th Cir. 1975).

<sup>156</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 263.

*v. Stiles* in which the court awarded pre-judgment interest although the damages were limited by statute.<sup>157</sup> The court reasoned that the objectives of fully compensating the injured party were the same under both the Death on the High Seas Act and the Warsaw Convention.<sup>158</sup> The Fifth Circuit rejected the lower court's argument that the goal of the Convention was to place a ceiling on the amount of damages recoverable rather than attempt to fully compensate an injured party.<sup>159</sup>

Based upon its analysis of the preceding authorities, the court held that awarding pre-judgment interest is within the discretion of the court and thus permissible under the Warsaw Convention.<sup>160</sup> Admitting that its decision was influenced by the "inequity of Eastern Airlines' benefiting from the delay between the crash and a final judgment" (6 1/2 years),<sup>161</sup> the court established discretionary guidelines for determining whether to allow interest.<sup>162</sup> The Fifth Circuit included in its guidelines consideration of the length of time between the tort and final judgment, and whether the defendant caused or contributed to the delay.<sup>163</sup>

The Fifth Circuit balanced the objectives of the Warsaw Convention with the objectives of post-judgment and pre-judgment interest and found them consistent.<sup>164</sup> The court stated that its decision did not defeat the objective of limiting liability because the amount of interest to be paid would depend on whether airlines avoid disposing of

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<sup>157</sup> *National Airlines v. Stiles*, 268 F.2d 400, 406 (5th Cir. 1959).

<sup>158</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 263.

<sup>159</sup> *Domangue v. Eastern Airlines*, 542 F. Supp. at 654.

<sup>160</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 262-64.

<sup>161</sup> *Id.* at 264.

<sup>162</sup> *Id.* Although the Domangue lawsuit lasted for six and one half years, it should be noted that part of the delay was due to the change in assertion by the plaintiff, Mrs. Domangue, as to the applicability of the Warsaw Convention to her case. See *supra* notes 17-22 and accompanying text.

<sup>163</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 264. By letting the court award interest in its discretion based upon the circumstances surrounding each case, both the plaintiff and defendant are encouraged to avoid dilatory tactics. *Id.*

<sup>164</sup> *Id.* at 262-64.

their claims.<sup>165</sup> The court opined that its decision would not result in higher insurance rates for the airline industry because airlines have the ability to keep interest on a judgment to a minimum.<sup>166</sup>

### III. CONCLUSION

The United States' discontent with the liability limitation of the Warsaw Convention continues with the Fifth Circuit holding in *Domangue v. Eastern Airlines*.<sup>167</sup> The decision, in light of a subsequent contrary holding involving the same incident,<sup>168</sup> adds yet more confusion to an agreement premised upon a goal of establishing uniformity.<sup>169</sup> Although the Fifth Circuit presented substantive authority for the idea of awarding pre-judgment interest on unliquidated tort claims, the relevance of its authority to the Warsaw Convention is highly questionable.<sup>170</sup> The Court was forced to refer to cases involving discrimination, utilities, and admiralty, and to conclude from those that pre-judgment interest is also proper under the Warsaw Convention.<sup>171</sup> It is difficult to understand (and the court makes no attempt to explain) the relevance between the cases cited and the Warsaw Convention.<sup>172</sup>

The court was only able to reconcile the award of interest by claiming it furthers the goals of the Warsaw Con-

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<sup>165</sup> *Id.* at 264.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 263.

<sup>168</sup> *O'Rourke v. Eastern Airlines*, 730 F.2d 842 (2d Cir. 1984) (holding that the Warsaw Convention does not allow pre-judgment and post-judgment interest above the \$75,000 liability limitation).

<sup>169</sup> See *supra* note 41 and accompanying text.

<sup>170</sup> Authority cited by the court for the proposition of awarding pre-judgment interest included: *McDaniel v. Tucker*, 520 S.W. 2d 543 (Tex. Civ. App. — Corpus Christi 1975, no writ); *Whiting v. Jackson State University*, 616 F.2d 116 (5th Cir. 1980); *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (5th Cir. 1975); *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1959) (for a discussion of these cases see *supra* notes 114-131 and accompanying text).

<sup>171</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 262; see *supra* note 170 and accompanying text.

<sup>172</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 262.

vention as modified by the Montreal Agreement.<sup>173</sup> The court viewed United States acceptance of the absolute liability provision in the Montreal Agreement as indicative of the "important American objective" to provide speedy compensation to injured parties.<sup>174</sup> The Fifth Circuit failed to note that the Montreal drafters offered absolute liability to the United States as an inducement for lowering the liability limit from \$100,000 to \$75,000, and that the United States adopted the offer in haste.<sup>175</sup> Because the proposed liability limit was lowered by \$25,000 to account for the speedy compensation to injured parties which absolute liability would bring, it could be argued that the principles for awarding interest have already been accommodated.<sup>176</sup> Thus, it appears as if delays in plaintiff recoveries are considered, and are a part of the Montreal Agreement.<sup>177</sup>

Another questionable identification of Warsaw goals arose in the court's treatment of *National Airlines v. Stiles*.<sup>178</sup> Damages are limited in that case by the Death on the High Seas Act to "fair and just compensation for the pecuniary loss sustained."<sup>179</sup> The court in *Domangue* found such a limitation consistent with the objectives of the Warsaw Convention in its regulation of damages.<sup>180</sup> Finding such a consistency seems "strained" when (1) the

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<sup>173</sup> *Id.* at 262-63.

<sup>174</sup> *Id.* at 261; The only authority the court cited for identifying "speedy compensation" as an important goal of the United States was certain sections of *Lowenfeld & Mendlesohn*, *supra* note 36, at 507-09, 570-71, 593, 600; *see Domangue v. Eastern Airlines*, 722 F.2d at 261.

<sup>175</sup> *Lowenfeld & Mendlesohn*, *supra* note 36, at 586-601; *see supra* note 70 and accompanying text.

<sup>176</sup> Without absolute liability, a plaintiff's recovery commonly takes longer; the plaintiff does not have the benefit of earning interest on money he would have had earlier with the imposition of absolute liability. Therefore, if he receives his money later due to a longer trial he should recover more money (\$100,000) than if he had the advantage of a quicker trial and a smaller award (\$75,000) that could begin earning interest earlier.

<sup>177</sup> *See supra* notes 175-176 and accompanying text.

<sup>178</sup> 268 F.2d 400 (5th Cir. 1959); *see supra* notes 124-131 and accompanying text.

<sup>179</sup> *National Airlines v. Stiles*, 268 F.2d at 402 n. 2.

<sup>180</sup> *Domangue v. Eastern Airlines*, 722 F.2d at 263.

Warsaw Convention places a definite monetary figure as a limit whereas the Death on the High Seas Act does not, and (2) the court, earlier in its opinion, recognized that victims of air disasters are only able to recover a proportion of their actual damages under the Warsaw Convention, whereas the Death on the High Seas Act provides for compensation commensurate to the loss sustained.<sup>181</sup>

Based, in part, upon these criticisms of the Fifth Circuit's interpretation of the Warsaw and Montreal Agreement, *Domangue* was not followed by the Second Circuit in a subsequent suit arising out of the same incident. In *O'Rourke v. Eastern Airlines*,<sup>182</sup> the Second Circuit stated in direct opposition to *Domangue* that "speedy resolution of claims was apparently not an important United States objective at the Montreal conference."<sup>183</sup> The Second Circuit, citing many of the same cases as relied on in *Domangue*, found no intent of the Warsaw contracting parties to deviate from the established limit and award anything above it.<sup>184</sup>

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<sup>181</sup> *Id.* at 261. In *National Airlines v. Stiles*, the Fifth Circuit awarded pre-judgment interest on the basis that the plaintiff would not be receiving the full value of her "pecuniary loss" (as required by the Death on the High Seas Act) if she was not compensated for the time between the loss and payment. 268 F.2d at 500. The Warsaw Convention and Montreal Agreement, on the other hand, limit damages to a specific amount which has been acknowledged as not fully compensating the plaintiff. *Domangue*, 722 F.2d at 261. See also *supra* note 97 and accompanying text (discussing the statement in *Reed* that the purpose of the liability limitation of the Warsaw Convention is to limit the cost to airlines). While the Fifth Circuit under the mandate of the Death on the High Seas Act had an obligation to fully compensate the plaintiff, that obligation is specifically limited in the Warsaw Convention and Montreal Agreement. See *supra* note 71 and accompanying text (discussing the \$75,000 liability limit.)

<sup>182</sup> 730 F.2d 842 (2d Cir. 1984).

<sup>183</sup> *Id.* at 854 n. 20. The court stated that the absolute liability provision was not a prime objective of the United States and that it was introduced as a "means of getting the United States to accept a liability limit lower than \$100,000." *Id.* (citing *Lowenfeld & Mendelsohn*, *supra* note 36, at 563, 570-71.)

<sup>184</sup> *O'Rourke v. Eastern Airlines*, 730 F.2d at 853, citing *Reed v. Wiser and Compagnie v. Nationale Air France* as examples of the court strictly adhering to the Convention. The Second Circuit recognized the Warsaw Convention as the supreme law of the land and stated that it had a duty to interpret it according to the intent of the framers. 730 F.2d at 853. In the absence of a specific provision in the Warsaw Convention allowing pre-judgment interest, the court concluded it must not be allowed because if the signatories had meant to exclude interest from

The *Domangue* decision, now standing in conflict with *O'Rourke*, dictates a need for action. A final interpretation as to interest and the \$75,000 limitation by the United States Supreme Court would clarify matters, but Warsaw plaintiffs would continue to be grossly undercompensated in comparison to non-Warsaw plaintiffs. Amending the Warsaw Convention or withdrawing from its guise altogether must once again seriously be considered.

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the limited damages, they would have included a specific provision in the treaty.  
*Id.*

