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TORTS — INTERNATIONAL LIABILITY LIMITATION AGREEMENTS — Absent a showing of prejudice to the passenger by the carrier's technical non-compliance with the baggage claim check provisions of the Warsaw Convention, or absent a demonstration of wilful misconduct related to the loss of checked baggage, an air carrier is entitled to limited liability under the Warsaw Convention. *Republic Nat'l Bank of N.Y. v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987).

On December 13, 1982, Renzo Baronti, a courier for Republic National Bank of New York (Republic), checked a bag containing two million dollars United States currency on Eastern Airlines Flight 001 to Lima, Peru.¹ The bag never reached Peru.² Republic brought this action to recover the lost currency.³

Republic operated a currency courier service on inter-

¹ *Republic Nat'l Bank of N.Y. v. Eastern Airlines*, 815 F.2d 232, 234 (2d Cir. 1987).

² *Id.* at 235.

³ *Id.* Republic commenced the action in the Southern District of New York. *Republic Nat'l Bank of N.Y. v. Eastern Airlines*, 639 F. Supp. 1410, 1411 (S.D.N.Y. 1986), *aff'd*, 815 F.2d 232 (2d Cir. 1987). With regard to the place where an action may be brought under the Warsaw Convention, Article 28 provides in pertinent part:

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted following* 49 U.S.C. app. § 1502 (1982) [hereinafter the Warsaw Convention]. Peru is not a party to the Warsaw Convention. For a list of parties to the Warsaw Convention see Comment, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 1000 (1986). Thus the action could not be brought in Peru. Further, since Republic was arguing for unlimited liability under the Warsaw Convention, tactically the United States was a better forum because the United States is known to award

national flights.⁴ On December 13, 1982, Republic dispatched Renzo Baronti to accompany two bags containing a total of 6.5 million dollars on Eastern Airlines Flight 001.⁵ Of the 6.5 million dollars, 4.5 million dollars were to go to Santiago, Chile.⁶ The remaining two million dollars were to go to Lima, Peru.⁷ Baronti obtained a ticket from New York City to Buenos Aires, Argentina from an Eastern ticket agent.⁸ The ticket contained a notice stating that the Warsaw Convention applied to the flight.⁹ After purchasing his ticket, Baronti approached an Eastern baggage check area and told the attendant that he needed two baggage claim checks for the high value ship-

the highest tort damages in the world. See Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528 (1967).

⁴ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 234. In May of 1982, Republic met with Eastern officials to notify Eastern that Republic would be dispatching couriers to accompany large amounts of currency which would be shipped on Eastern flights as checked baggage. Although Eastern told Republic it would not accept liability for currency checked as baggage, Eastern never refused to allow Republic to check the currency as baggage. *Id.* Further, Eastern never told Republic that Eastern's tariff did not allow it to accept money as checked baggage. *Republic Nat'l Bank of N.Y.*, 639 F. Supp. at 1412. Despite Eastern's refusal to accept liability, Eastern provided Republic with a letter of introduction to assure that Republic's couriers would receive assistance from Eastern employees. *Republic Nat'l Bank of N.Y.*, 815 F.2d at 234.

⁵ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 234-35.

⁶ *Id.* at 235.

⁷ *Id.* at 234.

⁸ *Id.* at 235 n.2. Because both the place of departure (New York) and the destination (Buenos Aires, Argentina) were located in countries which are parties to the Warsaw Convention, see Comment *supra* note 3, at 1000-01, the Warsaw Convention applied to the entire flight, including any stops in nonparty countries such as Peru. Warsaw Convention, *supra* note 3, art. 1(2).

⁹ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 235. The adequacy of the ticket under the Warsaw Convention was not contested. The Warsaw Convention requires carriers to deliver a ticket notifying the passenger of the applicability of the Convention and containing certain other details, specifically:

- (a) The place and date of issue; (b) The place of departure and of destination; (c) The agreed stopping places. . . ; (d) The name and address of the carrier or carriers; [and] (e) A statement that the transportation is subject to the rules relating to liability established by [the] convention.

Warsaw Convention, *supra* note 3, art. 3(1). The Warsaw Convention further provides that "if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or omit his liability." Warsaw Convention, *supra* note 3, art. 3(2).

ment.¹⁰ Baronti did not reveal the nature or exact value of the shipment.¹¹ Although Baronti did not have the bags with him, the attendant issued two claim checks to Baronti.¹² The first was a standard Eastern claim check for Santiago, Chile.¹³ The attendant, however, was unable to find a standard claim check for Lima, Peru.¹⁴ Instead, he substituted a limited release form¹⁵ which did not contain a notice of the applicability of the Warsaw Convention to the flight, Baronti's ticket number, or the weight of the bag.¹⁶

Baronti requested and received access to the tarmac to

¹⁰ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 235.

¹¹ *Id.* The Warsaw Convention allows a passenger to declare the value of the baggage in excess of 250 francs per kilogram, and where appropriate pay a supplementary amount for transportation of the baggage. If the passenger takes those steps, the carrier can be required to pay the lesser of the declared sum or the actual value of the baggage to the passenger. Warsaw Convention, *supra* note 3, art. 22(2).

¹² *Republic Nat'l Bank of N.Y.*, 815 F.2d at 235.

¹³ *Id.* Eastern's standard claim check is a pre-printed form which contains the destination, baggage identification number, routing codes, and a notice of the Warsaw Convention's applicability. *Id.* The adequacy of Eastern's standard claim check was not at issue in this case.

¹⁴ *Id.*

¹⁵ Eastern generally uses its limited release form to release itself from liability for previous damage to the passenger's checked bags. *Id.* at 235 n.4.

¹⁶ *Id.* at 235. Republic claimed this baggage check was insufficient under the Warsaw Convention. With respect to baggage checks, the Warsaw Convention requires:

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check. (2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier. (3) The baggage check shall contain the following particulars: (a) The place and date of issue; (b) The place of departure and of destination; (c) The name and address of the carrier or carriers; (d) The number of the passenger ticket; (e) A statement that delivery of the baggage will be made to the bearer of the baggage check; (f) The number and weight of the packages; (g) The amount of value declared in accordance with article 22(2); [and] (h) A statement that the transportation is subject to the rules relating to liability established by [the] convention. (4) . . . [I]f the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out in (d),(f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Warsaw Convention, *supra* note 3, art. 4.

meet the armored car carrying the bags containing the currency.¹⁷ Baronti checked the locks on the bags and attached the claim checks to the bags.¹⁸ He then told the Eastern baggage handlers to load Republic's two bags last.¹⁹ Baronti, however, allowed the baggage handlers to load several carloads of late baggage after Republic's bags.²⁰

The first scheduled stop in the flight was Miami, Florida.²¹ In Miami, Baronti inspected the bags and watched the baggage handlers replace the bags in the hold.²² The flight then continued to Peru. The bag destined for Peru and its contents never reached Peru.²³

Republic commenced an action against Eastern seeking to recover the full amount of its lost currency.²⁴ Eastern moved for partial summary judgment on the ground that the Warsaw Convention limits liability for lost baggage.²⁵ Republic opposed partial summary judgment, claiming that Eastern was not entitled to limited liability both because Eastern failed to include the information required by the Warsaw Convention on the baggage claim check,²⁶ and because Eastern's failure to adequately protect the bag from theft constituted "wilful misconduct" under the

¹⁷ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 235.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* Republic alleged that Eastern customarily loaded Republic's bags last so that they would be the first bags off the plane. *Id.* at 239. Eastern argued, and Baronti's testimony confirmed, however, that Republic, not Eastern suggested that this procedure be performed. *Id.* at 239-40. Thus the Eastern employees did not violate any Eastern rules relating to handling of high value luggage by loading other bags after the currency. *Id.*

²¹ *Id.* at 235.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* The Warsaw Convention provides the air carrier with limited liability in most cases. In pertinent part the Convention provides that "[i]n the transportation of checked baggage and of goods the liability of the carrier shall be limited to a sum of 250 francs per kilogram. . . ." Warsaw Convention, *supra* note 3, art. 22(2). Two hundred fifty francs per kilogram converts to approximately \$9.07 per pound. *Republic Nat'l Bank of N.Y.*, 639 F. Supp. at 1418.

²⁶ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 236. For the items that the Convention requires the air carrier to set forth on the baggage check see *supra* note 16.

Warsaw Convention.²⁷ The district court concluded that the Warsaw Convention limited Eastern's liability, and held that Eastern's maximum liability was \$634.90.²⁸ Republic appealed, arguing that the district court erred in failing to require strict adherence to the baggage claim check provisions of the Warsaw Convention and in failing to find Eastern guilty of wilful misconduct in handling the baggage.²⁹ *Held, affirmed*: Absent a showing of prejudice to the passenger by the carrier's technical non-compliance with the baggage claim check provisions of the Warsaw Convention, or absent a demonstration of wilful misconduct related to the loss of checked baggage, an air carrier is entitled to limited liability under the Warsaw Convention. *Republic Nat'l Bank of N.Y. v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987).

I. LEGAL BACKGROUND

A. History of the Warsaw Convention

The history of the Warsaw Convention demonstrates the dissatisfaction with the liability limitations that the Convention imposes.³⁰ The Warsaw Convention

²⁷ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 236. The Warsaw Convention prevents an air carrier from taking advantage of limited liability if the loss is due to "wilful misconduct." The relevant portion of the Convention reads as follows:

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

Warsaw Convention, *supra* note 3, art. 25(1). There is some dispute as to what constitutes wilful misconduct. See *infra* notes 193-213 and accompanying text for a discussion of wilful misconduct under the Warsaw Convention.

²⁸ *Republic Nat'l Bank of N.Y.*, 639 F. Supp. at 1412. The district court calculated Eastern's maximum liability based on 70 pounds of luggage, the maximum amount of luggage allowed a passenger according to Eastern's tariff, at the rate of \$9.07 per pound, the equivalent of 250 francs per kilogram. *Id.* at 1418.

²⁹ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 236.

³⁰ See generally Albert, *Limitations on Air Carrier Liability: An Inadvertent Return to Common Law Principles*, 48 J. AIR L. & COM. 111 (1982); DeVivo, *The Warsaw Convention: Judicial Tolling of the Death Knell?*, 49 J. AIR L. & COM. 71 (1983); Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 39 J. AIR L. & COM. 483 (1973);

emerged from conferences in Paris and Warsaw convened to discuss the legal problems of the then young aviation industry.³¹ The participants in the conference had two goals. First, they sought to draft uniform rules governing the rights and liabilities of international air carriers and passengers and to adopt uniform documentation.³² The participants at the Convention believed that uniformity was necessary to lessen the conflict of law problems which could arise in litigation against air carriers.³³ Accordingly, the Convention established standards for documentation including tickets, waybills, and baggage claim checks.³⁴ The Convention also addressed certain procedural areas including jurisdiction and statutes of limitation for actions seeking to impose liability on air carriers.³⁵

Second, the participants sought to limit the potential liability of air carriers.³⁶ The participants recognized this

Johnson & Minch, *The Warsaw Convention Before the Supreme Court: Preserving the Integrity of the System*, 52 J. AIR L. & COM. 93 (1986); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Comment, *Aviation Law: Attempts to Circumvent the Limitations of Liability Imposed on Injured Passengers by the Warsaw Convention*, 54 CHI.-KENT L. REV. 851 (1978); Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805 (1983) [hereinafter Comment, *Judicial Hostility*]; Note, *Interpretation of the Three Day Notice Requirement of Article 26(2) of the Warsaw Convention*, 39 J. AIR L. & COM. 251 (1973).

³¹ Lowenfeld and Mendelsohn, *supra* note 30, at 498.

³² *Id.*

³³ *Id.*; see also H. DRON, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 41-42 (1954). Among the possible conflicts of law the Convention was designed to avoid were conflicting jurisdictional determinations, conflicting statutes of limitations, conflicting documentation requirements, and conflicting substantive elements of claims. See 1 C. SHAWCROSS & K. BEAUMONT, *AIR LAW VII/2* (4th ed. 1987). The Warsaw Convention addresses each of these issues. *Id.*

³⁴ See Warsaw Convention, *supra* note 3, arts. 3, 4, 8.

³⁵ *Id.* arts. 28, 29. Article 28 provides that actions under the Warsaw Convention are subject to the jurisdiction of courts where the carrier has his domicile or principal place of business, where the contract was made, or at the destination. *Id.* art. 28. Article 29 provides that the statute of limitations is two years from the date of arrival or the date that the aircraft should have arrived or from the date the transportation stopped. *Id.* art. 29.

³⁶ Lowenfeld & Mendelsohn, *supra* note 30, at 499. The Convention set maximum liability for death or injury at 125,000 Poincaré francs consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. Liability for lost baggage or goods was set at 250 francs per kilogram. Warsaw Convention, *supra* note 3, art. 22. At the time of the adoption of the Warsaw

as the more important of the two goals because large tort claims could destroy the industry, and fear of large claims was preventing the industry from raising capital.³⁷

The Warsaw Convention granted air carriers limited liability but shifted the burden of proving lack of negligence to the air carrier.³⁸ Given the difficulty of establishing the elements of negligence in airline disasters,³⁹ this provision essentially required the carrier to admit liability unless the carrier could invoke one of the two defenses

Convention, 125,000 Poincaré francs were equal to approximately \$5,000. 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 33, at VII/3. However, the value of the dollar relative to gold declined, and in 1973 the United States devalued the dollar against gold. As a result the Warsaw liability limitations increased to approximately \$10,000 per passenger and \$9.07 per pound for baggage. 39 Fed. Reg. 1526 (1974). The United States subsequently went off the gold standard, but continued to adhere to the 1973 gold valuation for purposes of converting Poincaré francs to United States dollars under the Warsaw Convention. See 14 C.F.R. § 221.176 (1987). The United States Supreme Court approved the continued use of the last official conversion rate in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). According to the Court, tying recovery under the Warsaw Convention to the market value of gold would defeat the Convention framers' desire to establish predictable liability for carriers. *Id.* at 262.

³⁷ Lowenfeld & Mendelsohn, *supra* note 30, at 499. Drion criticized this rationale, noting "it is of little sense to protect the industry at the expense of its users. . . ." H. DRION, *supra* note 33, at 18. Moreover, even if liability limitation was arguably appropriate in 1929, once aviation grew past the start up phase, the infant industry argument began to ring hollow. By the 1960's public sentiment in the United States was that air carriers could and should bear the full burden of their accidents, because the industry had grown enough to absorb the cost and was safe enough that insurance was available at an inexpensive price. Lowenfeld, *The United States and the Warsaw Convention*, 54 DEP'T ST. BULL. 580 (1966).

³⁸ Warsaw Convention, *supra* note 3, arts. 17, 18, 19. The delegates saw this shift as *quid pro quo*. Comment, *Judicial Hostility*, *supra* note 30, at 808 n.16. Article 17 provides that the carrier "shall be liable" for bodily injury or death. Warsaw Convention, *supra* note 3, art. 17. Liability for damage or loss to checked baggage is provided in Article 18. *Id.* art. 18. Article 19 provides liability for delays in transportation of passengers, baggage, or goods. *Id.* art. 19.

³⁹ W. PROSSER, *TORTS* 246-47 (5th ed. 1984). Essentially, the problem is that the evidence needed to prove negligence is destroyed in the accident. *Id.* at 244. In some instances the doctrine of *res ipsa loquitur* overcomes this problem. The doctrine of *res ipsa loquitur* requires the plaintiff to demonstrate:

1. the event would not ordinarily occur in the absence of negligence;
2. the defendant had exclusive control of the agency causing the event; and
3. the plaintiff did not contribute to the accident. In some early air carrier accidents, the plaintiff could not demonstrate that the accident was unlikely to occur in the absence of negligence. *Id.* at 246.

provided in the Convention.⁴⁰ A carrier could escape liability by: (1) establishing that the passenger was contributorily negligent⁴¹ or (2) demonstrating that the carrier had taken all measures necessary to avoid the accident or that it was impossible for the carrier to take such measures.⁴²

The Convention became effective in November 1932, following ratification by France, Poland, Latvia, Spain, Brazil, Yugoslavia, and Rumania.⁴³ Although the United States did not participate in drafting the Warsaw Convention, the United States Senate approved the Convention by a voice vote without conducting prior committee hearings or debates on the floor.⁴⁴ The United States adhered to the Convention beginning in 1934.⁴⁵

International demands for revision of the Convention began almost immediately.⁴⁶ The dissatisfaction leading to the demands for revision focused upon two perceived problems. First, the language of Article 25, depriving a carrier of limited liability when the damage or injury was the result of wilful misconduct, was interpreted differently from country to country and even by courts within the same country.⁴⁷ Second, some countries argued that the liability limitations set by the Convention were unrealistically low, while others argued they were too high.⁴⁸ The

⁴⁰ Comment, *Judicial Hostility*, *supra* note 30, at 808.

⁴¹ Warsaw Convention, *supra* note 3, art. 21.

⁴² *Id.* art. 20. The Montreal Agreement, *see infra* notes 62-65 and accompanying text, eliminated this defense. In essence, after the elimination of this defense, the carriers were held strictly liable. Comment, *Judicial Hostility*, *supra* note 30, at 813.

⁴³ Article 37 provided that the treaty would come into force ninety days after five countries had ratified the Convention. Warsaw Convention, *supra* note 3, art. 37. Spain deposited its ratification March 31, 1930. Brazil ratified the Convention May 2, 1931 and Yugoslavia ratified the Convention on May 27, 1931. Rumania ratified the Convention on July 8, 1931 and France, Latvia and Poland ratified the Convention on November 15, 1932. The Warsaw Convention came into force pursuant to Article 37 on February 13, 1933. 137 L.N.T.S. 13 n.2.

⁴⁴ Lowenfeld & Mendelsohn, *supra* note 30, at 502.

⁴⁵ 78 CONG. REC. 11,582 (1934).

⁴⁶ Comment, *Judicial Hostility*, *supra* note 30, at 810.

⁴⁷ *See generally* G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 193-223 (1977). *See infra* notes 193-213 and accompanying text for a discussion of U.S. cases.

⁴⁸ Lowenfeld & Mendelsohn, *supra* note 30, at 504. The proponents of higher

result of this dissatisfaction was the Hague Conference in September, 1955.⁴⁹ The Hague Conference led to an amendment to the Warsaw Convention commonly known as the Hague Protocol.⁵⁰

The Hague Conference addressed both the standard for wilful misconduct and liability limitations.⁵¹ Because the wilful misconduct provisions provided a means of avoiding the liability limitations of the Convention, the participants at the Hague Conference believed that clarifying the wilful misconduct standard in favor of the carrier was a necessary *quid pro quo* for increasing the liability limitations.⁵² Thus, two changes emerged from the Hague Conference. First, a court could find a carrier guilty of wilful misconduct only if "the damage resulted from an act or omission of the carrier. . . done with intent to cause damage or recklessly and with knowledge that damage would probably result."⁵³ Second, the liability limitations for death or personal injury were doubled to \$16,000.⁵⁴ The United States never ratified the Hague Protocol due to increasing opposition to tort liability limitations in air-

liability limits argued that developed countries generally awarded much higher personal injury and wrongful death awards than the awards allowed under the Warsaw Convention. The proponents of higher liability limitations favored requiring the air carrier rather than the victim to bear the loss in aviation accidents. *Id.* On the other hand, some countries argued that liability limits were too high, causing less developed countries to reject the Convention. *Id.*

⁴⁹ *Id.* at 504-05.

⁵⁰ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter the Hague Protocol].

⁵¹ Lowenfeld & Mendelsohn, *supra* note 30, at 504.

⁵² *Id.* at 505.

⁵³ Hague Protocol, *supra* note 50, art. XIII. The Warsaw Convention had not specifically identified the state of mind necessary for wilful misconduct. *See* Warsaw Convention, *supra* note 3, art. 25. The delegates had considered two possible approaches to the revision of Article 25. The first proposal involved the articulation of the mental state required for wilful misconduct. The second proposal involved imposition of a higher monetary liability limitation for intentional acts than for negligent acts. Lowenfeld & Mendelsohn, *supra* note 30, at 505.

⁵⁴ The Hague Protocol raised the liability limitations to 250,000 francs. Hague Protocol, *supra* note 50, art. XI. This amount converted to \$16,600 at the time the Hague Protocol was being considered. Comment, *Judicial Hostility*, *supra* note 30, at 811. The United States initially sought a \$25,000 limitation. Comment, *supra* note 3, at 957.

craft disasters.⁵⁵ The stage was thus set for United States' denunciation of the Warsaw Convention.⁵⁶

In 1965, the United States formally denounced the Warsaw Convention, explaining that the denunciation was due to dissatisfaction with the Convention's liability limits for injury and death claims.⁵⁷ The State Department's announcement explained that the United States would retract its denunciation if all international air carriers agreed to increase the Warsaw Convention's liability limitations for injury or death to \$75,000.⁵⁸ The major airlines of the world agreed to these demands.⁵⁹ The result

⁵⁵ See Comment, *supra* note 3, at 958. Andreas Lowenfeld explained some of the opposition in his remarks to a special International Civil Aviation Organization meeting:

Our quarrel rather is with the other compromise contained in the Warsaw Convention: the compromise between the interests of the airlines and the interests of the traveling public. . . . [T]he overriding issue in the Warsaw Convention, as we see it, is that it was entered into in the late 1920's, when international aviation was hardly over the experimental stage and when the primary need was a means to prevent the growth of international aviation being choked off by one or more catastrophic accidents. Today, in contrast international aviation is big business. We are over the experimental stage. We are over the infant industry stage. . . . [T]he hazards of flying have been very much reduced and are actuarially predictable.

For these reasons the United States believes that there is no longer justification for a convention which tips the balance heavily in favor of the industry and against the consumer.

Lowenfeld, *supra* note 37, at 580-82.

⁵⁶ The Warsaw Convention provides that any party may denounce the Convention. Warsaw Convention, *supra* note 3, art. 39. Denunciation becomes effective six months after notification. *Id.*

⁵⁷ *U.S. Gives Notice of Denunciation of Warsaw Convention*, 53 DEP'T ST. BULL. 923 (1965). The Department of State's press release indicated that the denunciation of the Warsaw Convention was "solely because of the convention's low limits of liability for injury or death to passengers." *Id.* at 924.

⁵⁸ *Id.*

⁵⁹ The agreement was signed by the airlines instead of the parties to the Warsaw Convention because the agreement is not technically an amendment to the Warsaw Convention. Comment, *Judicial Hostility*, *supra* note 30 at 813 n.54. Article 22 of the Warsaw Convention allows carriers and passengers to enter into special contracts that provide for a higher limitation of liability. Warsaw Convention, *supra* note 3, art. 22. However, the Convention renders "any provision tending to relieve the carrier of liability or to fix a lower limit . . . null and void." Warsaw Convention, *supra* note 3, art. 23. Airlines licensed after the Montreal Agreement became effective are deemed to have signed the Montreal Agreement. 14 C.F.R. § 203.5 (1987).

was the Montreal Agreement.⁶⁰

The Montreal Agreement changed the Warsaw Convention in two major ways. First, it increased maximum liability for injury and death to \$75,000.⁶¹ Second, it required airlines to waive the defenses contained in Article 20.⁶² In effect, the airlines agreed to strict liability.⁶³ Because the airlines signed the Montreal Agreement, the United States continued to adhere to the Warsaw Convention.⁶⁴

The signatories to the Montreal Agreement designed it to be an interim measure until they could amend the Warsaw Convention.⁶⁵ In 1971, the member nations met in Guatemala for that purpose.⁶⁶ The Guatemala Protocol increased the Montreal Agreement limit for compensation for death and injuries to \$100,000.⁶⁷ It also imposed strict liability on the airlines.⁶⁸ The United States, how-

⁶⁰ Agreement C.A.B. 18,900, I.A.T.A. Agreement Re: Liability Limitations, 44 C.A.B. 819, reprinted in 31 Fed. Reg. 7302 (1966) [hereinafter the Montreal Agreement].

⁶¹ *Id.* The full text of the agreement is reprinted in 2 C. SHAWCROSS & K. BEAUMONT, *supra* note 33, at D43-D50. The Montreal Agreement applies to all flights that include the United States as a point of origin, point of destination, or agreed stopping place. *Id.* at D43.

⁶² Agreement C.A.B. 18,900, I.A.T.A. Agreement Re: Liability Limitations, 44 C.A.B. 819, 819 (1966). The Warsaw Convention allowed carriers to avoid liability when they had done everything they could to avoid the accident. Warsaw Convention, *supra* note 3, art. 20.

⁶³ Carriers may still claim contributory negligence of the passenger as a defense. Warsaw Convention, *supra* note 3, art. 21.

⁶⁴ *U.S. to Continue Adherence to Warsaw Convention*, 54 DEP'T ST. BULL. 955, 955-57 (1966).

⁶⁵ *Id.* at 956. The Department of State press release indicated: "This is an interim arrangement terminable on 12 months' notice. In the months ahead public hearings will be held for the purpose of determining the definitive United States position in preparation for further international discussions concerning the Warsaw Convention." *Id.*

⁶⁶ 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 33, at VII/14.

⁶⁷ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature March 8, 1971, 10 I.L.M. 613 [hereinafter the Guatemala Protocol]; see *International Civil Aviation Organization: Protocol Revising Warsaw Convention Rules on Air Carrier Liability to Passengers*, 10 I.L.M. 613 (1971). The Guatemala Protocol provided for maximum liability of 1,500,000 francs. Each franc was deemed to consist of 65 1/2 milligrams of gold. *Id.* art. VIII. This amounted to \$100,000. Comment, *supra* note 3, at 989.

⁶⁸ Guatemala Protocol, *supra* note 67, art. V.

ever, never ratified the Guatemala Protocol and thus it never became effective.⁶⁹

In 1975 the International Civil Aviation Organization met to amend the Warsaw Convention and the Hague Protocol once more.⁷⁰ The group drafted several amendments known as the Montreal Protocols.⁷¹ The Montreal Protocols provided for measurement of liability by Special Drawing Rights, an international monetary unit.⁷² In 1983, the United States Senate defeated the Montreal Protocols,⁷³ marking the third time in less than thirty years that the United States refused to ratify limitations of liability.⁷⁴ The Warsaw Convention and Montreal Agreements, with their lower liability limitations, are both still in effect in the United States. Thus, the courts of the United States are left to enforce the Warsaw Convention

⁶⁹ The provisions of the Guatemala Protocol required thirty nations to ratify the agreement. Under the terms of the Guatemala Protocol five of these thirty nations must account for at least 40% of scheduled air traffic. Since the United States alone accounts for 40% of scheduled air traffic, the Guatemala Protocol essentially cannot become effective without U.S. ratification. Guatemala Protocol, *supra* note 67, art. XX.

⁷⁰ Comment, *supra* note 3, at 990. The text of the Montreal Protocols is set forth in 2 S. ROSENFELD, BOOKLET 19, THE REGULATION OF INTERNATIONAL COMMERCIAL AVIATION 66-81 (1984) [hereinafter Montreal Protocol No. 1, No. 2, No. 3, and No. 4 or collectively the Montreal Protocols].

⁷¹ See DeVivo, *supra* note 30, at 72-75 for a more detailed discussion of the provisions of the Montreal Protocols.

⁷² The Montreal Protocols were designed to create a substitute for the Poincaré franc as the basis of measurement of liability. The Montreal Protocols are complicated by the fact that different versions of the Warsaw system are in effect in different countries. The Warsaw Convention, the Hague Protocol and the Guatemala Protocol each have different liability limitations. Montreal Protocol No. 1, thus applies to countries which have accepted the Warsaw Convention. Montreal Protocols, *supra* note 70, art. I. Montreal Protocol No. 2 applies to countries which have accepted the Hague Protocol. Montreal Protocol No. 2, *supra* note 70, art. I. Montreal Protocol No. 3 applies to countries which have accepted the Guatemala Protocol. Montreal Protocol No. 3, *supra* note 70, art. I. The fourth Montreal Protocol simplifies air waybill documentation requirements. Montreal Protocol No. 4, *supra* note 70, art. III.

⁷³ 129 CONG. REC. S2270-79 (daily ed. Mar. 8, 1983).

⁷⁴ Some critics of limited liability believe that no air carrier liability limitation measure will ever be ratified by the United States Senate. "When any one or anything . . . attempts to impose an arbitrary or artificial limitation of any kind . . . there is going to be a clash of ideology. And I do not think in this day and age you will see any further ratification of limitations." Kreindler, *supra* note 3, at 529-31.

despite the unpopularity of the basic concept of liability limitation.

B. *Judicial Interpretation of the Warsaw Convention*

A court wishing to disregard the liability limitations of the Warsaw Convention, without expressly disclaiming the validity of the Convention, can do so by finding that the carrier has not met the documentation requirements which are prerequisites for limited liability⁷⁵ or by finding that the carrier engaged in wilful misconduct.⁷⁶ Many cases lend themselves to either approach.

1. *Documentation Requirements*

The Warsaw Convention established requirements for three types of documents commonly provided by air carriers: passenger tickets, baggage checks, and air waybills.⁷⁷ The information required on each document is quite similar. Thus, courts developed the law in each area by way of analogy to the other areas.

⁷⁵ See *infra* notes 77-192 and accompanying text for a discussion of the documentation requirements of the Warsaw Convention.

⁷⁶ See *infra* notes 193-213 and accompanying text for a discussion of wilful misconduct.

⁷⁷ Warsaw Convention, *supra* note 3, arts. 3, 4, 8. For the text of Article 3 covering passenger tickets, see *supra* note 9. For the text of Article 4 covering baggage claim checks see *supra* note 16. In pertinent part the text of Article 8 reads:

The air waybill shall contain the following particulars: (a) The place and date of its execution; (b) The place of departure and of destination; (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character; (d) The name and address of the consignor; (e) The name and address of the first carrier; (f) The name and address of the first consignee, if the case so requires; (g) The nature of the goods; (h) The number of packages, the method of packing, and the particular marks or numbers upon them; (i) The weight, the quantity, the volume or dimensions of the goods; . . . (q) A statement that the transportation is subject to the rules relating to liability established by this Convention.

Warsaw Convention, *supra* note 3, art. 8. Article 9 provides that if the air waybill does not contain items (a) through (i) the carrier may not invoke limited liability. Warsaw Convention, *supra* note 3, art. 9.

a. *Passenger Tickets*

The Warsaw Convention requires the air carrier to give each passenger a ticket containing certain information about the flight, including points of departure and destination, agreed stopping places, and a statement about the applicability of the Warsaw Convention.⁷⁸ Failure to deliver a ticket results in loss of limited liability.⁷⁹ Among the earliest cases to construe these provisions was *Ross v. Pan American Airways*.⁸⁰ In *Ross*, the plaintiff was part of a USO group scheduled to fly to Europe to entertain American soldiers.⁸¹ A USO official made all travel arrangements for the group.⁸² All of the tickets for the group were delivered to that official. The plaintiff never actually received a ticket.⁸³ The court held that the agent had implied authority to receive the ticket by virtue of his role in arranging the transportation.⁸⁴ Because the agent had authority to receive the ticket, delivery to the agent was binding on the plaintiff.⁸⁵ Thus, the court limited the air carrier's liability despite the fact that the plaintiff never saw the ticket.⁸⁶

In another early case, *Grey v. American Airlines*,⁸⁷ the court granted the carrier limited liability even though the carrier had expressly failed to refer to the agreed stopping places in the ticket.⁸⁸ In *Grey*, the plaintiff's decedents

⁷⁸ Warsaw Convention, *supra* note 3, art. 3(1).

⁷⁹ *Id.* art. 3(2). Article 3 does not specifically require the presence on the ticket of the items listed in Article 3(1). The Convention merely provides that the air carrier must deliver a ticket. Several courts, however, have held that the inclusion of the required items is part of delivery. See *infra* notes 94-125 and accompanying text.

⁸⁰ 190 Misc. 974, 77 N.Y.S.2d 257 (N.Y. Sup. Ct.), *aff'd*, 274 A.D. 767, 80 N.Y.S.2d 735 (1948), *aff'd*, 299 N.Y. 88, 85 N.E.2d 880 (1949).

⁸¹ *Id.* at 974, 77 N.Y.S.2d at 259.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* The court noted that "[t]he Convention does not require that physical delivery be made to the passenger in person." *Id.*

⁸⁶ *Id.*

⁸⁷ 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

⁸⁸ *Id.* at 284. While the inclusion of agreed stopping places is not an express condition for limited liability, several courts have interpreted the requirements set

were en route from New York to Mexico City when the defendant's plane crashed at Love Field in Dallas, Texas. Dallas had not been listed as a stopping place on the ticket.⁸⁹ The court found that the omission of the stopping place was "technical and wholly unsubstantial."⁹⁰ For that reason the court concluded that the carrier should be allowed to claim limited liability.⁹¹ The *Grey* case began a trend. Before *Grey*, courts looked only at the requirements of the Warsaw Convention to determine whether limited liability should be granted. After *Grey* courts began to consider whether the purposes of the Warsaw Convention were served by limiting liability.⁹² As a result of *Grey*, courts began to reject a strict construction of the Convention in favor of a looser, purpose oriented approach.⁹³

Later courts used this technique to prevent the carrier from limiting its liability in situations where the carrier arguably met the Warsaw Convention requirements. In *Mertens v. Flying Tiger Line, Inc.*,⁹⁴ the passenger, an Army officer accompanying a shipment of material to Japan, died in an airplane accident in Japan.⁹⁵ The passenger did not receive his ticket until after he had boarded the plane which was ready to take off.⁹⁶ The statement on the

forth in Article 3 to constitute part of delivery. See *infra* notes 94-125 and accompanying text.

⁸⁹ *Grey*, 227 F.2d at 284.

⁹⁰ *Id.* The labeling of Warsaw Convention requirements as technical and insubstantial has been especially popular in cargo cases because it allows a court to require the waybill to contain only those items which are commercially necessary. See *infra* notes 170-192 and accompanying text.

⁹¹ *Grey*, 227 F.2d at 284.

⁹² The *Grey* Court analyzed the purpose of the Warsaw Convention as a whole:

The scheme of the Warsaw Convention is pretty plain on its face. . . .

. . . But perhaps of greater significance is the general purpose of protecting international air carriers from the burden of excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical or human shortcomings which caused the disaster.

Id. at 285.

⁹³ See *infra* notes 94-192 for a discussion of this trend.

⁹⁴ 341 F.2d 851 (2d Cir.), cert. denied, 382 U.S. 816 (1965).

⁹⁵ *Id.* at 853.

⁹⁶ *Id.* at 857.

ticket concerning limitation of liability was printed in such a way that it was illegible and almost unnoticeable.⁹⁷ The court held that in these circumstances the carrier had not adequately delivered the ticket.⁹⁸ In reaching this holding, the court analyzed the purpose of the delivery requirement. The court concluded that the Convention required delivery of a ticket containing notification of the applicability of the Warsaw Convention was to give the passenger an opportunity to take measures to protect himself from the airline's limited liability.⁹⁹ Delivery of the ticket just prior to take off could not accomplish this purpose.¹⁰⁰ The *Mertens* court claimed that its decision did not conflict with *Ross*, characterizing the *Ross* holding as a statement of the principle that the Warsaw Convention does not require that the passenger expressly assent to the liability limitation.¹⁰¹

The court in *Warren v. Flying Tiger Line, Inc.*¹⁰² engaged in a similar analysis. In *Warren*, an aircraft operated by Flying Tiger disappeared while flying to Vietnam.¹⁰³ The plane was carrying ninety-six passengers. Ninety-two were United States soldiers.¹⁰⁴ The representatives of the soldiers brought the suit.¹⁰⁵ The plaintiffs argued that Flying Tiger failed to deliver the passenger tickets adequately because Flying Tiger issued the tickets to the soldiers as they boarded the airplane.¹⁰⁶ The tickets did

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id. But cf. Ross*, 190 Misc. at 974, 77 N.Y.S.2d at 259. The *Ross* court held that the plaintiff need not receive a ticket. Delivery to the plaintiff's agent was sufficient. Thus, although the plaintiff did not have notice of the limitation of liability, the court held limited liability appropriate. *Id.* at 974, 77 N.Y.S.2d at 259.

¹⁰⁰ *Mertens*, 341 F.2d at 857. The court noted that even if the officer had read the ticket and decided to buy extra insurance, he could not do so because he was under military orders to remain on the plane. *Id.*

¹⁰¹ *Id.* "[*Ross*] did not decide whether the ticket must be delivered in such a manner [sic] as to provide the passenger with a reasonable opportunity to take self-protective measures." *Id.*

¹⁰² 352 F.2d 494 (9th Cir. 1965).

¹⁰³ *Id.* at 495.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 496.

contain a notice of applicability of the Warsaw Convention.¹⁰⁷ The trial court found, however, that the notice was in such fine print that the passenger would need a magnifying glass to read it.¹⁰⁸ The tickets did not contain the passengers' names or the agreed stopping places.¹⁰⁹ The court stated that it was in "complete accord" with the *Mertens* analysis of the purpose for the delivery requirement.¹¹⁰ The air carrier did not give the passengers an opportunity to take self-protective measures.¹¹¹ The court pointed out that if the carrier had delivered the tickets earlier, for instance in the hour while the passengers waited to board the plane, the passengers could have purchased additional life insurance from insurance vending machines located in the terminal.¹¹² Based on both *Warren* and *Mertens*, the Warsaw Convention requirement of delivery became a requirement of delivery prior to the flight.

The decision in *Lisi v. Alitalia-Linee Aeree Italiane*¹¹³ further liberalized the Convention requirements in favor of passengers. In *Lisi*, prior to the flight, the passengers received a ticket containing a notice of the applicability of the Warsaw Convention.¹¹⁴ That notice, however, was in very fine print and was positioned so that it was almost unnoticeable.¹¹⁵ The court held that the printing did not provide 'adequate notice to the passenger because the

¹⁰⁷ *Id.* at 497.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The Warsaw Convention requires both of these omitted items; however, their absence does not necessarily entitle the passenger to claim unlimited liability. See *supra* note 79.

¹¹⁰ *Warren*, 352 F.2d at 498.

¹¹¹ *Id.* The court pointed out that the passengers could not be blamed for the loss of the right to take protective measures because they had arrived in plenty of time to read any notice given to them. *Id.*

¹¹² *Id.*

¹¹³ 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1967) (4-4 decision).

¹¹⁴ *Id.* at 513.

¹¹⁵ *Id.* at 514. A copy of the ticket is included in the district court's opinion. *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 242 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1967).

print was too small.¹¹⁶ Thus, the passenger could not take protective measures. While the court did not require actual notice, the *Lisi* holding was a step in that direction. In dicta the *Lisi* court went further. The court pointed out that even if the printing had been legible, the notice would still be inadequate because it was difficult to understand.¹¹⁷ Thus, although under the facts set out in *Lisi* the passengers had ample time to discover the liability limitation, read the notice, have the notice explained to them, and procure additional insurance, the court found the notice inadequate. The dissent characterized the *Lisi* holding as tantamount to requiring actual notice and charged that the court's liberal interpretation of the Convention amounted to judicial treaty making.¹¹⁸

One year later in *Egan v. Kollsman Instrument Corp.*,¹¹⁹ the Court of Appeals of New York explicitly stated that a literal reading of the Convention was inappropriate under the facts presented.¹²⁰ In *Egan*, the court faced a situation

¹¹⁶ *Lisi*, 370 F.2d at 514. The court decided that the notification was too small as a matter of law. *Id.* Although it seems that the visibility of a warning would be a classic jury issue, the parties chose to treat the issue as one that the court could objectively determine. *Id.* at 513 n.9.

¹¹⁷ *Id.* at 514 n.10. The court believed that the failure to define "international carriage" and the value of "French gold francs (consisting of 65 1/2 milligrams of gold with a fineness of nine hundred thousands)" was unnecessarily confusing. For a contrary conclusion on virtually the same issue see *Parker v. Pan Am. World Airways*, 447 S.W.2d 731 (Tex. Civ. App. 1969). For a discussion of *Parker* see *infra* notes 141-143 and accompanying text.

¹¹⁸ The dissent severely criticized the majority, stating that "[t]he majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability." *Lisi*, 370 F.2d at 515.

¹¹⁹ 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

¹²⁰ *Id.* at 160, 234 N.E.2d at 203, 287 N.Y.S.2d at 20. The printing on the ticket was 4 1/2 point type. *Id.* at 160, 234 N.E.2d at 200, 287 N.Y.S.2d at 16. The court rejected the defendant's argument that *Ross* dictated that the carrier's liability should be limited, pointing out that conditions had changed since the date of the *Ross* decision. The court justified departing from a strict interpretation of the Warsaw Convention because "a traveler today is likely to undertake international travel quite casually and without realizing the drastically limited protection he is receiving when compared to that provided by domestic flights." *Id.* at 160, 234 N.E.2d at 204, 287 N.Y.S.2d at 21.

similar to *Lisi*. The air carrier physically delivered a ticket to the passenger, but the print was difficult to read.¹²¹ The court held that although according to the letter of the Convention such a notice was adequate, according to the spirit of the Convention, fine print did not satisfy the notice requirement.¹²²

The court declared that national policy required that "air carriers give passengers clear and conspicuous notice" of the applicability of the Warsaw Convention.¹²³ Relying on a passage from *Eck v. United Arab Airlines*,¹²⁴ a Warsaw Convention case interpreting the venue provisions of the Convention, the court explicitly stated that although a literal reading of the Convention might have been appropriate at the time the Convention was adopted, changes in the nature of air travel required that courts adhere to the purpose, rather than the letter, of the Convention.¹²⁵ In essence, the court was arguing not for a generally liberal interpretation of the Warsaw Convention, but rather for either a strict or liberal interpretation of the Convention, as the facts of the case required, to give effect to the underlying purpose of the Convention.

¹²¹ *Id.* at 160, 234 N.E.2d at 200, 287 N.Y.S.2d at 16.

¹²² *Id.* at 160, 234 N.E.2d at 203, 287 N.Y.S.2d at 20.

¹²³ *Id.* at 160, 234 N.E.2d at 204, 287 N.Y.S.2d at 21. The court gleaned this national policy from previous decisions and CAB regulations. *Id.* The court did not consider the possibility that an international policy favoring uniform standards of liability might outweigh national policy.

¹²⁴ 360 F.2d 804 (2d Cir. 1966). The *Eck* court indicated:

A court faced with this problem of interpretation, or another like it, 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." (Citations omitted). . . . The inquiry may lead the court to conclude. . . that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provisions refer.

Id. at 812. The court noted that these interpretation principles were especially relevant to treaties because treaties are less likely to be regularly modified than statutes. *Id.* at 812 n.18.

¹²⁵ *Egan*, 21 N.Y.2d at 160, 234 N.E.2d at 203, 287 N.Y.S.2d at 20.

b. *Baggage Checks*

In many ways the Warsaw Convention provisions related to baggage checks are quite similar to the provisions related to passenger tickets. Article 4 of the Warsaw Convention requires that the carrier provide a baggage check which lists, among other items, the number and weight of the packages and a statement that the transportation is subject to the Warsaw Convention.¹²⁶ Failure to include any of these items results in the loss of limited liability.¹²⁷

Seth v. British Overseas Airways Corp.,¹²⁸ was one of the earliest significant cases under Article 4. The plaintiff, a citizen of India, received an award to study theology in Cambridge, Massachusetts.¹²⁹ As part of the award, he received two airline tickets to Massachusetts.¹³⁰ The plaintiff checked two bags containing valuable religious treatises.¹³¹ The carrier lost the bags. The plaintiff contended he was entitled to full reimbursement because the statement on the baggage claim check regarding the applicability of the Warsaw Convention liability limitations was unclear.¹³² The court disagreed. While the ticket did not categorically inform the passenger that his transportation was subject to the Warsaw Convention, the court concluded that it gave the passenger adequate notice that liability limitations existed, which the carrier would take advantage of if it could.¹³³ The warning thus achieved the primary objective of the notice requirement: assuring that a passenger is aware that he may require extra insurance coverage.¹³⁴ Mere technical noncompliance with the War-

¹²⁶ See *supra* note 16 for the relevant text of Article 4.

¹²⁷ Warsaw Convention, *supra* note 3, art. 4(4).

¹²⁸ 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964).

¹²⁹ *Id.* at 304.

¹³⁰ *Id.*

¹³¹ *Id.* at 305. There was some question as to whether the treatises were overvalued to manufacture the requisite jurisdictional amount. However, the court could not conclude that it was impossible for Seth to recover more than the jurisdictional amount, assuming the Warsaw limitations did not apply. *Id.*

¹³² *Id.* at 306-07.

¹³³ *Id.* at 307.

¹³⁴ *Id.*

saw Convention was not sufficient to impose unlimited liability if the purpose of the Warsaw Convention was achieved. However, where the purpose of the Warsaw Convention was not achieved, mere technical compliance was insufficient to obtain limited liability.

Stolk v. Compagnie Nationale Air France,¹³⁵ reiterated this notion. In *Stolk*, the plaintiff lost two pieces of luggage on an Air France trip from New York to Paris. The required statement of liability limitation for loss of baggage was printed both on the ticket and the baggage check.¹³⁶ The court held that although the carrier had issued the ticket and baggage check approximately two weeks in advance, the plaintiff did not have notice of the limitations of the Warsaw Convention because the type was too small to read.¹³⁷ Although the ticket contained a warning in ten point type relating to the applicability of limitations of liability for death or bodily injury, the court determined that this warning did not achieve the primary purpose of the Convention because it would not put a passenger on notice that similar limitations applied to checked baggage.¹³⁸

Both *Seth* and *Stolk* demonstrate that courts hearing ticket and baggage claim cases place heavy emphasis on whether the passenger had notice of the Warsaw Convention and whether the passenger could understand the notice. The question naturally arises whether illegibility is a question of law or fact. Several cases seem to suggest that the judge determines whether the warning is adequate.¹³⁹

¹³⁵ 58 Misc. 2d 1008, 299 N.Y.S.2d 58 (N.Y. Civ. Ct. 1969), *aff'd*, 64 Misc. 2d 859, 316 N.Y.S.2d 445 (N.Y. Sup. Ct. 1970).

¹³⁶ *Id.* at 1008, 299 N.Y.S.2d at 60.

¹³⁷ *Id.* The court analogized the situation to *Lisi* and *Egan*. *Id.* at 1008, 299 N.Y.S.2d at 60-61. The court noted it would be "incongruous to permit a notice such as was denounced in *Lisi v. Alitalia* and *Egan v. Kollsman* . . . under Art. 3 to satisfy the more rigid requirements of Art. 4." *Id.* at 1008, 299 N.Y.S.2d at 61. The court pointed out that the notice was a judicially imposed condition of delivery under Article 3 but was mandated by the Convention under Article 4. *Id.*

¹³⁸ *Id.* at 1008, 299 N.Y.S.2d at 62.

¹³⁹ See, e.g., *Lisi*, 370 F.2d at 514 (notice "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'"); *Warren*, 352 F.2d at 497 (fine print on ticket would be difficult to read without a magnifying glass); *Mertens*, 341 F.2d at 857 (statement printed "in such manner as to virtually be both unnoticeable and un-

Assuming the purpose of the notice requirement is to warn passengers that they may require additional insurance, it would seem, however, that the passenger's subjective interpretation of the notice should be the appropriate standard for judging adequacy of the notice.¹⁴⁰

The court in *Parker v. Pan American World Airways*¹⁴¹ made it clear that it is the plaintiff who must be unable to read or comprehend the warning rather than a third party.¹⁴² The carrier need not demonstrate that the passenger had actual knowledge of the applicability of the Convention; rather, the passenger must demonstrate that if he looked for the notice, he would have been unable to read or comprehend the notice.¹⁴³ This is a reasonable requirement, assuming that the purpose of the notice requirement is to allow the passenger to assess whether he needed extra protection.

Most courts now take a relatively uniform approach to the Warsaw Convention's notice requirements, allowing a carrier to retain limited liability as long as the underlying purposes of the Warsaw Convention are fulfilled.¹⁴⁴ Courts do not yet, however, agree what effect to give to other failures to comply with the Warsaw Convention.

readable"). *But see* *Trans World Airlines v. Christophel*, 500 S.W.2d 409, 410 (Ky. 1973) (holding a warning twice the size of the print on the rest of the ticket adequate).

¹⁴⁰ See *supra* notes 94-125 and accompanying text for a discussion of various courts' interpretations of the purpose of the Warsaw Convention.

¹⁴¹ 447 S.W.2d 731 (Tex. Civ. App. 1969).

¹⁴² *Id.* at 736.

¹⁴³ *Id.* The court concluded that although an airline employee had difficulty reading and understanding the ticket, this fact was of no significance because there was no evidence plaintiff's vision was similarly defective. *Id.*

¹⁴⁴ See *supra* notes 128-138 and accompanying text for a discussion of cases concerning the purposes of notices regarding baggage liability limitations. Courts also generally agree on the effect of a carrier's failure to deliver a baggage check altogether. See, e.g., *Baker v. Lansdell Protective Agency*, 590 F. Supp. 165 (S.D.N.Y. 1984) (loss of jewelry during security screening; carrier not required to issue claim check because carrier had not taken control of the baggage); *Hexter v. Air France*, 563 F. Supp. 932 (S.D.N.Y. 1982) (carry-on bag given to attendant on board airplane; airline had accepted bag without baggage claim thus liability unlimited); *Schedlmayer v. Trans Int'l Airlines*, 99 Misc. 2d 478, 416 N.Y.S.2d 461 (N.Y. Civ. Ct. 1979) (carry-on bag given to attendant; claimant could not retrieve bag, thus airline had accepted bag without baggage claim and liability unlimited).

For instance, the Warsaw Convention requires that the air carrier record the number and weight of checked bags on the baggage claim check.¹⁴⁵ In cases in which the carrier did not fulfill this requirement, the courts in *Maghsoudi v. Pan American World Airways*,¹⁴⁶ *Hill v. Eastern Airways*,¹⁴⁷ and *Kupferman v. Pakistan International Airlines*¹⁴⁸ all concluded that liability was unlimited in accordance with the literal language of the Warsaw Convention. In each case, the carrier failed to record the weight of the passenger's baggage. Both the *Hill* and the *Kupferman* courts decided the issue in summary fashion.¹⁴⁹ The defendant had failed to record the weight, and thus he was not entitled to limited liability according to the plain language of the Convention.

The *Maghsoudi* court gave the issue greater attention. The court ultimately adopted an approach of strict construction of the Convention against the party primarily benefited by the Convention. The court explained its rationale in detail. It expressly rejected the airline's argument that the weight of the luggage was irrelevant to the operation of the Convention.¹⁵⁰ The court concluded that the weight of the luggage was highly relevant in the passenger's decision whether to buy additional insurance, because the passenger would have to know the recorded weight to determine the carrier's maximum liability for

¹⁴⁵ See *supra* note 16 for text of Article 4.

¹⁴⁶ 470 F. Supp. 1275 (D. Haw. 1979). The plaintiff was traveling to Iran to make records from two master tape recordings which he had packed in the lost luggage. *Id.* at 1276. The plaintiff claimed that the entire trip was worthless because the luggage disappeared. *Id.* at 1276-77.

¹⁴⁷ 103 Misc. 2d 306, 425 N.Y.S.2d 715 (N.Y. Civ. Ct. 1981). The plaintiff lost three separate pieces of baggage on a trip to Acapulco. One bag disappeared on the trip to Acapulco and the other two disappeared on the flight home. *Id.*

¹⁴⁸ 108 Misc. 2d 485, 438 N.Y.S.2d 189 (N.Y. Civ. Ct. 1981). The airline misplaced the plaintiffs' luggage and as a result the plaintiffs did not have suitable clothing to participate in all of the activities included in their package tour to China. *Id.* at 485, 438 N.Y.S.2d at 190-91.

¹⁴⁹ *Hill*, 103 Misc. 2d at 306, 425 N.Y.S.2d at 716; *Kupferman*, 108 Misc. 2d at 485, 438 N.Y.S.2d at 192.

¹⁵⁰ *Maghsoudi*, 470 F. Supp. at 1279. The airline argued that the plaintiff could easily have estimated the maximum liability by approximating the weight of the bag. *Id.*

loss of the luggage under the Warsaw Convention.¹⁵¹

The court in *Martin v. Pan American World Airways*¹⁵² adopted a similar approach but reached a different result in essentially the same situation. The plaintiff in *Martin* checked a number of bags prior to her departure for Buenos Aires.¹⁵³ The baggage handler placed two tags on one bag and failed to tag another bag. In addition, the handler did not record the weight of any of the bags.¹⁵⁴ The plaintiff argued that because of these failures to comply with the Warsaw Convention, Pan Am should be subject to unlimited liability. The court disagreed, rejecting a literal interpretation of the Warsaw Convention.¹⁵⁵

The *Martin* court rejected the *Maghsoudi* court's interpretation of the purpose of Article 4.¹⁵⁶ Looking to the legislative history of the Convention, the *Martin* court stated that the primary purpose of the Convention was to limit the liability of air carriers by limiting the recovery available for personal injuries and loss of property.¹⁵⁷ While recognizing that improvements in the airline industry's methods of operation and financial prospects had decreased the need for such provisions, the court noted that the liability limitations were still intact.¹⁵⁸ The court de-

¹⁵¹ The court noted that estimated liability could vary greatly depending upon the weight used as an estimate. *Id.* The court also distinguished the line of cases departing from a strict construction of the Convention, claiming that the *Lisi*, *Warren*, and *Mertens* plaintiffs had presented a compelling reason for departing from a strict construction of the Warsaw Convention. *Id.* at 1279 n.10. The court decided Pan American World Airways had not done so in the instant case. *Id.*

¹⁵² 563 F. Supp. 135 (D.D.C. 1983).

¹⁵³ *Id.* at 136. The plaintiff said she noted that the bags were mistagged and that she told the baggage handler about his mistake. The baggage handler did not check into the situation further. *Id.* at 137.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 139.

¹⁵⁶ The *Maghsoudi* court concluded that allowing the passenger to determine whether extra insurance coverage is necessary is a primary purpose of the Warsaw Convention's weight requirement. *Maghsoudi*, 470 F. Supp. at 1279.

¹⁵⁷ *Martin*, 563 F. Supp. at 139. The court noted: "The primary purpose of the Warsaw Convention is to limit the potential liability of international air carriers. This was accomplished by establishing limits on the amounts to which an airline would be liable for personal injury and property loss." *Id.* (Citation omitted).

¹⁵⁸ *Id.*; see also H. DRION, *supra* note 33, at 16 (criticizing liability limitation as a means of achieving financial stability).

terminated that absent Congressional action to change the Convention, it must construe the Convention to carry out its purpose.¹⁵⁹ The court concluded that although the Warsaw Convention required the carrier to note the weight of the luggage, the purpose of the Warsaw Convention was best served by overlooking this omission because the omission was technical and insubstantial.¹⁶⁰ The plaintiff could calculate the airline's maximum liability by estimating the weight of her luggage and extending this weight at \$9.07 per pound.¹⁶¹ Having failed to make this mental calculation to determine whether she needed to protect herself against the potential loss in excess of the carrier's liability, she bore the risk of excess loss.¹⁶²

In *Gill v. Lufthansa German Airlines*,¹⁶³ the United States District Court for the Eastern District of New York disagreed with the *Martin* court's approach to Article 4. *Gill* involved a somewhat different factual setting than *Martin*. The airline required the plaintiff, Dr. Gill, to give up his

¹⁵⁹ *Martin*, 563 F. Supp. at 139. The court considered both sides of the liability limitation argument.

Several courts have applied the language of the Convention under facts analogous to those at issue here and have found that an airline failing to weigh a passenger's luggage may not claim limited liability under the Convention.

However this court does not find this authority, which bases its holding on a literal reading of the record keeping provisions of the Convention, controlling under the facts before it . . .

Although improvements in baggage handling security and in the airline's competitive posture have eroded [the need for limited liability] to some extent, the limited liability provisions of the Convention remain intact. The court must follow the fundamental principle that a treaty, whether construed strictly or liberally, must be interpreted to effectuate its evident purpose.

Id. (Citations omitted).

¹⁶⁰ *Id.* at 140.

¹⁶¹ *Id.*

¹⁶² *Id.* at 140-41. As authority for the proposition that a court may ignore a technical and insubstantial omission which does not prejudice the passenger, the *Martin* court cited *Grey*, 227 F.2d at 284. "In *Grey*, the airline had failed to make specific reference on the passenger ticket to the intermediate 'agreed stopping places' of the flight. . . . The court of appeals found . . . that the record keeping requirement embodied in that article was a technical and minor one. . . ." *Martin*, 563 F. Supp. at 141 n.7.

¹⁶³ 620 F. Supp. 1453 (E.D.N.Y. 1985).

carry-on bag as he entered the airplane.¹⁶⁴ The airline never gave the plaintiff a baggage claim check or indicated in any way that the bag was checked.¹⁶⁵ When the bag disappeared, the airline claimed limited liability. The court refused to limit the carrier's liability.¹⁶⁶

The court distinguished *Martin* on the facts, pointing out that the *Gill* plaintiff had not voluntarily checked his luggage, and, thus, he had no opportunity to determine whether he required additional insurance.¹⁶⁷ Limiting the carrier's liability would defeat the purpose of the Warsaw Convention.¹⁶⁸ On a more fundamental level, the court objected to the end result in *Martin*. Noting that the Convention shifted a great deal of responsibility and risk to the passenger, the court held that it was not overly technical to demand literal compliance with the minimal requirements of the Warsaw Convention.¹⁶⁹

c. *Air Waybills*

While most recent decisions relating to both personal injury and loss of luggage show great concern for equitable compensation of the plaintiff despite the limitations of the Warsaw Convention,¹⁷⁰ decisions relating to air freight seldom show a similar concern. This is probably due to a judicial perception that commercial shippers

¹⁶⁴ *Id.* at 1454. The bag contained business documents. Gill claimed that the delay in finding the lost bag prevented consummation of a business deal. *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1456.

¹⁶⁷ *Id.* Apparently, Gill's flight was delayed while he and the attendant argued over whether he should have to check the bag. *Id.* Thus once the bag was taken from Gill there was no time at all to purchase extra insurance.

¹⁶⁸ *Id.* The court determined that the fact that Gill had previously been given a claim check with the appropriate warnings for another piece of luggage was of no significance. Although arguably the first claim check warned Gill that the Convention applied, that claim check did not contain the weight of the second piece of luggage. The first claim check thus did not satisfy the Warsaw Convention requirements as to the second piece of luggage. *Id.* at 1455.

¹⁶⁹ *Id.* at 1456. "The language [of the Convention] should be given its plain meaning and effect. Article 4 is straightforward. . . . [I]t is not unreasonable or overly technical to require the carrier to comply with the minimum requirements plainly set out by the Convention." *Id.*

¹⁷⁰ See *supra* notes 92-169 and accompanying text.

need less protection against limited liability than the traveling public. Accordingly, courts tend to construe the provisions of Article 8 and Article 9 to limit the liability of the air carrier.¹⁷¹

The earliest of these cases arose shortly after the *Ross* decision, which held that the carrier was entitled to limited liability for personal injuries despite the fact that the plaintiff was unaware of the Warsaw Convention.¹⁷² The court in *Kraus v. Koninklijke Luchtvaart Maatschappij, N.V.*,¹⁷³ applied a similarly strict standard to the shipment of cargo. In *Kraus*, the plaintiff shipped a rare book.¹⁷⁴ The book never reached its destination. The plaintiff sought to recover \$3,650, the value of the book, while the defendant asserted that its liability was limited to the dollar equivalent of two hundred and fifty francs.¹⁷⁵ The plaintiff argued that the liability limitation should not apply since the waybill did not contain a statement of agreed stopping places.¹⁷⁶ The court looked to the purpose of the requirement and determined that the requirement was designed to enable a shipper to determine whether the Warsaw Convention applied to the flight.¹⁷⁷ Because the airline incorporated its published timetable by reference and the international nature of the flight was indicated by the places of departure and destination, the court determined that limited liability was appropriate.¹⁷⁸

Almost without exception, courts considering Article 8 of the Warsaw Convention have followed the *Kraus* example and have attempted to determine whether the purpose of the Warsaw Convention was fulfilled even absent strict compliance with the terms of the Convention.¹⁷⁹ Thus,

¹⁷¹ See *infra* notes 173-192 and accompanying text.

¹⁷² *Ross*, 190 Misc. at 974, 77 N.Y.S.2d at 259.

¹⁷³ 92 N.Y.S.2d 315 (N.Y. Sup. Ct. 1949), *aff'd*, 278 A.D. 811, 105 N.Y.S.2d 351 (1951).

¹⁷⁴ *Id.* at 316.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 317.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ British courts have also looked to the purpose of the Article 8 provisions

arguments which would be successful in a personal injury case are often rejected in cargo cases. The classic example of the rejection of an Article 3 doctrine is *Bianchi v. United Air Lines*.¹⁸⁰ In *Bianchi*, the plaintiff shipped a promissory note to Mexico.¹⁸¹ Because the note was necessary for a real estate transaction, it was essential that the note be delivered promptly.¹⁸² The note was delayed and in the interim the peso was devalued causing the plaintiff a \$10,000 loss.¹⁸³ The plaintiff argued that the size of the notice of applicability of the Warsaw Convention made the warning virtually unreadable.¹⁸⁴ The plaintiff cited *Lisi* in support of the argument. The court found it unnecessary to consider whether the *Lisi* rationale should be applicable to a commercial setting, and held that as a matter of law the warning was adequate.¹⁸⁵

In *Exim Industries v. Pan American World Airways*,¹⁸⁶ the Second Circuit elaborated on the significance of the commercial setting to the applicability of the Warsaw Convention. Exim Industries made two shipments of Indian silk blouses from India to New York.¹⁸⁷ The market value of the blouses exceeded \$80,000; however, the district court limited recovery to \$8,740.¹⁸⁸ The heart of Exim's argument on appeal was that the waybills Pan Am provided

they have applied. See, e.g., *Corocraft Ltd. v. Pan Am. Airways*, [1969] 1 Q.B. 616, 654 (omission of dimension of package; Warsaw Convention should be interpreted so as to make "good sense amongst commercial men."); *Samuel Montagu & Co. v. Swiss Air Transp. Co.*, [1966] 2 Q.B. 306, 310 (lack of definite statement of applicability of Warsaw Convention; interpretation should not hamper conduct of business). But see *Westminster Bank v. Imperial Airways*, [1936] 2 All E.R. 890, 897 (rejecting argument that waybill is a commercial document which should be construed liberally and in a commercial sense).

¹⁸⁰ 22 Wash. App. 81, 587 P.2d 632 (1978).

¹⁸¹ *Id.* at 81, 587 P.2d at 632-33.

¹⁸² *Id.* at 81, 587 P.2d at 633.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 81, 587 P.2d at 634.

¹⁸⁵ *Id.* at 81, 587 P.2d at 635. The court pointed out that the warning was printed "in bold face, easily legible type placed directly above the space wherein [the plaintiff's agent] affixed his signature." *Id.*

¹⁸⁶ 754 F.2d 106 (2d Cir. 1985).

¹⁸⁷ *Id.* at 107.

¹⁸⁸ *Id.*

did not comply with the Warsaw Convention. The first waybill did not indicate the method of packing or the distinctive marks on the package.¹⁸⁹ The second waybill did not state the volume or dimensions of the cargo.¹⁹⁰ The court determined that these omissions were "technical and insubstantial" because the required items had little or no commercial significance and their omission did not prejudice the shipper.¹⁹¹ The court concluded that despite the explicit requirements of the Warsaw Convention, the only items necessary on the waybill were those that were significant in identifying the shipment or determining the freight rate.¹⁹²

2. *Wilful Misconduct*

In addition to imposing unlimited liability for failure to comply with certain documentary requirements, the Warsaw Convention provides that the carrier may not avail itself of limited liability if the plaintiff's loss was caused by wilful misconduct.¹⁹³ The definition of wilful misconduct has never been clear and case law concerning the subject has done little to decrease the confusion. Nevertheless, plaintiffs often assert wilful misconduct in conjunction with claims that the carrier did not heed the Warsaw Convention's documentation requirements.

*Grey v. American Airlines*¹⁹⁴ provided one of the earliest instances in which a plaintiff argued that the carrier had not complied with the Warsaw Convention and that the carrier had engaged in wilful misconduct. The court ap-

¹⁸⁹ *Id.* at 108.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The court emphasized throughout the opinion that *Exim* was a commercial shipper. *Id.* at 106-09.

¹⁹² *Id.* at 108. The court similarly rejected *Exim*'s contention that the notice of the applicability of the Warsaw Convention was inadequate because the carrier had said the Convention "may be" applicable. *Id.* The court stated: "[W]e believe the framers' intent was that the shipper be given reasonable notice of the likelihood that the Convention would be applicable, not that the carrier be treated as didactic arbiter of the law." *Id.*

¹⁹³ Warsaw Convention, *supra* note 3, art. 25.

¹⁹⁴ 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

proved jury instructions which stated that proof of wilful misconduct required the defendant to exhibit "a conscious intent to do or omit doing an act from which harm results to another . . . [and that] there must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct."¹⁹⁵ The court indicated that evaluation of the conduct was a jury question.¹⁹⁶

In practical terms, most recent decisions have interpreted *Grey* as establishing two requirements: first, that the defendant's actions actually caused the loss and second, that the defendant was aware that his conduct could cause a loss. Thus, for instance, storage of valuable freight in a guarded area which had been robbed only once in the previous year did not constitute wilful misconduct because the carrier did not cause the armed robbery of the freight storage area.¹⁹⁷ Similarly, a New York court ruled that an airline was not guilty of wilful misconduct when an employee stole luggage, because the employee was acting outside of the scope of employment.¹⁹⁸

On the other hand, courts have been less reluctant to impose liability for wilful misconduct when an employee acting within the scope of his employment commits the complained of act.¹⁹⁹ Even in these instances, however, wilful misconduct is difficult to establish. The plaintiff must demonstrate that the employee knew of the special circumstances that could lead to the loss, realized that there was a probability of loss because of these circumstances, and disregarded the probable consequences of

¹⁹⁵ *Id.* at 285.

¹⁹⁶ *Id.* at 286.

¹⁹⁷ *Wing Hang Bank v. Japan Air Lines Co.*, 357 F. Supp. 94 (S.D.N.Y. 1973). The plaintiff had shipped \$250,000 in bank notes with the airline declaring no value so that the cheapest freight rate would apply. Upon arrival, the airline placed the notes in a locked storage area which was monitored by closed circuit television for safekeeping until the plaintiff picked them up. *Id.*

¹⁹⁸ *Rymanowski v. Pan Am. World Airways*, 70 A.D.2d 738, 416 N.Y.S.2d 1018 (1979), *aff'd*, 49 N.Y.2d 834, 404 N.E.2d 1336, 427 N.Y.S.2d 795 (1980).

¹⁹⁹ See *infra* notes 201-213 and accompanying text for a discussion of wilful misconduct by airlines employees.

the act.²⁰⁰

The court in *Cohen v. Varig Airlines*²⁰¹ applied this test and determined that the carrier was guilty of wilful misconduct.²⁰² In *Cohen*, the plaintiffs' flight, which was scheduled to terminate in Rio de Janeiro, ended in Sao Paulo instead.²⁰³ Representatives of the airline scheduled the plaintiffs on a connecting flight to Rio de Janeiro.²⁰⁴ The plaintiffs expressed concern that their luggage might not be on the new flight. However, the representative assured the plaintiffs that he would personally see that the luggage was loaded. He later said that he had actually seen the luggage on the plane.²⁰⁵ When the plaintiffs arrived in Rio, an airline employee told them that the flight continued to New York. Because the plaintiffs did not want to go to New York, an airline employee drove them to the terminal, where the plaintiffs waited for their luggage.²⁰⁶ The luggage never arrived. Assuming that their luggage was destined for New York, the plaintiffs demanded that the airline remove their luggage from the plane bound for New York.²⁰⁷ The airline representatives refused and told the plaintiffs they could get their luggage in two days when the plane returned from New York.²⁰⁸ The luggage disappeared, compelling the plaintiffs to wear their travel clothes for eighteen days on an Amazon

²⁰⁰ *Cohen v. Varig Airlines*, 62 A.D.2d 324, 405 N.Y.S.2d 44, 47 (1978).

²⁰¹ *Id.*

²⁰² *Id.* at 324, 405 N.Y.S.2d at 48.

²⁰³ *Id.* at 324, 405 N.Y.S.2d at 45. The plaintiffs were taking a 28 day tour of the Amazon. They had been scheduled to fly from Iguassu Falls to Rio de Janeiro. After the plane took off they learned, however, that their plane was being routed to Sao Paulo. *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* The plaintiffs were on a flight from Sao Paulo to New York with a stop in Rio de Janeiro. In Rio the airline chose to switch planes. The airline told the passengers that they would have to board another aircraft to New York. Apparently, the airline loaded all of the luggage from the first plane onto the second plane and drove the passengers to the second plane. The plaintiffs protested that they did not want to go to New York and stayed on the bus. *Id.*

²⁰⁷ *Id.* at 324, 405 N.Y.S.2d at 46.

²⁰⁸ *Id.* The airline employee told the plaintiffs that it "would not go to the expense of unloading the plane" for them. *Id.*

tour.²⁰⁹

The court found Varig guilty of wilful misconduct.²¹⁰ The court held that because the plaintiffs had informed the carrier of their inability to wait for the return of their luggage, the defendant had knowledge of the probability of loss.²¹¹ At that point the defendant had a choice of either delivering the luggage and incurring the expense of unloading the plane or requiring the plaintiffs to suffer the loss. The defendant made a business judgment to require the plaintiffs to suffer the loss. The defendant knew that the plaintiffs would be inconvenienced but nonetheless failed to perform its contractual duty to the plaintiffs.²¹² The facts in *Cohen* were somewhat unusual. Luggage generally disappears due to less egregious conduct. For instance, in most cases mere negligence in the handling of luggage does not rise to the level of wilful misconduct; rather, the carrier must be aware of the risk he is creating and proceed despite that risk.²¹³

II. *REPUBLIC NATIONAL BANK OF NEW YORK v. EASTERN AIRLINES*

*Republic National Bank of New York v. Eastern Airlines*²¹⁴ addressed both the issue of non-compliance with the documentary requirements of Article 4 of the Warsaw Convention and the wilful misconduct provisions of the Convention. While Republic's loss arose during the course of transportation of checked baggage, even the

²⁰⁹ *Id.* at 324, 405 N.Y.S.2d at 45-46.

²¹⁰ *Id.* at 324, 405 N.Y.S.2d at 55.

²¹¹ *Id.* at 324, 405 N.Y.S.2d at 48.

²¹² *Id.*

²¹³ *Maschinenfabrik Kern A.G. v. Northwest Airlines*, 562 F. Supp. 232, 240 (N.D. Ill. 1983). Kern claimed that Northwest had accepted several duplicating machines for shipment knowing that the machines were poorly packaged. *Id.* at 240. The court set out the standard for wilful misconduct: "[W]ilful misconduct occurs where an act or omission is taken with knowledge that the act probably will result in injury or damage or with reckless disregard of the probable consequences." *Id.* The court refused summary judgment on the issue of liability, finding that the parties raised an issue of fact. *Id.*

²¹⁴ 815 F.2d 232 (2d Cir. 1987).

most well-heeled traveler is unlikely to carry several million dollars in his checked luggage. Thus, *Republic* did not fit the mold of other Article 4 cases.

The court initially noted that the baggage check issued to the courier did not set out the passenger ticket number, the number and weight of packages, or a statement related to the applicability of the Warsaw Convention liability limitation rules.²¹⁵ The court further noted that the express language of the Convention precluded limited liability when those items were absent.²¹⁶ The Second Circuit, however, recognized that the contents of the baggage were atypical. For this reason the court followed the logic of the cargo decisions rather than the checked baggage decisions.²¹⁷

The court began its analysis with a review of the *Exim* case. The court noted that in *Exim* the air waybills lacked particulars regarding the number of packages, the method of packing, and the dimensions of the packages, all of which Article 8 required, yet the *Exim* court had still allowed the carrier to limit its liability due to the commercial insignificance of the omitted items.²¹⁸

The court noted the many similarities between Article 4 and Article 8, recognizing that both Article 4 and Article 8 require information relating to notice, identification, and weight.²¹⁹ On this basis the court concluded that when

²¹⁵ *Id.* at 237.

²¹⁶ *Id.* at 236-37. For the text of article 4, see *supra* note 16.

²¹⁷ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 237. The court characterized *Republic* as "more like a commercial shipper than the typical airline passenger." *Id.*

²¹⁸ *Id.* The court described the circumstances in *Exim* as follows:

Missing from the air waybills in *Exim* were the method of packing, the numbers on the packages and a properly worded notice of the Convention's applicability. Because we found that these omissions were technical and non-prejudicial under the facts of that case, however, and because the shipper had received adequate notice of the Convention's applicability, we held that limited liability was available to the carrier.

Id. For a discussion of the *Exim* case, see *supra* notes 186-192 and accompanying text.

²¹⁹ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 237. The court characterized Article 4 and Article 8 as parallels. The court noted three ways in which the requirements of Article 4 and Article 8 are similar. First, both require the same basic informa-

the traveler is more like a shipper than an ordinary passenger, the court should apply the *Exim* standard to disputes relating to the extent of liability rather than the more liberal and passenger oriented Article 4 standard.²²⁰

After reaching the conclusion that the *Exim* standard was applicable, the court analyzed the facts in terms of *Exim*. Essentially, *Exim* excuses non-compliance with the Warsaw Convention when the defendant's failure to comply with the documentation provisions of the Warsaw Convention is technical and insubstantial and when the failure to meet the documentation requirements does not prejudice the plaintiff.²²¹ The court concluded Eastern had negotiated both hurdles.²²²

The court determined that the failure to include a notice of the Warsaw Convention's applicability on the Peru baggage claim was non-prejudicial because both the ticket and the Santiago baggage check included such a notice.²²³ Further, as an experienced courier, Baronti should have been aware of the Convention's liability limitations.²²⁴ Thus, Republic could not claim lack of knowledge of the Convention.²²⁵

The court next explored the effect of Eastern's failure to record the weight of the bag. The court used essentially the same approach the *Martin* court had used four years earlier. The *Martin* court looked to the purpose of

tion (i.e. notice, identification and weight). Second, both apply to property that is lost or damaged and neither affects liability for bodily harm. Finally, both articles contain certain requirements that must be met to claim limited liability. *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 238.

²²³ *Id.* at 237.

²²⁴ *Id.*

²²⁵ *Id.* In this respect the *Republic* court's analysis is somewhat similar to the *Gill* analysis. The *Gill* court was willing to concede that the previously issued baggage claim check satisfied the notice requirements of the Warsaw Convention. *Gill*, 620 F. Supp. at 1456. However, unlike the *Gill* court, the *Republic* court determined that the carrier need not note the weight of the baggage when the passenger should have known that he would need insurance for the contents. *Republic Nat'l Bank of N.Y.*, 815 F.2d at 238. For a discussion of *Gill*, see *supra* notes 163-169 and accompanying text.

the requirement that the weight of the bag be contained on the baggage claim check.²²⁶ According to the *Martin* court, the purpose of this requirement was to enable the passenger to make a mental calculation to determine whether he should purchase additional insurance.²²⁷ The *Republic* court agreed that this was the purpose of the requirement and noted that it was obvious that Republic would realize that it needed insurance to obtain adequate coverage. The bag would have had to weigh in excess of 220,500 pounds for Republic to recover two million dollars at \$9.07 per pound.²²⁸

The court found the absence of a baggage identification number more troubling.²²⁹ Again the court looked to the purpose of the requirement and determined that it was designed to allow the passenger to recover his luggage at his destination.²³⁰ Eastern's failure to include any identification number frustrated this purpose. The court, however, was willing to excuse the deviation in view of the special circumstances of the case. Baronti never actually presented the bag for tagging, thus Eastern had no opportunity to ensure that the bag was properly tagged.²³¹ The court further reasoned that Baronti's supervision of the loading process assured that Eastern did not mishandle the bag as a result of the failure to include an identifying number on the bag.²³² In essence the court applied a proximate causation test requiring that the air carrier's

²²⁶ *Martin*, 563 F. Supp. at 139.

²²⁷ See *supra* notes 152-155 and accompanying text for a discussion of the *Martin* analysis.

²²⁸ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 237-38.

²²⁹ *Id.* at 238.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* The court began its discussion of the lack of identification by once again looking at the purpose of the identification requirement. "Obviously the purpose of the baggage identification number is to assure the proper recovery of a passenger's baggage at the point of destination." *Id.* at 238. The court was willing to forego this purpose, however, because Baronti had not presented the bag for tagging and because Baronti had supervised the loading. Neither of these factors, however, eliminates or even decreases the likelihood that a bag will be given to the wrong passenger at the ultimate destination.

failure to comply with the mandatory provisions of the Warsaw Convention be the direct cause of the plaintiff's loss before the court would impose unlimited liability.

Having chosen to overlook the carrier's failure to comply with the baggage claim check provisions, the court turned to the plaintiff's allegations of wilful misconduct. The court concluded that Republic could avoid summary judgment on this issue only by showing that the method Eastern used to load the baggage was likely to result in loss.²³³ Republic claimed three acts of wilful misconduct: violation of Eastern's tariff prohibiting shipment of currency as checked baggage, failure to adopt security procedures for loading high value baggage, and violation of Eastern's *de facto* procedures for handling Republic's baggage.²³⁴ The court disposed of each of these claims quickly.

The court noted that the airline's violation of its tariff by accepting currency as checked baggage did not in itself create a probability that the baggage would be lost.²³⁵ Republic failed to introduce evidence that accepting currency was likely to result in the loss and that Eastern was aware of this likelihood.²³⁶ Thus, Republic's first claim failed.

In response to Republic's contention that Eastern was guilty of wilful misconduct because it failed to adopt high value baggage procedures, the court pointed out that Eastern did have high value cargo procedures.²³⁷ These

²³³ *Id.* at 239 (citing *Grey*, 227 F.2d at 285). The court noted that on this item Republic bore the burden of proof. *Republic Nat'l Bank of N.Y.*, 815 F.2d at 239. In contrast, under most other provisions of the Warsaw Convention the plaintiff's burden of proof is decreased. See *supra* notes 39-42 and accompanying text for a discussion of the burden of proof under the Warsaw Convention.

²³⁴ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 239-240.

²³⁵ *Id.* at 239. The court noted that "other factors must be established indicating that such a loss is likely to occur and that the defendant was aware of the probability when it accepted the plaintiff's valuables." *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

extra security measures were available for a fee,²³⁸ but Republic chose not to take advantage of these services.²³⁹ The court's refusal to accept Republic's argument was correct. Eastern had no obligation to single Republic out for better treatment than the average customer who chose not to pay the fee. The choice not to pay was entirely Eastern's. The court quoted the district court with approval noting, "if anyone was guilty of wilful misconduct it was Republic, and not Eastern."²⁴⁰

Finally, the court dealt with Republic's claim that loading additional luggage after Republic's bags were on the plane constituted wilful misconduct. The court noted that Republic suggested the last on, first off process.²⁴¹ For that reason, the court rejected Republic's claim that Eastern failed to comply with a *de facto* security measure adopted to ensure safe transportation of the currency.²⁴² In sum, Republic had not demonstrated that Eastern's failure to comply with the last on, first off procedure created any appreciable risk of loss.

Republic raised one last argument on appeal.²⁴³ Republic argued that regardless of whether Eastern had adopted procedures to deal with valuable cargo in general, or Republic's currency shipment specifically, Eastern's failure to place the bag containing the currency near the cargo door constituted wilful misconduct because it proximately caused Republic's loss.²⁴⁴ In response to this argument, the court first noted that reversal on grounds not raised below would be inappropriate.²⁴⁵ The court then noted that Baronti had known of the placement of the bag and failed to take any corrective action.²⁴⁶ The

²³⁸ The Warsaw Convention provides for the payment of a fee for excess declared value. Warsaw Convention, *supra* note 3, 22(2).

²³⁹ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 239.

²⁴⁰ *Id.* (citing *Republic Nat'l Bank of N.Y.*, 639 F. Supp. at 1418).

²⁴¹ *Republic Nat'l Bank of N.Y.*, 815 F.2d at 239.

²⁴² *Id.* at 239-40.

²⁴³ *Id.* at 240.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

court believed that Baronti's supervision of the process negated any claim that Eastern acted in reckless disregard of the possibility of theft.²⁴⁷

III. PRACTICAL IMPLICATIONS OF *REPUBLIC NATIONAL BANK OF NEW YORK V. EASTERN AIRLINES*

The Second Circuit's decision in *Republic National Bank of New York v. Eastern Airlines* could prove to be a set back for the traveling public. The result in *Republic* would not have been surprising in a commercial air shipping situation under Article 8 because courts in those cases have tended to construe the provisions of the Warsaw Convention to achieve the underlying purpose of limited liability to the benefit of the carrier. However, in cases falling under Articles 3 and 4, the passenger related articles, courts have tended to construe the Convention to avoid passenger loss.²⁴⁸ While the Second Circuit intimated that it might have viewed the case differently if an ordinary passenger had been involved, a very real danger exists that an airline might invoke the *Republic* holding against a passenger. The *Republic* court expressly limited its holding to those cases in which the passenger resembles a commercial shipper more than an ordinary passenger. However, an airline could easily argue that a sophisticated traveler should be aware of the Warsaw requirements just as a commercial shipper should be aware of the Warsaw Convention requirements.

In effect the *Republic* court unilaterally altered a United States treaty.²⁴⁹ The Warsaw Convention's requirements are specific and compliance with the requirements is generally not a burden to the carrier, yet the *Republic* decision labels the requirements insubstantial unless failure to

²⁴⁷ *Id.*

²⁴⁸ See *supra* notes 78-169 and accompanying text.

²⁴⁹ The *Lisi* dissent made a similar argument. The dissent criticized the majority for engaging in judicial treaty making and suggested that although the Warsaw Convention might be outdated, the executive and legislative branches rather than the judicial branch should set out to solve the problem. *Lisi*, 370 F.2d at 515.

meet the requirements is the proximate cause of the plaintiff's loss. The Warsaw Convention does not contain a proximate causation provision. While not the first court to declare certain mandatory provisions of the Convention insubstantial, the *Republic* court was the first to require, in effect, that the omission of the mandatory item be the proximate cause of a passenger's loss as opposed to a shipper's loss.

The Warsaw Convention attempted to accomplish two objectives: the standardization of documents and the limitation of air carriers' tort liability. The *Republic* decision and its predecessors virtually eliminate the mandated standardized documents. A carrier can now retain limited liability as long as it can demonstrate that the documents issued included all the *significant* items which the Convention mandates. Courts evaluate the significance of the omitted items on a case by case basis.²⁵⁰ Thus, courts have replaced a clear cut standard for the evaluation of entitlement to limited liability with a malleable standard. While flexibility in the law is not necessarily undesirable, where the framers of the law sought predictability of result, continual stretching defeats the aim of the law.

While it would be easy to speculate about the dire consequences which might occur as the result of the *Republic* decision, only time will determine its ultimate significance. Of course the decision could be cited as abandoning the technical requirements of the system of limited liability for air carriers. On the other hand, courts

²⁵⁰ See, e.g., *Republic Nat'l Bank of N.Y.*, 815 F.2d at 237-38 (weight, identification number, and statement of applicability of Warsaw Convention not relevant when bank shipped large amounts of money as checked baggage); *Exim*, 754 F.2d at 108 (method of packing, volume, and dimensions of cargo not commercially significant); *Seth*, 329 F.2d at 307 (improperly worded warning of applicability of Warsaw Convention sufficient to warn passenger that carrier's liability would be limited); *Grey*, 227 F.2d at 284 (omission of stopping place on ticket "technical and wholly unsubstantial"); *Martin*, 563 F. Supp. at 140 (omission of weight of passenger's luggage technical and insubstantial); *Maghsoudi*, 470 F. Supp. at 1279 (omission of weight of passenger's luggage highly relevant); *Stolk*, 299 N.Y.S.2d at 62 (warning of applicability of Warsaw Convention printed in fine print insufficient to warn passenger of carrier's limited liability).

could recognize the uniqueness of the fact setting in which *Republic* arose. Whatever the ultimate effect of the *Republic* decision, it is one more case in a long line of cases which have interpreted the Warsaw Convention in a manner necessary to achieve the outcome the court finds equitable. Of course, this approach often leads to conflicting decisions because the court must decide first who should win and then how it will interpret the Convention to achieve that outcome.

Underlying the modern courts' tendency to twist the Warsaw Convention to achieve equitable results seems to be a genuine dissatisfaction with the Warsaw Convention. Whether the airline industry still needs the limited liability the Warsaw Convention provides at the expense of injured passengers is questionable. On the other hand, limitation of liability to commercial shippers does not seem inequitable, because commercial shippers are better prepared than passengers to assess the degree of risk they are assuming and take appropriate measures to control the risk.

The executive and legislative branches have paid little attention to the Warsaw Convention in the past twenty years. Therefore, the judicial branch not surprisingly has felt constrained to step into the picture to attempt to make an outdated treaty workable. Predictably, the result has been a hodgepodge of often conflicting decisions. Courts do not agree whether they should interpret the Convention broadly or narrowly. Rather, courts seem to select a desired result and construe the Convention in whatever way is required to achieve that result. While this technique may produce equitable outcomes, it does violence to the notion of uniform international standards.

IV. CONCLUSION

Republic National Bank of New York v. Eastern Airlines involved an unusual situation: the loss of baggage containing several million dollars. Given the fact that the value of the contents of the baggage was so high, that the owner of

the baggage was a bank, and that an employee of the bank played a key role in supervising the handling of the baggage, the court's decision to excuse compliance with the technical requirements of the Warsaw Convention was a predictable outcome. The court's decision was no doubt based upon the principle that business entities who deal as equals should be aware of the risks inherent in the transactions they negotiate.

Because the *Republic* decision was predicated, at least in part, on equal bargaining power, applying the holding of *Republic* to ordinary airline passengers or even to sophisticated passengers with high value luggage would not make sense. The airline occupies a substantially stronger bargaining position than the passenger. Thus, although an airline could plausibly argue that the items required by the Warsaw Convention are no more significant to a passenger than to a commercial shipper, such an argument should not be accepted. The requirements the Warsaw Convention imposes serve to equalize the passenger and the airline.

Although under the facts of the case the *Republic* court may have reached a perfectly predictable and reasonable decision, the court ignored the explicit requirements of the Warsaw Convention. The court substituted its judgment for the judgment of the drafters of the Convention regarding which items are significant on a baggage claim check. While the court's decision might have been better reasoned than the Warsaw Convention drafter's decision, it was not a decision the court was entitled to make.

The Warsaw Convention was designed to achieve uniformity in international aviation tort law. One of the means of achieving this uniformity was the adoption of uniform documents so that carriers would be aware exactly what was required if they wanted to claim limited liability. Obviously, if courts second guess the Warsaw Convention drafters, uniformity evaporates.

While the time may have arrived for the United States to abandon the Warsaw Convention, courts should not

dictate abandonment by judicial fiat. Congress has greater latitude to examine a broad spectrum of issues in considering the best resolution of the liability limitation problem.

Whatever the ultimate decision on the wisdom of liability limitation, the time has come for the United States to evaluate the desirability of continued adherence to the Warsaw Convention. In the developed nations aviation is a flourishing industry. In these nations airlines could easily bear a greater portion of the expense of their accidents. While some of the aims of the Warsaw Convention are laudable, in many respects the Convention is outdated. The United States should take the lead in considering strategies to promote uniform and equitable standards for the liability of international air carriers.

Barbara A. Bell

TORTS — FEDERAL TORT CLAIMS ACT — The discretionary function exception of the Federal Tort Claims Act shields the United States from tort liability for the Federal Aviation Administration's negligent denial of a pilot's medical certificate. *Heller v. United States*, 803 F.2d 1558 (11th Cir. 1986), *reh'g and reh'g en banc denied*, 808 F.2d 1524 (1987).

Richard W. Heller began his career as a commercial pilot in 1956 and became a captain in 1958.¹ Federal Aviation Regulations ("FARs") required Heller, as a captain, to complete a first-class physical examination every six months.² In the following years, Heller underwent regular medical check-ups, which in 1968 included an electrocardiographic examination ("EKG").³ In January of 1972, Heller experienced chest discomfort and entered a hospital for testing.⁴ The examining physician, Dr. Teng, diagnosed that Heller suffered a myocardial infarction.⁵ He based this diagnosis on the results of an EKG performed upon Heller's admittance to the hospital.⁶ Heller thereupon instructed Dr. Teng to notify the Federal Aviation Administration (the "FAA") of Heller's condition and to provide them with a medical report.⁷

¹ Brief for Appellant at 4, *Heller v. United States*, 803 F.2d 1558 (11th Cir. 1986) (No. 85-3847)[hereinafter Appellant's Brief].

² *Id.*

³ *Id.*

⁴ *Id.* at 5.

⁵ *Heller v. United States*, 803 F.2d 1558, 1561 (11th Cir. 1986). A myocardial infarction results from the complete obstruction of one or more of the blood vessels feeding the heart's tissue. *Id.* at n.4. When the vessel shuts down, the tissue dies due to lack of continued oxygenation. *Id.* The resultant heart damage depends upon the size and location of the blocked vessel and the area of tissue involved. *Id.*

⁶ Appellant's Brief, *supra* note 1, at 5.

⁷ *Heller*, 803 F.2d at 1561. 14 C.F.R. § 61.53 (1987) provides that:

No person may act as pilot in command, or in any other capacity as a required pilot flight crewmember while he has a known medical defi-

The FAA withdrew Heller's first-class medical certificate, meaning he could no longer work as a commercial airline pilot.⁸ However, it failed to compare Dr. Teng's findings with Heller's FAA medical records which included the 1968 EKG.⁹ Such comparison would have revealed that the suspect characteristics of the 1972 EKG also existed in the 1968 EKG.¹⁰ In other words, Heller's condition exhibited no change.¹¹ Without such a change, Heller argued, the diagnosis of myocardial infarction should not have been made.¹²

Heller applied for recertification twice, and he petitioned on three occasions for an exemption from the certification requirements.¹³ Yet, all attempts to regain his medical certificate proved futile.¹⁴ Heller thereupon sought help from Dr. Richard Masters, the medical coordinator for the Air Line Pilots Association.¹⁵ After further testing of Heller by cardiac specialists, Dr. Masters petitioned the FAA, on Heller's behalf, for an exemption from the applicable FARs.¹⁶ On April 22, 1980, the Federal Air Surgeon found Heller qualified for a first-class airman medical certificate and therefore issued such a cer-

ciency . . . that would make him unable to meet the requirements for his current medical certificate.

Id.

⁸ *Heller*, 803 F.2d at 1561. 14 C.F.R. § 67.25(a) (1987) provides that:

The authority of the Administrator . . . to issue or deny medical certificates is delegated to the Federal Air Surgeon, to the extent necessary to . . . [i]ssue, renew, or deny medical certificates to applicants and holders based upon compliance or noncompliance with applicable medical standards.

Id.

⁹ Appellant's Brief, *supra* note 1, at 5.

¹⁰ Appellant's Brief, *supra* note 1, at 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Heller*, 803 F.2d at 1561. The Federal Aviation Act provides that "[t]he Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest." 49 U.S.C. app. § 1421 (1982).

¹⁴ *Heller*, 803 F.2d at 1561.

¹⁵ Appellant's Brief, *supra* note 1, at 7.

¹⁶ *Id.*

tificate to him.¹⁷

In July of 1982, Heller filed a complaint under the Federal Tort Claims Act ("FTCA")¹⁸ in the United States District Court for the Middle District of Florida, seeking damages for the FAA's negligent denial of his airman certificate.¹⁹ The United States moved for and received a dismissal on the ground that the district court lacked subject matter jurisdiction²⁰ due to governmental immunity.²¹ *Held, affirmed:* The discretionary function exception of the Federal Tort Claims Act shields the United States from tort liability for the Federal Aviation Administration's negligent denial of a pilot's medical certificate. *Heller v.*

¹⁷ *Heller*, 803 F.2d at 1561. Federal law requires that "[i]f the Secretary of Transportation finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate. . . ." 49 U.S.C. app. § 1422(b) (1982).

¹⁸ 28 U.S.C. § 1346(b) (1982). The FTCA allows damage suits against the United States:

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. The Act provides that the liability of the United States for tort claims shall be "in the same manner and to the same extent as a private individual under like circumstances. . . ." *Id.* § 2674.

¹⁹ *Heller v. United States*, 620 F. Supp. 270 (M.D. Fla. 1985).

²⁰ *Id.*; FED. R. Civ. P. 12(b)(1). Rule 12(b) provides that:

[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . . .

Id.

²¹ 28 U.S.C. § 2680(a) (1982). Section 2680(a) includes the discretionary function exception which provides that the FTCA shall not apply to:

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. (emphasis added).

United States, 803 F.2d 1558 (11th Cir. 1986) *reh'g and reh'g en banc denied*, 808 F.2d 1524 (1987).

I. LEGAL BACKGROUND

A. *The Federal Tort Claims Act of 1946*

The Federal Tort Claims Act represents a limited waiver of the federal government's sovereign immunity.²² The Act's underlying policy implies that if citizens at large benefit from a government program, that collective citizenry, not the individual injured by the negligent conduct of the program, should bear the economic burden of that injury.²³ Under the statute, civil litigants may hold the federal government liable for damages for any claim that predicates private liability under similar circumstances.²⁴

An exception to the FTCA provides immunity from tort action when a federal agency or employee performs or fails to perform a discretionary function.²⁵ Three predominant policies justify the discretionary function exception.²⁶ First, it promotes the separation of powers by sparing federal officials from explaining their official actions in court.²⁷ Second, in areas of policy-making, courts are not equipped to investigate and weigh the factors

²² The Federal Tort Claims Act, Pub. L. No. 79-601, §§ 401-424, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-2402, 2411-2412, 2671-2680 (1976)); see W. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* 2 (1957). Prior to the enactment of the FTCA, the United States and its agents committed a number of actionable wrongs if the U.S. were an individual or corporation. *Id.* at 2. A system developed to compensate injured parties through private congressional bills of relief. *Id.* at 2-5. They were "not a matter of right but a matter of grace." *Id.* at 2; see, e.g., W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON TORTS* § 131 (5th ed. 1984); Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1 (1926); Parker, *The King Does No Wrong — Liability for Misadministration*, 5 VAND. L. REV. 167 (1952).

²³ *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (nearly 1,000 persons sued under the FTCA for injuries allegedly sustained as a result of the government's open-air testing of nuclear weapons at a Nevada test-site from 1951-1962).

²⁴ See *supra* note 18 for the text of the relevant sections of the FTCA.

²⁵ 28 U.S.C. § 2680(a) (1982); see *supra* note 21 for text.

²⁶ See Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 121-23 (1968).

²⁷ *Id.* at 121. Note, however, that the court does not consider the personal lia-

which enter into the decisions of the other branches.²⁸ Last, the exception prevents the enormous and unpredictable cost that could result from judicial re-examination of government decisions.²⁹ In sum, the discretionary function exception has defeated liability claims when officials exercise policy-making authority³⁰ but not when the claims involve operational level negligence.³¹ Defining the boundary between operational level and policy level actions presents a difficult duty for the court.

B. *The Federal Aviation Act*

The goal of the Federal Aviation Act is to promote safety in air commerce.³² To achieve this goal, Congress empowered the Administrator of the Federal Aviation Administration to issue or deny airman certificates.³³ The Administrator delegates statutory authority pertaining to medical certification to the Federal Air Surgeon.³⁴ In

bility of the official because the United States is the defendant in all FTCA cases. *Id.*

²⁸ *Id.* at 122.

²⁹ *Id.*

³⁰ *Dalehite v. United States*, 346 U.S. 15 (1953).

³¹ *Id.* The Supreme Court recognized a distinction between planning level and operational level acts as early as *Johnston v. District of Columbia*, 118 U.S. 19 (1886). In *Johnston*, the Court found that a municipal authority's decision to adopt a general plan of drainage and determination of where to build the sewers was discretionary, because such decision involved considerations of public health. *Id.* at 20-21. However, the negligent construction and repair of sewers were actionable. *Id.* at 21; see also *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75 (D.C. Cir. 1955) (per curiam) (construing air traffic controller negligence as operational).

³² 49 U.S.C. app. § 1421(a)(1982). Section 1421 provides that, "[t]he Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce. . . ." *Id.*; see, e.g., *Meik v. NTSB*, 710 F.2d 584, 586 (9th Cir. 1983) (FAA properly denied medical certificate to a pilot who had suffered moderate cerebrovascular accident); *Dodson v. NTSB*, 644 F.2d 647, 651 (7th Cir. 1981) (FAA properly denied medical certificate to a pilot with evidence of coronary disease); *Day v. NTSB*, 414 F.2d 950, 953 (5th Cir. 1969) (statute to promote safety of flight on civil aircraft in air commerce provided adequate standards to support the regulation).

³³ 49 U.S.C. app. § 1422(a) (1982). Section 1422(a) provides that, "[t]he Secretary of Transportation is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft." *Id.*

³⁴ 14 C.F.R. § 67.25(a) (1987); see *supra* note 8.

most cases, the applicant for a medical certificate begins the process with an examination by a private physician designated by the Air Surgeon to serve as an aviation medical examiner ("AME").³⁵

Regulations provide that, in order for an individual to lawfully serve as a pilot of a civil aircraft of United States registry, the individual must hold a pilot certificate³⁶ and an appropriate medical certificate.³⁷ Both the type of pilot certificate and the class of medical certificate required depend upon the type of flying in which the pilot wishes to engage. To serve as a pilot-in-command, Heller required an airline transport pilot certificate³⁸ and a first-class airman medical certificate which is subject to renewal every six months.³⁹ To maintain this level of medical approval, pilots-in-command over thirty-five must show an absence of myocardial infarction on an EKG.⁴⁰

³⁵ 14 C.F.R. § 67.23 (1987). Section 67.23 provides that "[a]ny aviation medical examiner who is specifically designated for the purpose may give the examination for the first class certificate." *Id.*

³⁶ 14 C.F.R. § 61.3(a) (1987). Section 61.3(a) provides that "[n]o person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate. . . ." *Id.*

³⁷ 14 C.F.R. § 61.3(c) (1987). Section 61.3(c) provides that:

Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as a pilot in command or any other capacity as required pilot flight crewmember of an aircraft . . . unless he has in his personal possession an appropriate current medical certificate. . . .

Id.

³⁸ 14 C.F.R. § 121.437(a) (1987). Section 121.437(a) provides that:

No pilot may act as pilot in command of an aircraft (or as second in command of an aircraft in a flag or supplemental air carrier or commercial operator operation that requires three or more pilots) unless he holds an airline transport pilot certificate and an appropriate type rating for that aircraft.

Id.

³⁹ 14 C.F.R. § 61.151(e) (1987). Section 61.151 provides that "[t]o be eligible for an airline transport pilot certificate, a person must. . . (e) [h]ave a first-class medical certificate. . . ." *Id.*

⁴⁰ 14 C.F.R. § 67.13(e)(2) (1987). Section 67.13(e)(2) provides that, "[i]f the applicant has passed his thirty-fifth birthday but not his fortieth, he must, on the first examination after his thirty-fifth birthday, show an absence of myocardial infarction on electrocardiographic examination." *Id.*

C. *Decisions of the Federal Courts*1. *The Federal Tort Claims Act*

The Supreme Court examined the discretionary function exception in the seminal decision of *Dalehite v. United States*.⁴¹ *Dalehite* involved claims arising from the explosion of ammonium nitrate fertilizer which the government had manufactured, packaged, stored, and generally controlled pursuant to an overriding plan to increase the food supply of some foreign countries.⁴² The explosion leveled most of Texas City, Texas and killed over five hundred people.⁴³ The overriding plan pursued a cabinet-level judgment requiring discretion.⁴⁴ Therefore, the Court applied the exception and found that the government employees acted with impunity.⁴⁵

More importantly, *Dalehite* articulated the now famous distinction between non-actionable planning-level negligence and actionable operational-level negligence.⁴⁶ Planning-level acts immune from liability include initiating programs and activities, as well as establishing plans, specifications, or time schedules.⁴⁷ Additionally, acts of subordinates must fall within the same protection.⁴⁸ Justice Reed held that, otherwise, the immunity from liability

⁴¹ 346 U.S. 15 (1953).

⁴² *Id.* at 19-21. Explosives had long used ammonium nitrate as a component, and much of the ammonium nitrate used in the fertilizer export program was produced in federal munitions plants. *Id.* at 21. The United States planned to export the fertilizer to help meet its obligation as an occupying power to feed the populations of Germany, Japan and Korea. *Id.* at 19.

⁴³ *In re Texas City Disaster Litigation*, 197 F.2d 771, 772 (5th Cir. 1952).

⁴⁴ *Dalehite*, 346 U.S. at 37.

⁴⁵ *Id.* at 42-43. The majority held manufacturing, loading, and all other acts except fire-fighting fell within the Act's exception. *Id.* at 38-43. No liability attached to the Coast Guard for negligence in fighting the fire caused by the explosion as there was no analogous private liability. *Id.* at 43-44.

⁴⁶ *Id.* at 33-36. The Court, in a 4-3 vote, held:

Where there is room for policy judgment and decision there is discretion. It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 36.

⁴⁷ *Id.* at 35-36.

⁴⁸ *Id.* at 36.

would fail when needed.⁴⁹ It would fail when an employee performed an act at the direction of a superior to further the policy.⁵⁰ Justice Jackson dissented, claiming that the protection afforded by the discretionary function exception should not extend to all parties carrying out the government's policy.⁵¹

More recently, a unanimous Supreme Court reaffirmed *Dalehite* and reduced the scope of government liability under the FTCA. In a dual-decision, the Court reversed two appellate court decisions, *S.A. Empresa de Viacao Aerea Rio Grandense v. United States* and *United Scottish Ins. v. United States*, and issued the single opinion of *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (Varig Airlines).⁵² *Varig* resulted when a fire broke out in one of the aft lavatories of a Boeing 707 commercial jet airliner, producing thick, black smoke throughout the cabin.⁵³ The plane landed successfully, but 124 of the 135 people aboard died of asphyxiation.⁵⁴ The plaintiffs in *Varig* asserted that the United States was liable for the FAA's implementation of an aircraft spot-check program and the negligent execution thereof.⁵⁵ *United Scottish* involved the crash of a DeHavilland Dove aircraft in October of 1968

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 58. In a strongly worded dissent, Justice Jackson stated:

The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.

Id.; see, e.g., *Hoffman v. United States*, 398 F.Supp. 530, 533-38 (E.D. Mich. 1975), *aff'd*, 600 F.2d 590 (6th Cir. 1979) (finding no discretion for FAA to ignore federal regulations), *cert. denied*, 444 U.S. 1073 (1980).

⁵² 467 U.S. 797 (1984), *rev'g* 692 F.2d 1205 (9th Cir. 1982) and 692 F.2d 1209 (9th Cir. 1982). The Supreme Court reviewed *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*) v. *United States*, 692 F.2d 1205 (9th Cir. 1982) and *United Scottish Ins. v. United States*, 692 F.2d 1209 (9th Cir. 1982) together because both cases concerned claims that the FAA improperly approved aircraft for flight.

⁵³ *Varig*, 467 U.S. at 800.

⁵⁴ *Id.*

⁵⁵ *Id.* at 801. The Civil Aeronautics Board (the predecessor of the Federal Aviation Administration) failed to inspect the aft lavatory of the Boeing 707 during its

that resulted from a fire on board the aircraft.⁵⁶ Although the FAA performed a complete and mandatory inspection of that aircraft and its modified cabin heater, it failed to detect numerous design deficiencies in the heater that caused the fire.⁵⁷

By concluding that the discretionary function exception protected FAA employee's execution of the spot-check program in *Varig*, the Court reaffirmed its ruling in *Dalehite* that a subordinate's action is immune from liability when effectuating the operations of government pursuant to official directions.⁵⁸ The opinion removed all doubts as to how to construe the discretionary function exception.⁵⁹ In *Varig* the Court explicitly denounced the increasingly narrow construction given the exception since *Dalehite*.⁶⁰ Moreover, the Court may have extended

spot-check of the aircraft. The lavatory failed to contain smoke and fire due to its inadequate design and construction. *Id.* at 800.

⁵⁶ *Id.* at 802.

⁵⁷ *Id.* The aircraft had been modified with the installation of a gas-burning cabin heater. The trial court found that the heater, as installed, exhibited numerous design deficiencies, that should have alerted any reasonably competent FAA inspector that the overall quality of the design and fabrication of the heater system was not consistent with FAA regulations. *Id.* at 803.

⁵⁸ *Id.* at 813-14. The Court stated:

As in *Dalehite*, it is unnecessary — and indeed impossible — to define with precision every contour of the discretionary function exception. From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. . . . Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

Id.

⁵⁹ *Id.* at 810-14. The Court endorses a broad interpretation of the exception by stating that the rank of the employee does not determine the operational nature of the negligent act. *Id.* at 813. "[T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability." *Id.*; see also *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987).

⁶⁰ See Note, *United States v. Varig: The Supreme Court Narrows the Scope of Government Liability Under the Federal Torts Claims Act*, 51 J. AIR L. & COM. 197 (1985).

the discretionary function exception to negligent inspection since it did not distinguish between the spot-check of the Boeing and the negligent inspection of the DeHavilland Dove.⁶¹

Alabama Electric Cooperative v. United States represents the Eleventh Circuit's primary interpretation of *Varig*.⁶² In *Alabama Electric*, an electrical cooperative filed suit under the FTCA to recover the cost of stabilizing a tower allegedly undermined by erosion after the Army Corps of Engineers constructed dikes in a river.⁶³ Circuit Judge Anderson stated that where the Corps makes a social, economic, or political policy decision concerning the design of a particular navigation or flood control project, that decision is excepted from judicial review under the discretionary function exception.⁶⁴ However, reliance upon some fixed or readily ascertainable standard implicates operational activity.⁶⁵ The court held that no economic or political policy decision entered into the Corps' placement of the dikes.⁶⁶ Thus, the Corps' design decisions were subject to judicial review under the state law tort standards that would normally govern an action for engineering malpractice.⁶⁷

Another significant decision involved the Fifth Circuit's earlier examination of the boundaries of the discretionary function exception. In *Payton v. United States* a murder victim's husband and children brought suit under the FTCA, alleging that the government released a federal prisoner in total disregard of extensive medical reports confirming his homicidal and psychotic tendencies.⁶⁸ The Fifth Cir-

⁶¹ *Id.* at 230; see also *Proctor v. United States*, 622 F. Supp. 10 (C.D. Cal. 1984), *aff'd*, 781 F.2d 752 (9th Cir.), *cert. denied*, 106 S. Ct. 2918 (1986) (due to broad language in holding of *Varig*, a claim for negligence in performing an actual inspection also came within the discretionary function exception).

⁶² *Alabama Elec. Coop. v. United States*, 769 F.2d 1523 (11th Cir. 1985).

⁶³ *Id.* at 1525.

⁶⁴ *Id.* at 1536-37.

⁶⁵ *Id.* at 1537.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Payton v. United States*, 679 F.2d 475 (5th Cir. Unit B 1982).

cuit Judges disagreed as to whether the final act of releasing the prisoner and all antecedent acts of the parole board were immune from tort action.⁶⁹ Yet, a majority held that the parole board's negligent review of the prisoner's file involved sufficient discretion to be excepted from liability.⁷⁰

2. *Pilot Certification Cases*

Federal courts have previously dealt with cases of commercial pilots who sought damages for FAA negligence in failing to issue medical certificates. *Duncan v. United States*⁷¹ resulted when the Administrator of the FAA twice revoked the plaintiff's airman medical certificate.⁷² The National Transportation Safety Board restored the certificate on administrative appeal. Subsequently, the airline pilot brought an action for damages against the United States pursuant to the FTCA, alleging negligence on the part of the agents and employees of the FAA.⁷³ The district court concluded that where an applicant, qualifying under the regulations, deserved a certificate, application of that regulation to the individual case was an administrative decision at the operational level.⁷⁴ Therefore, negligent application of the medical standards would make the government liable.⁷⁵

⁶⁹ *Id.* at 476. The Justices submitted seven distinct opinions for publication.

⁷⁰ *Id.* at 482. The court stated that "[t]he acquisition and examination of the records on which the Board bases its ultimate decision necessarily implicates its discretionary function." *Id.*

⁷¹ 355 F. Supp. 1167 (D.D.C. 1973).

⁷² *Id.* at 1168.

⁷³ *Id.*

⁷⁴ *Id.* at 1170.

⁷⁵ *Id.* at 1169. The court reasoned that:

Without a doubt, the decision to make standards for certification of airmen is a policy-making decision. . . . But where clear standards are set forth to which are matched the actual individual facts, the courts will hold the judgment to be operational and not discretionary.

Id. (citation omitted). The court added that:

If the government assumes the responsibility of regulating the commercial air pilot occupation in furtherance of its "end-objective" of securing air safety, it must do so in a careful manner. The "discre-

Nearly ten years after *Duncan*, the United States Court of Appeals for the District of Columbia dealt with the applicability of the discretionary function exception to the FAA's medical certification process.⁷⁶ In *Beins v. United States*, the FAA denied a commercial pilot his airman's medical certificate on five occasions.⁷⁷ The decision noted that the FAA's medical regulations fall into three categories. First, standards exist which leave the FAA little or no discretion of any kind.⁷⁸ Second, standards exist which require medical judgment but no balancing of competing policies associated with a discretionary decision.⁷⁹ Last, standards exist which actually require the FAA to balance medical judgment with a calculation of whether the applicant's medical condition permits him to perform his duties safely.⁸⁰ Only the last is protected as discretionary.⁸¹ The court, to illustrate, claimed that the determination of whether a pilot has an established medical history or clinical diagnosis of a myocardial infarction requires medical judgment but no balancing of competing policies associated with a discretionary function.⁸² In finding that the facts of the particular case did place the FAA's actions in a category protected as discretionary, the appellate court upheld the district court's decision in the case.⁸³

tionary function" exemption embodied in the Federal Tort Claims Act should not be used to effect a mantle of protection for negligent action.

Id. at 1170.

⁷⁶ *Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982).

⁷⁷ *Id.* at 596.

⁷⁸ *Id.* at 603.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 603-04.

⁸² *Id.*

⁸³ *Id.* at 610. In a concurring opinion, Chief Judge S.W. Robinson III stated that:

To be sure, medical determinations invariably draw on discretion, but medical rather than governmental judgment is what is generally utilized. When no "exercise of judgment or discretion of a public character" is discernible, no basis for invocation of the exemption is present.

Id. at 614-15 (citations omitted).

Within a year, the same court followed the reasoning of both *Beins* and *Duncan*.⁸⁴ *Harr v. United States* resulted when the FAA withdrew the plaintiff's medical certificate after the pilot suffered injuries and post-traumatic seizures.⁸⁵ Upon his recovery, the FAA denied reissuance of the certificate.⁸⁶ The court of appeals ruled that the FAA has a duty to issue a medical certificate to a pilot if the pilot meets the FAA's own standards and a related duty to base any disqualification on a reasonable analysis of the medical evidence.⁸⁷ The court reiterated that substandard medical or administrative conduct is never exempt from liability under the FTCA.⁸⁸

II. *HELLER V. UNITED STATES*

Richard Heller raised two contentions on appeal. First, he claimed that the FAA's failure to consult the 1968 EKG was not within the scope of the discretionary function exception, being a nondiscretionary activity.⁸⁹ Second, Heller contended that since the denial of the certification was based solely on the FAA's negligent application of the medical standards concerning myocardial infarctions,⁹⁰ and since the application of this standard did not require the FAA to balance competing policy concerns, his claim was not barred by the discretionary function exception.⁹¹ Heller did not contest the government's immunity for implementing the airman medical certification program.⁹²

⁸⁴ *Harr v. United States*, 705 F.2d 500 (D.C. Cir. 1983).

⁸⁵ *Id.* at 501. On July 25, 1976, Harr suffered what was diagnosed as post-traumatic seizure. After an additional year of medical care and supervision, Harr's physicians deemed him fit to fly. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 503. The Court stated that "an applicant who meets the medical standards is entitled to an appropriate medical certificate." *Id.*

⁸⁸ *Id.* at 505-06.

⁸⁹ *Heller v. United States*, 803 F.2d 1558, 1562 (11th Cir. 1986).

⁹⁰ *Id.* at 1562.

⁹¹ *Id.*

⁹² *Id.* at 1564. The court stated that:

Heller concedes that the government's decision to implement the airman medical certification process is immune from suit under § 2680(a), but argues that the FAA's negligent failure to consult the

The court agreed with the government, concluding that both questions on appeal fell within the discretionary function exception of the FTCA.⁹³

Justice Anderson, writing for the court, disposed of Heller's first contention quickly, citing as authority *Payton v. United States*.⁹⁴ The *Heller* court drew no distinction between the parole board's review of a psychotic prisoner's records and the FAA's review of Heller's medical file.⁹⁵ The court reasoned that both defendants inadequately reviewed the files, but both exercised a degree of discretion in determining whether or not to review the records more thoroughly.⁹⁶ Therefore, the court concluded that the FAA's failure to compare Dr. Teng's findings with the FAA's own medical records (which included Heller's 1968 EKG) involved adequate discretion warranting exemption from tort liability.⁹⁷

Heller's second contention presented the court with a more difficult question.⁹⁸ Relying on *Harr*, *Beins*, and *Duncan*, Heller asserted that a finding of an established medical history or clinical diagnosis of myocardial infarction did not implicate the policy making concerns which are immune from tort action.⁹⁹ The *Heller* court specifically addressed the part of the *Beins* decision that classified

1968 EKG and negligent application of the medical standard in 14 C.F.R. § 67.13(e)(1)(i) (1986) in the instant case were nondiscretionary activities that do not fall within the scope of the discretionary function exception.

Id.

⁹³ *Id.* at 1559.

⁹⁴ *Id.* at 1564; see *supra* notes 68-70 and accompanying text for a discussion of *Payton*.

⁹⁵ *Heller*, 803 F.2d at 1564.

⁹⁶ *Id.* The court stated that "Heller's allegation that the FAA's negligent failure to consider the 1968 EKG in deciding to withdraw Heller's first-class airman's medical certificate falls within the scope of the discretionary function exception."

Id.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*; see *supra* notes 71-88 and accompanying text for a discussion of *Harr*, *Beins*, and *Duncan*.

a myocardial infarction diagnosis as non-discretionary.¹⁰⁰ Justice Anderson rejected such classification, instead stating that a diagnosis of myocardial infarction requires policy making considerations.¹⁰¹ Congress drafted medical regulations for the benefit of the flying public and not for the benefit of the airman.¹⁰² Therefore, the FAA conservatively applies medical standards to avoid any substantial safety risk.¹⁰³ This concern for safety implicates the policy concerns protected by the discretionary function exception.¹⁰⁴

In deciding the applicability of the discretionary function exception, Justice Anderson followed the guidelines set forth in *Varig*.¹⁰⁵ First, he noted that the nature of the conduct rather than the status of the actor determines the exception's appropriateness.¹⁰⁶ Therefore, it was irrelevant that a mere aviation medical examiner withdrew Richard Heller's medical certificate. Second, Justice Anderson examined whether the challenged acts of the FAA were of the nature and quality that Congress intended to

¹⁰⁰ *Heller*, 803 F.2d at 1565; see *supra* notes 78-82 and accompanying text for a discussion of the three categories of FAA medical standards set forth in *Beins*.

¹⁰¹ *Heller*, 803 F.2d at 1565. The court stated:

[W]e expressly reject the *Beins* dicta that the standard at issue in this case does not implicate policy considerations. We conclude that, in the context of medical examinations conducted by the FAA to determine whether persons shall be certificated to pilot in air commerce, the determination of whether an applicant has an "established medical history or clinical diagnosis" of myocardial infarction involves not only a medical judgment, but also necessarily implicates policy concerns.

Id.

¹⁰² See, e.g., *Holmes v. Helms*, 705 F.2d 343, 345 (9th Cir. 1983) (FAA regulations to benefit of passenger not the pilot); *Dodson v. NTSB*, 644 F.2d 647, 651 (7th Cir. 1981) (FAA properly denied medical certificate to a pilot with evidence of coronary disease).

¹⁰³ *Heller*, 803 F.2d at 1566.

¹⁰⁴ *Id.* Justice Anderson states that "[T]he FAA in applying the medical standard at issue in the instant case will make its decision in a conservative manner so as to avoid any substantial safety risk. This consideration of safety . . . obviously implicates the policy concerns protected by § 2680(a)." *Id.*

¹⁰⁵ *Heller*, 803 F.2d at 1562-63; see *supra* notes 52-61 and accompanying text for a discussion of *Varig*.

¹⁰⁶ *Heller*, 803 F.2d at 1563.

shield from tort liability.¹⁰⁷ He reasoned that Congress manifested its concern for the safety of air commerce with the Federal Aviation Act,¹⁰⁸ and furthermore that the medical certification program is an integral part of that program.¹⁰⁹ Hence, he concluded the FAA's actions fit within the four corners of the FTCA's discretionary function exception when judged within the *Varig* guidelines.¹¹⁰

The court did not hold that the entire FAA medical certification process falls within the discretionary function.¹¹¹ Relying on its own decision in *Alabama Electric Cooperative v. United States*, the court noted that operational activity still exists when the government official relies upon some fixed or readily ascertainable standard.¹¹² It further agreed with the D.C. Circuit's articulation in *Beins* of two categories of medical certification which require no discretion.¹¹³ The court emphasized that when a particular decision depends upon scientific or technical information, the discretionary function exception is not rendered inapplicable.¹¹⁴

III. PRACTICAL IMPLICATIONS

The *Heller* decision broadened and further defined governmental immunity under the Federal Tort Claims Act. Yet, the court's opinion did not explicitly exempt the entire FAA medical certification program from liability.¹¹⁵ Accordingly, this holding will effect the Federal Aviation Administration, commercial pilots, and other litigants bringing suit under the Act.

¹⁰⁷ *Id.* at 1563-66.

¹⁰⁸ 49 U.S.C. app. § 1421(a) (1982); see *supra* note 32 for the text.

¹⁰⁹ 49 U.S.C. app. § 1422 (1982 & Supp. 1984); see *supra* note 33 for the text.

¹¹⁰ *Heller*, 803 F.2d at 1566-67.

¹¹¹ *Id.* at 1565-66.

¹¹² *Id.* at 1563.

¹¹³ *Id.* at 1565. The court states that it does not disagree with the *Beins* articulation of two categories which would not involve a discretionary decision. See *supra* text accompanying notes 78-82 for a discussion of the three categories of FAA medical standards set forth in *Beins*.

¹¹⁴ *Heller*, 803 F.2d at 1563.

¹¹⁵ *Id.* at 1565-66.

Heller provides the FAA with useful precedent for future lawsuits. The court accepted the agency's argument that policy considerations entered into its judgment of a pilot's medical fitness with regard to myocardial infarctions.¹¹⁶ This successful defense will again be asserted alongside the *Heller* decision should the next case involve another borderline malady in terms of the *Beins* classifications. Furthermore, *Heller* reinforces the belief that *Varig* excepted actual negligent inspections from liability.

Pilots, on the other hand, must go to greater lengths to prove that the challenged acts of the FAA were not of the nature and quality that Congress intended to shield from tort liability. Due to *Heller*, those pilots grounded for indications of myocardial infarction must anticipate summary dismissal of their cases for lack of subject matter jurisdiction.¹¹⁷ Hence, this decision represents unwelcome news for commercial airline pilots.

Heller also deserves notice for its effect on other litigants under the FTCA. In *Varig*, the Supreme Court explicitly denounced the increasingly narrow construction given the discretionary function exception since *Dalehite*.¹¹⁸ This decision manifests the same judicial attempt to expand the application of the exception. Therefore, given suitable facts in future cases, the federal courts are likely to continue expanding the government's immunity within the framework of the FTCA. Future plaintiffs against any part of the government must go to extensive lengths to emphasize the operational quality of the challenged actions. They must concentrate their arguments on those criteria in *Beins* not overturned by *Heller* and those in *Alabama Electric*. Most importantly, future litigants must effectively distinguish their cases from *Varig*.

Many people, as well as the lower federal courts, assumed that the government had waived its immunity from responsibility for negligent conduct that injures individual

¹¹⁶ *Id.* at 1566.

¹¹⁷ *Heller v. United States*, 620 F. Supp. 270 (M.D. Fla. 1985).

¹¹⁸ See *supra* notes 52-61 and accompanying text for a discussion of *Varig*.

citizens.¹¹⁹ Many endorsed the FTCA's apparent policy that if the citizens at large benefitted from a government program, that collective citizenry, not the isolated individual injured by the negligent conduct of the program, would bear the economic burden of that injury.¹²⁰ *Heller* illustrates that the FTCA promises little relief for the injured party in all but the simplest common law torts.¹²¹

IV. CONCLUSION

The court in *Heller* reached the correct conclusion in affirming the district court's summary dismissal. Admittedly, the medical certification of pilots likens greatly to the certification of planes. Also, the decision fulfills the three goals of the discretionary function exception. First, it promotes the separation of powers by sparing FAA officials from explaining their official actions in court. Second, in areas of policy-making, courts are not equipped to investigate and weigh the factors which enter into the FAA's medical certification program. Last, the application of the exception prevented the great and unpredictable cost that could result from judicial re-examination of the FAA's actions and policies.

The Supreme Court accurately stated that it is impossible to define the exact boundaries of the discretionary function exception.¹²² However, more than two hundred years after the ouster of King George III, it appears that the King can do very little wrong.¹²³ The line between

¹¹⁹ *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987).

¹²⁰ *Id.*

¹²¹ The legislative reports characterized section 2680(a) as a "highly important exception" designed to preclude damage suits against the government for such authorized activities as a flood control project, but to allow suits for common law torts such as the negligent operation of a motor vehicle. *Dalehite*, 346 U.S. at 27-30; see H.R. REP. No. 2245, 77th Cong., 2d Sess. 10 (1942) (report on 1942 version of Tort Claims Act); S. REP. No. 1196, 77th Cong., 2d Sess. 7 (1942) (report on 1942 version of Tort Claims Act); H.R. REP. No. 1287, 79th Cong., 1st Sess. 5-6 (1945) (report accompanying FTCA as enacted).

¹²² *Varig*, 467 U.S. at 813.

¹²³ See *supra* note 22 and accompanying text for a discussion of sovereign immunity.

discretion and operation keeps shifting so that more falls within the protective mantle of discretion. In *Heller*, policy favoring public safety excepted the government from liability. Yet, few regulations exist which do not promote some beneficial policy goal. Therefore, *Heller* illustrates that any court can conclude that discretion was ultimately involved due to the existence of an underlying salutary public policy.

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