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The Japanese Initiative on the Warsaw Convention

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# THE JAPANESE INITIATIVE ON THE WARSAW CONVENTION

Naneen K. Baden

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I. INTRODUCTION

THE WARSAW CONVENTION was established as an agreement between countries to set liability limits for death or injury caused during international air travel. The original goals of the Warsaw Convention were to provide uniform liability limits and to develop uniform procedures for dealing with international air transportation claims for death or personal injury caused by air travel accidents. The drafting history of the War-

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2 Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-99 (1967); see, e.g., Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 458 (5th Cir. 1984) (stating that the Warsaw Convention’s goal was to establish uniform law for airline accidents), cert. denied, 469 U.S. 1186 (1985); Reed v. Wiser, 555 F.2d 1079, 1089 (2d Cir.) (stating that the Warsaw Convention’s objective was to limit airline liability), cert. denied, 434 U.S. 922 (1977); Velasquez v. Aerovias Nacionales de Colom., S.A., 747 F. Supp. 670, 673, 675-76 (S.D. Fla. 1990) (stating that the Warsaw Convention’s objective was to establish uniformity for airline liability); Huber v. Swiss Air Transp. Co., 388 F. Supp. 1298, 1244 (S.D.N.Y. 1975) (stating that the Warsaw Convention’s main goal was to protect airlines from destructive liability in the event of an airline crash); see also Block v. Compagnie Nationale Air Fr., 386 F.2d 323, 327 (5th Cir. 1967) (stating that the Warsaw Convention’s goals were to provide uniform rules for documents limiting carrier liability for airplane accidents), cert. denied, 392 U.S. 905 (1968); David I. Shinfeld, Comment, From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention, 45 J. Air L. & Com. 653, 656 (1980) (examining inequities of passenger recovery under the Warsaw Convention).
saw Convention clearly demonstrates that the Convention's primary goal was to provide industry-wide uniform liability for death or personal injury caused by an airline accident. Uniform limited liability was needed to "foster the growth of the fledgling commercial aviation industry." The Warsaw Convention's uniform limitation on liability applied to all international flights and was intended to "attract capital that might otherwise be scared away by the fear of a single catastrophic accident." The unification of procedures was intended to decrease and simplify litigation.

The airline industry has changed dramatically in the sixty years since the signing of the Warsaw Convention. Air carriers are now sufficiently financed, and liability insurance is readily available. The airline industry can bear the burden of loss in major, catastrophic accidents as it is "capable of reimbursing customers for the damages it causes them."

Because of the United States' dissatisfaction with the liability limits, international airlines serving the United States entered into an unofficial agreement that increased strict liability limits to U.S. $75,000 when the United States is the place of departure or destination, or an agreed stopping place of the international flight. Depending on the destination, departure, or agreed stopping place of an international flight, and whether the country of destination, departure, or stopping place is a signatory of the Warsaw Convention, Hague Protocol, or Montreal Agreement, passengers on the same flight may be subject to different liability limits. Stated simply, the uniformity goal of the Warsaw Convention has not been met. In light of the lack of uniformity and the embarrassingly low liability limits under the

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6 Id.
7 Lowenfeld & Mendelsohn, supra note 2, at 499.
8 Id. (citing Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934)).
13 Id. at 966.
Warsaw Convention and its amendments, ten Japanese airlines have contracted out of international flight liability limits governed under the Warsaw Convention.12

This Comment discusses the background of the Warsaw Convention and its amendments, the circumstances leading up to the Japanese abandonment of Warsaw Convention liability limits, and the effect of the Japanese action on other international airlines, especially those based in the United States.

II. THE WARSAW CONVENTION AND ITS AFTERMATH

A. UNIFORMITY ACHIEVED VIA LIABILITY CAPS

The Warsaw Convention is an international treaty entered into by 128 countries in 1929.13 The Convention's original goals, setting uniform liability limits for death or personal injury in international airline accidents and setting uniform procedures for dealing with international air transportation claims, were accomplished by a trade-off between the proof of liability and the limit set by the convention for plaintiffs' losses.14 To provide uniform liability limits, the Warsaw Convention shifted the burden of proof in international accidents to the air carrier.15 The air carrier is presumed to be liable unless it can prove otherwise.

The recovery of a plaintiff is limited under the Warsaw Convention to the liability limits that were established in 1929 and amended later by the Hague Protocol and the Montreal Protocol.16 As stated by article 25 of the Warsaw Convention, a plaintiff must prove that the air carrier acted with willful misconduct

13 Warsaw Convention, supra note 1.
14 See id. at arts. 17, 21.
15 Id. The full text of article 17 states:
   The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
Id. at art. 17.
to obtain an award higher than the agreed-upon liability limits.\footnote{17} The consequence of article 25 has been a considerable amount of litigation attempting to prove willful misconduct on the part of air carriers in order to circumvent the liability limits established by the Warsaw Convention.\footnote{18}

\section*{B. Dissatisfaction with "Inadequate" Liability Limits Leads to Modification of the Warsaw Convention}

The original liability limit established by the Warsaw Convention was approximately U.S. $8300.\footnote{19} The Convention based this amount on the "poincare franc" which fluctuated with the gold standard and did not adjust for inflation.\footnote{20} As time passed, the Warsaw Convention’s liability limit became woefully inadequate to compensate injured passengers because of the rising cost of inflation.\footnote{21} It became apparent that the Warsaw Convention was not meeting its goals.\footnote{22}

The United States, in particular, became concerned about the inadequacies of the Warsaw Convention’s liability limits. In the United States the amounts of recovery in domestic flight personal injury and death actions far exceeded the limits established by the Warsaw Convention.\footnote{23} At the International Civil

\footnote{17} Warsaw Convention, \textit{supra} note 1, at art. 25(1). Article 25(1) states:

\begin{quote}
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 \textit{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 to be equivalent to wilful misconduct.
\end{quote}

\textit{Id.} (emphasis added).


\footnote{19} Lowenfeld & Mendelsohn, \textit{supra} note 2, at 499.

\footnote{20} \textit{Id.}

\footnote{21} Sheinfeld, \textit{supra} note 2, at 656.

\footnote{22} \textit{Id.} at 658-59.

\footnote{23} Lowenfeld & Mendelsohn, \textit{supra} note 1, at 504.
Aviation Organization (ICAO) International Conference on Private Air Law in September 1955, delegates discussed several reasons for abandoning or amending the Warsaw Convention's liability limits. First, the improved safety record of the airline industry would enable the air carriers to purchase liability insurance at cheaper rates than originally calculated. Second, the improved safety record and the increased experience of air carriers made the protections provided by the Warsaw Convention too extensive. With fewer airline crashes than anticipated, and with less expensive liability insurance readily available to air carriers, financial risk decreased for the airline industry, which reduced the need for protection by the Warsaw Convention's liability limit. In view of this decreased risk, airlines no longer needed the protection of strict liability coupled with a liability cap. Hence, there was industry-wide dissatisfaction with the Warsaw Convention. The need for modification to the Warsaw Convention's liability limit led to the Hague Conference.

C. The Hague Conference Leads to U.S. Denunciation of the Warsaw Convention

The conference at the Hague in the Netherlands culminated in an amendment to the Warsaw Convention. After much deliberation the liability limit was increased from approximately U.S. $8300 to U.S. $16,600. Although this increase represents a doubling of the Warsaw Convention's liability limits, in reality the increase in liability amounted to much less because of rising costs due to inflation and because attorneys' fees would significantly decrease the amount that was actually received by a plaintiff. This increase was not sufficient to appease the U.S. government's concerns over the deficiency of the liability limits of the Warsaw Convention, and the United States never ratified the amendment set forth at the Hague Conference. An Interagency Group on International Aviation study, after much review and many public hearings, made two recommendations to

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25 Id.
26 Id.
28 Sheinfeld, supra note 2, at 660; see also Hague Protocol, supra note 16, at 381-83.
29 Sheinfeld, supra note 2, at 660.
the United States Secretary of State. First, the study recommended continued efforts to attempt to ratify the Hague Protocol. Second, the agency recommended compulsory insurance to complement the Hague Protocol’s liability limits. The U.S. Congress failed to take action on the compulsory insurance recommendation. The U.S. government determined that withdrawal from the Warsaw Convention was necessary to best protect American airline travellers. Solely because of the Warsaw Convention’s low liability limits for personal injury or death, the United States denounced the Warsaw Convention. The United States indicated, however, that it would withdraw the denunciation under two conditions. First, the ICAO Conference in February of 1966 must give reason to believe that a new convention with a U.S. $100,000 limit could be a distinct possibility. Second, major international air carriers must be able to work out an interim agreement under article 22 of the Warsaw Convention with a U.S. $75,000 liability limit.

30 United States Dep’t of State, The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation, 32 J. AIR L. & COM. 243, 244 (1966). The Interagency Group on International Aviation is a group of representatives of governmental agencies and departments having an interest in aviation affairs. Id.
31 Id.
32 Id.
33 Id.
34 Id. Without compulsory insurance legislation “reliance on the common law” would allow for the greatest recovery of damages for personal injury or death in air travel accidents. Id.
35 U.S. Gives Notice of Denunciation of Warsaw Convention, 53 DEP’T ST. BULL. 923, 923-24 (1965). The notice of denunciation read in part:

The United States of America wishes to state that it gives this notification solely because of the low limits for liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention and Hague Protocol but without limits of liability for personal injury or death.

Id. at 924-25.
36 Id. at 924; see also Warsaw Convention, supra note 1, at art. 22.
1. Justifications for U.S. Denunciation and a Compromise That Saves the Warsaw Convention

There is an inherent abhorrence in the United States against artificially restricting the amount of compensation for personal injury or death.\footnote{Lee S. Kreindler, The Denunciation of the Warsaw Convention, 31 J. AIR L. & COM. 291, 293 (1965).} Limiting the amount of compensation unduly places the burden of loss on the victim or on the victim's family.\footnote{Id.}

Under article 39 of the Warsaw Convention, a country may denounce the Warsaw Convention at any time as long as the country provides proper notification.\footnote{Warsaw Convention, supra note 1, at art. 39.} This denunciation becomes effective six months after the notice is tendered by the country.\footnote{Id.} Since the United States accounts for over sixty percent of all international air travel passengers, U.S. denunciation would irreparably harm the integrity and stability of the Warsaw Convention and jeopardize adherence to it by other nations. In an effort to prevent the United States from proceeding with its denunciation of the Warsaw Convention, the International Air Transportation Association (IATA) convened a special meeting in Montreal in the early part of 1966. The goal of the meeting was to form an agreement among air carriers that would assuage the United States' grave concerns over the Warsaw Convention's liability limits.\footnote{Id.} An agreement was reached among international air carriers serving the United States that increased strict liability limits to U.S. $75,000 gross of legal fees or U.S. $58,000 net of legal fees.\footnote{Id.} This agreement applied only to air carriers who had signed the agreement and only to international transportation, including the United States.\footnote{Id.} It took effect when a location within the United States was either the point of origin,

\begin{quote}
(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.
\end{quote}

\footnote{Montreal Protocol, supra note 16, at 7302.}

\footnote{Id.}

\footnote{Id.}
point of destination, or an agreed stopping point of an international flight. The agreement also stipulated that the air carriers that were parties to the agreement would furnish passengers with a written notice in ten-point type advising them of the liability limitations that were established by the Warsaw Convention, the Hague Protocol, or the higher limit imposed by the agreement. While this agreement was merely a private agreement that did not rise to the force of law accorded a treaty, the agreement did allow the United States to withdraw its denunciation of the Warsaw Convention.

D. THE GUATEMALA CONFERENCE: SUPPLEMENTAL COMPENSATION PLANS AND LIMITS AND RESERVATIONS

In 1971, at the ICAO International Conference on Air Law at Guatemala City, Guatemala, the United States proposed new compensation limits for international air travel. The United States suggested a liability limit of U.S. $100,000. Also, a supplemental compensation plan was proposed to pay for claims in excess of U.S. $100,000. This supplemental compensation plan was to be financed by contributions made by the passengers. At the ICAO conference, it was decided that, for the agreement to take effect, thirty countries would have to ratify the agreement. It was furthermore stipulated that five of the thirty countries would have to comprise forty percent of air travel of ICAO member nations. Unfortunately, Article H of the Guatemala agreement limited the reservations that a country could make at the time of ratification. Only a few reservations were allowed. For example, any state whose courts were not allowed to award damages could reserve that article 22 would not apply to its courts. A state could also declare that the Warsaw Convention and its amendments would not apply

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44 Id.
45 Id.
46 Id.
47 ICAO International Conference on Air Law, Guatemala City, at 76, ICAO Doc. 9040-C/167-2 (1972) [hereinafter Guatemala Proceedings].
48 Id.
49 Id. at 77-78.
50 Id. at 179.
51 Id.
52 Id. at 180.
53 Id.
54 Id.
when military personnel were carried on the aircraft. Finally, a state could declare that the Warsaw Convention and its amendments did not apply to "the carriage of persons, cargo, and baggage." Twenty-two nations ratified the Guatemala Protocol, but the U.S. Senate refused to ratify it because of the limit on reservations. Since the airlines of the United States comprised a large part of the world's air traffic, without the ratification of the United States, the Guatemala Protocol became basically a dead issue.

E. THE MONTREAL PROTOCOL NO. 3 INTRODUCES THE STANDARD DRAWING RIGHT TO ALLOW LIABILITY LIMITS TO KEEP UP WITH INFLATION

The next meeting of the ICAO took place in 1975 in Montreal, Quebec, where another amendment to the Warsaw Convention, known as the Montreal Protocol No. 3, was drafted. Some aspects of the Guatemala Protocol, including strict liability, were retained in Montreal Protocol No. 3. Montreal Protocol No. 3 also contained a settlement inducement clause and an unbreakable liability limit of 100,000 standard drawing rights (which was approximately U.S. $117,000 at that time) and provided for an optional supplemental compensation plan. An SDR, a standard drawing right, is "a monetary unit based on the exchange rates for British, French, German, Japanese, and U.S. currencies." This specialized unit of exchange eliminated one of the major criticisms of the Warsaw Convention's liability limits, specifically the failure of limits to keep up with the rising costs of inflation. The supplemental compensation plan was to provide compensation beyond the strict liability limits if passengers paid a set surcharge on their tickets for extra liability insurance. The settlement inducement plan provided air carriers with an incentive to settle claims within a period of six

55 Id.
56 Id.
57 Sheinfeld, supra note 2, at 677.
59 Hearings on Aviation Protocols Before the Comm. on Foreign Relations, 95th Cong., 1st Sess. 52 (1977) [hereinafter Hearings].
60 Id.
62 See Sheinfeld, supra note 2, at 659-60.
63 Hearings, supra note 59, at 52.
months. The air carriers would be forced to pay added costs, including attorneys’ fees, if a court subsequently awarded a plaintiff more than the airline had offered.

F. The U.S. Response to the Montreal Protocol No. 3

In July of 1977, the Civil Aeronautics Board approved a supplemental compensation plan. This plan provided for an additional U.S. $200,000 recovery, above the U.S. $117,000 for loss of life. This plan also provided for unlimited medical coverage. Under this plan, the surcharge per ticket was to be two dollars. The two-dollar fee went toward establishing a fund to pay for the supplemental recoveries.

The Senate Committee on Foreign Relations supported ratification of the Montreal Protocol. The Committee expressed a concern that the failure to ratify the Montreal Protocol could undermine United States influence within the Civil Aviation Organization and lead to the end of the Warsaw Convention. The Senate Committee concluded that participation by the United States in a limited liability system was warranted because of the special concerns of international aviation. Participation in such a system, however, was predicated on the system ensuring “sure and sufficient compensation” supplemented by a domestic compensation plan to increase recoveries for U.S. citizens.

The Montreal Protocol No. 3 was defeated in 1983 when it failed to achieve the ratification of the U.S. Senate. Since then, several supplemental compensation plans have been proposed, but so far, none have been approved by the Senate.

65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 S. EXEC. REP. No. 45, 97th Cong., 1st Sess. 4-7 (1981).
71 Leich, supra note 64, at 414.
72 Id.
73 Id.
Until a viable supplemental compensation plan is approved, rati-
fication by the United States of the Montreal Protocol No. 3 can-
ot occur. As a result, like the Guatemala Protocol, the
Montreal Protocol No. 3 may remain a moot issue.

III. THE JAPANESE INITIATIVE

The Warsaw Convention has been criticized for not ade-
quately compensating passengers in the event of an airline acci-
dent. In an effort to avoid the liability limitations imposed by
the Warsaw Convention, many plaintiffs have engaged in
lengthy and expensive court battles. Some of these court bat-
tles have served to increase the areas where plaintiffs can re-
cover damages under the Warsaw Convention. Other cases
have been undertaken in an effort to find a basis for recovery
that does not fall under the Warsaw Convention's liability limits.

A. Extension of the Warsaw Convention to Apply to
Charter Flights

A litigious area of the Warsaw Convention concerns its appli-
cability to charter flights. One example is Block v. Compagnie Na-
tionale Air France, a case involving an effort on the part of the
plaintiffs to prove that the Warsaw Convention did not apply to
charter flights. If the plaintiffs could have proven that the War-
saw Convention's liability limits were not intended to apply to
charter flights, then recovery would not have been limited. In
Block, an Air France Boeing 707 jet beginning the last part of the
trip on an Atlanta-Paris-Atlanta flight crashed at Orly Field in
Paris, France. All 122 passengers on the charter flight were
killed. The plaintiffs wanted the court to remove the Warsaw
Convention's liability limits from the accident because at that
time compensation would have only amounted to U.S. $8300.
After five years of court battles, the United States Court of Ap-
peals for the Fifth Circuit undertook an extensive investigation
into the legislative history of the Warsaw Convention and deter-
mined that the Warsaw Convention was based on "the existence
of a contract of carriage between the air carrier and the passen-

76 Sheinfeld, supra note 2, at 678.
77 See Shapiro, supra note 75, at 10.
78 See Sheinfeld, supra note 2, at 656.
79 Id.
80 Id.
81 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).
ger." The court further stated that the contract existed whenever a "passenger is transported"; therefore, the Warsaw Convention also governed international charter flights. This decision defined the parameters of application of the Warsaw Convention between an air carrier and a passenger. It also found a contractual basis for the Warsaw Convention's application.

B. LITIGATION TO AVOID THE WARSAW CONVENTION'S LIABILITY LIMITS BY PROVING WILLFUL MISCONDUCT

Other court battles have been undertaken in an effort to prove willful misconduct by air carriers in order to remove the Warsaw Convention's liability cap. Under article 25, an air carrier cannot invoke the Warsaw Convention's liability limits if the air carrier is guilty of willful misconduct. In Abramson v. Japan Airlines Co., a passenger with a pre-existing paraesophageal hiatal hernia sued Japan Airlines when his condition worsened on an international flight from New York to Tokyo. Japan Airlines staff refused to allow the passenger to lie down in order to apply a self-help remedy to alleviate his condition. Airline personnel insisted that no empty seats were available, although there were in fact nine empty seats in first class. The court determined that the aggravation of a pre-existing medical condition during an international flight did not fall within the definition of an "accident" as defined in the Warsaw Convention. Therefore, no claim could be brought under the Warsaw Convention.

In Walker v. Eastern Air Lines, the district court also concluded that the aggravation of a pre-existing medical condition...
did not fall within the definition of an "accident" under the
Warsaw Convention. In that case, a passenger with a congeni-
tal asthmatic condition died on a round-trip flight from New
York to Jamaica, a flight that had an agreed stopping place in
Miami, Florida. A four-year court battle ensued in an effort by
the passenger’s widow to prove that the actions of Eastern Air-
lines constituted willful misconduct on the part of the air carrier
under the Warsaw Convention.

In Eastern Airlines, Inc. v. Floyd, a six-year court battle was un-
successfully undertaken to obtain a ruling that the Warsaw Con-
vention applied to mental injury that was unaccompanied by
physical trauma. The appellate court held that claims for pure
mental distress fell within the actions allowed by the Warsaw
Convention. On the flight from Miami to Nassau, Bahamas,
one of three plane engines lost oil pressure, forcing the flight to
return to Miami. When the second and third engines failed, the
passengers were informed that the plane would have to ditch in
the Atlantic Ocean. Fortunately, the crew was able to restart the
first engine and the plane landed safely in Miami. On appeal,
the U.S. Supreme Court determined that psychic injury alone
was not recoverable under article 17 of the Warsaw
Convention.

Finally, in In re Korean Air Lines Disaster of Sept. 1, 1983, a
nine-year court battle ensued over the downing of a Korean Air
Lines jet by Soviet military aircraft. The Court of Appeals for
the District of Columbia held that punitive damage awards were
excluded by the Warsaw Convention. In a related case, the
United States District Court for the Southern District of New
York concluded that, if proven, a plaintiff could recover for the
decedent’s conscious pain and suffering, loss of support, loss of
love, affection and companionship, loss of inheritance, and loss
of services.

Court battles in the United States regarding the Warsaw Con-
vention’s liability limits have taken many years and have been

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91 Id. at 1170-71.
92 Id. at 1168-71.
95 Eastern Airlines, 499 U.S. at 552.
97 Id. at 1490.
98 In re Korean Air Lines Disaster of Sept. 1, 1983, 807 F. Supp. 1073, 1089
expensive. Overseas courts have experienced similar court battles. In the process, the Warsaw Convention’s coverage has expanded, and many recoveries in excess of the Warsaw Convention’s liability limits have been achieved.

Proposed amendments to the Warsaw Convention attempting to increase liability limits have not been effective. As quickly as the amendments are ratified, they become outdated by the rising costs of inflation.

C. THE ROLE OF COMPENSATION AND FAULT LIABILITY

Compensation should adequately reflect and be significantly related to the actual economic losses suffered by the victims of airline accidents. Compensation, by its very definition, should compensate a victim. One of the very basic concepts of tort liability is that liability is based on fault. Anytime an artificial limit is imposed, such a limit prevents the victim from obtaining compensation appropriate to the victim’s injuries. By definition, the strict liability limits imposed by the Warsaw Convention deprive the victim of adequate compensation for pain and suffering. An individual who is greatly injured should be compensated greatly, and an individual who is only injured slightly should be compensated slightly.


104 Id. at 530.

105 Id.

106 Id.
D. The Warsaw Convention's Strict Liability Defeats the Purpose of Compensation

The strict liability of the Warsaw Convention prevents airlines from defending their actions against plaintiffs who are only slightly injured. On the other hand, the liability cap prevents plaintiffs who are severely injured from obtaining adequate compensation for more significant injuries. This strict liability limit defeats the purpose of compensation for a victim. This problem was brought to light in the case of Ross v. Pan American Airways, where an American entertainer was seriously injured in a Pan American Airways crash in Portugal in 1943. Despite massive injuries and immense medical bills, the award was limited to a mere U.S. $8300 under the Warsaw Convention's liability cap. The Ross case demonstrated how difficult it was to prove an air carrier's willful misconduct in order to avoid the Warsaw Convention's liability limits. In a companion case, the court defined willful misconduct as "an intentional act done with either intent to cause damage or recklessly and with knowledge that damage would probably result." It could prove extremely difficult to convince a jury that a pilot would intentionally cause a crash since the pilot's own life would be at risk. Other American cases have defined willful misconduct as an action done with intent to cause damage or done recklessly without regard for probable consequences. Under this more flexible definition of willful misconduct, plaintiffs have won several cases and awarded damages exceeding the Warsaw Convention's liability limits. Because of cases in which an air carrier's willful misconduct has been proved, many other cases

107 See Kreindler, supra note 37, at 293.
109 Id. at 884.
111 Id.
112 Id.
114 LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir.), cert. denied, 382 U.S. 878 (1965); see also Tuller, 292 F.2d at 782 (affirming award of U.S. $350,000 when evidence supported showing of willful misconduct); Ulen, 186 F.2d at 533-34 (affirming award in excess of U.S. $8300 when willful misconduct was found).
have been settled for amounts in excess of the Warsaw Convention’s liability limits.115

E. TEN JAPANESE AIRLINES ABANDON THE WARSAW CONVENTION’S LIABILITY LIMITS: THE JAPANESE LEGAL SYSTEM’S EMPHASIS ON SETTLEMENT

Amidst all the controversy over the Warsaw Convention’s liability limits, something very interesting happened in Japan. On November 20, 1992, ten Japanese airlines voluntarily abandoned the international liability limits of the Warsaw Convention.116 The Japanese airlines’ decision to abandon liability limits was preceded by a devastating domestic airline crash in Japan. A Japan Air Lines Boeing 747 crashed in 1985, killing 529 passengers.117 Since this was a domestic crash, settlements for the crash were not covered by the Warsaw Convention’s liability limits.

Traditionally, the Japanese legal system encourages settlement. Under this system the plaintiff requests an amount, and the defendant either gives the plaintiff the requested amount or the two parties negotiate until a mutually acceptable settlement is reached.118

In Japan, the tradition is to deal with conflicts through social arrangements.119 Civil disputes are taken to court only as a last resort.120 The Japanese prefer a less adversarial process than liti-
Reconciliation, valuing "harmony and compromise" to reach agreements that collectively benefit Japanese society. Because of the availability of mediation, and the far-reaching interdependent relationships characteristic of Japanese society, fewer benefits are achieved by litigation. Between the years 1977 and 1982, there were two Japan Air Lines crashes in which a total of fifty-seven people were killed. Only one civil damage suit was brought against Japan Air Lines; the majority of claimants worked out private settlements with the airline company. The settlements varied depending on the "victim's age, salary and family obligations."

Taking someone to court in Japan constitutes a "breach of the community harmony" as a lawsuit evidences a "miscarriage of the social process." In view of the prevailing Japanese mores and standards, it is easier to understand why Japan Air Lines privately settled with the passengers in the Boeing 747 crash. Settlements averaged U.S. $800,000 per passenger. This settlement figure established a legal precedent for compensation under Japanese law. After this precedent was set, it would have been dishonorable for Japanese airlines to continue operating under the liability limits set by the Warsaw Convention. Japanese domestic liability limits had been scrapped in 1982. Then, because of the precedent set by the settlements in the 1985 Japan Air Lines crash and embarrassment over the Warsaw Convention's limits on international compensation, ten Japanese airlines decided to take advantage of article 22, section 1 of the Warsaw Convention. Article 22(1) specifically allows airlines to "opt out" of the liability limits established by the Warsaw Convention.
Constitution. Under article 22, an airline may "contract privately for higher liability awards."

F. HOW THE JAPANESE WITHDREW FROM THE WARSAW CONVENTION'S LIABILITY LIMITS

In order to effectuate the removal of Japanese airlines from the Warsaw Convention's liability limits, two paragraphs concerning passenger liability on international flights were added to the air carriers' conditions of carriage. The first paragraph stated: "Each airline shall not apply the applicable limit in article 22(1) of the Warsaw Convention in defense of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of the convention." This paragraph clearly informed the passenger that the flight was not covered by the Warsaw Convention's liability limits. The second paragraph added to the conditions of carriage that "[e]ach airline shall not use any defense for negligence as stated in Article 20(1) of the Warsaw Convention up to 100,000 SDRs [standard drawing rights worth U.S. $137,500], but will use those defenses thereafter, excluding legal costs awarded by a court." This waiver of Warsaw Convention liability limits applied only to Japanese airlines and not to any other airline involved in inter-airline tickets.

At the end of 1992, the Japanese airline Al Nippon Airways requested approval of the waiver of Warsaw Convention liability limits from the United States Department of Transportation.

132 The Warsaw Convention, supra note 1, at art. 22. Article 22(1) states: In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.


134 Shapiro, supra note 61, at 3.

135 Id.

136 Id.

137 Id.

138 Id.
The Department of Transportation agreed to Al Nippon’s exemption because the Montreal Agreement did not preclude waiving liability for amounts higher than U.S. $75,000.\textsuperscript{139} Higher liability limits, or unlimited liability as proposed by the Japanese, afforded the traveling public additional protection.\textsuperscript{140} The Department of Transportation determined that releasing Al Nippon Airways from the liability limits of the Warsaw Convention was “consistent with the public interest of the United States.”\textsuperscript{141} Other Japanese airlines are expected to follow suit.\textsuperscript{142}

G. Initial Reaction to the Japanese Initiative

Supporters of the Japanese Initiative believe that removal of Warsaw Convention liability limits will decrease litigation.\textsuperscript{143} Plaintiffs enter into litigation in an attempt to prove an air carrier’s willful misconduct, thereby increasing their damage awards.\textsuperscript{144} Litigation is costly and time consuming, and it defeats the original purpose of the Warsaw Convention.\textsuperscript{145} Litigation has also been contradictory and confusing, since several countries, including the United States and Japan, have no set liability limits for domestic flights.\textsuperscript{146} Further complicating matters is the fact that under the Warsaw Convention, passengers on the same flight suffering from the exact same injuries may receive different amounts in damage awards.\textsuperscript{147} Different citizenships affect the choice of law that is utilized in any given passenger suit; therefore, depending on where the suit is brought, compensation values will vary.\textsuperscript{148} Proponents of the Japanese Initiative believe that contracting out of Warsaw Convention liability limits, as the major Japanese airlines have done, is the best way to prevent inequities in compensation to airline

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. (quoting statement by George N. Tompkins, Jr., an aviation defense lawyer and senior partner for the New York law firm of Condon & Forsyth).
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Kreindler, supra note 37, at 294-95.
\textsuperscript{147} See generally Cagle, supra note 10, at 953-54 (noting that although the Warsaw Convention was intended to create uniformity in liability limits, four damage limits are in use).
\textsuperscript{148} Id. at 959, 961-66.
crash victims.\textsuperscript{149} Fixed liability limits allow for damages to be based on fault, rather than strict liability.\textsuperscript{150}

Opponents of the Japanese Initiative want to retain some form of liability limits within the realm of the Warsaw Convention’s original goals. Aviation underwriters, in particular, oppose unlimited liability such as that enacted by the Japanese airlines.\textsuperscript{151} Airline insurers are afraid that unlimited liability on international flights will cause an increase in underwriting losses.\textsuperscript{152} Underwriters plan to charge airlines that have contracted for unlimited liability a premium surcharge to cover increased costs.\textsuperscript{153}

Air carrier underwriters are also fearful that the Japanese plan may allow liability limits on baggage and cargo to be removed.\textsuperscript{154} Underwriters fear that without liability limits on baggage, passengers will claim that their bags contain very expensive designer clothes.\textsuperscript{155} Litigators counter underwriters’ fears by emphasizing the potential savings through waiver of Warsaw Convention liability limits since litigation costs, paid by the insurers, will be greatly reduced.\textsuperscript{156}

The European Community to date has not embraced the Japanese waiver of the Warsaw Convention’s liability limits. Instead, the European Community wants to retain the Warsaw

\textsuperscript{150} Kreindler, \textit{supra} note 103, at 537.
\textsuperscript{151} Shapiro, \textit{supra} note 61, at 3.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.; Warsaw Convention, \textit{supra} note 1, at arts. 18 and 22(2). Article 22(2) states:

In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

\textit{Id.} This amounts to “about $9 per pound of checked baggage and $400 per passenger for unchecked baggage.” Shapiro, \textit{supra} note 61, at 4.
\textsuperscript{155} Id.
\textsuperscript{156} Id. Removal of the Warsaw Convention’s liability limits would decrease the costly and lengthy litigation necessary to prove willful misconduct. \textit{Id.}
Convention's liability limits.\textsuperscript{157} The European Commission, however, proposed in October of 1992 that the per passenger liability limit be raised to 250,000 SDRs.\textsuperscript{158} The European Commission plan also includes optional first-party insurance from the air carriers allowing compensation above the 250,000 SDR limit.\textsuperscript{159}

British air carriers have not moved to increase their liability limits, but they are not adverse to an increase to liability limits by the British Department of Transportation.\textsuperscript{160} The Australian Department of Transportation and Communication is currently investigating proposals from the airline industry concerning increasing liability limits to a potential high of U.S. $750,000.\textsuperscript{161} No U.S. air carrier has followed the Japanese example and contracted out of Warsaw Convention liability limits.\textsuperscript{162} Instead, the U.S. Department of Transportation's supplementary compensation plan proposed in 1989 continues to receive support.\textsuperscript{163} The proposed supplementary compensation plan provides unlimited recovery for economic damages to U.S. citizens and residents on international flights, subject to a limit of U.S. $500 million per incident per aircraft.\textsuperscript{164} This plan was amended in 1993 to give the Secretary of Transportation the power to set the supplemental compensation plan's liability limits.\textsuperscript{165} As of April 1994, the supplemental compensation plan has stalled once in Congress and is not on the Senate's present agenda.\textsuperscript{166} With the supplementary compensation plan stalled in Congress, most U.S. air carriers are contemplating voluntarily increasing the Warsaw Convention's liability limits.\textsuperscript{167}

\textsuperscript{157} \textit{Id.} at 3.
\textsuperscript{158} \textit{Id.} 250,000 SDRs are approximately U.S. $343,750. \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} Shapiro, \textit{supra} note 75, at 10.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} Shapiro, \textit{supra} note 61, at 4.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} Shapiro, \textit{supra} note 75, at 10.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
IV. WHAT DOES THE JAPANESE WAIVER OF THE LIABILITY LIMITATION REALLY MEAN AND WHERE IS THE AIRLINE INDUSTRY GOING?

A. WHAT IS THE TRUE EFFECT OF THE JAPANESE INITIATIVE?

The Japanese Initiative does not provide absolute unlimited liability in international air travel. Actually, the Japanese Initiative returns the Warsaw Convention to true fault-based liability. The Japanese amendment to the airline's conditions of carriage achieves this sense of fault-based liability by removing the liability limitations of any international treaty concerning passenger personal injury or death from an accident covered by article 17 of the Warsaw Convention. The Convention's article 20 defenses are waived up to the 100,000 SDR limit, but for compensation over 100,000 SDRs, the defenses are reinstated. Since the defenses are waived up to the treaty's liability limits, there is no need for the ticketing requirement of article 3 or the willful misconduct provision of article 25. In essence, the Japa-
anese Initiative merely allows the Japanese airlines to negotiate settlements that exceed the Warsaw Convention's limitation of liability, without requiring passengers' families to resort to lengthy litigation to prove willful misconduct by the air carrier.\textsuperscript{173}

The purpose behind reinstating article 20 defenses for claims greater than 100,000 SDRs is to protect the air carrier from claims made by third parties.\textsuperscript{174} The air carrier needs to be protected from claims by air manufacturers and air traffic control facilities. By waiving article 20 defenses, the airline risks becoming a "volunteer," and may not be entitled to seek indemnification from a responsible third party.\textsuperscript{175} Therefore, reinstitution of the article 20 defenses allows the air carrier to negotiate settlements with passengers' families that exceed Warsaw Convention liability limits without prejudicing the air carrier's own claims for indemnification against any liable third parties.\textsuperscript{176}

B. PROBLEMS WITH THE JAPANESE INITIATIVE

Compensation is one important aspect of the tort system, but arguably a concomitantly important purpose is the exposition of fault.\textsuperscript{177} Tort system litigation exposes fault and lack of care, and also determines the underlying facts in airline crashes.\textsuperscript{178} While the Japanese Initiative solves the problem of compensation, it does nothing to replace the investigative aspect of the tort system.\textsuperscript{179}

George Tompkins, an adviser to Japan Air Lines in formulating the Japanese Initiative, credits the investigative aspect of the tort system for finding the exact cause of the Lockerbie crash.\textsuperscript{180} Plaintiffs' attorneys in the Lockerbie case examined witnesses, avail himself of those provisions of this convention which exclude or limit his liability.


\textit{Id.}\textsuperscript{174} Panel Discussion, \textit{supra} note 168, at 823.

\textit{Id.}\textsuperscript{175} at 823-24.

\textit{Id.}\textsuperscript{176} at 828.

\textit{Id.}\textsuperscript{177} at 828-29.

examined the Frankfurt base of Pan Am, took testimony from baggage and x-ray machine handlers and examined security personnel. The litigation aspect of the tort system focused on causation, which helped explain what went wrong in the Lockerbie crash, and helped make air travel safer for all passengers.

Tompkins further points to the Sabena Airlines crash of 1961 as proof of the investigative purpose served by the tort system. It took three years of litigation against Boeing Airlines to discover the cause of the Sabena crash. The plaintiffs’ attorneys found no way to break liability limits concerning the airline, but they were able to pursue litigation against the manufacturer of the airplane. The lawsuit helped disclose the design errors that caused the crash.

Since early settlements prevent investigation into airline crashes, Tompkins recommends an alternative plan: denouncing the Warsaw Convention altogether. Without the Warsaw Convention, air crashes would be handled in the same way as domestic air crashes in the United States. A free tort system based on negligence has no liability limitation. Tompkins concludes, “The best way to protect the public, recognizing the need for adequate compensation on the one hand, but also recognizing the need to keep society protected, to protect itself from malfeasance and to protect future accidents, is to denounce Warsaw.”

C. CRITICISMS OF THE CLAIM THAT THE TORT SYSTEM LENDS ITSELF TO EXPOSING FAULT

The tort system does not necessarily lend itself to exposing fault to the public. In order to receive compensation, plain-
tiffs and their attorneys must sign protective orders preventing them from disclosing any information about the case. 192 Therefore, the premise that the tort system functions to expose defects in widely used products is false. 193 The tort system's true function is to provide for recovery, not to discover exactly what happened. 194 The tort system is not designed to be a "safety watchdog." 195

Even if the tort system did serve some expository function, there is a greater cost that must be considered. 196 Because of the lengthy litigation inherent in the tort system, people are deprived of compensation for many years. 197 The financial and emotional costs of the discovery process are immense. 198 Sometimes immediate economic compensation is more important than the satisfaction of finding out what caused the accident. 199 Any time parties go through the litigation process to establish fault, they must also go through the discovery process. 200 This process inevitably takes a great deal of time. 201

Rather than abandon the Warsaw Convention, Warren Dean suggests, the treaty must be modified. 202 "We must have rules that people can understand and rely upon, and we must have a system that works to bridge the awkwardness and difficulty of the international air transportation system that people encounter in attempting to get compensation for their losses." 203 The treaty serves to create obligations for governments, and one of those obligations is that governments "cannot pass laws that prohibit compensation to victims of air crashes." 204

192 Id.  
193 Id.  
194 Id. at 834-35 (discussing the KAL 007 litigation and the fact that the truth may never be known about what happened in that crash).  
195 Id. at 835.  
196 Id.  
197 Id.  
198 Id.  
199 Id. (discussing the value of compensation in the present to pay for once-in-a-lifetime events such as sending a child to college).  
200 Id. at 835-36.  
201 Id. at 835 (discussing the great length of time involved in obtaining depositions and the complexity of the discovery process).  
202 Id. at 836.  
203 Id.  
204 Id. at 837.
Since the United States apparently will not pass the Montreal Protocol anytime soon, another solution will need to be found. The Japanese Initiative is something that the United States should consider seriously. The International Air Transport Association has filed a petition before the Department of Transportation seeking “discussion authority and antitrust immunity” to consider special contracts like the Japanese Initiative. Air carriers need this authority and immunity to enter into joint discussions on liability issues. Without such permission, the air carriers would be in violation of United States antitrust laws. The petition is pending at the present time.

D. WHERE DO THE AIRLINES GO FROM HERE?

Some aviation underwriters have alleged that removing the Warsaw Convention liability limits will increase insurance premiums, thereby costing the airline industry more than it will save in decreased litigation costs. The allegation, however, has no basis. For example, premiums for liability coverage for passengers amounted to U.S. $150 million in 1989. Even if underwriters increased premiums by fifty percent to cover increased litigation costs resulting from unlimited liability, airlines would only have to pay U.S. $37.5 million more than they are presently paying. In 1989, there were approximately one billion airline passengers. In order to pay for the increased insurance costs, passengers would have to expend an additional four cents per ticket purchased. Therefore, the allegation that unlimited liability would be more costly to airline industry than protracted litigation seems to be unfounded.

Assuming that unlimited liability is not prohibitively expensive for the airline industry, what then are the benefits of unlimited liability to the airline industry? After all, it would not be
economically advantageous to the airlines to advertise that passengers can now recover more money if they are killed in plane crashes.216 The benefit to the airline may not be obvious until the airline has had an accident. Then, the waiver of liability limits "will be of inestimable value."217 The additional premiums needed to pay for unlimited liability are small compared to the airlines' other essential costs and to the benefit incurred through the avoidance of lengthy litigation.218 In view of the availability of contracting out of Warsaw Convention liability limits, failure to do so is likely to bring "severe criticism" to an airline that then suffers an accident.219

One non-economic criticism of the Japanese contracting out of Warsaw Convention liability limits is that passengers on the same flight may be subject to different contractual terms because of operating agreements with other airlines.220 This risk is nothing new.221 Successive carriage to and from the United States by a carrier who is not governed by the Montreal Agreement already bears this risk.222 This criticism of the Japanese Initiative should be given minimal weight.

With all the discussion about the Japanese Initiative, and with pressure on air carriers to "adopt the Japanese solution," many airlines are busy obtaining insurance quotations.223 Can the insurance industry absorb and provide coverage for unlimited liability for air carriers? Currently, combined single-limit policies of up to U.S. $1.5 billion have been underwritten without difficulty.224 It is estimated that a U.S. $1 billion policy should adequately cover unlimited liability damages in even the worst crash scenario.225

It is difficult to estimate exactly how much insurance premiums will increase because of unlimited liability.226 But for major airlines with exposure to high-value societies, it is probable that the increase in death or injury liability premiums would be no

216 Martin & French, supra note 173, at 44.
217 Id.
218 Id. (referring to the amount and length of litigation required to prove willful misconduct).
219 Id.
220 Id.
221 Id.
222 Id.
223 Id.
224 Id.
225 Id.
greater than five to seven percent. Cost will not be prohibitive for most air carriers since insurance costs are less than one percent of operating costs. Since the underwriting market seems to be prepared to share the risk of unlimited liability in order to decrease the costs of litigation, air carriers should seriously consider contracting out of the Warsaw Convention and providing unlimited liability for their passengers.

V. CONCLUSION

The Warsaw Convention has not achieved its original goal of providing industry-wide uniform liability for death or personal injury caused by airline accidents. Several amendments to the Warsaw Convention have increased the liability limits from a low of U.S. $8300 to a high of U.S. $75,000. Even with increases in the Warsaw Convention liability limits, there is still concern that the limits have not kept up with the rising costs of inflation and therefore do not adequately compensate the victims of an air accident. Moreover, the U.S. $75,000 liability limit applies only to air carriers that have signed the Montreal Agreement, and then only to international flights that include the United States as the point of origin, point of destination, or an agreed-upon stopping point.

Even with the failure of the U.S. air carriers to increase liability limits, commentators predict that the trend toward increasing liability limits will continue. It is also predicted that the Japanese unlimited liability plan will contribute to confusion among airline passengers. Code-shared flights and successive carriage flights with through-ticketing may contribute to passenger expectations that the liability limits of the carrier issuing the ticket will extend throughout the trip regardless of destination. Ross Marland, legal officer for British Aviation Insurance Group, predicts that "courts are likely to assume that no-limit cover extends through all sectors." Second, carriers will

227 Id. High-value societies include the United States, Japan, and Europe. Id.
228 Id. Of the one percent cost for insurance, only one-half of that is for personal liability insurance. Id.
229 Rice, Business and the Law, supra note 74, at 16.
230 See Shapiro, supra note 61, at 3.
231 Leich, supra note 64, at 414.
233 Martin & French, supra note 173, at 44.
234 Id.
235 Id.
236 Id.
inevitably be “saddled with unlimited liability . . . because of the legal difficulties of arguing otherwise.”\textsuperscript{27} This possibility raises the expectation that many airlines will opt for unlimited liability.\textsuperscript{28}

The Japanese Initiative seems to be the solution to the recovery problems associated with the Warsaw Convention. Since one of the main criticisms of the Warsaw Convention is that its liability limits do not keep up with the rising costs of inflation, the no-liability option of the Japanese Initiative seems to be the perfect solution to the criticism. Since the insurance industry appears to be prepared to absorb the increased cost of an unlimited liability system for air carriers, why, then, have no air carriers followed the lead that the Japanese airlines have started?

Many of the world’s air carriers are waiting to see what the United States will do before they take their own action. As a result, the Japanese Initiative has stalled. Despite the fact that no air carrier has followed the Japanese Initiative, it still remains a viable alternative to the strict liability limits of the Warsaw Convention. Since Warsaw Convention liability limits have not kept up with the rising cost of inflation and do not serve fully to compensate the victims of an air carrier crash, the fault-based, no-limit liability of the Japanese Initiative is an attractive solution to the problem of how much a victim of an air carrier crash should be compensated.

\textsuperscript{27} Id.
\textsuperscript{28} Id.