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THE FATAL PASSAGE: EXEMPLARY RELIEF
AND THE HUMAN INSTINCT FOR
SELF-PRESERVATION*

Edward Charles De Vivo**

I. INTRODUCTION

1600:02 That don't seem right does it?
1600:05 Ah, that's not right
1600:07 (Well) —
1600:09 Yes it is, there's eighty
1600:10 Naw, I don't think that's right
1600:19 Ah, Maybe it is
1600:21 Hundred and twenty
1600:23 I don't know
1600:31 Vee one
1600:33 Easy
1600:37 Vee two
1600:39 (Sound of stickshaker starts and continues to impact) [indicating the onset
of a stall]
1600:45 Forward, forward
1600:47 Easy
1600:48 We only want five hundred
1600:50 Come on, forward
1600:53 Forward
1600:55 Just barely climb
1600:59 (Stalling) we're (falling)
1601:00 Larry, we're going down, Larry
1601:01 I know it
1601:01 (Sound of impact)\(^1\)

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\(^1\) This conversation is taken from the cockpit voice recorder of the fatal flight of
Air Florida Palm 90 which crashed into the Potomac River on January 13, 1982.
National Transportation Safety Board, Aircraft Accident Report; Air Florida, Inc;
Boeing 737-222 N 62 AF, January 13, 1982, at Appendix "F" [hereinafter cited as
THIS CONVERSATION, which spanned a total of fifty-nine seconds, ended in the death of the speakers, a flight crew, and the more than sixty passengers aboard their fatal flight. With the accident occurring in an atmosphere of freezing conditions and near-blizzard snowfall, the question lingering long after the news media forgot about the incident was, "Why did Air Florida flight number 90 take off from National Airport in Washington, D.C., if the weather was so bad?"

The fatal crash of "Palm 90" into the icy Potomac River on January 13, 1982, is one of many recent mass aviation disasters which leave legal scholars to ponder the propriety of punishment through the award of damages in civil law. In the aftermath of the Washington, D.C. incident, a host of other tragic mass aviation disasters have occurred. The eleven worst disasters in aviation history all occurred within eleven years, between March 1974 and August 1985. Three of these took place within four years of one another and resulted in the loss of 1,122 lives. With the advent of larger, faster jet transport aircraft which removed aviation from its adolescent stage, mass aviation disasters have become more costly in human life, placing the question of exemplary damages in sharper, more dramatic focus.

Proponents of punitive damages in mass aviation disasters philosophically envision the use of punishment as a necessary means to deter future tragedy in modern-day jet transportation. Deterrence with its related societal benefit has been the mainstay of the rationale for punishment in the criminal law sector since the early develop-

Washington, D.C. Accident Report]. The dialogue was between Captain Larry Wheaton and First Officer Roger Pettit. Id.

See infra notes 328-39 and accompanying text for a detailed factual analysis of the events leading up to the crash of Palm 90.

Id.

N.Y. Times, Aug. 13, 1985, at A6, col. 3-4. Beginning with the March 3, 1974 Turkish Airlines DC-10 crash over Ermenonville, France, 3,457 lives have been lost in the 11 worst aviation disasters through August 12, 1985, when the worst single aircraft disaster occurred, involving a Japan Air Lines aircraft which crashed into a mountain in Tokyo, killing 524 people. Id.

Id.
ment of English law. However, the importation of this rationale to American jurisprudence, especially in the civil law context, is unbecoming in civil aviation which historically uses as a backdrop a model that adjusts conflicting interests among litigants who are not intent upon seeking punishment of each other.

The proposition that punishment is not reserved solely

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5 Originally the English judicial system was reluctant to review a jury's determination of damages because the English jury was composed of local citizens who were familiar with the dispute at hand. 1 T. SEDGWICK, MEASURE OF DAMAGES § 349, at 688 (9th ed. 1912); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 6, at 25 (1935). Thus, the courts deferred to the province of the jury and exerted no judicial control over the quantum and rationale of a jury's damage award. 1 T. SEDGWICK, supra, at 688.

However, at the beginning of the nineteenth century, the personal knowledge of the local jurist no longer enjoyed the attention it previously received because standards for measuring damages began to develop in the English judicial system. Id. at 688-89. These standards for measuring damages in personal injury cases permitted recovery only for pecuniary loss. Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 518 (1957). However, in Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763), the court justified an excessive jury award in a tort action. The decision became the benchmark of the law on punitive damages. 1 T. SEDGWICK, supra, at 689-90.

The Huckle litigation arose out of the struggle of King George the Third to suppress a journal, "The North Briton," which was published by the radical John Wilkes. King George issued a warrant to arrest the printer but named no one on the warrant itself. The plaintiff was imprisoned for six hours under the general warrant. The court permitted the jury to award exemplary damages against Money, the arresting officer. When the defendant requested a new trial, Lord Camden refused and articulated his justification for the exemplary award: "I think they [the jury] have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." Huckle v. Money, 2 Wils K.B. at 206-07, 95 Eng. Rep. at 768-69. The underlying rationale of this decision which took root in the United States was that exemplary damages express a particular community's or society's disapproval of the conduct at issue. Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1160 (1966) [hereinafter cited as Note, Punitive Damages]. Hence, despite the expected influx of damage awards which contemplated recovery of intangible injuries such as pain and suffering, see, e.g., Kennon v. Gilmer, 131 U.S. 22, 26 (1889), the primary justifications given by the American judicial system for permitting excessive jury awards were punishment and deterrence. See, e.g., Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801, 197 P.2d 713, 720 (1948); Note, Punitive Damages, supra, at 1160-61.

6 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES L. & PRAC. § 2.02, at 4 (1984). The conflict which immediately arose with respect to the doctrine of punitive damages was whether punitive recovery would have a debilitating effect on civil law's purpose, adequate compensation of the victim. By injecting an element of
for the criminal justice system can be subjected to a two-tier analysis vis-a-vis the mass aviation disaster. The first tier focuses on the appellation “pilot error” to prove that what occurred in the cockpit in the final moments before the loss of life was deliberate conduct guided by evil motive, wanton disregard or recklessness. When this fails, the punitive damage advocate moves to the second tier and attempts to place the punishable blame upon the corporate air carrier which employed the flight crew. Generally, the latter theory is couched in terms of deficiency in training. This more easily lends itself to deliberate, conscious decision-making than does the split-second spontaneous reaction of a flight crew, whose destruction is as imminent as that of their passengers.

Whatever propriety attaches to either prong of this analysis, the recorded history of mass aviation disasters involving operational fault demonstrates that punish-

punishment into the system which was designed purely to compensate, the civil law system took on a somewhat schizophrenic complexion. Id. at 4.

Prosser, in recognizing this problem, stated that in an “anomalous respect...the ideas underlying the criminal law have invaded the field of torts.” W. Prosser, HANDBOOK OF THE LAW OF TORTS § 2, at 9 (4th Ed. 1971). This line of reasoning is supported by the argument that if the conduct under scrutiny does not deserve criminal punishment, the matter should be left to resolution under the civil law sector. In that area, the focus is appropriately on “the adjustment of conflicting interests” of those who are intent upon reaching a desirable result, rather than on the infliction of punishment by either party upon the other. W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW § 3, at 11 (1972).

7 See generally Mohler, Introduction, in PILOT ERROR: THE HUMAN FACTORS ix-x (R. Hurst and L. Hurst ed. 1982) [hereinafter cited as PILOT ERROR]. The “unrecorded” history of mass aviation disasters and the wrongful death litigation which ensues therefrom arguably lends more credence to the concept of punishment of the air carrier because those instances where the carrier is in the most adverse litigative posture are settled forthright without reported judicial decisions on the issue of punitive damages.

8 The scope of this article is limited to operational incidents whereby the conduct under scrutiny vis-a-vis punitive damages generally was in the form of spontaneous response, enveloped in an emergency scenario. The analysis throughout this article does, however, consider the conduct which preceded the split-second ultimate decisions which either caused or contributed to a particular mass aviation disaster. That “preceding” conduct may be in the form of corporate planning or pilot training which, if found to be deficient, could be viewed as the long-term cause of the crash.

A further, intentional limitation on the parameters of this analysis is that it does not discuss operational incidents in the general context of transportation. Rather,
ment beyond compensable damages seldom is assessed against the civilian aircraft operator. The same is true whether the liability theory selected is international treaty law,⁹ federal statutory law,¹⁰ or individual state law on punitive damages.¹¹

If recorded history accurately portrays the role of exemplary damages in operational aviation incidents, then the question becomes whether there is one prevalent legal doctrine which serves as the cornerstone to this area of law. Arguably there is no such commonly accepted doctrine. In the most recent aviation cases, a principle known as "depecage"¹² has shifted some of the emphasis away from the cockpit scenario to enable closer scrutiny of corporate conduct. In general, however, application of legal doctrine has become displaced by a less tangible standard. When the conduct under microscopic view concerns the final moments of a flight crew's lives, the fact finder is caught in a dualistic struggle shared by even the most seemingly reckless of pilots.¹³ Mankind entertains a basic

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⁹ See infra notes 38-109 and accompanying text.
¹⁰ See infra notes 110-210 and accompanying text.
¹¹ See infra notes 211-437 and accompanying text.
¹² See Reese, Depecage: A Common Phenomenon in Choice of Law, 73 COLUM. L. REV. 58 (1973). "This process of applying the rules of different states to determine different issues has the forbidding name of depecage, although it is sometimes more colloquially referred to as 'picking-and-choosing'." Id.

As explained in detail, infra at Part V, the proper application of the principle of depecage has given rise to the concept of "extraterritoriality" in assessing corporate behavior vis-a-vis liability for punitive damages.

¹³ E. BECKER, THE DENIAL OF DEATH 17 (1973). "And so we can understand what seems like an impossible paradox: the ever-present fear of death in the normal biological functioning of our instinct of self-preservation, as well as our utter obliviousness to this fear in our conscious life." Id. See generally E. BECKER, ES-
instinct for self-preservation\textsuperscript{14} and, but for a suicidal mission, this makes for a shift in emphasis from legal to ontological principles when one must decide if the flight crew consciously delivered the loss of their passengers.

Hence, this article should be viewed as an invitation to the reader to decide for himself whether and to what extent it is conceivable for a pilot to consciously risk his own ultimate demise and thereby cause all those aboard to perish with him. At least one court has held in so many words that such an occurrence is not conceivable.\textsuperscript{15} Pilot error is a multifactorial phenomenon which is imperfectly understood and, as such, the attribution of legal responsibility between the criminal and civil sectors must be very carefully delineated.\textsuperscript{16}

In the aftermath of a mass disaster, a vast amount of energy is expended in the teardown of the wreckage, syntheses of cockpit voice recordings and flight data recorders, and computerized simulations of the flight scenario which led up to the crash. However, the presence and magnitude of the psychological element is not as readily presented for proper analysis. One commentator has explained the problem this way:

In a crash investigation, for example, the acceleration to which the cockpit was subjected might have been recorded and enquiries can reveal the pilot's sleep patterns for the

\textsuperscript{14} Eastern Air Lines v. Union Trust Co., 221 F.2d 62, 72 (D.C. Cir. 1955). See infra notes 235-437 and accompanying text.


\textsuperscript{16} See British Air Navigation Order, Article 20, cited and discussed in Hill & Pile, Some Legal Implications of Pilot Error, The Log (Journal of the British Airline Pilots Association) 44:9 (June 1983). This delineation is clearer in the English legal system which perhaps could serve as a model for American jurisprudence. For example, a pilot commits an offense under English law if he flies an aircraft knowing that he is too fatigued to do so. Id.
previous few days. But establishing the importance of the real relationship between the crew members as a factor in the accident, or the degree to which the captain was worrying about his child's health . . . may well be virtually impossible.\textsuperscript{17}

Even when a tangible legal standard such as that fostered by depecage emerges in the assessment of corporate conduct, the complexity of the man, as opposed to the pilot, too often clouds the shaping of the corporate carrier's safety philosophy. A large proportion of the professional pilot's training is devoted to preparing him for situations which will hopefully never be encountered. But in the process of corporate self-reflection, when the carrier must ask itself whether it has done enough to safeguard against real emergencies, how does it assess whether it has sufficiently trained the correct spontaneous response? How far must the carrier go to "over train"\textsuperscript{18} its pilots so that response time is as automatic as possible when simulation of disaster becomes reality? Moreover, is it the corporation's responsibility to train against complacency in its most senior and experienced pilots?\textsuperscript{19}

Whether scrutiny focuses upon the cockpit scenario or corporate decision-making, the intricacies of the human mind should reveal to the fact finder, investigative and judicial alike, that the logic behind punishment may be foreign to the mass aviation disaster. Each individual's finitude is housed within an infinitive awareness of his own mortality and this dualistic tension is the rub. It has been said that the difference between a pilot and his technologically intricate aircraft is that only the former possesses the sensibilities to care about getting himself and his passengers home safely.\textsuperscript{20}

Hence, if the reader does not endorse the thesis put

\textsuperscript{17} PILOT ERROR, supra note 7, at 15-16.

\textsuperscript{18} Id. at 11-14.

\textsuperscript{19} Id. "Many [experienced] pilots have begun what proved to be a final flight secure in the knowledge that "it can't happen to me"." Id. at 13. See also E. Becker, supra note 13, at 120.

\textsuperscript{20} PILOT ERROR, supra note 7, at 13-16.
forth herein, then, at the very least, the appellation "pilot error" should be assessed in a constructive manner. Liability exposure of the corporate air carrier cannot be evaluated dispassionately because the errors committed by the human system are not provoked by a breakdown that is as predictable and identifiable as those errors committed by the aircraft system. When the immediacy of death enters into the pilot error analysis, the punitive damage advocate must satisfy himself that two human beings in a cockpit were less interested in their own survival than they were interested in the survival of their passengers. Thus, it is the instinct for survival that creates tension when attempting to apply exemplary relief against the carrier to civil aviation cases.

II. THE BACKDROP

At least five basic functions have been identified through which the American criminal law system utilizes punishment to fulfill the intended purpose. One is a retributive function which expresses society's disapproval of the criminal behavior. The second and third functions involve deterrence, focusing on the effect of the punishment on the particular criminal as well as other members of society who might engage in similar behavior. The fourth and fifth functions are more action-oriented than the first three because they focus on removing the criminal from society rather than trying to influence him by leaving him in society. These latter two functions of punishment work to insulate society from the dangerous individual by incarcerating him while he is simultaneously rehabilitated for the dual benefit of himself and the society from which he was extracted.

21 Note, Punitive Damages, supra note 5, at 1161.
23 Id.
24 Id.
25 Id.
When the functions performed by criminal punishment are viewed under the guise of civil law, however, the effects to be gained from a utilitarian standpoint are minimized. Society at large has less to gain from punishing a tortfeasor than it does from punishing a criminal because the propriety of punishing the wrongdoer must be assessed according to very indefinite criteria. This indefiniteness places the functions to be served by punishment and deterrence on a sliding scale and makes the assimilation of purpose between the criminal and civil systems difficult, if not impossible. Among those jurisdictions allowing punitive damages there is wide diversification as to what constitutes tortious conduct for which exemplary damages should be awarded.\textsuperscript{26} The societal need to discourage the malicious tortfeasor is greater than the need to punish one whose conduct was grossly negligent. Yet both forms of behavior may be equally punishable, depending upon the particular jurisdiction's punitive damages law. The application of those penal sanctions reserved for criminal conduct, however, would be distorted if it were extended to the grossly negligent tortfeasor.

The American tort system focuses upon that jurisdiction which has the most legitimate interest in assessing punitive damages; but once assessed, that system yields little more than a societal satisfaction that the tortfeasor has been punished.\textsuperscript{27} It is questionable whether this result can be looked upon as a benefit to society in the first instance since the satisfaction derived by that society imposing punitive damages possesses an ironic twist of vengeance well beyond even the functions which punishment serves in the criminal law system.\textsuperscript{28} The real benefit, instead, is derived by the individual plaintiff, who receives a windfall profit beyond the just compensation which the tort system is designed to foster. In this sense, there is no

\textsuperscript{26} See infra notes 211-437 and accompanying text.
\textsuperscript{27} See infra notes 229-34 and accompanying text.
\textsuperscript{28} See supra notes 21-25 and accompanying text.
real retributive function in the civil law sector vis-a-vis society at large. In a civil law context, the by-product of the law of punitive damages is a fluctuating degree of culpability that is not statutorily defined on a state-by-state basis. The misdirected result is a windfall profit to the plaintiff. These by-products, however, do not fulfill the original purpose behind the assessment of exemplary damages.

In the context of the operational aviation case, the original design of the law of exemplary damages becomes even more clouded for three reasons. First, there is a sliding scale ranging from gross negligence through recklessness to malicious behavior against which a court has to apply the facts of the case. There is no statute, as there is in criminal law, setting forth each degree of behavior and its relation to the degree of crime that has been committed. The civil law leaves the court with a gray area to determine from the flight scenario whether the aircraft operator was reckless or perhaps possessed some evil motive in his actions leading up to an airline disaster.

Second, the assessment of punitive damages in the operational aviation case does not act as a deterrent. In

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29 As stated, an operational aviation case involves a sequence of events during the actual operation of a commercial passenger flight. This article examines exemplary damages solely in the context of the air carrier against whom the damages are considered. It does not delve into the liability of the aircraft manufacturer or other entities involved in an operational aviation case, except to the extent that the aircraft manufacturer is involved in the flight crew's ability to respond immediately before a crash. See infra notes 330-32, 392 and accompanying text.

30 See, e.g., N.Y. PENAL LAW § 125.27 (McKinney 1975). In New York, for example, there are various gradations within the crime of homicide, each gradation with a definitive penalty attached to it. First degree murder is committed only when (1) the victim is a police officer killed in the course of performing his official duties (where the wrongdoer knew or should have known he was an officer), (2) the victim is an employee of a correctional facility killed in the course of duty, or (3) at the time of the commission of the crime, the defendant was in custody or had escaped from custody upon a life sentence or an indeterminate term the minimum of which is fifteen years and the maximum of which is life. Id.

Second degree murder can be intentional, highly reckless or done in furtherance of a felony. N.Y. PENAL LAW § 125.15 (McKinney 1975). A similar delineation applies to first and second degree manslaughter. N.Y. PENAL LAW §§ 125.10, 125.15 (McKinney 1975).
those instances where a major disaster is involved, the crew members have lost their lives too. The only means of venting the deterrent factor is to punish the crew's employer for improper and inadequate training. As demonstrated herein, the principle of "depecage" has become a significant deterrent as applied to the most recent airline disasters, shifting the emphasis away from the cockpit scenario and focusing instead on the site of the origin of the conduct. The concept of "depecage" has been given great weight by the judiciary in its recent attempts to use the sliding scale of various degrees of behavior to determine whether to penalize the air carrier for the conduct of its crew.

The third reason that the design of civil punishment is somewhat thwarted in the operational aviation case involves the relationship between the crew and its passengers. The legal representatives of passengers will argue that the passengers entrusted their safety to the flight crew. Instead of rebutting this argument, the airline will pursue it to the point of diminishing return for its advocate. The airline will pose the question that if the flight crew knew what was in store for themselves as well as their passengers, would they have taken all lives into their hands and engaged in reckless or other punishable behavior? Short of deeming such a flight scenario a suicide mission, what justification exists for punishing the commercial air carrier? Though the commercial air carrier is admittedly wrong and accountable to the injured victim, it is not deserving of a penal sanction especially when the split-second decisions before impact cannot counter the fatal demise of the flight. What room would there be for recklessness or malicious thought when two pilots cannot alter the sequence of events which delivers their own

31 See supra note 12 and infra notes 235-437 and accompanying text. In relation to the concept of depecage, the "extraterritorial" factor, infra note 236, is a significant development which has effectively shifted the focus of the punitive damage analysis toward the initiation point of the wrong and away from what actually took place in the cockpit.

32 See infra notes 235-437 and accompanying text.
death as well as that of the passengers? The judicial progression, by treaty law, federal statute and state statutory provisions, is an exhibit of those legal tensions which inherently reside in this area of the law. Beyond those tensions, however, there exists an area for consideration which evades legal analysis yet strongly dictates the role of exemplary damages in civil aviation.

III. TREATY LAW: THE WARSAW CONVENTION

In 1925, a group of representatives from approximately twenty-three countries met in Paris to discuss the concept of limited liability for commercial airlines in what was then a fledgling aviation industry. As the Paris Conference adjourned and preparation for the Warsaw Conference was contemplated, the general sentiment toward an innovative design for establishing a ceiling on the amount of damages recoverable for wrongful death, personal injury or the loss of goods or personal effects was expressed most descriptively by the Reporter for the Preparatory Committee: "[W]hat the engineers are doing for machines, we must do for the law."

Nearly four years elapsed before the second conference representatives reconvened and further canvassed the issue of limited liability. Finally, after many hours of discussion, on October 12, 1929, an international treaty, now commonly known as the Warsaw Convention, was drafted and signed by twenty-three nations to provide uniformity to the terms and conditions of international transportation by air.

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33 See infra notes 36-109 and accompanying text.
34 See infra notes 110-210 and accompanying text.
35 See infra notes 211-437 and accompanying text.
37 Id. See also Lowenfeld and Mendelsohn, supra note 36, at 498-502.
The central underpinning of the Warsaw Convention, both as originally formulated and to date, is Article 22, which places a maximum ceiling on the damages recoverable from an air carrier when a passenger has been injured or killed in international transportation.\textsuperscript{39} The internationally established rule states that subscribing air carriers will be liable for damage sustained by a passenger in the course of international transportation up to an amount not exceeding 125,000 Poincaré francs.\textsuperscript{40} Under article 22(4) of the treaty, the franc is defined as a gold coin consisting of 65.5 milligrams of gold.\textsuperscript{41} The United States equivalent at that time was $8,300 and this became the monetary limitation as applied in the context of Warsaw Convention cases brought in the United States.\textsuperscript{42}

\textsuperscript{39} Lowenfeld and Mendelsohn, supra note 36, at 498.

\textsuperscript{40} Warsaw Convention, supra note 38, art. 22. Article 22 provides:

(1) 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.

\textsuperscript{41} Lowenfeld and Mendelsohn, supra note 36, at 499.
It was not long before the $8,300 limit proved to be inadequate and unable to keep pace with the socio-economic changes experienced by the United States. Through periodic episodes of reconsideration of the monetary limitation, an Intercarrier Agreement finally tended the Paris and Warsaw Conferences merely as an observer. It was not one of the original signatory nations when the Warsaw Convention was adopted on October 12, 1929 but became a signatory in 1934 pursuant to art. 38:

1. This convention shall, after it has come into force, remain open for adherence by any state.
2. The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of High Contracting Parties thereof.
3. The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Warsaw Convention, supra note 38, art. 38.

See 2 ICAO INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW (1955) (Doc. No. 7686-LC/140) [hereinafter cited as HAGUE PROCEEDINGS]. Both historical and economic measures caused the Convention's monetary limitations to be periodically reconsidered. In September, 1955, a diplomatic conference was convened at the Hague to consider the status of the Warsaw Convention. Id. The Hague Conference was the culmination of several years of extensive research devoted to revising the Convention. Id. Immediately after World War II the issue of revision had been referred to the Comite International Technique d'Experts Juridiques Aeriens (CITEJA) by the Provisional International Civil Aviation Organization. Because the CITEJA was dissolved in 1947, the Legal Organization (ICAO) continued this study. As a result of discussions in the ICAO Legal Committee, several draft conventions were formulated during the years 1948 through 1951. Id. In January, 1952, a special subcommittee appointed by the ICAO Legal Committee drafted a completely new convention in Paris to replace the Warsaw Convention in its entirety. Id.

Prior to convening at the Hague, the ICAO Legal Committee gave serious consideration to utilizing the Paris draft as the new starting ground for rewriting and replacing the original Convention. Id. After extensive debate in the committee, however, it was determined that the more practical and expedient manner in which to proceed was to conform the existing Warsaw Convention to the contemplated revisions rather than to work from the 1952 Paris draft.

Therefore while recognizing the unquestionable value of the draft formulated at Paris by [the ICAO Legal Committee's] sub-committee and of the preparatory and exploratory work undertaken by its rapporteur, Major K.M. Beaumont, particularly inasmuch as the draft represented a systematic rearrangement, including drafting improvements, of the contents of the Warsaw Convention and also included fresh treatment of certain subjects, the Committee decided that the object of effecting only limited necessary amendments would be better achieved by taking as the bases of its discussions the Warsaw Convention itself rather than the Paris draft.

Id.

Having decided to work from the Warsaw Convention itself rather than the
emerged in 1966, whereby the carriers agreed to raise the
draft prepared in Paris in 1952, two major considerations became the focal point of the Hague Conference: (1) an increase in the monetary value of the liability limitation and (2) a modification of article 25 relating to the “wilful misconduct” exception. ICAO Legal Committee, Report on the Revision of the Warsaw Convention, in 2 Hague Proceedings, supra, at 93, 96-99. The proposal which emerged from the Hague Conference was to raise the liability limitation from $8,300 to $13,000. Id. at 76-81, 99-100. The United States had attempted to raise the limit to $25,000. ICAO Legal Committee, Minutes 9th Sess. 1953, at 162-163, 270 (ICAO Doc. No. 7450-LG/126)(1954). By compromise, it was agreed to double the originally established $8,300 ceiling and establish a new limitation of liability in the amount of $16,600. Id. at 270.

Although the United States endorsed the Hague Protocol, ten years elapsed before either the President of the United States or the Senate Foreign Relations Committee took a firm stand on ratification. Lowenfeld and Mendelsohn, supra note 36, at 515-16. The United States grappled with the concept of limited liability in death or injury cases even after it agreed to the accord reached at the Hague in 1955. The United States did not sign the Hague Protocol at the conference, demonstrating its equivocation despite its acknowledgement of the Protocol’s increase of the monetary ceiling on recoverable damages. It is unknown to what extent the tragedy over Medicine Bow Peak, Wyoming in October, 1955, killing members of the Mormon Tabernacle Choir, captured the minds and hearts of those who originally favored the United States’ adherence to the Hague Protocol. Id. Moreover, the doubling of the $8,300 ceiling established by the original Warsaw Convention did not mollify the opponents of the Warsaw Convention.

In June, 1961, the Chairman of the Senate Foreign Relations Committee wrote to the new Secretary of State regarding the hiatus over Hague ratification: [The Hague] Protocol was referred to the Committee on Foreign Relations on July, 24, 1959, and as of this date, the Executive Branch has shown little interest in it. I should like to learn, therefore, whether the Department of State would want the Committee on Foreign Relations to act on the Protocol during this session of the Congress. If not, I would be interested in learning the reasons why the Department of State does not desire Committee action on the Protocol at this time.

Letter from Senator J.W. Fulbright to Secretary of State Rusk (June 12, 1961), referred to in Lowenfeld and Mendelsohn, supra note 36, at 516 n.73.

The receipt of the letter by the Department of State prompted a new look at the Hague Protocol. Consequently, the Kennedy administration introduced domestic legislation under which an air carrier would be compelled to insure passengers at a higher monetary level. The Senate Foreign Relations Committee thereafter left no doubt as to where it stood, stating that the Warsaw Convention liability limitation was an “extremely inadequate amount of compensation” and further that “even the $16,600 limitation . . . is highly inadequate by U.S. standards.” Lowenfeld and Mendelsohn, supra note 36, at 545-46 (citing Senate Comm. On Foreign Relations, Hague Protocol To Warsaw Convention, S. Exec. Rep. No. 3, 89th Cong., 1st Sess. 9-10 (1966)). The Senate Committee called for complementary insurance legislation for protection of up to $76,000. Id. at 6-7.

After lengthy Congressional debate on the insurance legislation, it became evident that there was little chance of its enactment. Automatic recovery through compulsory insurance projected serious concern over the potential for aircraft
liability limitation to $75,000. This interim proposal became known as the Montreal Agreement and was predicated upon further reconsiderations of the monetary limitation as would become necessary to accommodate future economic alterations.

sabotage and became the gravamen of the controversy over the Hague Protocol in 1964 at hearings before a special committee composed of representatives of the State Department, the Justice Department, the CAB and the FAA.

The argument was that an automatic recovery of 50,000 dollars was 'an invitation to sabotage,' not only in less developed countries where this would be a 'king's ransom,' but even in the United States. Unlike trip insurance or large amounts of life insurance purchased shortly before a flight, there could be no record that could lead to identification of a saboteur.

Lowenfeld and Mendelsohn, supra note 36, at 538-39 n.157.

In fact, the issue had gained such momentum that neither the Senate nor the House of Representatives would call for a hearing on the Hague Protocol. Id. at 544-45. As opposition mounted, so did the United States' unhappiness with the unrealistic monetary limitation. In an atmosphere of increasing dissatisfaction, the Executive Branch of the United States government denounced the Warsaw Convention on November 15, 1965, to become effective six months from that date, on May 15, 1966. See Department of State Press Release No. 268, 53 DEP'T ST. BULL. 923-24 (1965).

A chasm thus emerged between the United States and the rest of the world over the limitation on liability in international air transportation accidents. On the same date that the formal notice of denunciation was deposited by the United States, the Department of State issued a press release indicating that the United States would continue its adherence to the Warsaw Convention provided that an international agreement limiting liability to approximately $100,000 could be reached. Id. The Department of State further stipulated that it would continue to adhere to the Warsaw Convention pending the adoption of such an international agreement, provided there was a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger. Id. at 924.


See Lowenfeld and Mendelsohn, supra note 36. Under the impetus of the United States' denunciation of the Warsaw Convention, the ICAO held a conference in Montreal in February, 1966 in an effort to fulfill the United States Department of State's proviso. Id. at 552. The Department of State released the proviso on November 15, 1965. Id. at 551. While the Montreal conference proved inconclusive and the May 15, 1966 denunciation date for the United States was drawing closer, domestic and international air carriers reconsidered interim measures which they had, on previous occasions, found to be unacceptable. As a result, the carriers agreed to a monetary liability limitation in the amount of $75,000, without regard to fault on the part of the carrier. See Montreal Agreement, supra note
In order to counterbalance the ceiling on recoverable damages, the Warsaw Convention shifts the burden of proof onto the carrier. The carrier is presumed liable for the damage alleged to have occurred unless the carrier can prove that it either has taken all necessary measures to avoid the damages or that it was impossible to do so.\textsuperscript{46} While article 20 provides a measure whereby the carriers can establish a defense against liability on the basis of "all necessary measures," article 25 of the Warsaw Convention offers plaintiffs a countermeasure whereby they, too, can lift their wrongful death or personal injury case out of the Warsaw Convention,\textsuperscript{47} but for very different reasons than those contemplated by article 20. Under article 25, a plaintiff has an opportunity to disqualify the application of the $75,000 liability limitation by proving that the carrier was guilty of "wilful misconduct."\textsuperscript{48}

\textsuperscript{44} The United States government, as a result of this interim resolution, withdrew its denunciation of the Warsaw Convention on May 13, and gave its approval to the Montreal Agreement of 1966, \textit{Department of State Press Release No. 111, May 14, 1966}, 54 DEP'T ST. BULL. 956-57 (1966) which became effective on May 15, 1966. See Montreal Agreement, \textit{supra} note 44.

\textsuperscript{46} Warsaw Convention, \textit{supra} note 38, art. 20. Article 20 provides:

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

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

\textit{Id.}

\textsuperscript{47} For a discussion of plaintiffs who seek to "lift out" their $75,000 claims and then prosecute their wilful misconduct cause of action afterward, see \textit{In re Korean Air Lines Disaster of Sept. 1, 1983}, 19 Av. Cas. (CCH) 17,584, 17,595-96.

\textsuperscript{48} Warsaw Convention, \textit{supra} note 38, art. 25. Article 25 provides as follows:

(1) 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 to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

\textit{Id.}
The wilful misconduct exception to the liability limitation under article 25 of the Warsaw Convention has been a cause of concern and extensive debate since its promulgation. According to the original draft of the treaty written in French, the carrier cannot invoke the liability limitation provisions if the damage was caused by "dol" or by such default on the carrier's part so as to be considered the equivalent to "dol." It has become established that the nearest equivalent to the term "dol" in the English language is "wilful misconduct." However, even this translation does not seem to coincide with the original intent of the treaty drafters who selected the word "dol." While the English translation of the Convention certainly serves a useful purpose, it must be abandoned where its meaning conflicts with the meaning intended by the original French text. A vigorous debate arose among the framers of the Convention during the drafting of article 25 with respect to what conduct on the part of the carrier should permit circumvention of the limitation of liability provided by article 22. The merits of the French terms "dol" and "faute lourde" were considered and debated by the delegates. The German Delegation proposes to make the carrier liable at any time that he has committed a serious error. If you introduce in an international convention an expression so
Still, the conflict which has emerged over the years in those Warsaw Convention cases where "wilful misconduct" is alleged against a carrier has not focused so much on the question of translation as it has on the case-by-case factual issue of what constitutes wilful misconduct.\textsuperscript{51}

The United States has been a party to the Warsaw Convention for more than fifty years. Although plaintiffs in hundreds of personal injury and death cases have attempted to circumvent the Convention's limitation of liability by attempting to prove "wilful misconduct," only four have been successful.\textsuperscript{52} In \textit{American Airlines v. Ulen},\textsuperscript{53} the United States Circuit Court of Appeals for the District of Columbia affirmed the district court's ruling that the carrier's charter operation of a flight from Washington, D.C. to Mexico City flew at an improper altitude, causing the plane to crash into Glade Mountain in southwest Virginia. The evidence established wilful misconduct on the part of the flight crew because the plan called for flight at an altitude of 4,000 feet within one and one half miles of a mountain 4,080 feet high.\textsuperscript{54} With a finding of wilful mis-

\textsuperscript{51} See, \textit{e.g.}, article 25, Warsaw Convention, \textsuperscript{ supra} note 38, which, among other provisions of the Warsaw Convention, invokes domestic (state) law to resolve particular issues arising out of the treaty language. In the case of article 25, the issue of the "fault" which will be deemed the equivalent of "dol" is left to domestic law. \textit{Id.}


\textsuperscript{53} 186 F.2d 529 (D.C. Cir. 1949).

\textsuperscript{54} \textit{Id.} at 534.
conduct the Warsaw Convention limitation was deemed inapplicable.\textsuperscript{55} The court based its finding on a determination that American Airlines deliberately and intentionally formulated a flight plan which directed its aircraft to fly into a mountain at the very center of a chosen airway.\textsuperscript{56}

In \textit{Koninklijke Luchtvaart Mattschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller},\textsuperscript{57} Circuit Judge Burger, writing for the United States Circuit Court of Appeals for the District of Columbia, affirmed the district court's decision that there was sufficient evidence to find KLM and its ground agent guilty of wilful misconduct. The aircraft crashed into the tidewaters of the Shannon River approximately one minute after its takeoff from the airport in Shannon, Ireland. KLM's failure to properly instruct passengers of the location of life vests and their use; failure to broadcast an emergency message; failure to provide for the safety of the plaintiff after his peril was known; and the failure of KLM's ground agent to monitor radio messages and initiate rescue procedures precluded the invocation of the Warsaw liability limitation.\textsuperscript{58}

In \textit{LeRoy v. Sabena Belgian World Airlines},\textsuperscript{59} a jury finding of wilful misconduct rested upon deductions from indirect evidence concerning the flight crew's missed approach and crash into a mountain northeast of the city of Rome. The crew alleged that it had obtained a radio compass bearing on a navigational beacon which, in fact, was more than thirty miles from the aircraft's actual position.\textsuperscript{60} Expert testimony at trial established that the absolute maximum transmission range of the beacon was only twenty-two miles.\textsuperscript{61} Since the inferences which had been drawn to find Sabena guilty of wilful misconduct were reasonable, the United States Court of Appeals for the Second

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.}


\textsuperscript{58} \textit{Tuller}, 292 F.2d at 779-82.

\textsuperscript{59} 344 F.2d 266 (2d Cir.), \textit{cert. denied}, 382 U.S. 878 (1965).

\textsuperscript{60} \textit{LeRoy}, 344 F.2d at 271.

\textsuperscript{61} \textit{Id.}
Circuit held that the jury’s finding must not be overturned.62

In the vast majority of article 25 cases, however, the carrier has prevailed on the issue of wilful misconduct.63 In Berner v. British Commonwealth Pacific Airlines, Ltd.,64 the district court granted the plaintiffs’ motion for a directed verdict, thereby finding that the pilot’s failure to follow instructions to maintain a certain altitude over a radio signal station constituted wilful misconduct. The court reasoned that even though the pilot did not intend the fatal crash near Half Moon Bay, California, his conduct constituted recklessness and thus was sufficient to invoke the “wilful misconduct” exception to the treaty liability limitations.65 On appeal, the United States Court of Appeals for the Second Circuit reversed the directed verdict for plaintiffs and held that there was evidence from which the jury properly could have inferred that the pilot thought he was bringing the aircraft down at the proper location.66 The appellate court stated that once the case went to the jury, its verdict should not have been upset if reasonable men could find in defendant’s favor, as they could have done in Berner.67

62 Id. at 268-75.
66 Berner, 346 F.2d at 537-38.
67 Id. at 538.
In *Grey v. American Airlines, Inc.*,\(^6\) recovery was sought exclusive of the Warsaw limitation when an American Airlines flight crashed near Dallas, Texas on November 29, 1949. At trial, evidence showed that one of the engines backfired and forced the aircraft to seek clearance to land in Dallas.\(^6\) Disregarding a direct order from the Captain, the First Officer failed to execute a missed approach in the mistaken, but good faith, belief that the Captain's order would lead to an immediate crash.\(^7\) The jury found that miscommunication in the cockpit occurred between the time the aircraft crossed the boundary of the airport at an altitude of 200 feet and the time it crashed on top of the hangar of the Dallas Aviation School. The jury further found that the disaster was due to wilful misconduct.\(^7\)

The trial court, however, granted American Airlines' motion to set aside the verdict and directed judgment in favor of the plaintiffs pursuant to the Warsaw limitation.\(^7\) The United States Court of Appeals for the Second Circuit affirmed the directed verdict upholding the liability limitation:

If defendant had the burden of proving that there was no wilful misconduct on the part of any member of the crew, we think a jury would have been warranted in finding on this record that the burden had not been sustained. There are too many gaps and imponderables, to say nothing of the conflicts and inconsistencies, some of which we have not thought it necessary to collate. But we cannot discover anything in the case to warrant a finding that there was wilful misconduct. It is said that the Captain was in command and that he was the only one authorized by Civil Air Regulations 61.301, 61.310, to act in an emergency. But we find nothing in the Regulations to justify this conclusion. *The plane was in extremis; whatever the First Officer did or failed to do was done to save the plane and the...*\(^8\)

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\(^7\) *Grey*, 227 F.2d at 284.
\(^8\) *Id.* at 284.
lives of all on board including his own.75

In Pekelis v. Transcontinental & Western Air, Inc.,74 Judge Augustus Hand, writing for the United States Court of Appeals for the Second Circuit, reversed the ruling of the Southern District Court of New York which upheld limiting the maximum recoverable damages to $8,300 for the death of a passenger killed enroute to Shannon, Ireland on December 28, 1946. The underlying basis for the Second Circuit’s reversal was the lower court’s exclusion of the findings of various inquiry boards. These findings documented a faulty altimeter on the aircraft, thereby properly giving rise to jury instructions that one of TWA’s mechanics intentionally omitted to perform a necessary safety check.75

In In re Pago Pago Aircrash of January 30, 1974,76 a Boeing 707 aircraft crashed on American Samoa, killing the ninety-seven persons aboard, including all members of the flight crew. The record reflected evidence that the aircraft descended too quickly, was flying too low and too fast, and that the crew failed to use proper callout and instrument checking procedures during the runway landing approach.77 The district court held that the determination of wilful misconduct was a question for the jury and accordingly allowed into evidence facts pertaining to the flight crew’s conduct.78 The United States Court of Appeals for the Ninth Circuit held that the jury could properly find from the evidence that the flight crew’s conduct not only constituted negligence but that taken cumulatively, the crew’s errors could be found to have constituted wilful misconduct.79

Additionally, there are two federal court decisions finding carriers guilty of wilful misconduct; however, neither

73 Grey, 227 F.2d at 286 (emphasis added).
75 Pekelis, 187 F.2d at 126-31.
76 No. 78-3591, slip op. (9th Cir. 1982).
77 Id. at 5.
78 In re Pago Pago, 419 F. Supp. at 1160.
79 In re Pago Pago, No. 78-3591, slip op. at 6.
of the incidents involved operational acts or omissions concerning the flight itself and hence do not typify article 25 cases. First, in *Hill v. United Airlines*, the plaintiffs made reservations on United Airlines to travel from Kansas City to Denver to Seattle, where they planned to depart for the Orient on Northwest Airlines. Once airborne on the Kansas City-Denver leg, United announced that inclement weather in Seattle led to cancellation of the Denver-Seattle flight. In rerouting from Denver to Seattle through Portland on the advice of a United Airline ticket agent, plaintiffs discovered in flight that the Seattle airport had, in fact, been open. When they ultimately arrived in Seattle, plaintiffs learned that they not only missed their Northwest flight to Tokyo, but also that United did not have the proper equipment in Denver to meet its scheduled Denver-Seattle flight. In a rather twisted interpretation of the Warsaw Convention, the district court first held that the terms of the Convention applied to the facts before the court. The court then assimilated the plaintiffs' assertion of intentional misrepresentation to "wilful misconduct" under the Warsaw Convention. The language of article 25, the court said, is broad enough to encompass intentional misrepresentation when it arises in international transportation. On the basis of this finding, the court denied the defendant's motion for a determination of the applicable law and for judgment thereon.

The second "Warsaw" case not based on operational conduct is *Tarar v. Pakistan International Airlines*. In *Tarar*, the family of Feroze Tarar sued the airline for failing to properly transport the human remains of the decedent to his homeland in accordance with the family's Islamic reli-

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81 Id. at 1050.
82 Id. at 1055.
83 Id.
84 Id. at 1056.
Among the various family members, only decedent’s son entered into the contract for carriage of the casket from Houston, Texas to Lahore, Pakistan. Thus, only his claim for damages invoked the provisions of the Warsaw Convention, while all other plaintiffs’ recoverable damages were governed by Texas law. The court’s characterization of the decedent’s son’s suit as a “Warsaw” case stemmed from its interpretation of article 1 of the Convention. Under article 1, the treaty applies to “all international transportation of persons, baggage, or goods.” Despite its admission that human remains are neither “person, baggage, or goods,” the court found that the case fell within the ambit of the Convention. With respect to the son’s claim for damages under the Warsaw Convention, the court held that the carrier intentionally refused to load the human remains of the decedent aboard the agreed upon flight to Pakistan. Wilful misconduct was therefore established.

Most recently, in Butler v. Aeromexico, the July 27, 1981 crash of a DC-9 on final approach to Chihuahua Airport in Mexico gave rise to the issue of whether the flight crew knowingly entered weather conditions which caused them to lose sight of the landing area and, in turn, lose control of the aircraft. The district court relied specifically on the crew’s failure to execute a missed approach when they lost visibility. By equating the term wilful misconduct with “wantonness” under the relevant law of Alabama, the district court held that the carrier was guilty of wilful misconduct. Having identified the standard to which the court could relate, vis-a-vis its working knowledge of Alabama law, it defined plaintiffs’ burden of proof as follows:

86 Id. at 472-75.
87 Id. at 478-79.
88 Warsaw Convention, supra note 38, art. 1.
89 Tarar, 554 F. Supp. at 478-79.
90 Id.
91 No. CV82-PT-9322-S (N.D. Ala. 1984), aff’d, No. 84-7714 (11th Cir. 1985)(available on WESTLAW, Fed. database).
92 See Butler, No. 84-7714 at 8.
"[t]hat the flight crew intentionally committed an act or intentionally omitted a duty with knowledge that the act or omission would probably result in injury, or in a manner as to imply reckless disregard of the consequences."  

The district court then concluded that the misconduct of the Aeromexico flight crew was sufficiently wilful or reckless to lift plaintiffs’ cases out of the liability limitation regime of the Warsaw Convention. However, the same misconduct was not sufficient to justify a finding of wilful misconduct under Alabama law. Hence, the court deferred to the applicable state law to determine how to measure wilful misconduct and thus, to decide whether article 25 should be invoked. However, the court wrongly equated article 25’s “wilful misconduct” with Alabama’s “wantonness,” rather than correctly upholding the state law definition of wilful misconduct. In determining how the Warsaw Convention would apply to plaintiffs’ recovery, the court seemed intent upon stripping the carrier of the liability limitation imposed by the Convention by dissecting the legal issue of what constitutes wilful misconduct. If misconduct is wilful under the Warsaw Convention, then it should be considered wilful under the particular state statutory interpretation to which the court has resorted. The dynamic circumstances of the flight crew’s actions and mental processes themselves do not give rise to multiple interpretations of one concept, namely “wilful misconduct”. However, once the court locked the article 25 concept into something less than Alabama’s interpretation of the same term, the district court was able to use this back door to keep Alabama law intact while achieving its objective of removing the ceiling from plaintiffs’ recoverable damages under the Warsaw Convention.

93 Butler, No. CV82-PT-9322-S at 14.
94 Id. at 19.
95 Id.
96 See Butler, No. 84-7714 at 8.
97 Id. at 10-11.
98 Id. at 8-9.
Thus, as interpreted by the court in *Aeromexico*, wilful misconduct under article 25 of the Warsaw Convention is not sufficient to justify an award of punitive damages under Alabama law.\textsuperscript{99} Although the court does not expressly state this finding in so many words, the effect of its holding against *Aeromexico* is in violation of the distinction between wilful misconduct and punitive damages upheld in other jurisdictions.\textsuperscript{100} Hence, even when a court properly resorts to applicable state law to decipher the meaning of wilful misconduct under article 25 of the Warsaw Convention, finding the carrier guilty may not necessarily result in liability for punitive damages.\textsuperscript{101}

In punitive damage analyses by the judiciary, then, the Warsaw Convention demonstrates that the standard of "wilful misconduct," regardless of how it is interpreted vis-a-vis state statutory application, is seldom met by a plaintiff, and judgment is generally limited to the scope of recovery set forth in article 22 of the treaty.\textsuperscript{102} Despite a growing identifiable trend in the American judicial system's expression of dissatisfaction with the liability limitations imposed by the Warsaw Convention,\textsuperscript{103} a strong

\textsuperscript{99} *Id.* at 11, 12, 19.


\textsuperscript{101} See Warsaw Convention, *supra* note 48, art. 25. The direct effect of a finding of wilful misconduct against the carrier is that the liability limitation of $75,000 is lifted. *Id.* The damage implications which ensue from a finding of wilful misconduct are that the plaintiff then can seek *provable* damages up to any amount he desires.

In this sense, a finding of wilful misconduct does not arouse the retributive and deterrent forces which normally justify an assessment of punitive damages. Hence, even when a court holds that there is sufficient evidence to support a finding of wilful misconduct, such evidence may not legally support an award of punitive damages because the Warsaw Convention reference to "wilful misconduct" depends for its interpretation upon the particular state law by which the term is to be measured. See *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 742-44 (C.D. Cal. 1975).

\textsuperscript{102} See *supra* note 39 and accompanying text.

\textsuperscript{103} See *Saks v. Air France*, 724 F.2d 1383, 1385-87 (9th Cir. 1984), *rev'd*, 105 S.
countervailing consideration inevitably re-emerges in each wilful misconduct case.

In retrospect, what is it about *Ulen*, *Tuller*, *Sabena*, and *Pago Pago* that sets them apart from the overwhelming majority of Warsaw Convention decisions that adhere to the liability limitation regime? Perhaps the common thread which weaves the three wilful misconduct decisions together is that in each case, the flight crew had an opportunity to make a conscious, informed decision which implicitly dictated whether the flight would be placed in jeopardy. An opportunity to jeopardize the safety of flight, even though not deliberate or "wilful" in the true sense, riles the sensibilities of the fact finder because the flight crew members no longer are viewed as merely victims of the calamity. Rather, they appear as the holders of the strings which can influence the fate of the flight. Thus, the crew becomes a reflection of the merit behind punishment for the loss of innocent lives.

Such conjecture aside, however, the practicalities be-

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104 See supra notes 53-56 and accompanying text.
105 See supra notes 57-58 and accompanying text.
106 See supra notes 59-62 and accompanying text.
107 See supra notes 76-79 and accompanying text.
108 There are at least two other identifiable factors which may go toward explaining the "wilful misconduct" cases under the Warsaw Convention. First, in *Ulen*, plaintiff sued for damages resulting from personal injury rather than from death. *Ulen*, 186 F.2d at 550. Violet Ulen was present to give her own accounting of the crash. The presence of a victim to give a first-hand account of the carrier's conduct arguably has great impact upon the fact finder.

Second, the flight crew's escape from mass destruction is offensive to the sensibilities of any fact finder. Regardless of the propriety of a flight crew's instinct to survive a crash, such conduct becomes assimilated to recklessness or wanton dis-
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hind the wilful misconduct issue suggest that the overwhelming majority of judicial decisions that have held against the wilful misconduct exception represent an illusory statistic. How many operational cases really exist where settlement out-of-court for damages above the liability limitation is prompted by the strong likelihood that, if tried to a jury, the issue of wilful misconduct would be resolved against the carrier? No one knows.

If left to conjecture, then perhaps what can be discerned is that each person, the fact finder included, is faced with his human condition. When the legal standards and theories are put aside, each person is left with an infinite awareness of his own mortal finitude and must ask himself whether, put in the position of the flight crewman, he would jeopardize his own life by conduct which bears such a high risk of destruction. At least one fact finder who has squarely addressed the question answers it this way: "[I]t is hardly conceivable that [a flight crew] wanted to perish [with their passengers]."109

IV. FEDERAL STATUTORY LAW: THE DEATH ON THE HIGH SEAS ACT

Through the enactment of what is commonly referred to as the Death on the High Seas Act (DOHSA), Congress attempted to provide uniformity to the treatment of wrongful death cases occurring in those waters that are beyond three miles, or one marine league, from the terri-

regard for the safety of the passengers. This was the problem confronting Circuit Judge Burger in Tuller, 292 F.2d at 777.

Most recently, wilful misconduct was alleged against the carrier in the context of the Tuller facts when an in-flight fire broke out aboard Air Canada Flight No. 797 on June 2, 1982. Twenty-three passengers died in the fire while eighteen passengers and all five crew members safely evacuated the aircraft. Some of the Air Canada crew members were among the first persons to exit the aircraft upon its landing at Greater Cincinnati Airport. Wilful misconduct has been alleged against Air Canada in the litigation which has arisen out of this incident and is pending as of the time of publication of this article.


torial waters of the United States or the shores of any state or other territory belonging to the United States.\textsuperscript{111} The invocation of the DOHSA vests in the personal representative of the decedent the right to maintain a wrongful death action.\textsuperscript{112} That right of recovery is limited to the pecuniary loss suffered by the death of the decedent.\textsuperscript{113}

The seminal decision on the scope of recoverable damages under the DOHSA is \textit{Higginbotham v. Mobil Oil Corp.}.\textsuperscript{114} The decision in \textit{Higginbotham} arose out of an aviation disaster in the Gulf of Mexico\textsuperscript{115} which resulted in the death of the pilot and three passengers. The District Court for the Western District of Louisiana found that admiralty jurisdiction existed because the accident occurred on the high seas,\textsuperscript{116} in conjunction with the operator’s ex-

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\textsuperscript{111} 46 U.S.C. §§ 761-768 (1982). Section 761 reads as follows:
§ 761. Right of action; where and by whom brought.
Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.
\textit{Id.} at § 761.
\textsuperscript{112} \textit{Id.}

Prejudgment interest also is awardable in a DOHSA action at the discretion of the trial judge. \textit{National Airlines, Inc. v. Stiles}, 268 F.2d at 406; \textit{Dugas v. National Aircraft Corp.}, 438 F.2d 1386, 1392 (3d Cir. 1971).

\textsuperscript{114} 545 F.2d 422 (5th Cir. 1977), \textit{rev’d on other grounds}, 436 U.S. 618 (1978).
\textsuperscript{115} \textit{Id.} at 424. The codification of certain principles of admiralty law became applicable to aviation cases with the decision in \textit{Executive Jet Aviation, Inc. v. City of Cleveland}, 448 F.2d 151 (6th Cir. 1971), \textit{aff’d}, 409 U.S. 249 (1972). \textit{See infra} note 120 and accompanying text.
\textsuperscript{116} \textit{Higginbotham v. Mobil Oil Co.}, 357 F. Supp. 1164, 1167 (W.D. La. 1973).
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tensive offshore activities. On the issue of damages, the United States Court of Appeals for the Fifth Circuit expressly limited the holdings of earlier cases to deaths in territorial waters, and thereby emphasized strong adherence to the uniformity theme which served as the cornerstone to the creation of the DOHSA. As a result of Higginbotham, it is now a well-established principle that the explicit statutory limitation on recovery in high seas death actions pursuant to Section 761 of the DOHSA is to be applied without judicial inroads.

When the DOHSA is applied in an aviation case, its effect is not altered and recoverable damages thereby re-

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117 Id. at 1167.
119 See supra note 111.
120 The transition from the DOHSA's original design as an admiralty law device to the skies which blanket the high seas was effected in 1972 by the United States Supreme Court. In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), a flock of seagulls was struck by an aircraft on takeoff from a regional airport in Cleveland, Ohio. The aircraft lost engine power and ultimately sank in Lake Erie. The operator of the aircraft commenced an action against the City of Cleveland for the latter's failure to keep the runway free of birds as well as its failure to give adequate warnings of the presence of the birds. Id.

From the United States Supreme Court's preliminary reference to the Sixth Circuit Court of Appeals' decision in Chapman v. City of Grosse Pointe Farms, 384 F.2d 962 (6th Cir. 1967), the Court launched into an extensive exposé on the applicability of federal admiralty jurisdiction to aviation tort claims. In Chapman it was determined that in order to assert federal admiralty jurisdiction over aviation cases, there had to be more than a nexus between navigable waters and the situs of the allegedly wrongful conduct. Id. at 966. Locality of the wrong over the "high seas" in and of itself was insufficient to make the DOHSA applicable. Id.

Bearing upon the insufficiency of a "locality" test to bring aviation tort cases within the ambit of the DOHSA, the Supreme Court, in Executive Jet, 409 U.S. at 268, held that admiralty jurisdiction over tort cases may be invoked only when the "locality" nexus was combined with a second requirement that the wrongful conduct at issue have some relationship with traditional maritime activity upon navigable waters. The Sixth Circuit Court of Appeals had determined that the alleged tort occurred on land before the aircraft crashed in Lake Erie and therefore found it unnecessary to consider the question of a maritime relationship. Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971), aff'd, 409 U.S. 249 (1972). The United States Supreme Court upheld both the district court's findings and the Sixth Circuit's affirmance, memorializing the two-prong...
main limited to the pecuniary loss suffered. However, a
test for determining whether an aviation tort case properly invokes admiralty ju-
risdiction. Executive Jet, 409 U.S. at 274.
While the Supreme Court in Executive Jet explicitly stated that the DOHSA in-
vokes admiralty jurisdiction, 409 U.S. at 263-64, 271 n.20, it left open the ques-
tion of what happens once the admiralty jurisdiction is found. Id. at 271. Since the
decision in Executive Jet was handed down by the Court in December of 1972,
courts have had to grapple with the issue of whether jurisdiction under the
DOHSA is exclusive or concurrent with state court jurisdiction. Many times a
plaintiff suing in a representative capacity for the death of an individual arising
out of a mass aviation disaster will intentionally avoid pleading the DOHSA de-
spite the fact that the crash occurred on the high seas and meets the criteria
adopted by the Supreme Court in Executive Jet. Plaintiffs who do not want their
cases in federal court because they do not want the rules and procedures of the
Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407 (1982), to apply will
argue that the DOHSA at least invokes concurrent jurisdiction with the state
court. Thus, the plaintiff will argue that he has the right to prosecute his claim in
state court under state substantive law on the issues of both liability and damages.
The effect of succeeding with such an argument is that plaintiff is able to "lift" his
case out of the exclusive jurisdiction of the DOHSA and thereby avoid the federal
statute's limitation on recovery to pecuniary loss.
The prototypical argument in opposition to plaintiffs' circumvention of the
DOHSA is that the underpinning of the DOHSA, namely uniform application of
law and remedy to cases arising in admiralty, would be thwarted in the mass avia-
tion disaster case where consolidation and coordination of the various claims is
paramount to the just and speedy resolution of those claims. This is particularly
so in light of the role played by the Judicial Panel on Multidistrict Litigation,
which selects one forum where all the cases can be consolidated just for pre-trial
proceedings on the sole issue of liability. The consolidation procedure does not
prejudice any plaintiff from having his case remanded to the court in that state
from which the case emerged, and plaintiff thereby can utilize all the pre-trial
discovery already conducted to thereafter try his case on the issue of damages in
the forum he originally selected.
The conflict between concurrent and exclusive jurisdiction over DOHSA claims
is heightened by the language of Section 767 of the Act and the judicial interpre-
tation it has received. Section 767 provides as follows:
The provisions of any state statute giving or regulating rights of ac-
tion or remedies for death shall not be affected by this chapter. Nor
shall this chapter apply to the Great Lakes or to any waters within
the territorial limits of any State, or to any navigable waters in the
Panama Canal Zone.
remedies available through the state court system are discussed at length in Safir
1965).
In the most recent instance where these prototype points and counterpoints
faced one another, two federal district courts from the same state have taken op-
posite positions. In litigation arising out of the tragic shootdown of Korean Air
Lines Flight No. KE 007 over the Sea of Japan on September 1, 1983 more than
150 wrongful death actions were filed against Korean Air Lines and others. Two
actions in particular were filed in state court in California for the counties of San
"punitive" element of damages has emerged under the


Korean Air Lines removed both actions to the appropriate federal district court within the State of California so that the cases could be consolidated for pre-trial liability proceedings with the other pending actions pursuant to the Rules of the Judicial Panel on Multidistrict Litigation. See In re Korean Air Lines Disaster of Sept. 1, 1983, 575 F. Supp. 342 (J.P.M.D.L. 1983)(originally consolidating forty-two actions against Korean Air Lines in the District of Columbia).

After the Hendrie matter was removed to the United States District Court for the Northern District of California on August 10, 1984, and the Van Ryn matter was removed to the Central District of California on August 31, 1984, the Hendrie and Van Ryn plaintiffs, on October 1 and September 13, 1984, respectively, moved to remand their actions on the basis of the DOHSA giving rise to at least concurrent jurisdiction between the state and federal courts.

Korean Air Lines, relying on federal question jurisdiction which had served as the original basis for removal from state court, contended that California's own state courts viewed the DOHSA as exclusively federal and that to view it otherwise would thwart the very purpose of uniformity for which the Act was promulgated.


After motions both to reargue the Van Ryn matter and to appeal the district court's decision were denied, Korean Air Lines on April 2, 1985 moved in the Los Angeles Superior Court to dismiss the complaint for lack of subject matter jurisdiction. Movant cited three cases, two of which hailed from the Los Angeles Superior Court, which had found no state court subject matter jurisdiction in DOHSA cases because the Act gave rise to exclusive federal jurisdiction. Touhey v. Ross-Loos Medical Group, 111 Cal. App. 3d 958, 168 Cal. Rptr. 910, 911-12 (1980)(superior court did not have jurisdiction over wrongful death action where cruise ship passenger died on land one year after sustaining injuries); Cairl v. The Boeing Co., 39 Cal. App. 3d 137, 113 Cal. Rptr. 925, 926-27 (1974)(federal court jurisdiction exclusive in DOHSA action); Gordon v. Reynolds, 187 Cal. App. 2d 472, 10 Cal. Rptr. 73, 77 (1960)(state courts cannot have jurisdiction of action for wrongful death under the DOHSA).

Faced with this unequivocal authority to dismiss plaintiff's complaint due to lack of subject matter jurisdiction, the state court on May 3, 1985, without opinion, nevertheless denied the motion. What the court did do, however, was to stay all proceedings in the pending action so as to force plaintiff to await the outcome of the multidistrict pre-trial discovery on all liability issues. It should be noted that the stay issued by the state court has the same operative effect as a dismissal. In the latter event, plaintiff would have re-filed his suit in federal court before the statute of limitations ran, and the matter then would have been consolidated with the other multidistrict litigation actions as a "tag-along" action pursuant to Rules
DOHSA in those judicial decisions which have taken the claimant outside the parameters of recovering pecuniary loss. Hence, prefatory to this section of the article, one must adopt, for argument's sake, the assimilation between

9 and 10 of the Rules of the Judicial Panel on Multidistrict Litigation. 28 U.S.C. § 1407 (1982). Upon completion of the pre-trial proceedings, plaintiff's suit would have been transferred back to its original forum for a trial on the issue of damages. *Id.*

Shortly after the Central District of California remanded the *Van Ryn* action, despite the controlling authority of the Ninth Circuit Court of Appeals' decision in Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 80 (9th Cir. 1983) (DOHSA preempts state wrongful death statutes), the Fifth Circuit Court of Appeals rendered a decision which gave rise to a direct conflict among the circuits on the issue of the DOHSA's exclusivity. Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1280-84 (5th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3193 (U.S. Oct. 8, 1985) (No. 85-202). Interestingly, the *Tallentire* dissent read Section 767 of the DOHSA in its proper historical perspective and pointed to the *Nygaard*-type rationale as the only viable resolution of this issue. *Id.* at 1289. Clearly, the question of exclusivity now is a matter for the United States Supreme Court to resolve.


recovery under the law of a foreign state provided for by an alternate damage provision of the DOHSA and the "punitive" nature of such recovery that is unbound by compensatory-type relief.

The strict confines of the Act itself do not provide for any recovery beyond the pecuniary loss recoverable under Section 761.\(^{121}\) However, Section 764 of the DOHSA confers additional rights to the appropriate plaintiff "[w]henever a right of action is granted by the law of any foreign state on account of death by wrongful act."\(^{122}\) It is the application of foreign laws providing for specialized rights of recovery which may give Section 764 a punitive effect because whatever remedy falls under this Section is above and beyond the compensatory relief provided by Section 761.\(^{123}\) These additional claims are generally

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\(^{121}\) See Section 761, supra notes 111-119 and accompanying text.

\(^{122}\) 46 U.S.C. § 764 (1982). Section 764 of the DOHSA provides as follows:

> Whenever a right of action is granted by the law of any foreign state on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

\(^{123}\) For example, in certain parts of the world, air navigation is controlled by criminal law as well as civil law. In the United Kingdom, the 1976 Fatal Accidents Act consolidated many prior laws from the mid-1800's. Fatal Accidents Act, 1976, reprinted in 46 Halsbury Statutes of England 1115 (Butterworths 3d ed. 1977). This Act provides, \textit{inter alia}, that:

> If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

\textit{Id.} at § 1.

Moreover, the 1961 Carriage by Air Act provides for strict liability on the part of the aircraft operator when death of a passenger has occurred during flight or in the course of embarkation/disembarkation procedures. Carriage by Air Act, 9 & 10 Eliz. 2, ch. 3, art 17 (1961), reprinted in 2 Halsbury Statutes of England 604 (Butterworths 3d ed. 1968).

In addition to these civil law remedies, however, the English system provides for criminal liability which is applicable only to aircraft operators. A pilot is guilty of a criminal offense if he flies an aircraft knowing that he is too fatigued to properly do so. See \textit{supra} note 16 and accompanying text. Article 43 of the British Air
granted without abatement of the claimant’s right to pur-
sue recovery of pecuniary loss under Section 761.\textsuperscript{124}

The case law dealing with Section 764 in the context of aviation-oriented torts illustrates the interface between Sections 761 and 764 of the DOHSA.\textsuperscript{125} The central issue with which United States courts have grappled is reflective of the threshold question which arises when the DOHSA potentially is called into play. That is, by way of preliminary consideration, courts often are faced with a plaintiff’s

\textsuperscript{124} See Section 764, \textit{supra} note 122 and accompanying text.

\textsuperscript{125} See \textit{infra} notes 130-202 for a discussion of the cases dealing with the interface of § 761 and § 764.
contention that he is not compelled to prosecute his claim in federal court, particularly when he intentionally has avoided pleading the DOHSA so as to maintain his wrongful death cause of action in state court.\textsuperscript{126} This strategy by plaintiffs injects into the litigation the issue of whether the DOHSA applies, regardless of the manner in which plaintiff has pleaded his wrongful death cause of action. The real nature of a plaintiff's claim, rather than his characterization of it, governs the question of federal jurisdiction.\textsuperscript{127} Thus, the plaintiff cannot avoid either removal of his claim to federal court, where appropriate, or consolidation of the case with other wrongful death actions arising out of the same set of operative facts.\textsuperscript{128} Hence, the courts must decide whether the DOHSA invokes federal jurisdiction to the exclusion of the state court's jurisdiction or whether the two forums share jurisdiction over the subject matter of plaintiff's action.\textsuperscript{129}

So, too, when the provisions of the DOHSA are found to apply to the resolution of damages, the courts have to determine whether Section 761, which limits recovery to pecuniary loss,\textsuperscript{130} applies to the exclusion of Section 764, which governs rights of action given by laws of foreign countries,\textsuperscript{131} or whether plaintiffs can seek recovery under both. The latter allows the plaintiff to utilize Section 764 as a safety valve analogous to the recovery of damages under state statutory provisions unrelated to those compensatory damage issues designed to make the plaintiff whole.

The factual prototype that gives rise to the interface be-

\textsuperscript{126} See supra note 120 and accompanying text.

\textsuperscript{127} See, e.g., Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir. 1983); Clinton v. Hueston, 308 F.2d 908 (5th Cir. 1962).


\textsuperscript{129} See supra note 120.

\textsuperscript{130} See supra notes 111-12 and accompanying text.

\textsuperscript{131} See supra notes 122-24 and accompanying text.
between Section 761 and Section 764 is an aviation disaster over international waters involving the flag carrier of a foreign country. The early decisions, although arising in admiralty rather than aviation incidents, viewed the two sections of the DOHSA as mutually exclusive. The courts reasoned that when the deaths occurred on a foreign vessel, the claimants did not have the option of suing under both sections of the DOHSA. In fact, the courts were emphatic in holding that Section 761 was not applicable at all when the death occurred on a foreign vessel. For example, in *The Vulcania*, the District Court for the Southern District of New York sustained a libel under Section 761 even though a foreign vessel was involved. Subsequently, however, the district court dismissed the Section 761 claim on the basis that the foreign law was sufficiently pleaded so as to provide the basis for the claimants' cause of action under Section 764. Hence, the complexion of the foreign cause of action, at least on the admiralty side, was that of a compensatory rather than "punitive" nature and was analyzed in the context of an interface of alternative remedies.

The judicial view of the interface between the two sections remained consistent until 1952 when the District Court for the Southern District of New York, Judge Weinfield, rendered its decision in *Iafrate v. Compagnie Generale Transatlantique.* In *Iafrate*, plaintiff's intestate, a passenger on board the French vessel S.S. Liberte, became injured and died on the high seas. Two suits were filed in the Southern District Court of New York, one in civil law

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132 See, e.g., The Vestris, 53 F.2d 847 (S.D.N.Y. 1931); The Vulcania, 41 F. Supp. 849 (S.D.N.Y. 1941).
133 *The Vestris*, 53 F.2d at 855-56; *The Vulcania*, 41 F. Supp. at 849.
134 *The Vestris*, 53 F.2d at 855; *The Vulcania*, 41 F. Supp. at 849. In *The Vulcania*, the Southern District of New York overturned itself after it originally sustained a libel under Section 761 even though a foreign vessel was involved. The Vulcania, 32 F. Supp. 815 (S.D.N.Y. 1940), rev'd, 41 F. Supp. 849 (S.D.N.Y. 1941).
136 *The Vulcania*, 41 F. Supp. at 849.
138 *Id.* at 620.
and the other grounded in admiralty. The court permitted recovery only in admiralty pursuant to Section 761 of the DOHSA, although the death occurred on the vessel of a foreign carrier. Despite an inadequate pleading for recovery under Section 764, the court did not welcome the potential confrontation between Sections 761 and 764. Instead, the court concluded that "[f]oreign law [pursuant to Section 764 of the DOHSA] is a matter of fact which must be pleaded and proved." This rationale shielded the court from having to determine the issue of exclusivity as it existed between the two sections of the DOHSA. The court dismissed the Section 764 claim on grounds of insufficiently pleading French law. However, the court gave the plaintiff permission to replead his cause of action based on French law, thereby leaving the unresolved issue of multiplicity of remedies under the DOHSA on the doorstep of the next forum where the issue would re-emerge.

Five years after Iafrate, the issue of multiple recovery did re-emerge, on the same doorstep where it had been left by Judge Weinfeld. In Fernandez v. Linea Aeropostal Venezolana, a United States citizen was killed when a Venezuelan aircraft crashed into the Atlantic Ocean more than one marine league from United States shores. The carrier contended that the plaintiff's cause of action was governed by Venezuelan law pursuant to Section 764 of the DOHSA. The district court rejected this contention and sustained the libel action under Section 761. In doing so, the court implied that the remedies provided by Sections 761 and 764 were cumulative in nature rather than exclusive:

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139 Id.
140 Id. at 621.
141 Id. at 622.
142 Id.
143 Id.
144 Id.
146 Id. at 95-96.
147 Id. at 98.
But the act as passed preserved not merely rights under foreign law, but also, by § 1 [761] of the act, gave an additional right to the personal representative of the deceased to maintain an action against the 'vessel, person, or corporation which would have been liable if death had not ensued.'

One year later, in litigation arising out of the same air disaster as involved in Fernandez, the District Court of New Jersey in Noel v. Airponents, Inc. disagreed with the Southern District Court of New York. Although the death occurred on a foreign carrier, the district court sustained plaintiff's cause of action under Section 761 as the Southern District Court of New York had done in Fernandez. Unlike the Fernandez decision, however, the New Jersey district court in Noel did not find Section 761 to be cumulative with the remedy provided in Section 764.

The Noel court did not squarely address the issue of cumulation of these remedies because the defendant moved to dismiss plaintiff's cause of action under Section 761, on the basis that the law of the aircraft's registry exclusively governed the tort liability of the defendant. Although the plaintiff did not plead Section 764, the court seemed inclined to select one section over the other and assumed Section 764 had been raised as an alternate or cumulative remedy. In accordance with some of the early decisions, the Noel court treated the question of exclusivity as a choice of law issue and found that all relevant ties with the litigation were in the United States. Of particular importance to the court was that the carrier sued in the

148 Id. at 96. It is noteworthy that the Fernandez court, like the Vulcania court, see supra notes 131-135, was unsure as to whether the plaintiff had sufficiently pleaded a foreign cause of action and, therefore, dismissed it with leave to amend under Section 764 of the DOHSA. Fernandez, 156 F. Supp. at 98-99.

149 See supra notes 145-48.


151 Id. at 351.

152 Id.

153 Id. at 350.

154 Id.

155 Id.
Fernandez litigation was not sued in Noel. The only defendant in Noel was Airponents, Inc, the agency that serviced the aircraft prior to its departure on the day of the crash. Moreover, Airponents was a domestic corporation and the decedent was a citizen of the United States. Hence, the court seemingly would not have followed the cumulative rationale of Fernandez; yet on the particular facts before the Noel court, the overwhelming contacts with the United States diminished the strength of the interface between Section 761 and Section 764.

With this judicial history before it, the Southern District Court of New York reaffirmed its position in 1960 when the case of Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V. presented the issue of double recovery under the DOHSA. Wrongful death actions were commenced on behalf of United States citizens who were killed when a Dutch-operated aircraft crashed into the Atlantic Ocean while en route to New York from Shannon, Ireland. The personal representatives of the decedents sought recovery on three bases: Section 761 of the DOHSA, Section 764 of the DOHSA, and the Dutch Wrongful Death Statute. KLM moved to dismiss the claims brought pursuant to Section 761 and the common-law claims brought under Dutch law. KLM argued that although all decedents were United States citizens, the governing principle establishing the scope of plaintiffs' remedy should be that deaths occurred on the high seas aboard a foreign vessel. Thus, KLM claimed that Section 764 of the DOHSA applied to the exclusion of any and all other remedies.

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156 See supra notes 145-48.
157 Noel, 169 F. Supp. at 349.
158 Id. at 350.
159 Id. at 350.
161 Id. at 594-95.
162 Id. at 595.
163 Id.
Noting that the question of interaction between Sections 761 and 764 of the DOHSA "has long been a perplexing one,"\textsuperscript{164} the District Court for the Southern District of New York, Judge Kaufman, entertained an historical review of the cases that dealt with the issue and then granted KLM's motion to dismiss all claims except those brought under Section 764.\textsuperscript{165} The court adopted the methodology previously utilized by the United States District Court for the District of New Jersey in \textit{Noel} \textsuperscript{166} and characterized the issue as a conflicts of law question.\textsuperscript{167} The court in \textit{KLM} reasoned that if an American citizen died aboard an American carrier and thereby had but one remedy under Section 761, then why should an American citizen who dies aboard a foreign vessel have two or more bases for recovery?\textsuperscript{168} The court warned that Congress did not intend such an anomalous result when it enacted the DOHSA for the purpose of bringing uniformity to the law of the high seas when American citizens lose their lives by disaster.\textsuperscript{169}

The problem with the \textit{Bergeron} court's analysis is that the DOHSA's function is served once the Act is applied to the exclusion of other state statutory or common law remedies. It is neither inconsistent with the principle of uniformity fostered by the DOHSA nor an anomalous result to apply the DOHSA exclusively and then permit alternate remedies of recovery as provided within the confines of the Act itself.

As interpreted by the District Court for the Southern District of New York, however, the congressional design in passing the DOHSA was to ensure that American citizens killed on the high seas had \textit{some} basis for recovery.\textsuperscript{170} Judge Kaufman linked the judicial history of the interface

\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 598.
\textsuperscript{166} \textit{Noel}, 169 F. Supp. at 348. See supra notes 150-58.
\textsuperscript{167} \textit{Bergeron}, 188 F. Supp. at 596.
\textsuperscript{168} \textit{Id.} at 596-97.
\textsuperscript{169} \textit{Id.} at 597.
\textsuperscript{170} \textit{Id.}
between Sections 761 and 764 to his interpretation of Congress' intent as follows: "Thus, the courts in Iafrate, Fernandez and Noel felt it necessary to apply American Law when there appeared to be substantial doubt whether a cause of action under foreign law existed, in order to ensure that some basis for recovery was present."\(^\text{171}\)

To the extent that Sections 761 and 764 create a genuine issue as to how they are to be applied, their respective application to a particular case should not depend upon whether there is a viable alternate remedy under the law of the foreign carrier. The existence or non-existence of such a remedy never should affect the invocation of Section 761. Such an analysis is reserved for resolution of forum non conveniens issues, i.e., choosing appropriate fora for plaintiffs to seek proper relief. Hence, the real question proposed by the two damage sections of the DOHSA is whether a viable additional remedy exists under the law of the foreign carrier and, if it does, should it be permitted over and above the compensatory remedy provided to plaintiff pursuant to Section 761. Under the Bergeron court analysis, however, Section 761 is interpreted out of context as a fall-back provision to be used only when no other remedy exists to afford plaintiff recoverable damages.

Depiction of the interface as a choice of law analysis extracts the punitive element presented by Section 764 of the DOHSA. As a practical matter, this section has come to be utilized by plaintiffs as a method of recovery over and above Section 761. Both the realistic interpretation and practical effect of Section 764 can only be derived from the unreported cases that settle out of court. When the lives of American citizens are lost on the high seas, plaintiffs will plead Section 764 of the DOHSA as a form of leverage to entice a larger settlement from the defendant carrier. Since Section 761 limits recovery to pecuniary loss,\(^\text{172}\) Section 764 threatens the limitation of the former

\(^{171}\) Id. (Emphasis by the court).

\(^{172}\) Supra note 111 and accompanying text.
provision by opening the door to unlimited recovery of "moral" damages or "consolation money" under the foreign law.\textsuperscript{173} In an effort to avoid the invocation of such provisions and their potentially "punitive" implications, the defendant carrier often will be more inclined to make settlement offers that go beyond the scope of recoverability under Section 761. In this context then, Section 764, as seen through the eyes of the defendant, is a means to an award of exemplary-type damages.

Since the \textit{Bergeron} decision by the Southern District of New York court in 1960, no significant developments emerged from the judiciary's treatment of the exclusivity issue until twenty-two years later. In 1982, the United States District Court for the Western District of Washington addressed the issue in \textit{In re Air Crash Disaster Near Bombay, India on January 1, 1978}.\textsuperscript{174} The Bombay litigation arose out of the crash of an Air India Boeing 747 aircraft on New Year's Day, 1978, shortly after take-off from Bombay, India. Since almost all of the fatalities were Indian nationals, their claims for wrongful death were settled directly with Air India at the outset of litigation. Thereafter, the personal representatives of these and other decedents brought suit in various United States district courts against the aircraft manufacturer, The Boeing Company, on the theory of negligent design and manufacture of various component parts and on the alternate theory of strict tort liability.\textsuperscript{175} Plaintiffs contended that only by commencing suit within the United States could they properly litigate their claims against The Boeing Company because the proof of liability was to be found through documents and witness testimony all located in the United States.\textsuperscript{176} The Boeing Company, on the other hand, argued that the aircraft did not suffer from any mechanical or technical defects; that the crash was attributable to the

\textsuperscript{173} \textit{Supra} note 122 and accompanying text.

\textsuperscript{174} 531 F. Supp. 1175 (W.D. Wash. 1982).

\textsuperscript{175} \textit{Id.} at 1176.

\textsuperscript{176} \textit{Id.}
flight crew's faulty operation of the aircraft; and that the evidence upon which this theory rested existed exclusively in India.\textsuperscript{177}

Hence, before addressing the issue of how Sections 761 and 764 of the DOHSA apply, the court faced a more imminent concern as to whether the United States courts were the proper fora for the resolution of liability issues.\textsuperscript{178} Concluding that the United States courts served as convenient fora for these cases\textsuperscript{179} and that the DOHSA applied to the facts before it,\textsuperscript{180} the District Court for the Western District of Washington addressed the application of the DOHSA damage provisions.

The plaintiffs in \textit{Bombay} argued that Congress designed Section 764 as a means of preserving additional rights after a plaintiff recovered the pecuniary measure of damages under Section 761.\textsuperscript{181} Relying upon \textit{Iafrate},\textsuperscript{182} the two Venezuelan carrier decisions, \textit{Noel}\textsuperscript{183} and \textit{Fernandez},\textsuperscript{184} and an admiralty case entitled \textit{McPherson v. Steamship South African Pioneer},\textsuperscript{185} plaintiffs advocated the cumulative rem-

\textsuperscript{177} Id. at 1177.

\textsuperscript{178} Id. at 1189-91. Upon defendant Boeing's \textit{forum non conveniens} motion, the district court determined that the United States offered to plaintiffs the proper forum and therefore denied the motion. Id. For further illuminating discussion of \textit{forum non conveniens} in the context of aviation cases, see Tompkins, \textit{Barring Foreign Air Crash Cases from American Courts} (pts. 1 & 2), \textit{23 FOR THE DEFENSE} No. 6, p. 16 & No. 7, p. 12 (1981); \textit{Update: Barring Foreign Air Crash Cases from American Courts}, \textit{18 THE FORUM} 93 (1982); Birnbaum & Wrubel, \textit{Foreign Plaintiffs and The American Manufacturer: Is a Court in the United States a Forum Non Conveniens?}, \textit{20 THE FORUM} 59 (1984).

\textsuperscript{179} \textit{Bombay}, 531 F. Supp. at 1176-82. The actions filed in the various district courts throughout the United States were consolidated for pre-trial proceedings on liability issues in the United States District Court for the Western District of Washington, \textit{Id.} at 1176, pursuant to the Rules of the Judicial Panel on Multidistrict Litigation. \textit{See 28 U.S.C.} § 1407 (1982).

\textsuperscript{180} \textit{Bombay}, 531 F. Supp. at 1182-84.

\textsuperscript{181} Id. at 1185.


\textsuperscript{185} 321 F. Supp. 42 (E.D. Va. 1971). This case is discussed by the district court in \textit{Bombay}, 531 F. Supp. at 1185-86.
edy theory originally pronounced in 1957 by the Southern District of New York court in *Fernandez.* The Boeing Company strongly contested plaintiffs' theory and argued that the interface between Sections 761 and 764 of the DOHSA represented nothing more than a choice of law question for the court to resolve. The court did not adopt the strict interpretation of the DOHSA advanced by Boeing, but did agree with Boeing that the respective remedies provided by Section 761 and Section 764 were neither concurrent nor cumulative.

The District Court for the Western District of Washington drew heavily from the *Bergeron* decision which held that there is no warrant in the statutory language or policy for the maintenance of concurrent causes of action under both American law (Section 761) and foreign law (Section 764). Of primary interest to the court was the manner in which the *Bergeron* court distinguished the *Fernandez* decision, considering that both *Bergeron* and *Fernandez* emanated from the same district court in New York. The Washington district court reasoned that *Fernandez* should be analyzed strictly within the confines of the facts upon which it was decided. The indicia of cumulative remedies in *Fernandez* stood as somewhat illusory because there seemed to be no viable alternative remedy under foreign law.

The *Bombay* court adopted the *Bergeron* rationale rather than a theory of cumulative remedies because there was "no warrant, whether in the Act [DOHSA] and its legislative history or in principles of logic and fairness, for such a construction [as that postulated by plaintiffs]." With

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188 Id.
189 Id. at 1186-88 (discussing *Bergeron*, 188 F. Supp. at 597).
190 *Fernandez*, 156 F. Supp. at 94.
191 *Bombay*, 531 F. Supp. at 1186.
192 Id. at 1187 (citing *Bergeron*, 188 F. Supp. at 596. "Thus, to guard against this possibility, a cause of action under Section 1 [761] was found [in *Fernandez*]." Id.).
193 *Bombay*, 531 F. Supp. at 1188.
the Fernandez decision distinguishable because it did not offer two viable remedies from which to choose, the Washington district court had to decide whether the law of the United States applied over the law of India. The Bombay court utilized the choice of law analysis enunciated by the Supreme Court of the United States in Lauritzen v. Larsen, whereby the applicability of maritime law in a given case is determined by ascertaining and valuing points of contact between the transaction and the states whose competing laws are involved. Whether Lauritzen is applicable when the DOHSA is involved is an issue not yet resolved by the circuits. However, the general consensus among those courts that have dealt with the issue is that the choice of law principles of Lauritzen are equally applicable to claims brought pursuant to the DOHSA.

Interestingly, by adopting the Lauritzen approach for DOHSA cases, the Bombay court digressed from the real issue as to whether Sections 761 and 764 were mutually exclusive remedies. Those cases holding the choice of law analysis from Lauritzen applicable to the DOHSA involved a conflict between state law and the application of the DOHSA itself. None of the DOHSA cases invoking Lauritzen utilized the choice of law analysis for the purpose of determining whether the two damage provisions of the DOHSA were mutually exclusive. To that extent, the Lauritzen principles distort the precise nature of the issue presented by Sections 761 and 764 vis-a-vis the scope of recoverable damages.

The Lauritzen decision espoused a multi-factor contact examination. Seven points of contact were enumerated as

198 See supra note 198 and accompanying text.
follows: 1) the place of the wrongful act; 2) the law of the flag; 3) the allegiance or domicile of the injured; 4) the allegiance of the shipowner; 5) the place of contract; 6) the inaccessibility of a foreign forum; and 7) the law of the forum. From this analysis, the Supreme Court in *Lauritzen* determined what substantive law should apply to govern the rights of the parties to the litigation. The multi-factor test was not utilized—nor was it intended to be utilized—to determine whether alternate remedies under the DOHSA should be applied in cumulative or exclusive fashion. Nevertheless, having invoked the *Lauritzen* rationale, thereby concluding that the law of India prevailed over the law of the United States, the Bombay court found Section 764 to be the exclusive remedy available to plaintiffs' claims for recovery. As such, this protracted choice of law analysis disfigured the interface between Sections 761 and 764 and totally distorted the issue of whether the latter of the two DOHSA remedy provisions is effectually "punitive" in nature.

From the judicial treatment of the DOHSA in the context of punitive awards in aviation disaster cases, what can be gleaned is that the courts are more inclined to treat Section 764 as an "additional" remedy only when a choice of law analysis is invoked. When this occurs, the question of interface between Sections 761 and 764 transforms from a legal to a factual issue because the court applies a contact analysis to "choose" the law of either Section of the DOHSA over the other. Should the court feel that Section 761 is an inadequate remedy for the plaintiff, then Section 764 acts as a safety valve and enters the damage scenario through the back door.

To the potentially settling tortfeasor who has gained familiarity with the DOHSA issue, the contour of the inter-

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201 *Bombay*, 531 F. Supp. at 1190-91.

202 Id. at 1191.
face between Sections 761 and 764 appears in a very
different light on the negotiating table. The many unre-
ported decisions that have involved extensive briefing of
the issue\textsuperscript{203} have utilized Section 764 as a device by plain-
tiffs to promote higher settlement parameters from de-
fendant air carriers to the extent that the law of the
relevant jurisdiction seems to favor transcendence of Sec-
tion 761.\textsuperscript{204}

Despite the demonstration of recent case law, Section
764 initially is raised in aviation litigation where the
DOHSA is applicable as an "alternate" remedy. Plaintiffs
often are asked in preliminary interrogatories what law
they will contend is relevant to the issue of recoverable
damages. Their answer not only puts the defendant on
notice that plaintiffs will seek damages beyond the scope
of Section 761, but also implicitly plants in the mind of
the defendant that this unknown quantity of damages
under Section 764 potentially will serve plaintiffs as a pu-
nitive-type remedy, in the sense that the particular foreign
state whose law is invoked may not limit recovery of dam-
ages to "compensatory" factors.

Citing the applicability of foreign law in answers to in-
terrogatories sends defense counsel into the cases that
have dealt with the issue of how Section 764 should be
interpreted. While the more recent decisions\textsuperscript{205} have
been inclined to utilize Section 764 as an alternative to
Section 761, the defendant still must weigh the counterv-
ailing considerations which may demonstrate over-
whelming contacts between plaintiffs and the foreign
state. But, the choice of law analysis befits resolution of a
different issue: whether the DOHSA should apply at all
and not whether the two remedies provided within the Act


\textsuperscript{204} Unlike the implications of a wilful misconduct finding under the Warsaw
Convention, which is limited to the air carrier only, the invocation of Section 764
of the DOHSA is applicable to any party defendant and not merely to the carrier.

\textsuperscript{205} \textit{See supra} notes 159 & 174 and accompanying text.
are mutually exclusive.\textsuperscript{206} Despite this difference, courts have utilized conflict of laws principles out of context to determine the parameters of recoverable damages under Sections 761 and 764.\textsuperscript{207}

Hence, although defense counsel can support an argument based upon the cases that have viewed the two damage sections as mutually exclusive, he also must anticipate the type of choice of law analysis used by the district court in the \textit{Bombay} decision,\textsuperscript{208} which potentially overrides any exclusivity argument. While no reported decision has done so to date, it is feasible for a court to apply Section 761 at the outset and then invoke choice of law principles to determine whether the \textit{Lauritzen}-type contacts would permit application of relief under foreign law. The \textit{Bombay} decision indicated that the choice of law analysis would be a stop-gap against this kind of dual recovery. However, the very misapplication of the \textit{Lauritzen} principles to the interface issue\textsuperscript{209} opens the door for further improper utilization of conflicts principles to discern how Congress wanted the DOHSA to apply. Once the \textit{Lauritzen} analysis is invoked to resolve the issue of the DOHSA's applicability, that same analysis is not intended to be reapplied when the court must dissect the various provisions of the Act itself.

Without the benefit of a more pronounced judicial viewpoint on the question of how Sections 761 and 764 are to interact, defense counsel confronted with a claim under foreign as well as domestic law must be wary of litigating the issue. In mass aviation disasters, counsel may utilize the consolidated pre-trial liability procedures established by the Judicial Panel on Multidistrict Litigation to brief the issue and have the court rule on it well in advance of a trial on the scope of damages. In general, how-

\textsuperscript{206} See \textit{supra} notes 130-31 and accompanying text. See also DeMateos v. Texaco, 562 F.2d 894, 899 (3d Cir. 1977); Fitzgerald v. Texaco, 521 F.2d 448, 454 (2d Cir. 1975), \textit{cert. denied}, 423 U.S. 1052 (1976).
\textsuperscript{207} \textit{Bombay}, 531 F. Supp. at 1182-84.
\textsuperscript{208} See \textit{supra} note 174.
\textsuperscript{209} See \textit{supra} notes 200-202 and accompanying text.
ever, the issue may be better left unresolved while negotiations toward settlement take place, in light of the danger imposed when a court relies upon *Lauritzen* to decide whether Section 764 is an additional means to recovery.

Perhaps proper briefing of the issue, should it come to pass in future cases involving the DOHSA, will focus more attention on the construction of foreign limitation statutes and whether they are considered *procedural* rather than substantive in nature.\(^{210}\) This kind of distinction may lend more incisive and clear delineation to the real issue of whether the *additional* recovery provided by Section 764 of the DOHSA is premised upon principles of exemplary damages rather than principles which evoke a choice between two equally viable remedies under the Act. It remains to be seen whether the DOHSA will be judicially interpreted as a means to permitting recovery of unlimited or, in essence, punitive damages under the guise of a foreign cause of action.

V. THE STATE LAW CONTROVERSY: DEPECAGE AND THE ALIENATION OF PUNITIVE DAMAGES

The statutory breakdown with respect to recovery of punitive damages in wrongful death cases provides no useful barometer for extracting a consensus among the states. Presently, punitive damage claims arising out of wrongful death actions are permitted in twenty-two states.\(^{211}\) Twenty-three states and the District of Columbia do not permit punitive damage claims in wrongful death actions.\(^{212}\) The issue apparently has not been ruled


\(^{211}\) 1 J. GHIARDI & J. KIRCHER, supra note 6, at 19 & n.5.

\(^{212}\) Id. at § 5.19 & n.4.
upon (at least in a reported decision) in the remaining four states.\textsuperscript{213} Furthermore, a close examination of the thirteen judicial circuits does not offer any general principles as to whether the permissibility of punitive damage claims is affected by regional and socioeconomic considerations.\textsuperscript{214}

In every jurisdiction of the United States where punitive damage claims are allowed, the standard of conduct by which to justify a punitive damage award has received either judicial or legislative delineation.\textsuperscript{215} The trier of fact who must apply the standard to the facts before him, however, is faced with broad terminology which varies widely from one state to another. Although a majority of the states that permit punitive damage claims require a showing of either malice or ill motive,\textsuperscript{216} there are some states that permit recovery of punitive damages on the basis of less definable conduct that is "atrocious" or characteristic of flagrancy and oppression.\textsuperscript{217} It is this latter standard which digresses from the element of consciousness and aligns punitive damage principles with legal theories of deterrence in criminal law. In such instances, an award of punitive damages can become justified by inad-

\begin{footnotesize}
\textsuperscript{213} These states are Connecticut, Idaho, Indiana, Rhode Island and Vermont. \textit{Id.} at § 5.19 & n.7.

\textsuperscript{214} Of the thirteen circuits, only the states belonging to the Third Circuit (Pennsylvania, New Jersey and Delaware) are in agreement among themselves that punitive damages are not allowed in wrongful death actions. \textit{See generally} Kenney, \textit{Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma}, 48 J. AIR. L. \& COM. 753, 754-56 (1983). In the Seventh Circuit, Illinois and Wisconsin agree that punitive damages should be disallowed, however the state of Indiana has no authority on the issue. In the Second Circuit, only New York has decided the issue (in favor of permitting punitive damage claims) while the states of Connecticut and Vermont have no authority either way. All the other circuits demonstrate a strong split of authority. \textit{Id.}

\textsuperscript{215} I J. GHIARDI \& J. KIRCHER, \textit{supra} note 6, at § 5.01.

\textsuperscript{216} \textit{See}, e.g., \textit{MONT. CODE ANN.} § 27-1-221 (1983); \textit{NEV. REV. STAT.} § 42.010 (1981); \textit{OKLA. STAT. ANN. tit. 23, § 9} (1955).

\textsuperscript{217} \textit{See} Ingram v. Pettit, 340 So. 2d 922, 924-25 (Fla. 1976); Ellis v. Golconda Corp., 352 So. 2d 1221, 1225 (Fla. Dist. Ct. App. 1977). \textit{See also} Smith v. Jones, 382 Mich. 176, 169 N.W.2d 308 (1969) ("Where the act done is one which from its very nature must be expected to result in mischief... carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others." 169 N.W.2d at 319).
\end{footnotesize}
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vertent conduct or several acts of negligence which have a cumulative effect. Even if the conduct under scrutiny does not possess an element of deliberation, the trier of fact can justify punitive damages if the assessment would serve an admonitory function.\textsuperscript{218}

Despite the clear delineation of the necessary standard of conduct as enunciated by the Restatement (Second) of Torts, such transgressions in the courts' interpretations of the Restatement standard depict a sliding scale of conduct which jeopardizes the rationale allowing punitive damage claims in wrongful death cases. The Restatement (Second) of Torts classifies two types of conduct. The first classification focuses upon the element of deliberation, where the defendant intends to cause harm to the plaintiff.\textsuperscript{219} The second type of conduct focuses not on the motive of the defendant as much as on his indifference to the gravity of those consequences of which he is aware.\textsuperscript{220} While the former classification is typified by the term "wilful misconduct,"\textsuperscript{221} the latter is commonly referred to as "wanton misconduct" or a "reckless disregard" for the safety or welfare of the plaintiff.\textsuperscript{222}

The wilful or deliberative element often is not found in a particular set of facts, yet the fact finder may impute the element of consciousness or disregard it completely. In the former instance, the jury might reason that a flight crew taking off in adverse weather conditions certainly did not intend to crash but did not sufficiently appreciate the gravity of those adverse conditions.\textsuperscript{223} In such a situation, the jury must decide whether the failure of the flight crew

\textsuperscript{219} Restatement (Second) of Torts § 8(A) (1965).
\textsuperscript{220} Restatement (Second) of Torts § 500 (1965).
\textsuperscript{221} It should be noted that as this term is used to define a standard of conduct under a state statute, its impact differs from the "wilful misconduct" exception to the liability limitation regime under article 25 of the Warsaw Convention. See Warsaw Convention, supra note 48, at art. 25.
\textsuperscript{222} J. Ghiardi & J. Kircher, supra note 6, at § 5.03.
\textsuperscript{223} For a factual scenario which highlights this rationale, see In re Air Crash Disaster at Washington D.C. on January 13, 1982, 559 F. Supp. 333 (D.D.C. 1983).
to carry out procedures mandated by inclement pre-takeoff weather conditions is sufficient to constitute reckless disregard of the public safety. The countervailing consideration for the jury is whether the "flight crew," two complex individual human systems, would be so reckless as to jeopardize their own lives as well as those of their passengers.

In the latter instance, the trier of fact may not have sufficient evidence to justify the imputation of some deliberate or conscious motive. The only evidence before the jury may be several decisions and omissions of the flight crew, each of which, in and of itself, constitutes a single act of negligence. But, when viewed in succession in the context of the flight scenario leading to the crash, the jury may find, if so instructed by the court, that cumulative acts of negligence displace the requirement of a conscious, deliberate act or omission and demonstrate a type of negligence that is gross in nature. This type of analysis tips the sliding scale over by stacking acts of negligence one upon the other, thereby giving rise to a punitive liability standard grounded in quantitative rather than qualitative analysis.

To the extent punitive damages are assessed in civil proceedings, their justification has stemmed from an as-

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224 See, e.g., In re Pago Pago Aircrash of January 30, 1974, 419 F. Supp. 1158 (C.D.Cal. 1976). The instructions form the standard by which a jury determines if the conduct warrants punitive liability. If the court says "you may find that when all the acts of negligence are taken together, they demonstrate a wanton disregard for public safety," then cumulative acts of negligence become the standard for assessing punitive liability. See infra note 225.

225 See, e.g., Pago Pago, 419 F. Supp. at 1158. In this case, the claims were governed by the Warsaw Convention and not by state statutory law. Therefore, the district court allowed the question of the flight crew's conduct to go to the jury to determine whether those cumulative acts constituted wilful misconduct. Id. at 1160. The Ninth Circuit Court of Appeals held that the jury properly could find wilful misconduct from the cumulative acts of negligence. No. 78-3591, slip. op. (9th Cir. 1982).

Although the case is distinguishable from one that is assessed under a state punitive damage statute, the Pago Pago decision does demonstrate how "stacking" acts of simple negligence can lead a jury to displace the element of a flight crew's mental processes which is the touchstone to the proper analysis of punitive damage liability.
similation of criminal law and its *mens rea* standard of culpability.226 Punishment on the civil side of the law first required some conscious thought-making process which preceded the act itself.227 As the need to find the consciousness element diminished with the adoption of varying standards throughout the United States, the more recent history of punitive damage liability in tort cases represents either imputation or displacement of the deliberative motive behind the defendant’s conduct.228 When the transgressions resulting from wilful misconduct approach the “gross negligence” standard, the spectrum of potentially punitive conduct is interrupted. The qualitative analysis necessary to determine whether a defendant’s conduct meets a particular state’s standard for measuring punitive damage liability no longer exists.

However large the dispute may loom with respect to the propriety of permitting punitive damages against a strain of negligent conduct, a greater controversy overshadows the sliding scale when punitive damage claims emerge from one aviation disaster but involve the law of more than one state. This controversy centers around the conflict of law problem which ultimately dictates the outcome of disputes regarding the recoverability of punitive damages.

The choice of law question is a threshold issue when the punitive damage laws of two or more jurisdictions are in conflict with one another.229 As shall be demonstrated below, the choice of law rules of the various jurisdictions are so disparate that a highly incongruous result often emerges against the carrier vis-a-vis the other defendants.

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226 “*Mens rea*” is the legal term for a guilty mind; a guilty, wrongful purpose; a criminal intent. BLACK’S LAW DICTIONARY 1137 (5th ed. 1979). See generally W. LaFaye & A. Scott, *supra* note 6, at 192 for a discussion of *mens rea*.

227 See 1 J. Ghiardi & J. Kircher, *supra* note 6, at ch. 1, 2 (discussion of historical basis of and current rationale behind punitive damages).

228 See *supra* notes 76-79 and accompanying text.

in the litigation. To illustrate, suppose a mass aviation disaster occurs in a jurisdiction that does not permit punitive damage claims in wrongful death actions. A suit is filed against the carrier and the aircraft manufacturer in State X, whose conflict of law rules yield the conclusion that the substantive law of the defendant’s place of incorporation must apply to determine the applicability of punitive damages in wrongful death cases. If that jurisdiction permits punitive damage claims against the corporate defendant, the choice of law rules of the defendant’s own place of incorporation will subject the defendant to punitive damage exposure, while the forum where the conduct actually took place will insulate the defendant from punitive damage claims. If the conduct of the flight crew gave rise to the punitive damage claims in the first instance, rather than the employer’s training and operation procedures, then this result is even more incongruous. Since the conduct to be scrutinized vis-a-vis punitive exposure is operational in nature, the law of the situs of the crash should govern the permissibility of exemplary damage claims.

Suppose further that the suit originally filed in State X is transferred to a more convenient forum for purposes of prosecuting and defending the suit. Under the doctrine of forum non conveniens, the suit is transferred to the jurisdiction where the crash occurred. While State X invoked the law of the defendant’s place of incorporation to govern (and in this instance, permit) punitive damage claims, suppose the transferee forum does not permit recovery of punitive damage claims in wrongful death cases. Which conflict of law rules apply: those of the transferee forum, or those of the court where the suit originally was commenced, State X? As established by the United States

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230 One glaring example hails from the mass air disaster of an American Airlines DC-10 near O’Hare Airport in May, 1979. The respective choice of law approaches utilized by the interested jurisdictions led to the conclusion by the district court that American Airlines was subject to punitive damages while the aircraft manufacturer, McDonnell Douglas, was not. See infra notes 283-91 and accompanying text. See also Kennelly, supra note 229, at 298-99 n.142.
Supreme Court, the transferee forum must follow and adopt the choice of law rules of the transferor.\textsuperscript{291} Hence, the defendant is subject to punitive damage claims even after transfer of the action to the more convenient forum, where no punitive damage claims against him would have been permitted if the suit had been commenced there originally.\textsuperscript{292}

This scenario raises the issue of what should dictate the choice of law analysis in a punitive damage context. With the principles of punishment and deterrence as the backdrop, should the selection of applicable law be structured around achieving uniformity among the defendants? One commentator has viewed such uniformity as the "palatable result" in determining the applicable law on punitive damages to be applied to an aircraft manufacturer and an air carrier who are co-defendants in litigation arising out of a mass aviation disaster.\textsuperscript{293}

Whether the result of the punitive liability assessment is palatable is irrelevant to the proper implementation of expansive principles which are designed to set examples by awards of unlimited monetary damages. The real design of the conflicts of law analysis is to respect the exemplary


\textsuperscript{292} This issue arose in the context of determining what law would govern the availability of punitive damage claims against American Airlines and McDonnell Douglas in the American Airlines DC-10 Air Crash Disaster near Chicago, Illinois on May 25, 1979. Adhering to the principle that the corporate defendant's principal place of business (as of May 25, 1979) should govern the choice of law issue, the District Court for the Northern District of Illinois determined that American Airlines was subject to punitive damage claims under New York law but McDonnell Douglas was not subject to such claims under Missouri law. \textit{In re Air Crash Disaster near Chicago, Illinois on May 25, 1979}, 500 F. Supp. 1044, 1049-52 (N.D. Ill. 1980).

In his opinion, Judge Will of the Northern District of Illinois acknowledged the incongruity of his decision, noting that the bottom line is that the result is inconsistent, incongruous and crazy, "but that is the way the conflict of laws rules work." Transcript Pretrial Hearing on June 26, 1980, at 8-9, as cited in Kennelly, \textit{supra} note 229, at 299 n.142.

On appeal, the Seventh Circuit Court of Appeals reversed this entire portion of the district court's opinion. 644 F.2d 594 (7th Cir. 1981). The opinion of the Seventh Circuit became the touchstone for the modern-day analysis of punitive damage law in aviation disasters.

\textsuperscript{293} Kennelly, \textit{supra} note 229, at 299.
principle such that it is purposefully utilized only when warranted against that corporate carrier or flight crew who have consciously turned their back on the safety of their passengers. When the exemplary principle is invoked against conduct that falls short of this conscious element, punitive damages become a dangerous weapon, abusively assessed to attain some kind of palatable uniformity or to establish an impressive precedent in a particular court’s case of first impression.294

This section will examine the punitive damage analysis in litigation which arose out of three mass aviation disasters. The first tragic disaster involved the collision of two Boeing 747 jet aircraft on the airport runway at Tenerife in the Canary Islands on March 27, 1977. The second incident occurred on March 25, 1979 near Chicago, Illinois when a DC-10 aircraft crashed shortly after take-off from Chicago O’Hare Airport. The last and most recent disaster discussed in this section took place near Washington, D.C. when a Boeing 737 aircraft crashed into the Potomac River shortly after its take-off from Washington National Airport on January 13, 1982. In these three instances, nearly 1,000 lives were lost.

As these cases will show, the most recent judicial viewpoint on the issue of punitive liability in aviation cases has been an exhibit of respect for the exemplary principle. The reason behind this trend is not often identifiable, however, because the analysis of each jurisdiction’s treatment of a defendant’s culpability is visibly complex. Oftentimes, the intricacy of the analysis breeds nothing more than judicial dissipation. Through the mesh of divergent analytical models, however, a touchstone to the proper treatment of the exemplary principle has emerged in a handful of reported decisions where the courts have focused more of their attention on the pure facts of the particular case at hand rather than simply trying to attain a palatable result. Thus, the goal of attaining a palatable

294 See, e.g., In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983). See supra note 109 and accompanying text.
result has, in the recent judicial trend, been outweighed by the desire to refine the more popular depecage principle.

The pure factual analysis, which avoids overbreadth and looks at each issue independently of all others, is grounded in the principle of “depecage.” As an outgrowth of depecage, some courts have chosen to expound upon the intricacy further and classify the potentially punitive conduct as extraterritorial to the situs of the disaster. Yet, as sophisticated as the terminology has become, this recent judicial outlook must be credited with incorporating pragmatism into the law of punitive damages, particularly where the need for a practical solution is pressing: a flight regime wherein life turns to death in a split second. It is in such a factual scenario that the element of deliberate decision-making seems gravely displaced and “palatability” of results flies in the face of logic.

In the 1978 decision of Sibley v. KLM-Royal Dutch Airlines (Koninklijke Luchtvaart Maatschappij N.V.), the United States District Court for the Southern District of New York introduced what subsequently became known as depecage. Wrongful death actions were consolidated in

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236 The seminal decision which introduced the concept of extraterritoriality is In re Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 633 (7th Cir. 1982).

237 454 F. Supp. 425 (S.D.N.Y. 1978). Although a prior decision from the Southern District of New York pronounced the importance of “issue” focus in the choice of appropriate damage laws, that case did not deal with punitive damages. In Gordon v. Eastern Air Lines, Inc., 391 F. Supp. 31 (S.D.N.Y. 1975), the district court refused to provide a more elaborate remedy under Florida law to plaintiff for the death of her husband. Although the crash occurred in Florida and the carrier had its principal place of business there, the court reasoned that to select the appropriate law on remedies rather than on liability, plaintiff’s residency in New York—which had nothing to do with the issue of the carrier’s culpability—must be invoked to limit plaintiff’s recovery because the state’s policy was to “protect its [New York’s] domiciliaries from unjust foreign laws, not to enhance their recovery by application of a more favorable foreign law…” 391 F. Supp. at 34.
the district court in Manhattan as a result of the tragic collision of a Pan Am 747 aircraft with a KLM 747 on the airport runway at Tenerife in the Canary Islands. Plaintiff Sibley and his deceased father both were residents of Massachusetts where the wrongful death action was commenced against the two commercial carriers. The plaintiff sought a ruling against defendant KLM that the substantive law of Massachusetts applied to determine KLM's liability for punitive damages. KLM was a Dutch corporation with its principal place of business in the Netherlands.

The case came before the district court in Manhattan pursuant to a Section 1407 transfer and, as such, the applicable choice of law rules were those of the transferor court in Massachusetts rather than those of the transferee forum in Manhattan. A Section 1407 transfer is primarily aimed at judicial efficiency and the preclusion of duplic-

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239 Sibley, 454 F. Supp. at 426. Plaintiff originally sought the same ruling against co-defendant Pan Am but withdrew the claim for punitive damages against that carrier. Id. at 426 n.1.
240 Id. at 426. See also 28 U.S.C. § 1407 (1982).
241 Sibley, 454 F. Supp. at 426. The type of transfer has significant impact on the choice of rules which will govern resolution of all issues in a mass aviation disaster. Section 1407 transfers are for the purpose of consolidating all cases in one forum for non-duplicative pre-trial liability proceedings. 28 U.S.C. § 1407 (1982). Once these proceedings have been completed, each case can be transferred, upon motion by plaintiffs, back to the original jurisdiction where plaintiff commenced the action. Id. If the suit originated in state court and was removed by the defendant so as to subject the action to the Section 1407 proceedings, then upon transfer back to the federal court to which defendant removed the action, plaintiff can seek to have the case remanded to the state court. See supra note 120 and infra notes 394-400 and accompanying text.

The purpose in doing so is to allow plaintiff his right to try his case on the issue of recoverable damages in the forum he selected. In the great majority of instances, the multidistrict liability proceedings yield settlement of the cases so there is no need for re-transfer to the original forum. The consolidated liability proceedings also serve, as in the instant case, as the blueprint for the direction in which the litigation should proceed. It was during these proceedings that plaintiff Sibley determined that he had an insufficient basis upon which to proceed against Pan American World Airways for punitive damages.

cative discovery; to that end, the transferee court is an administrative device which should not dictate the substantive rights of the parties by utilization of its own choice of law rules.\textsuperscript{242} The plaintiff and KLM did not dispute that the choice of law rules of the Commonwealth of Massachusetts governed the resolution of the substantive issues arising out of the crash.

The Massachusetts choice of law standard, like many other jurisdictions', resulted from a replacement of a "lex loci delicti" test in the mid-1970's\textsuperscript{243} with the more practical standards enunciated in the Restatement (Second) of Conflict of Laws.\textsuperscript{244} Under the \textit{lex loci delicti} standard, all substantive issues arising out of plaintiff's cause of action were governed by the law of the place where the injury occurred.\textsuperscript{245} The departure from this traditional approach gave rise to a principle calling for close examination of the respective interests of those jurisdictions whose substantive law potentially controlled the resolution of legal issues.

Plaintiff Sibley argued that an interest analysis based on the facts before the United States District Court for the Southern District of New York would result in applying Massachusetts law to resolve the issue of liability for both


\textsuperscript{244} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} §§ 6, 145 (1971).

\textsuperscript{245} See, e.g., Brogie v. Vogel, 348 Mass. 619, 205 N.E.2d 234 (1965). However, in many jurisdictions the onset of more practical choice of law analyses failed to totally displace the \textit{lex loci delicti} standard. Rather, the long-established principle drawing upon the conflicts of law of the situs of injury remains as a decisive consideration in appropriate instances. The Supreme Court of Florida's decision in Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) is highly illustrative. As discussed below, the Bishop decision became the touchstone for dismissal of several punitive damage claims against Air Florida, Inc. in those actions which were commenced against the carrier as a result of the fatal crash of its flight Palm 90 in Washington, D.C. on January 13, 1982 but could not be consolidated due to a lack of diversity which barred removal from state court. \textit{See infra} notes 394-400 and accompanying text.
punitive and compensatory damages. The plaintiff contended that Massachusetts held the greatest interest in having its law applied to resolve the scope of plaintiff's recovery because the decedent, the plaintiff and his son all were domiciliaries of the Commonwealth of Massachusetts. Inasmuch as recovery of punitive damages for its own domiciliary would have been in the interest of Massachusetts, the district court in New York properly recognized this interest as relative to the greater interest held by the Netherlands. The relativity of importance of the various interests in assessing the choice of punitive damage law served as the backdrop for the yet unpronounced principle of depecage.

Admittedly, each state wants to see its citizens adequately restored for the loss of a loved one, to the extent that a monetary award even performs that function, even if that restoration implicitly encompasses a design for punishment of the alleged wrongdoer. The viability of this interest notwithstanding, it digresses from the real issue at hand when the fact finder must assess whether the defendant's culpability reaches that degree of severity at

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246 The Massachusetts Wrongful Death Act provides:
A person who (1) by his negligence causes the death of a person, or (2) by wilful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case where the decedent's death was caused by the malicious, wilful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant.


247 Sibley, 454 F. Supp. at 428.

248 Id. at 428-29. It should be noted that had the court adopted the lex loci delicti standard to resolve the issue of punitive damage liability, the law of Spain would have applied. Spanish law, the court noted, did not provide for the recovery of punitive damages in wrongful death cases. Id.
which punishment attaches. In examining the facts of the crash against the degree of culpability necessary to find punitive liability, the most significant interest would seem to belong to the Netherlands because it must decide whether to punish its own citizen-defendant. Having realized this, the district court extracted the essence of the principle of depecage without a specific reference to it: "[T]he economic and social impact of this litigation will fall on Massachusetts domiciliaries. . . . However, in performing an interest analysis, the Court (sic) must look to the particular issue in question to determine which state has the strongest interest in having its law applied."\(^{249}\)

The court proceeded to demonstrate that the issue of "damages" as such is not a single issue to resolve in disposing of a cause of action. By the dictates of a depecage-type analysis, damage issues must be dissected so that different strains of damages are analyzed in the context of the jurisdictions most legitimately interested in resolution of the issues: "The issue presently before the Court (sic) is the availability of punitive damages. Unlike compensatory damages, the purpose of punitive damages is not to restore the plaintiff, but rather to punish the defendant and to deter future wrongful conduct by the defendant and others."\(^{250}\)

The court defined as its mission the determination of whether the jury should be instructed that damages grounded in punishment could be considered by the panel members. Having identified the interests involved, the district court ruled that Massachusetts had no interest in punishing KLM because the acts which gave rise to punitive scrutiny occurred in the Canary Islands.\(^{251}\) KLM, or any other carrier in its position, could not be expected to conform its future conduct to Massachusetts standards


\(^{250}\) Sibley, 454 F.2d at 428.

\(^{251}\) Id.
“in order to avoid the slight risk of injuring Massachusetts domiciliaries there.” The same principle would hold true for domiciliaries of other states, particularly those jurisdictions adhering to the Restatement’s interest analysis approach.

In connection with its use of the depecage principle, the district court in Manhattan discussed an additional reason why the seemingly generic issue of “damages” cannot be disposed of summarily in wrongful death cases arising out of a mass aviation disaster. By properly focusing

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252 Id. at 429.

253 Three months after Judge Robert Ward decided Sibley, three other wrongful death cases arising out of the same Tenerife disaster were brought before Judge Ward pursuant to the machinations of 28 U.S.C. § 1407 (1982). Jackson v. Koninklijke Luchtvaart Maatschappij N.V., 459 F. Supp. 953 (S.D.N.Y. 1978). Three plaintiffs who filed suit originally in the United States District Court for the Central District of California opposed KLM’s motion to have all counts of punitive damages against it dismissed. Id. at 954. Looking to the relevant interests under California’s choice of law rules, Judge Ward only had to weigh the interests of the situs of the crash, Spain, against the situs of KLM’s headquarters, the Netherlands. Id. at 955-56. It already was an established principle in the New York forum that the decedent’s domiciliary state had no significant interest in imposing punitive damages against conduct which occurred either in the cockpit at Tenerife or at the corporate headquarters in the Netherlands. Id. at 954 n.2, 955. With respect to those two interested jurisdictions the court stated:

Spain’s policy of not imposing punitive damages in tort cases reflects its judgment that its interest in protecting the financial security of those doing business in Spain, such as KLM . . . outweighs its interest in imposing punitive damages as a means of regulating conduct. The Netherlands, KLM’s place of incorporation, and principal place of business, has a similar interest in protecting KLM from excessive financial burdens.

Id. at 956.

With the interest analysis properly orchestrated, Judge Ward could, without further analysis, determine whether the conduct giving rise to the claims for punitive damages arose out of the flight crew’s conduct, whereby the law of Spain would apply, or as a result of corporate policy concerning training and operational procedures established by the carrier, in which case the law of the Netherlands would apply. However, further analysis would become necessary in later cases due to the origination and expansion of the principle of depecage. See e.g., In re Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 594 (7th Cir.), cert. denied, 454 U.S. 828 (1981). See also In re Air Crash Disaster at Washington, D.C. on January 13, 1982, 559 F. Supp. 333 (D.D.C. 1982); In re Air Crash Disaster at Malaga, Spain on September 13, 1982, MDL No. 530 (E.D.N.Y. Apr. 5, 1984). KLM’s motion to dismiss all claims for punitive damages accordingly was granted. Jackson, 459 F. Supp. at 956.

254 Sibley, 454 F. Supp. at 428.
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upon the detailed factual scenario in pari materia with the advancement of genuine interests in the litigation, the court realized that not only did Massachusetts have no legitimate interest in applying its punitive damage law, but the situs of the crash itself may have had an equally insignificant interest.255

Having dismissed the decedents' respective domiciliaries as bearing no nexus to recovery of exemplary damages, the remaining analysis of potentially interested jurisdictions should have been easy for Judge Ward because there was no need to rule upon the countervailing interests of Spain and the Netherlands.256 Nevertheless, Judge Ward illustrated his grasp of an elusive area of damage law, explaining how the defendant's domicile may be of particular relevance because the arguably wilful or reckless conduct at issue may have originated in deliberate corporate procedures which rendered the flight crew as helpless as its passengers in preventing the disaster.257 In this sense, what occurred in the cockpit in the flash of a few seconds before death represented only the tip of the iceberg, since the culpable conduct may have been committed by those officers at the carrier's headquarters who, over a period of time, defined the procedures to be implemented when operational danger appears imminent. In this context, punitive culpability is "extraterritorial" to the cockpit and shifts the focus of the prevailing interest factors to the principal place of business of the carrier.

Judge Ward did not further pursue his analysis of the relevant interests because there was no need to do so based on the facts before him. However, throughout both the Sibley and Jackson opinions,258 he alluded to the essence of the depecage principle. The court pointed out that even after disposing of the interests of the states

256 Sibley, 454 F. Supp. at 429.
257 Id.
258 See supra notes 237-57 and accompanying text for a discussion of the Sibley and Jackson opinions.
where the claimants are domiciled, the proper assessment of the carrier’s liability for punitive damages retains an element of difficult deliberation for any court that intends to incisively focus on the few facts in the case from which the most interested jurisdiction shall emerge.\(^{259}\)

Less than one year after the United States District Court for the Southern District of New York decided *Sibley* and *Jackson*, the same issues re-emerged in one of the worst mass disasters in aviation history. On May 25, 1979, at 3:04:05 p.m. (CDT), a McDonnell Douglas DC-10 jet transport aircraft, operated by American Airlines as Flight 191, crashed shortly after takeoff into an open field and trailer park about 4,600 feet northwest of the departure end of runway 32R\(^{260}\) at Chicago’s O’Hare International Airport.\(^{261}\) The aircraft carried 258 passengers and 13 crew members, all of whom were killed. The left engine and related structures fell off the aircraft during its

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\(^{259}\) It is not reasonable to expect that KLM or other potential defendants will conform their future conduct to Massachusetts standards when acting in the Canary Islands in order to avoid the slight risk of injuring Massachusetts domiciliaries there. Furthermore, application of the Massachusetts punitive damages provision would impair the clear and substantial interest of the Netherlands in protecting its domiciliary KLM from excessive financial burdens. *Sibley*, 454 F. Supp. at 429.

Spain’s policy of not imposing punitive damages in tort cases reflects its judgment that its interest in protecting the financial security of those doing business in Spain outweighs its interest in imposing punitive damages as a means of regulating conduct. The interests of Spain and the Netherlands are accentuated under present circumstances, where hundreds of damage claims have been asserted against KLM. *Jackson*, 459 F. Supp. at 956.

\(^{260}\) Kennelly, *infra* note 229.

Runway numbering corresponds to the magnetic heading of the runway to the nearest ten degrees on the compass rose; thus, an aircraft landing or taking off on runway 32 would be flying a heading of approximately 320 degrees. “R” signifies that runway 32R is the right of two parallel runways. *Id.*

takeoff roll. Initially, the aircraft climbed away from the runway in a wings-level attitude, but shortly thereafter rolled into a steep left bank, descended rapidly and crashed. The impact occurred one minute and twenty seconds after the takeoff roll had begun.

This was the fourth worst air disaster in world history and the worst ever in the United States as of that time. Congress and the National Transportation Safety Board, realizing the need for a prompt and thorough inquiry, initiated a massive investigation. Only twelve days after the accident, the Federal Aviation Administration suspended the Type Certification for the McDonnell Douglas DC-10. All DC-10's operated by U.S. carriers were grounded until the Type Certificate was reinstated on July 13, 1979.

The left, or number 1, (underwing) engine fell off the aircraft while it was in the air because of the failure of one of the pylons. Initially, the National Transportation Safety Board believed that a fatigue fracture occurred in a three-inch belt that was vital to the integrity of the pylon. Later in the investigation, this finding was repudiated. The bolt fracture, described as typical of overload, was not the cause but rather the result of the pylon fracture. The pylon failure in turn caused the hydraulic system to fail. When the left engine and pylon separated from the DC-10, the aircraft had already accelerated from

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262 Id.
263 Id. at 2.
264 Disaster in the Air, TIME MAGAZINE, June 4, 1979 at 12.
266 Id. at 42,170.
268 Pylons are the structures beneath the wings which are incorporated into the tail assembly and connect the engine assembly to the main frame of the aircraft. There are three pylons on the DC-10 aircraft, one on each wing and one on the rudder of the aircraft. The pylons support the demountable General Electric CF6-6D engines. Chicago Accident Report, supra note 261, at 3.
269 Chicago Sun Times, May 28, 1979, at 2 (remarks of Elwood Driver, National Transportation Safety Board Vice Chairman).
270 Chicago Accident Report, supra note 261, at 67. See also Kennelly, supra note 229, at 285 n.61.
V1 speed.\textsuperscript{271} Despite the loss of one-third of the aircraft’s available power, the flight crew had no choice but to continue the takeoff. When the aircraft reached VR speed,\textsuperscript{272} the number 1 engine and pylon assembly detached from the aircraft, went over the top of the left wing and the fuselage, and fell to the side of the runway.\textsuperscript{273} Despite the total loss of the number 1 engine thrust, the aircraft continued its takeoff and became airborne at 3:03:38 p.m., approximately 6,700 feet from the start of its takeoff roll.\textsuperscript{274}

During an eighteen-second period after becoming airborne, the crew managed to maintain a relatively stable attitude,\textsuperscript{275} an indication that the aircraft was being flown to gain altitude. During this same period, the DC-10 aircraft reached its highest altitude, approximately 325 feet above ground level.\textsuperscript{276} Twenty-two seconds after the aircraft became airborne, however, the aircraft’s previously stable roll attitude began rapidly to deteriorate. Five seconds later the aircraft crashed.\textsuperscript{277}

The numerous wrongful death cases arising out of the crash were filed in Illinois, California, New York, Michigan, Hawaii, and Puerto Rico.\textsuperscript{278} Pursuant to 28 U.S.C. § 1407,\textsuperscript{279} the cases were transferred to the United States District Court for the Northern District of Illinois for consolidated pre-trial liability proceedings. Plaintiffs sought

\textsuperscript{271} "V1" Speed is referred to as the critical engine failure speed or the "decision speed", at and above which the aircraft is committed to takeoff and no longer can be aborted. See Kennelly, supra note 229, at 286 n.63.

\textsuperscript{272} VR is the speed at which the aircraft is "rotated", i.e., the action of applying back pressure to the aircraft’s nosewheel off the runway. Id. at 286 n.65.

\textsuperscript{273} Chicago Accident Report, supra note 261, at 2.

\textsuperscript{274} Id. at 5.

\textsuperscript{275} Id.

\textsuperscript{276} Id.

\textsuperscript{277} For a more detailed sequence of the flight scenario leading up to this crash, as well as for insightful analysis of the various factual and legal issues arising out of this crash, see Kennelly, supra note 229, at 273.

\textsuperscript{278} In re Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044, 1048 (N.D. Ill. 1980) [hereinafter cited as Chicago I], modified, 644 F.2d 633 (7th Cir. 1982) [hereinafter cited as Chicago II in the footnotes and as Chicago in the text], cert. denied, 454 U.S. 878 (1981).

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punitive damages from both McDonnell Douglas, the aircraft manufacturer, and American Airlines, the carrier, for allegedly egregious conduct in the design, manufacture, maintenance and operation of the DC-10 aircraft. McDonnell Douglas was a Maryland corporation at the time relevant to the litigation, with its principal place of business in Missouri. The design and manufacture of the DC-10 took place in California. American Airlines was a Delaware corporation which had moved its principal place of business from New York to Texas just two months after the May 25, 1979 crash.

Both defendants moved in the district court to strike all claims for punitive damages. The conflict of laws issue and the respective conflict standards of the many potentially interested jurisdictions spearheaded the intricate dispute over the issues arising out of the question of punitive damage liability. The district court looked to Illinois' "most significant relationship" test. This test analyzes the nexus between the type of damages being assessed and a particular jurisdiction's interest in having that assessment applied pursuant to its substantive law on punitive damages. In each instance where the court invoked the substantive law of that state with the greatest interest in the issue, it found that interest to be in the state where McDonnell Douglas' and American Airlines' respective principal places of business were located at the time of the occurrence. Under Missouri law, punitive damage claims were permitted in wrongful death cases. New

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280 Chicago 1, 500 F. Supp. at 1047.
281 Id.
282 Id. at 1047-49.
283 At the time of the occurrence, McDonnell Douglas had its principal place of business in Missouri and American Airlines in New York. Although American Airlines moved its principal place of business to Texas before these issues were presented to the court, the Northern District of Illinois determined that a corporate move during lengthy litigation should not affect the substantive law to be applied. Chicago 1, 500 F. Supp. at 1049, 1050.
284 Id. at 1050. The court noted, however, that Missouri does not characterize these damages as "punitive". See Mo. Ann. Stat. § 537.090 (Vernon 1949); Wise- man v. Missouri Pacific R.R., 575 S.W.2d 742 (Mo. App. 1979); Glick v. Ballentine Produce, Inc., 396 S.W.2d 609 (Mo. 1965).
York, which amended its law on this issue in 1982, did not permit such claims in 1979. Illinois did not permit punitive damage claims in wrongful death actions.

The court found that the law of the state of the defendant's principal place of business should apply. Even if the law of the principal place of business conflicts with that of the place where the particular conduct occurred, the former should prevail because "responsibility for corporate conduct in the form of punitive damages should be uniform regardless of where the particular operation took place."

The district court then defended the reasoning behind its analysis, pointing out that: "[t]his result is best achieved by placing the responsibility for corporate conduct at the corporate headquarters where, as in the case of punitive damages, the purpose of the tort rule is to punish or deter wrongful conduct or to regulate the financial burdens on resident persons or corporations." The result of the court's analysis making punitive damages available against McDonnell Douglas but not against American Airlines was an anomaly. This seemingly placed the principle of depecage in its proper perspective: "The inconsistency of finding punitive damages against one defendant and not the other is compelled by differences in the various states' conflict of law and punitive damages rules and reflects the problems inherent in the

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286 ILL. REV. STAT. ch. 70, § 2 (Supp. 1985).
287 Chicago I, 500 F. Supp. at 1049.
288 Id.
289 Id. at 1049-50. The court illustrated its rationale by pointing to American Airlines' corporate organization:

American maintained its corporate headquarters in New York, its operations base in Texas, its maintenance department in Oklahoma, and conducts business throughout the country. Application of the law where the allegedly wrongful conduct occurred would require extensive examination of the particular employees and operations involved, as well as varying rules depending upon the particular type of conduct involved.

Id. at 1050.
290 Id.
application of state law to activities of national scope."  

With this closing comment in mind, the district court certified its order pursuant to 28 U.S.C. § 1292(b). An interlocutory appeal from the district court's multi-faceted ruling followed with the intention to "materially advance the ultimate termination" of the litigation.

On appeal to the United States Court of Appeals for the Seventh Circuit, the concept of depecage received its due attention. First, the Seventh Circuit court noted that: "The application of choice-of-law rules is not a mechanical process of cranking various factors through formula. Critical to conflicts analysis is the notion that we must examine the choice-of-law rules not with regard to various states' interests, in general, but precisely, with regard to each state's interest in the specific question of punitive damages." Hence, the court specifically approved the concept of "depecage", whereby the rules of different states are applied according to the precise issue involved vis-a-vis which state has the greatest purpose and policy in awarding punitive damages.

Following an exhaustive analysis of the various interested jurisdictions, the court reversed in part and affirmed

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291 Id. at 1054.
292 Id. 28 U.S.C. § 1292(b) (1982) provides as follows:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.
293 Chicago I, 500 F. Supp. at 1054.
294 Chicago II, 644 F.2d at 594.
295 Id. at 611.
296 Id. at 611 n.13.
in part the finding of the district court.\textsuperscript{297} Under all applicable choice of law rules, the court determined that the substantive law of Illinois applied in determining the right to punitive damages in all wrongful death cases.\textsuperscript{298} Accordingly, neither American Airlines nor McDonnell Douglas was subject to claims for punitive damages in any of the wrongful death cases, regardless of where the suits originally were filed, the location of the principal place of business of the respective defendants or the place of the commission of the alleged egregious conduct.\textsuperscript{299}

The court commenced its analysis by considering those actions filed in Illinois. Noting that Illinois state courts apply the “most significant relationship test” advocated by the Restatement, the court identified two sets of criteria for the measurement of the “most significant relationship” test.\textsuperscript{300}

The first set of criteria includes general factors such as the need of the interstate system; relevant policies of the forum and other interested states; protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied. The second set of criteria includes the contacts to be taken into account in applying these principles. These contacts are: (1) the place of injury; (2) the place of misconduct; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship between the parties is centered.\textsuperscript{301}

Having set forth the parameters of what would be dictated by proper utilization of the depecage principle, the court began its factual analysis with the defendant Mc-

\textsuperscript{297} Id. at 633.
\textsuperscript{298} Id. at 626.
\textsuperscript{299} Id. at 633.
\textsuperscript{300} Id. at 611.
\textsuperscript{301} Id. at 611-12. See also Restatement (Second) of Conflict of Laws §§ 6, 145 (1971).
Donnell Douglas. The states with relevant contacts that had to be taken into account in analyzing McDonnell Douglas' exposure to punitive damages were: Illinois, the place of injury; California, the place of McDonnell Douglas' alleged misconduct; Missouri, McDonnell Douglas' principal place of business; and, as noted by the court, the states where the relationship among the parties was centered, to the extent that this factor could be determined.

Turning to the prospective interests of the states of domicile of the various plaintiffs, the court summarily dismissed such interests by highlighting the underpinnings of the principle of depecage. The court noted that the domiciliary states of plaintiffs have no interest in disallowing punitive damages because the decision to disallow such damages is "obviously designed to protect the interest of resident defendants, not to effectuate the interest of the domiciliary states in the welfare of plaintiffs." Nor do the domiciliary states of plaintiffs have an interest in imposing punitive damages on the defendants. The legitimate interests of the states are limited to assuring that each plaintiff is adequately compensated for his or her injuries and that the proceeds of any award are distributed

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302 Chicago II, 644 F.2d at 612. In the court below, the principal place of business of each defendant was determined to have the controlling interest in resolving the question of punitive damages against both defendants. Noting that Missouri, McDonnell Douglas' principal place of business at all times relevant to the litigation, allowed punitive damages in wrongful death cases, the district court found that punitive damages were allowed in wrongful death claims under Missouri law and thus could be assessed against McDonnell Douglas. Chicago I, 500 F. Supp. at 1050.

303 Chicago II, 644 F.2d at 612. In searching for the "center" of the relationship, the court ultimately determined that it made little difference whether the center was Illinois, where the decedents purchased their tickets for a flight originating in Illinois, or California, the destination of the flight. Neither state allowed punitive damages in wrongful death actions. Id.

Moreover, this "center" really had little to do with the punitive damage analysis. The mere fact that a relationship is based upon certain contacts arising out of general factors such as contract origin, flight origin and destination, had nothing to do with the issue of punishment. Id. at 612 n.20.

304 Id. at 612.
to the appropriate beneficiaries.\textsuperscript{305} Hence, the court reasoned that the interests of the domiciliary states of plaintiffs are fully served by the application of the law of plaintiffs' domiciles to issues involving the measure of compensatory damages: "Once the plaintiffs are made whole by the recovery of the full measure of compensatory damages to which they are entitled under the law of their respective domiciles, the interests of those states are satisfied."\textsuperscript{306}

The court thereby narrowed the number of relevant jurisdictions to three: Illinois, the situs of the crash and place where many of the lawsuits originally were commenced; California, the place of McDonnell Douglas' alleged misconduct; and Missouri, the principal place of business of the defendant aircraft manufacturer. In the interest of depecage, the court addressed its judicial obligation by examining the precise interest of each state with respect to the purpose of punitive damages.\textsuperscript{307} Identifying the underlying purpose of punitive damages as punishment or deterrence, the court noted that California and Missouri held a very definite interest in pursuing and accomplishing this purpose.\textsuperscript{308} The interest of the situs of injury, where the litigation was consolidated and pending, was comparable to the respective interests of McDonnell Douglas' principal place of business and the situs of alleged misconduct.\textsuperscript{309}

California derived its substantial interest in the resolu-

\textsuperscript{305} Id. at 612-13.
\textsuperscript{306} Id. at 613.
\textsuperscript{307} Id. The principle of depecage dictated rejection of a "grouping" of contacts, as advocated by the defendants. Id. at 613 n.21.
\textsuperscript{308} Id. at 613.
\textsuperscript{309} Id. The court stated: "Because the corporate headquarters of MDC [McDonnell Douglas] is located in Missouri, Missouri has an obvious interest in deterring wrongful conduct in such design and manufacture, even if the actual work was performed in California. To find otherwise would be to gut the very concept of corporate accountability." Id.

Under a grouping of contacts, McDonnell Douglas argued, Missouri would have no interest in the imposition of punitive damages. Since the law of the place of injury (Illinois) and the law of the place of misconduct (California) both would disallow punitive damages, so the argument goes, the choice-of-law analysis must
tion of the punitive damage exposure of McDonnell Douglas from its vested interest in the economic health of corporations doing business there. Furthermore, as the court pointed out, California was the recipient of substantial sales revenues and income taxes both directly and indirectly from the corporation's activities within the state. But the fact that California did not permit punitive damages in wrongful death claims while Missouri did became the catalyst for the district court's conclusion that when the law of the principal place of business conflicts with the law of the place of alleged misconduct, the former should prevail.

The district court reasoned that responsibility for corporate conduct should be uniform regardless of where individual instances of such conduct take place. The Seventh Circuit used the district court's reasoning to highlight the depth of the depecage analysis and to demonstrate the significant interests of the situs of injury in resolving the issue of punitive damage exposure: "But the district court's analysis only looked at the purpose behind the decision to allow punitive damages. As we have discussed, both the decision to allow punitive damages and the decision to disallow punitive damages must be ac-

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proceed as if injury and misconduct occurred in the same state. Thus Missouri's potential interest would be discounted. Id. at 613 n.21.

The Seventh Circuit responded to this argument as follows:

[T]o say that Missouri has no interest in the imposition of punitive damages—as defendants do—would encourage rampant subterfuge and confusion. . . . If courts held that the place of 'conduct' had the critical interest in punitive damages, then litigation would center around exactly where activities and decisions occurred. The practical effect of such a holding would be to require extensive examinations of numerous employees and to require complex investigations into the precise locations of many areas of corporate decision.

Id. at 613-14. The court realized how this type of defense strategy could lead to total circumvention of punitive damage exposure: "Corporations seeking to avoid potential punitive damages would be encouraged to structure decisions so that no specific locus for a major decision could ever be proved to have occurred in a 'punitive' state." Id. at 614.

310 Id. at 614.
311 Id.
312 Chicago I, 500 F. Supp. at 1049.
corded great respect.

The court acknowledged that the place of injury is largely fortuitous in aircrash disasters and that the interest of the situs of injury is relative to the significance of the interests of a defendant’s place of alleged misconduct and the principal place of business. The court emphasized, however, that these interests do not disqualify Illinois from holding a legitimate stake in determining the outcome of the punitive damage issue. First, Illinois was more than the situs of injury. Many other significant contacts were within the state of Illinois. Second, the state of Illinois contains one of the world’s busiest airports and thereby has a significant interest in encouraging air transportation corporations to do business in the state. Third, Illinois had a very strong interest in not suffering further air crash disasters. Fourth, as accepted by judicial notice, the DC-10 crash sent shock waves throughout the metropolitan area. Many sectors of the state’s emergency operations were affected by the crash: immediately deploying disaster units to the crash site, incurring significant expenses in attempted rescue and cleanup operations; and the long and difficult task of identifying decedents and notifying their respective next of kin. Once the Seventh Circuit justified the legitimacy of Illinois’ interest, it balanced the relevant countervailing considerations and thereby forged the nexus to a proper utilization of the depecage principle throughout the analysis of the punitive damage issue.

Turning its analysis to the co-defendant, American Airlines, the court of appeals grappled with the change in American’s principal place of business during 1979. During 1979, American moved its principal place of business from New York, which did not allow punitive damages at

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315 Chicago II, 644 F.2d at 615. See also supra note 253 and accompanying text.
315 Chicago II, 644 F.2d at 615, supra note 253.
316 Id.
317 Id.
the time, to Texas, which did and still does\textsuperscript{318} allow punitive damages in wrongful death claims. The plaintiffs took the position that since the design of a punitive damage statute is to punish and deter, the aim of punitive damages is to control \textit{future} conduct rather than present or past conduct of the corporation. The plaintiffs added that only the current principal place of business can control future conduct. Therefore, Texas, the new principal place of business of American Airlines, should be adopted as the principal place of business for purposes of the court's choice-of-law analysis as it applies to American Airlines.\textsuperscript{319}

Reinforcing the necessity for an issue-by-issue analysis based purely upon the facts of the case before it, the Seventh Circuit Court of Appeals used two points to reject the plaintiffs' argument and conclude that, for purposes of its choice-of-law analysis, American Airlines' principal place of business was New York. First, the court stated that it is not enough simply to look at whether a state's interest is legitimate or significant for purposes of the choice-of-law analysis.\textsuperscript{320} The judicial obligation must go further and determine when that interest has vested.

Because Illinois has such strong interests in promoting airline safety, it would have a strong interest in allowing punitive damages to deter corporate misconduct relating to air safety. But because Illinois also has such strong interests in having airlines fly into and out of the state and having related air transportation companies do business within the state, it would have a strong interest in protecting air transportation companies by disallowing punitive damages. Thus, the decision made by the Illinois legislature [to disallow punitive damages] must be accorded special weight.\textsuperscript{321}

\textsuperscript{318} Id. at 617. See \textsc{Tex. Const.} art. 16, § 26.

\textsuperscript{319} \textit{Chicago II}, 644 F.2d at 616-17, \textit{supra} note 253.

\textsuperscript{320} Id. at 617.

\textsuperscript{321} Id. at 615-16. Thus, in terms of a principled basis upon which a choice can be made, neither state has a 'more significant interest' than Illinois. "[Hence]... it is important to resolve the conflict between states by principled means. Determining that, all other factors being equal, the law of the place of injury shall be
Thus, with respect to McDonnell Douglas' exposure to punitive liability, the court of appeals concluded that while either California or Missouri, taken separately, would have a greater interest than Illinois in the resolution of this issue, the absolute conflict in the laws of California and Missouri indicates that neither state has an interest greater than the other's. Accordingly, the "more significant interest" rationale is of no assistance to resolving the dispute. Based upon this fact and the finding of a significant legitimate interest in the state of Illinois to see the punitive damage issue resolved, the Seventh Circuit chose to apply the law of Illinois governing punitive damages. With this choice, the court thereby granted McDonnell Douglas' motion to strike the punitive damage claims in all actions filed in Illinois.\textsuperscript{322}

Viewing the analysis from a different vantage point, if a state's interest in punitive damages vests at the time of the trial of the action rather than at the time the conduct actually took place, then a state choosing to allow punitive damages could never deter the conduct.\textsuperscript{323} The Seventh Circuit Court of Appeals stated:

\begin{quote}
It is true, of course, that New York made the decision to give more importance to protection of defendants than to punishment and deterrence. But the issue confronted—punishment or protection—only has meaning in terms of the time of the conduct. Otherwise, both the decision to allow and the decision to disallow punitive damages would have the effect of providing protection from punitive damages for the commission of any misconduct, so long as a corporation timely moved thereafter.\textsuperscript{324}
\end{quote}

The second point established by the court's finding that American Airlines' principal place of business was New York rather than Texas, was that even if the court applied

\textsuperscript{322} \textit{Id. at} 616.
\textsuperscript{323} \textit{Id. at} 616.
\textsuperscript{324} \textit{Id. at} 617.
a "nerve center" test, used by the Seventh Circuit to establish diversity issues, this test would not alter the court's choice of New York over Texas. The mere fact that American's operations base was located in Texas on the date of the crash does not suggest that the operations center was the true "nerve center" of American's activities.

In continuing its analysis of the defendant, American, the court focused upon the law of Oklahoma, which permitted recovery of punitive damages in wrongful death claims. Oklahoma served as the place of American's alleged misconduct because it is the state in which American's maintenance department was located. Thus, the court's choice of law included: Oklahoma, as the place of misconduct and allowing punitive damages; New York, as American's principal place of business and not allowing punitive damages; and, Illinois, as the situs of the accident, disallowing recovery of punitive damages. Tracking the same argument it made with respect to McDonnell Douglas, the court reasoned that the interest of Oklahoma in allowing punitive damages and the interest of New York in disallowing them cancelled each other out, and therefore, the law of Illinois remained to determine whether punitive damages would be permitted in wrongful death claims arising out of the Illinois actions.

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325 See Chicago II, 644 F.2d at 612, supra note 313 and accompanying text.
326 Id. at 620.
327 Id. at 620-21.

The Seventh Circuit Court of Appeals proceeded to apply the same analysis to those actions filed in California, New York, Michigan, Puerto Rico, and Hawaii.

(i) California followed a choice-of-law analysis somewhat at variance from the approach generally found among the other jurisdictions. Known as the "comparative impairment" approach, this analysis proceeded on the principal theory that, when the respective laws of two or more states are in conflict, the law to be applied is that state's whose interest would be the most impaired if not applied. Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 164-65, 148 Cal. Rptr. 867, 870, 583 P.2d 721 (1978). The Seventh Circuit developed its own criteria from the "comparative impairment" test a la depecage:

The comparative impairment theory requires that the court attempt to determine the relative commitment by each interested state to the law involved. [Citation omitted]. This examination of relative commitment examines two factors: (1) the current status of a statute and the intensity
Accordingly, the punitive damage claims against American

of interest with which it is held; and (2) the 'comparative pertinence' of
the statute: the 'fit' between the purpose of the legislature and the situa-
tion in the case at hand.

*Chicago II*, 644 F.2d at 622.

Applying these two factors under the guise of California's "impairment" stan-
dard, the Seventh Circuit drew the following conclusions:

a) Missouri had a strong current interest in allowing punitive damages,
but the 'fit' between the purpose of that law and its application to a Missouri-
based corporation suffered from some "slippage" in that Missouri could
achieve a policy of deterrence by means other than the implementation of puni-
tive damages. *Id.* at 623;

b) California has an equally current interest in its policy to disallow pu-
nitive damages but also suffered from some slippage in the 'fit' because the
underpinnings of California's punitive damage policy—financial protection for
the enhancement of commerce within the state—could have been achieved at
least in part by alternative means (e.g., insurance). *Id.* at 623-25;

c) Due to the major effect of this crash on Illinois, the situs of injury was
not purely fortuitous. Illinois' purpose in disallowing punitive damages was to
protect defendants from excessive liability. As such, the court found a stronger
'fit' between Illinois' legislative purpose and the facts at hand than it found with
either Missouri or California; and

d) The disallowance of punitive damages under Illinois law was a
'unique' interest and thereby warranted special attention. *Id.* at 625. All of the
other factors being equal, the interests of Illinois tipped the scales against the
allowance of punitive damages in the wrongful death actions originally com-
menced in California. *Id.* at 625-627.

(ii) Noting that New York's choice-of-law standard was the functional
equivalent of the Restatement (Second) test, the court ruled that the analysis of
those cases filed in New York would follow the analysis of the Illinois cases. The
New York punitive damage claims against McDonnell Douglas and American Air-
lines were dismissed. *Id.* at 629.

(iii) The Michigan choice-of-law standard had moved away from the *lex loci
delicti* standard, but a replacement test was not clearly defined. *Id.* at 630. Like
other jurisdictions, the *lex loci* standard was deeply rooted in so many jurisdictions
of the United States that states which considered it outmoded nevertheless re-
tained it for certain cases. See, e.g., Bishop v. Florida Specialty Paint Co., 389 So.
2d 999, 1001 (Fla. 1980), which is discussed infra notes 397-400 and accompany-
ing text.

With some of *lex loci*'s roots still embedded in Michigan's conflicts law, the Se-
venth Circuit reasoned that the place of conduct and principal place of business as
applied to both defendants had equal interests in the application of their laws.
Accordingly, Michigan would resolve the matter by relying upon its strong history
of *lex loci delicti*. *Chicago II*, 644 F.2d at 630. The motions of both McDonnell
Douglas and American Airlines to strike all punitive damage claims in the Michi-
gan actions were granted.

(iv) Puerto Rico abided by the *lex loci delicti* standard and the law of the place of
injury, Illinois, did not permit recovery of punitive damages. The punitive dam-
age claims against both defendants pending in actions commenced in Puerto Rico
were therefore dismissed. *Id.*
Airlines, like those against McDonnell Douglas, were dismissed in all actions originally commenced in Illinois courts.

The analysis developed by the Seventh Circuit to consider the assessment of exemplary damages in a mass aviation disaster was quickly used by other courts faced with similar issues. Just one year after the Seventh Circuit handed down its decision in Chicago, a Boeing 737 taking off from Washington National Airport on January 13, 1982 crashed into the icy waters of the Potomac River. The flight crew and all but five passengers were killed in the crash. Most of the victims were residents of the District of Columbia or the states in which the District's suburbs lie, namely, Maryland and Virginia. Other victims were from the states of Florida, Massachusetts, Pennsylvania, Georgia and Texas.

Litigation arising out of the crash involved more than seventy wrongful death actions against the operator of the aircraft (Air Florida), the manufacturer of the aircraft

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(v) Finally, the district court had been unable to discern the choice-of-law approach utilized by the state of Hawaii. In turn, the court reasoned that under any of the conflicts rules it considered, the law of New York or Illinois ultimately would apply to the carrier. With respect to McDonnell Douglas, however, the court found that some of the potentially applicable choice-of-law rules would assess punitive damages against the manufacturer. Chicago I, 500 F. Supp. at 1052.

The Seventh Circuit Court of Appeals rejected the reasoning of the district court and concluded that where the choice-of-law approach cannot be determined, the forum presumably will apply its own law. Chicago II, 644 F.2d at 631. The punitive damage claims against both defendants were dismissed.

The court indicated some uncertainty in its conclusion, not because of the actual end result, but due to the manner in which the court reached its conclusion. Concluding that Hawaii law did not authorize recovery of punitive damages in wrongful death cases, the court of appeals looked to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS to determine whether application of Hawaii law would "not meet the needs of the case or . . . not be in the interest of justice." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 comment h (1971). The court found that, if applied, Hawaii law would contravene neither the needs of the case nor the interest of justice. Chicago II, 644 F.2d at 692.

To buttress its finding and diminish uncertainty, the Seventh Circuit Court of Appeals found that the use of Illinois' and California's varied conflicts standards, as well as the lex loci delicti rule of Michigan, all yielded the same result in this case. Id. "Palatability" was a means to an end.

329 Id. at 1, col. 5.
(The Boeing Company), and a contractor responsible for de-icing the aircraft (American Airlines). The litigation proceedings were consolidated in the United States District Court for the District of Columbia for purposes of resolving all pre-trial liability issues.380

Plaintiffs sought recovery of both punitive and compensatory damages against the defendants. Plaintiffs alleged that Air Florida did not follow proper procedures for operation of the aircraft in adverse weather conditions; The Boeing Company did not adequately warn operators of the B-737 aircraft about operation in adverse weather conditions; and American Airlines did not properly implement all de-icing procedures prior to the aircraft leaving the gate and lining up for its takeoff from Washington National Airport. As such, the alleged punitive conduct of each of the defendants implicated not only the situs of takeoff381 and the situs of injury382, but also the states where each of the three corporate defendants was headquartered. Air Florida's corporate headquarters was located in the state of Florida; The Boeing Company maintained its corporate headquarters in the state of Washington, which also was the site of all design, construction and certification phases of the 737 aircraft; American Airlines maintained its corporate headquarters in the state of Texas.383

The aircraft originally was scheduled to depart Washington National Airport at 2:15 p.m. as Air Florida Palm 90 to Tampa, Florida.384 The airport was closed from

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381 Washington National Airport is physically located on the Virginia side of the Potomac River. For purposes of the district court's analysis, however, the District of Columbia was considered the place of departure. In re Air Crash at Washington, D.C. on January 13, 1982, 559 F. Supp. 333, 344 n.13 (D.D.C. 1983) [hereinafter cited as Washington, D.C.].
383 Id. at 340.
384 Washington, D.C. Accident Report, supra note 1. References to the factual
1:38 p.m. to 2:53 p.m. while snow was removed from the runways, delaying Palm 90’s scheduled departure. At 2:59:21 p.m., Palm 90 requested and received an Instrument Flight Rules (IFR) clearance from Clearance Delivery. Between 2:45 and 2:50 p.m., the pilot in command, Captain Larry Wheaton, requested that the de-icing operation, which had been discontinued after it became apparent that the airport would not re-open as scheduled, be resumed by American Airlines’ employees.

With the de-icing/anti-icing of Palm 90 completed between 3:10 p.m. and 3:15 p.m., the aircraft was closed up and the jetway retracted. The American Airlines Maintenance Crew Chief personally advised Captain Wheaton in the cockpit of the completion of the de-icing. By universal custom and usage, this assured Captain Wheaton that his aircraft was free of snow and ice, adequately protected from subsequent formation of ice, and ready for push-back. At 3:16:45 p.m., Palm 90 requested push-back clearance, but was delayed for approximately seven minutes by Ground Control. Moderate snow continued to fall.

Starting at approximately 3:25 p.m., American Airlines personnel attempted the push-back using a tug. This effort proved unsuccessful because the tug was not equipped with chains and lacked sufficient traction to move the aircraft. The crew started the aircraft’s engines and deployed the thrust reversers to assist the tug in a second attempt at push-back. This attempt also proved unsuccessful. The engines were shut down and a different tug equipped with chains was requested. During the second unsuccessful attempt at pushback, the engines were operated for approximately 40-60 seconds but the thrust reversers were deployed for only 15-30 seconds of this time. Deploying the thrust reversers caused some snow to swirl around the aircraft, but the leading edges of the

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analysis of the Air Florida flight are taken from the Washington, D.C. Accident Report, §1.1 and Appendix “F” to the Report, supra note 1.
wings and the inside and outside of the engines were free of snow and ice after shutting down the engines.

A different tug, equipped with chains, was then used to successfully push-back the aircraft at approximately 3:35 p.m. The reversers were still deployed in accordance with approved procedures, but the engines were not operating during this push-back. The flight crew requested that the tug be disconnected before the engines were started. At 3:36:34 the tug-operator told the flight crew: “Stand by for salute and we’ll see ya later.” The Captain responded: “Right’o, thanks a lot.” This “salute” by custom assured Captain Wheaton that his aircraft was ready for taxi and takeoff.

Prior to approving Palm 90’s push-back at 3:23:37 p.m., the Ground Controller could not give Palm 90, or any of the other aircraft scheduled to depart Washington National, any reasonable idea of the length of delay which could be expected prior to actual departure. At 3:38:38 p.m., Ground Control advised Palm 90 to commence its taxi and hold in line behind a New York Air DC-9. Eleven minutes later, at 3:49:42 p.m., Ground Control cleared Palm 90 to cross Runway 3 and await further instructions from the Local Controller. The Local Controller advised Palm 90 at 3:52:04 p.m. that it would take off immediately after the New York Air DC-9.

At 3:53:21 p.m., the Captain (CAM-1) and the First Officer (CAM-2) exchanged the following comments indicating their concern about the weather and its effect on the aircraft:

CAM-2 Boy, this is a, this is a losing battle here on trying to de-ice those things, it (gives) you a false feeling of security that’s all that does

CAM-1 That, ah, satisfies the Feds

CAM-2 Yeah

As good and crisp as the air is and no heavier than we are I’d

CAM-1 Right there is where the icing truck, they oughta have two of them, you pull right

CAM-2 Right out
CAM-1 Like cattle, like cows right Right in between these things and then
CAM-2 Get your position back
CAM-1 Now you’re cleared for takeoff
CAM-2 Yeah and you taxi through kinda like a car wash or something
CAM-2 Flight Controls
CAM-1 Bottoms
CAM-2 Tops good
CAM-2 Let’s check these tops again since we’ve been setting (sic) here awhile\textsuperscript{335}

At 3:57:42 p.m., after the New York Air DC-9 was cleared for takeoff, Captain Wheaton and First Officer Pettit proceeded with the pre-take-off checklist, including verification of the take-off EPR setting of 2.04:

“CAM-2 EPR all the way two oh four”

This subsequently was confirmed as being the correct take-off power setting.

Immediately thereafter, the cockpit crew continued their dialogue about the effects of the weather on their take-off and flight regime:

CAM-2 Slush (sic) runway, do you want me to do anything special for this or just go for it
CAM-1 Unless you got anything special you’d like to do
CAM-2 Unless just takeoff the nose wheel early like a soft field takeoff or something
CAM-2 I’ll take the nose wheel off and then we’ll let it fly off\textsuperscript{336}

At 3:58:55 p.m., the Local Controller advised Palm 90 to “taxi into position and hold, be ready for an immediate [take-off].” Palm 90 acknowledged that transmission at 3:58:58 p.m. Immediately after this exchange, the Local Controller requested Eastern Flight 1451 to continue at a reduced speed on its final approach to Runway 36, in view of Palm 90’s imminent departure.

\textsuperscript{335} Id.
\textsuperscript{336} Id.
At 3:59 p.m., the Local Controller cleared Palm 90 for take-off and followed immediately with the instruction not to delay since there was inbound traffic (Eastern 1451) on final approach at 2 1/2 miles. Palm 90 acknowledged receipt of both these transmissions. At 4:00:11 p.m., Eastern 1451 acknowledged the Local Controller’s clearance to land and advised that it was “over the lights.” At this time Palm 90 had only reached a speed of 80 KIAS. At 4:00:30 p.m., the Local Controller instructed another aircraft, Gulf 68, to taxi into position for take-off. This instruction was not given until the Controller had observed Eastern 1451 on the ground south of the intersection of Runway 36/18 and Runway 33/15.

The Local Controller did not observe the actual touchdown of Eastern 1451, which occurred between 4:00:28 and 4:00:31 p.m. However, throughout this 3-second period and beyond, Palm 90 was still on the same active runway as Eastern 1451. This is evidenced by the fact that Captain Wheaton did not call VI until 4:00:31 p.m.

CAM-1 Vee one
CAM-1 Easy
CAM-1 Vee two
CAM (Sound of stickshaker starts and continues to impact)[indicating the onset of a stall]
CAM-1 Forward, forward
CAM-1 Easy
CAM-1 We only want five hundred
CAM-1 Come on, forward
CAM-1 Forward
CAM-1 Just barely climb
CAM (Stalling) we’re (falling)\(^{337}\)

During the early stages of the take-off roll, First Officer Pettit appears to have been concerned by some aspect of the aircraft’s performance, although his comments do not reveal his exact concern. However, Captain Wheaton as pilot in command was satisfied, upon reaching speeds of

\(^{337}\) Id.
80 KIAS, 120 KIAS and through to V1, that continuation of the take-off was appropriate.

At approximately 4:00:32 p.m., just after the VI callout, Palm 90 began rotation. At 4:00:37 p.m. the V2 callout was made, and approximately 2 seconds later the stick-shaker activated and continued until impact. Within four seconds from the onset of the stick-shaker, the aircraft became uncontrollable.

"CAM-2 Larry, we're going down, Larry
CAM-1 I know it
(Sound of impact)"

About 4:01 p.m., the aircraft struck the northbound span of the Fourteenth Street Bridge, which connects the District of Columbia with Arlington County, Virginia and plunged into the Potomac River. It came to rest west of the bridge, .75 nautical miles from the departure end of Runway 36.

The district court began its analysis of the choice of law issue as it related to the applicability of punitive damages by specific reference to the principle of depecage: "Modern choice of law analysis regards an examination not simply of the various states' interests generally, but of their interests regarding the various distinct issues to be adjudicated." Recognizing at the outset that the analysis would turn strictly upon the basic facts pertaining to each defendant's conduct vis-a-vis the location of the alleged misconduct, the court noted that most of the interested jurisdictions abandoned the lex loci delicti standard and either explicitly or implicitly adopted the test of the Restatement (Second) of Conflict of Laws.

The District of Columbia stands as one of the jurisdic-

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338 Id.
340 Id. It should be noted that the District of Columbia abandoned the lex loci delicti standard before the Restatement (Second) of Conflict of Laws was published in 1971. See Tramontana v. S.A. Empresa de Viacao aerea Rio Grandeuse, 350 F.2d 468 (D.C. Cir. 1965), cert. denied, Tramontana v. Varig Airlines, 358 U.S. 943. The Commonwealth of Virginia and the states of Maryland and Georgia had not formally abandoned the lex loci delicti rule.
tions that did not explicitly adopt the standard found in the Restatement (Second) of Conflict of Laws.\textsuperscript{341} However, the court stated that in a recent decision, the District of Columbia Circuit Court of Appeals used the factors enumerated in the Restatement Second in applying the District of Columbia choice of law analysis.\textsuperscript{342} This test, which incorporated the factors of the Restatement Second, is commonly referred to by the District of Columbia courts as a "governmental interest" analysis.\textsuperscript{343}

Under the "governmental interest" analysis, the court is directed first to identify the respective state policies underlying each law in conflict\textsuperscript{344} and then to determine which state's policy would be advanced by having its law applied.\textsuperscript{345} Comparatively speaking, the Restatement formula seeks to determine which state has the "most significant relationship" to the occurrence and parties as they relate to the specific issue under consideration.\textsuperscript{346} Once the contacts of each potentially interested state are designated, each contact is evaluated in terms of its relative importance with respect to the particular issue.\textsuperscript{347} Hence, as the district court pointed out, the state with the "most significant relationship" should also be that state whose policy would be advanced by application of its law.\textsuperscript{348}

Most of the plaintiffs represented by the Plaintiffs' Steering Committee contended that the District of Columbia's law should apply because of the obvious contacts between the litigation and the District of Columbia juris-

\textsuperscript{341} Washington D.C., 559 F. Supp. at 341.
\textsuperscript{342} Id. See Hitchcock v. United States, 665 F.2d 354 (D.C. Cir. 1981).
\textsuperscript{343} Id. at 335, 341-42. The court noted at the outset that the choice of law analysis is premised on a genuine conflict among the laws of the potentially interested jurisdictions and, in air crash disasters, such conflicts prove difficult to resolve. In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975).
\textsuperscript{345} Id. at 924.
\textsuperscript{346} Restatement (Second) of Conflict of Laws § 145(1) (1971).
\textsuperscript{347} Id. § 145(2).
\textsuperscript{348} Washington, D.C., 559 F. Supp. at 342, supra note 331.
The District of Columbia allows the recovery of punitive damages in survival actions, but not in wrongful death actions. Florida, on the other hand, permits recovery of punitive damages in wrongful death actions. Thus, in the alternative, the Plaintiffs' Steering Committee argued that Florida law should be applied in determining whether Air Florida should be liable for punitive damages. The Committee noted that Air Florida received Boeing's warnings and instructions for operation of the 737 aircraft and trained its pilots in the state of Florida.

Other plaintiffs asserted that the laws of their respective decedents' domiciles, Pennsylvania and Massachusetts, should be applied with respect to the issue of Air Florida's liability for punitive damages. Both states allow punitive damage claims in wrongful death actions.

Defendants Air Florida and American Airlines contended that the law of Virginia should govern their assessments of liability for punitive damages. The defendants claimed that the allegations as to their conduct relevant to punitive damages occurred in Virginia. The Boeing Company, on the other hand, argued that the law of Washington should govern the determination of its liabil-

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349 Id. at 335.
353 Id. at 353.
354 Id. The law of the decedent's domicile was originally used by courts transferring the cases to the United States District Court for the District of Columbia pretrial proceedings.
356 The Virginia Death by Wrongful Act statute did not permit recovery of punitive damages at the time this crash occurred in January, 1982. VA. CODE §§ 8.01-50, -52 (1967). This law was subsequently amended in 1982 to permit punitive damage claims in wrongful death actions; however, the amendment had no effect on the application of Virginia law disallowing punitive damages in this case.
ity for punitive damages since all aspects of design, manufacture and testing, as well as dissemination of information for operation of the aircraft, took place within the state of Washington.\textsuperscript{357} Both Virginia and Washington disallow recovery for punitive damages in wrongful death actions.\textsuperscript{358}

The District Court for the District of Columbia tracked the analysis utilized by the Seventh Circuit Court of Appeals in \textit{Chicago}\textsuperscript{359} and determined that the law of the District of Columbia governed resolution of the issue of liability for punitive damages as applied to each of the three defendants.\textsuperscript{360}

Nevertheless, while the district court drew strongly from the depecage principle which was the keynote to the \textit{Chicago} decision, the District of Columbia court made two important digressions from the Seventh Circuit Court of Appeals' analysis. These digressions, though seemingly at variance with the principle of depecage, actually illuminated the principle more so than had the Seventh Circuit. This illumination emerged through two observations critical to the principle of depecage.

First, particularly with respect to the aircraft manufacturer, the court found that the inquiry into the interest of

\textsuperscript{357} The state of Washington not only has disallowed punitive damages but has gone so far as to say that the doctrine of punitive damages is "unsound in principle." Maki v. Aluminum Bldg. Products, 436 P.2d 186, 197 (Wash. 1968). The strong pronouncement against punitive damages is largely due to the commercial impact which The Boeing Company has upon the state of Washington.

\textsuperscript{358} See supra notes 356-57.

\textsuperscript{359} See supra notes 295-327 and accompanying text.

\textsuperscript{360} The district court originally ruled that with respect to Boeing's liability for punitive damages, the most interested jurisdiction was the state of Washington and, upon the application of its law, no punitive damage claims would be permitted against Boeing. \textit{Washington, D.C.}, 559 F. Supp. at 356-58, supra note 331. See infra notes 361-86 and accompanying text for more detailed discussion of why the court reached this conclusion.

Upon motion by Air Florida for reconsideration of this ruling, the district court overturned its original ruling and held that the District of Columbia's law with respect to liability for punitive damages would govern Boeing's liability as well as the liability of its co-defendants, Air Florida and American Airlines. \textit{Id.} at 337-38. See infra notes 369-84 and accompanying text where reconsideration of the issue by the court is discussed in detail.
the state of injury has two components: the state's connection with the defendant alleged to have caused the injury and the state's connection with the injury itself.\footnote{Washington, D.C., 559 F. Supp. at 357, supra note 331.}

The district court reviewed the Seventh Circuit's ruling in Chicago, and found that the site of the crash for the purpose of establishing a nexus between the jurisdiction and the defendant was fortuitous.\footnote{Chicago II, 644 F.2d at 615. See Reese, The Law Governing Airplane Accidents, 39 Wash. & Lee L. Rev. 1303, 1314 (1983), which was relied upon heavily by the Air Florida court throughout its opinion.}

With respect to the second and more important connection between the state and the injury, the Seventh Circuit had found the interest of the place of injury less than the interests of the place of the manufacturer's business headquarters\footnote{Chicago II, 644 F.2d at 615, supra note 253.} and the place of the alleged misconduct. However, this did not mean that the site of injury held no interest in resolving the punitive damage issue.\footnote{Id.}

The District of Columbia, like Illinois, holds strong interests in not suffering through air crash disasters and in promoting safety. Moreover, the district court pointed out, the Seventh Circuit Court of Appeals had taken judicial notice of the shock waves sent throughout the metropolitan Chicago area after the DC-10 crash and added that the crash of Air Florida Flight 90 had the same ramifications upon the District of Columbia.\footnote{Washington, D.C., 559 F. Supp. at 357, supra note 331.}

Beyond the underpinnings of the Chicago decision, the district court found the District of Columbia's stake in the manufacturer's liability for punitive damages greater than Illinois' interest in the Chicago case:

In Chicago, since Illinois did not impose punitive damages, that state would not have been disturbed by the application of California's equivalent law to that action. On the other hand, applying Missouri law would not have concerned it either, inasmuch as Illinois as home of none of the defendants, had no interest in shielding any party from punitive damages. In the instant case, however, the poli-
cies of the District of Columbia of preventing air disasters and promoting safe air travel are advanced by the district’s decision to allow punitive damage assessments in actions such as this. Those policies would be offended by the application of a law such as the state of Washington’s [Boeing’s principal place of business] which denies such awards.366

The district court’s second point of departure from the Chicago decision intricately relates to the first point. In the District Court’s consideration of the site of the alleged misconduct, Air Florida and American Airlines argued that the conduct which must be scrutinized for purposes of determining whether liability for punitive damages should attach is the conduct that occurred outside of, or “extraterritorial” to, their respective places of business, the states of Florida and Texas.367 Under this theory, if the jurisdiction where a corporate defendant resides holds any interest in scrutinizing that defendant with a standard of “corporate accountability,” that interest is lessened when the conduct under analysis for purposes of attaching punitive damage liability occurs outside of the state.368

As such, the entire punitive damage scenario vis-a-vis the corporate defendants turned upon the single factual determination by the court of the situs of alleged misconduct. This finding would determine not simply the issue of liability but, more specifically, the issue of liability for punitive damages. The District of Columbia court determined that the situs of injury must be examined at least as closely as the corporate headquarters of each defendant to determine where the alleged misconduct which could give rise to liability for punitive damages occurred.369

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366 Id. at 358.
367 Id. at 355.
368 Id. at 356.
369 As between the District of Columbia and Virginia, it was a difficult decision as to which state’s interest was paramount to the other. Although the court determined that the District of Columbia was the place of departure, it did not discount the interests of Virginia:

This is not to say that the Commonwealth of Virginia does not have an interest in the safe condition and operation of planes at National
Air Florida and American Airlines were concerned, the court reasoned that the District of Columbia and the Commonwealth of Virginia held a concurrent regulatory interest. The allegations of wrongful conduct on the part of Air Florida's flight crew centered around their actions throughout the take-off procedure; conduct which took place either in the District of Columbia or in the Commonwealth of Virginia. Again, the court determined that the conduct was "extraterritorial" to Air Florida's corporate headquarters in the state of Florida.\textsuperscript{370} With respect to American Airlines' liability for punitive damages, the court used the same reasoning as it did with respect to Air Florida to conclude that the conduct at issue occurred at the airport during the de-icing procedures rather than at the corporate headquarters of American Airlines. The court concluded, therefore, that the District of Columbia and Virginia were the most significant jurisdictions for resolution of the issue of punitive damages as applied to American Airlines.\textsuperscript{371}

The District of Columbia court did not as easily dispose of the choice of law issue with respect to the potential assessment of punitive damages against the manufacturer of

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\textsuperscript{370} Id. at 355-56.

\textsuperscript{371} Id. at 356.
the 737 aircraft, The Boeing Company. In fact, the District of Columbia court made two points of departure from the Chicago decision; namely, (i) the close examination of the nexus between a particular state's interests in application of its punitive damage law and the actual injury sustained based upon the facts of the case; and (ii) the concept of "extraterritoriality". These departures led the district court to reverse itself on its finding of the law applicable to the punitive damage liability of The Boeing Company.

The court premised its choice of law analysis by tracking the findings of the Seventh Circuit Court of Appeals in Chicago regarding the aircraft manufacturer involved therein, McDonnell Douglas. In Chicago, the Seventh Circuit selected the law of Illinois, the site of injury, to govern the manufacturer's liability for punitive damages. However, the district court in the Washington D.C. case also noted that the Seventh Circuit Court of Appeals expressly stated that Illinois' interest in the question of punitive damages was not as significant as that of California, the state where the aircraft was designed and manufactured, or Missouri, the manufacturer's principal place of business. Because the laws of California and Missouri conflicted on the recoverability of punitive damages, the Chicago Court could not resolve the issue based purely upon an interest analysis. The Chicago court also was unable to arrive at a "moderate and restrained" interpretation of the relevant policies underlying state interest in determining liability for punitive damages. Instead, the Seventh Circuit Court of Appeals reverted to the law of the site of injury in order to break the tie and to tip the

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372 Id.
373 Id. at 359.
374 Id. at 352-59.
375 Chicago I, 644 F.2d at 615-16.
376 Id. at 615.
377 Id.
balance in favor of the use of Illinois law.\textsuperscript{379} However, in the pure application of the deprecage principle, a manufacturing or design defect in an aircraft, unlike a navigational or operational error, renders the place of injury fortuitous in virtually every factual setting.\textsuperscript{380}

The deprecage principle notwithstanding, the District of Columbia district court found Boeing's relationship to the District of Columbia much more substantial than the usual relationship between a manufacturer and the site of injury in a typical "fortuitous crash" case:

[Boeing] reasonably could have foreseen, and no doubt desired, that its short-haul 737 aircraft would be used for flights out of Washington National Airport, one of the nation's busiest airports and a station limited by federal regulation to flights shorter than 1,000 statute miles. [citation omitted] As the allegations against Boeing concern the aircraft's performance upon departure, it would not be unreasonable to hold Boeing, with respect to the issues of this case, to the standards of the District of Columbia.\textsuperscript{381}

Moreover, although Boeing's conduct conceivably could have caused injury wherever a 737 took off under similar circumstances surrounding the departure of Air Florida's Flight 90, "the fact [that] the likely places of resultant harm are limited to areas around commercial airports renders the site of injury in this case, with respect to Boeing, less fortuitous than the injury sites in cases such as Bruce v. Martin-Marietta Corp."\textsuperscript{382}

Based upon the foregoing analysis, the district court shifted its focus away from the conflict faced by the Chi-

\textsuperscript{379} Chicago II, 644 F.2d at 615-16.
\textsuperscript{380} Washington, D.C., 559 F. Supp. at 357.
\textsuperscript{381} Id. at 358.
\textsuperscript{382} Id. In Bruce v. Martin-Marietta Corp., 418 F. Supp. 829 (W.D. Okla. 1975), aff'd, 544 F.2d 442 (10th Cir. 1976), a flight bound for Utah crashed in Colorado after takeoff from Kansas. Plaintiffs were domiciled in Oklahoma and Kansas and the aircraft manufacturer-defendant was headquartered in Maryland. The district court in Oklahoma determined that the place of injury was of relatively minor importance to the issue of product liability because the crash occurred while the aircraft was merely passing through Colorado. Bruce, 418 F. Supp. at 832-33.
cago court. The district court found that both Boeing's principal place of business and the site of Boeing's alleged misconduct, where the aircraft was designed and manufactured, were in the state of Washington.\textsuperscript{383} Washington, therefore, had the greatest interest in applying its law to resolve Boeing's liability for punitive damages.\textsuperscript{384} Upon reconsideration of this analysis, the court concluded that the conflict created by the interest of the site of injury, vis-à-vis the manufacturer in the Chicago case, was even more starkly present in the instant case:

[In each case [Chicago and in the instant case] the aircraft was built or designed in a state other than the state of injury. Consequently, with respect to this issue neither state would have had a superior interest in such extraterritorial conduct causing injury within its borders, unless one of those states had a policy of punishing such conduct—which it would if its law provided for punitive damages.

There lies the rub. This is where the facts of the instant case depart from those of Chicago. Illinois' interest in the DC-10 manufacturer's liability for punitive damages vis-à-vis the interest of the other two potentially interested states, Missouri and California, was not as great as is the District of Columbia's interest in Boeing's liability vis-à-vis the interest of Washington State.\textsuperscript{385}

Hence, the Air Florida court narrowed its depecage analysis to whether the interest of the jurisdiction where the injury occurred was of such significance that the jurisdiction should govern the manufacturer's punitive damage liability despite the appearance of fortuity. More importantly, the court asked whether it would disturb state policies to not select that jurisdiction above other conflicting, yet potentially more interested jurisdictions:

Since Illinois did not impose punitive damages, Illinois would not have been disturbed by the application of Cali-
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fornia's equivalent law to the action. On the other hand, applying Missouri law would not have concerned it either, inasmuch as Illinois, as home of none of the defendants, had no interest in shielding any party from punitive damages. In the instant case, however, the policies of the District of Columbia of preventing air disasters and promoting safe air travel are advanced by the District's decision to allow punitive damage assessments in actions such as this. Those policies would be offended by resort to Washington's law, which denies such awards. 386

From an operational standpoint, the decision of the District of Columbia court shifted the focus of the carrier's conduct away from activities that may have occurred during a long period of time at the carrier's corporate headquarters. The corporate decision-making process continued until the flight crew of Palm 90 was forced into making split-second decisions in the final moments before beginning the take-off roll from Washington Airport. These facts serve as the backdrop for determining whether the corporate operational philosophy extended far enough to assure that Air Florida pilots were able to spontaneously respond to unforeseeable difficulties; difficulties which could surprisingly arise in a cockpit on any given day in an aircraft taking off with fare-paying passengers aboard despite inclement weather.

Closer scrutiny of the conduct of the corporation rather than the "extraterritorial" conduct of the flight crew prior to the crash may have given rise to a very different result in the Washington, D.C. decision. Air Florida's liability for punitive damages would be determined by the law of the District of Columbia, which permits punitive damages only in a survival action and not in a wrongful death action. Once the focus shifted to the activities in the cockpit during those final moments in the lives of the flight crew and the passengers it became an extremely burdensome task for the plaintiff to prove that the flight crew, waiting to be released for takeoff, nevertheless recklessly disre-

386 Id.
garded the lives of all those aboard Palm 90.  

The depecage analysis emerging out of the district court's decision in Washington, D.C. immediately became an imposing precedent for the state court of Florida. For procedural reasons, several cases arising out of the same set of operative facts were still pending in the Florida state court. Thus, the Florida court undertook the task of determining Air Florida's liability for punitive damages. Although the decision in Washington, D.C. did not bind the state court of Florida's assessment of Air Florida's liability for punitive damages, the decision nevertheless served as a strong influence in the determination of Air Florida's exposure. The District of Columbia court, through a sound utilization of the depecage principle, firmly established that conduct which occurred extraterritorial to Air Florida's corporate headquarters in Florida was the operative conduct for purposes of assessing punitive damages. This became the cornerstone of the Florida state court's choice of law analysis.

By a motion to dismiss all counts for punitive damages arising out of the wrongful death actions pending in state court, Air Florida invited the court to consider a two-prong analysis. First, Air Florida argued, the court should ask itself whether there is any basis on which to characterize the conduct of the flight crew of Air Florida as wilful, wanton, malicious, oppressive or atrocious pursuant to the standards by which punitive damages would be measured in the jurisdictions having an interest in applying their laws. Secondly, if and only if, the court is able to make such a finding, then it must determine whether the

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387 See generally the transcript of the Cockpit Voice Recorder from Flight 90, which appears in the Washington, D.C. Accident Report, supra note 1, at Appendix "F".

388 Several actions, commenced by plaintiffs domiciled in Florida could not be removed to federal court pursuant to 28 U.S.C. Sections 1332 and 1441 (1982) because no diversity jurisdiction existed between plaintiffs and defendant Air Florida. Without removal capacity, those actions thereby could not be consolidated with and become part of the multidistrict litigation proceedings conducted in Washington, D.C.
corporation itself, through its management personnel, either ratified that conduct under the law of the District of Columbia or committed any separate tort that could be considered contributory to the accident under the law of Florida.\textsuperscript{389} Air Florida argued that if either prong of the analysis is answered in the negative, the court should find in Air Florida's favor and dismiss all counts of punitive damages.\textsuperscript{390}

Harnessing with the strong utilization of the depecage principle by the District of Columbia district court, plaintiffs in the state court actions confronted the argument that the prevailing interest of the District of Columbia in applying its law to Air Florida's alleged liability for punitive damages would not be affected, although plaintiffs were Florida domiciliaries. Plaintiffs knew at the outset that their cases could not be removed to federal court and therefore they could complete their actions in the forum they selected: the forum of their own domiciliary. In the punitive damages analysis, however, it made no difference that plaintiffs were litigating the issue in their "home court" because, as the \textit{Chicago} and \textit{Washington, D.C.} decisions demonstrated, the domicile of plaintiffs has little or no interest in having its law applied when the issue is something other than compensation to plaintiffs.\textsuperscript{391}

In an effort to counter the depecage analysis brought by Air Florida to the state court, plaintiffs contended that at least some of the conduct giving rise to the question of liability for punitive damages occurred strictly within Florida. This conduct consisted of the training of the pilots of Palm 90 and the receipt of warnings and other operational instructions from the manufacturer of the aircraft, Boeing, within the state of Florida.\textsuperscript{392} Air Flor-


\textsuperscript{390} \textit{Id.}

\textsuperscript{391} \textit{Chicago II}, 644 F.2d at 613-16; \textit{Washington, D.C.}, 559 F. Supp. at 355-57.

\textsuperscript{392} Air Florida Memo of Law, \textit{supra} note 389, at 12.
ida’s rebuttal emphasized to the court that conduct of the flight crew relating to decision-making processes of the corporation itself becomes relevant only after the court answers a threshold issue in the affirmative. That issue, Air Florida argued, is whether the actions of the flight crew itself, just prior to the take-off roll, constituted conduct possessing an evil motive under the District of Columbia’s standard or was malicious or atrocious in nature under the state of Florida’s alternate standard.393

Before providing the court with analysis of the relevant law under each of the two interested jurisdictions, the District of Columbia and Florida, Air Florida contended that the District of Columbia maintained a more significant interest than Florida due to the extraterritorial nature of the conduct of the flight crew.394 Moreover, although Florida was the site of Palm 90’s destination, that alone did not amplify Florida’s interest in resolving an issue that had nothing to do with compensating victims of the crash.395 Finally, the turning point in the state court’s decision ultimately to dismiss all punitive damage claims against Air Florida seemed to be Air Florida’s argument that although Florida adopted a Restatement-type conflict of law standard, the predecessor standard of lex loci delicti has not been abandoned in certain circumstances applicable to the instant case.396 According to the Supreme Court of Florida’s decision in Bishop v. Florida Specialty Paint Company,397 when a Florida plaintiff is not deprived of recovery under the remedies provided by an alternate state’s statutory law,398 the lex loci delicti standard not only is viable, but is preferred.399

Applying Bishop to the instant case, vis-a-vis the principle of depecage, the Supreme Court of Florida’s logic re-

393 Id.
394 Id.
395 See Reese, supra note 362, at 1312.
396 Id.
397 389 So. 2d 999 (Fla. 1980).
398 Id. at 1000.
399 Id. at 1001.
vealed that the essential consideration in Bishop of assuring just compensation of a Florida resident was not before the Florida state court in Air Florida. As upheld by the Florida judiciary, the gravamen of selecting the applicable law for punitive damage liability was deterrence of similar future conduct.

Advocating the use of depecage and adoption of the decision in Washington, D.C., Air Florida launched a five-prong argument. First, Air Florida contended the District of Columbia held a greater interest than Florida in having its law applied to the issue of punitive damages. Second, the law of the District of Columbia would mandate extremely close scrutiny of the conduct of Palm 90’s flight crew. Under this scrutiny the crew’s conduct, taken singularly or cumulatively, would not support a finding of punitive damages. Third, in the event the Florida court digresses from the factual findings of the District of Columbia court, the Florida court could look to the alleged misconduct which occurred at Air Florida’s corporate headquarters in Florida and still find no support for an assessment of punitive damages against the carrier. Fourth, even if the court rejected the legal as well as the factual analysis of the district court and thereby found the law of Florida controlling, the alleged misconduct of the flight crew would not meet the standard of culpability necessary to establish liability for punitive damages. Finally, paralleling the analysis under the law of the District of Columbia and measuring the conduct of Air Florida in rejection of the concept of “extraterritoriality,” the corporate conduct nevertheless would not support a finding of punitive liability under Florida’s less stringent test.

On the first prong of attack, Air Florida pointed out to

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400 Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1042 (Fla. 1982).
401 Air Florida Memo of Law, supra note 389, at 11-15.
402 Id. at 15-18.
403 Id. at 18-21.
404 Id. at 22-26.
405 Id.
the court that the District of Columbia looked with disfavor upon punitive damages and only awarded punitive damages to punish and deter outrageous conduct. The facts from two District of Columbia Circuit Court of Appeals decisions, Nader v. Allegheny Airlines, Inc. and Knippen v. Ford Motor Co., were discussed in detail by Air Florida to demonstrate the stringency of the punitive damages standard utilized by the District of Columbia court.

In Nader, an airline passenger sued Allegheny Airlines when his confirmed reservation was not honored due to overbooking of the flight. The district court awarded plaintiff both compensatory and punitive damages. The basis of the punitive award was that Allegheny misrepresented its booking status, knew it had been overbooking in persistent fashion, and discriminated against plaintiff Nader.

The District of Columbia Circuit Court of Appeals reversed the punitive damage award holding that the record could not support such an award for three reasons. First, there was no evidence that Allegheny engaged in any "outrageous conduct": "[t]he tort must be aggravated by evil motive, actual malice, deliberate violence or oppression." Second, the District of Columbia Circuit Court of Appeals found that the record failed to support a finding of discrimination. While the gate agent may have refused to take reasonable measures to accommodate Nader while the plane was at the gate, the court again concluded that "no evil or wanton motive" could be deduced from the agent's conduct. Third, since a punitive damage

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409 546 F.2d 993 (D.C. Cir. 1976).
410 Air Florida Memo of Law, supra note 389, at 15.
411 Nader, 512 F.2d at 459.
412 Id. at 550.
award first requires a finding of malice or reckless disregard for the rights of others, the defendant’s motives are crucial. The court could not justify a punitive assessment because the carrier was not motivated by a discriminatory or intentional scheme to keep Nader off the airplane. Furthermore, the court seriously considered the policy underlying awards for punitive damages, and noted that the rationale for doing so must be grounded in deterrence. On the facts before the court, the deterrence argument was not persuasive because the overbooking policy was regulated by the Civil Aeronautics Board rather than by Allegheny Airlines.

One year later, the District of Columbia Circuit Court of Appeals looked back upon its decision in Nader and relied upon that holding to decide an identical issue in Knippen v. Ford Motor Co. In Knippen, the record contained evidence that the government and industry were concerned with the injury potential of force-localizing protrusions on automobiles and that, despite such concern, the Ford Motor Company designed an automobile with sharp metal protrusions. The district court held this evidence insufficient to submit the question of punitive damages to the jury. The Court of Appeals for the District of Columbia upheld the lower court’s directed verdict on the ground that such evidence was insufficient as a matter of law to support an award of punitive damages. Relying directly on its decision in Nader, the court demonstrated the stringency of the standard which must be met in order to assess punitive liability:

I think what the court said in the Nader and Allegheny Airlines case which just came down is that the tort, in order to support punitive damages, must be aggravated by evil motive, actual malice, deliberate violence or oppression; a deliberate thing: We are going to go out and get as many

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413 Id. at 551.
414 Id. at 550.
415 546 F.2d 993 (D.C. Cir. 1976).
Air Florida contended that the judiciary's interpretation of the requisite criteria for assessing punitive liability made it clear that the conduct of Palm 90's flight crew could not justify punitive liability as a matter of law. In closely scrutinizing the motivation of the flight crew, the motive would have to be considered suicidal or homicidal before the state court could find that a factual issue existed with respect to the alleged punitive damage liability on behalf of the carrier.

Thus, the court was presented with a purely factual issue of whether the flight crew, who had to make split-second decisions in order to save the lives not only of commercial fare-paying passengers but of themselves as well, could have had some suicidal or homicidal motive. Without such a motive, punitive damages under the law of the District of Columbia could not be assessed. Even if the court determined that the crew's decision to combat the adverse weather conditions prevailing on January 13, 1982 constituted a form of gross negligence, Air Florida argued that fair-minded persons would not disagree that the flight crew would never have risked the lives of those aboard if they thought there was any possibility that the aircraft would crash immediately after take-off.

In the second prong of its argument, Air Florida drew further from these same stringent criteria to persuade the court that even if it were to find that exemplary damages befit the flight crew's conduct, there was no "corporate ratification" of that conduct. To buttress its position, Air Florida submitted to the court a sworn affidavit from the Federal Aviation Administration's Principal Operations Inspector assigned to oversee Air Florida's operations during the relevant period before the crash. This

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416 Id. at 1002.
417 Air Florida Memo of Law, supra note 389, at 17.
418 Id.
419 Id. at 17-18.
420 Id. at 18.
affidavit was intended to "objectify" the entire motion for dismissal of all counts of punitive damages with the affiant stating, in his official governmental capacity, that none of Air Florida's operations was deficient and no Federal Aviation Regulation had been violated by Air Florida.421

In order for a corporation to be found liable for the malicious or wanton conduct of an employee or agent under the law of the District of Columbia, the corporation must either participate in the tortious conduct or subsequently ratify it with full knowledge of the facts.422 Just as it had demonstrated how the alleged misconduct of the flight crew did not satisfy the standard by which punitive damages could be assessed, Air Florida relied upon the facts as presented in two decisions, both of which interpreted the standard of "corporate ratification" in a stringent manner.423

First, in Woodard v. City Stores Co.,424 false imprisonment and assault and battery were the subject of a civil suit to recover compensatory and punitive damages. The trial court refused to submit the issue of punitive damages to the jury and plaintiff appealed. The record in the case demonstrated that after the plaintiff was taken to the store security office a store detective threw the plaintiff to the floor, beat and kicked him, and slammed his head against a wall.425 However, the District of Columbia Court of Appeals upheld the trial court's decision not to permit the issue of punitive damages to be submitted to the jury. The court of appeals performed the requisite two-tier analysis, holding that the conduct in question would have to be intentional, malicious or wilful in order to assess punitive damages.426 Even if this conduct had met this stan-

421 Id. See also Affidavit of Robert Wiltuck, annexed to Air Florida Memo of Law, supra note 389, at Exhibit "Z".
423 Air Florida Memo of Law, supra note 389, at 19.
425 Id. at 191.
426 Id.
dard, the corporation, through its officers or directors, would have to be found to have participated in the wrongful conduct or otherwise to have authorized or subsequently ratified the offending conduct with full knowledge of the facts.\textsuperscript{427} Finally, Air Florida asked the court to take note that in \textit{Woodard}, the corporate employer permitted the employee to continue his employment, subsequently granted him a promotion, and still avoided a finding of ratification of wrongful conduct.\textsuperscript{428}

The second case illustrating the stringent standard of corporate ratification under the law of the District of Columbia is \textit{Rieser v. District of Columbia}.\textsuperscript{429} In \textit{Rieser}, the court held the District of Columbia liable for the negligence of its parole officers in failing to disclose a parolee’s criminal background to a potential employer and further failing to properly supervise his parole, resulting in the murder of a resident of an apartment where the parolee was employed. Whalen, the parolee, had not only been previously convicted of assault with intent to commit rape, but as a juvenile, also had murdered an elderly woman. Immediately prior to being paroled he was diagnosed by a psychiatrist as a “serious potential danger.” Following his parole for the assault charges, he was hired as a maintenance man at an apartment complex and approximately six months later became a suspect in the rape-murder of a woman and the murder of her small child at the complex where he worked. Thereafter, Whalen quit his job and applied for new employment. At that time, his parole officer, in filling out an employment application, failed to mention Whalen’s prior murder offense, current psychiatric evaluation, prior conviction for attempted rape, and the murder case in which he was a suspect. Subsequently, after Whalen was hired at a second apartment complex, he became a suspect in a third murder at his original place of employment. Although the parole officer recom-

\textsuperscript{427} Id.
\textsuperscript{428} Id.
\textsuperscript{429} 563 F.2d 462 (D.C. Cir. 1977).
mended that Whalen's parole be revoked, the Parole Board declined. Approximately six months later, the parolee murdered a young woman at the apartment complex where he worked.

At trial, it was clear that the acting Chief Parole Officer was aware of the details surrounding the case, but did not insist upon the revocation of parole. Although the court assessed compensatory damages for the failure of the parole officers to disclose the background of the parolee and to supervise his parole, it declined to award punitive damages, finding, *inter alia*, no evidence in the record that the high officers of the District of Columbia participated in or ratified the act. The court found that the corporate authorization must be explicit in order to subject the corporation to liability for punitive damages; the act must be ratified by the corporation itself through an officer empowered to bind the corporation, and the very conduct to which the corporation is held accountable must entail much more than one isolated instance.431

Based upon *Woodard* and *Rieser*, Air Florida argued that its management neither expressly nor impliedly authorized or ratified the allegedly wrongful acts of the flight crew resulting in the crash.432 The corporation, therefore, could not be held liable for punitive damages absent wilful or wanton misconduct on the part of the corporate officers. Air Florida recited portions of the cockpit voice recorder transcript as well as other relevant portions of the record to demonstrate that the entire record was devoid of any evidence of malicious or wanton acts or conduct which could give rise to an inference of malice on the part of the officers or the management of Air Florida.433

The fourth and fifth prongs of Air Florida's attack centered on the law of Florida. Even if the court determined

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430 *Id.* at 482.
431 *Id.* at 481.
432 *Air Florida Memo of Law, supra* note 389, at 22.
433 *Id.*
that it was not bound by the decision in Washington, D.C., and thereby chose the substantive law of Florida as controlling, that law would be equally unsupportive of a finding of liability for punitive damages against Air Florida.

The general principle governing punitive damages in Florida is that the conduct necessary to justify a finding of punitive liability in a civil case must be tantamount to that conduct which would support a conviction of manslaughter in a criminal case. The courts of Florida draw such a parallel because punitive liability is cautiously assessed by the Florida judiciary and reserved only for those instances where punitive damages serve some admonitory function. This factor, the application of an admonitory function, became the springboard for the Florida state court to determine that under the law of Florida, as under the law of the District of Columbia, no punitive damages could be assessed against Air Florida based upon the facts before the court.

Exactly eight months after the Air Florida crash, a DC-10 aircraft operated by Spantax, S.A. crashed at Malaga, Spain. The suits for wrongful death arising out of the crash were consolidated in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1407 (1982).

Spantax moved to dismiss all counts of punitive damages which arose out of the allegedly reckless operation of the aircraft. Relying heavily upon Judge Ward's decision from the Southern District of New York in Sibley v. KLM, 545 F. Supp. 425 (S.D.N.Y. 1978), supra note 237, Spantax argued that the choice of law rules of New York yielded the law of Spain as controlling on the issue of liability for punitive damages. Memorandum of Law of Spantax in Support of Motion to Strike all Claims for Punitive Damages, at 8, MDL No. 530 (E.D.N.Y. 1982). As the "depecage" principle applied, Spantax argued, the principal purpose to be achieved by awarding punitive damages is to deter defendants from the commission of intentional torts. Id. at 13. (citing the Washington D.C. decision, 559 F. Supp. 333 (D.D.C. 1983)). Spantax demonstrated to the court that a Spanish corporation is not likely to conform its future conduct to the standards of a foreign jurisdiction and, therefore, the law of Spain, which disallowed punitive damages, controlled resolution of the issue. Id. at 20. The motion to dismiss all claims for punitive damages against Spantax was granted by the district court.
VI. CONCLUSION

Although most people are familiar with Dickens’ Christmas allegory, how many realize the statement of the human condition underlying the classic tale. In stave four of *A Christmas Carol*, Scrooge is led to his own tombstone and, faced with the reality of his own death, pleads, “Good Spirit . . . your nature intercedes for me . . . Assure me that I yet may change these shadows you have shown me, by an altered life.”

In the book of prose where Scrooge resided, the course of man’s wrongdoings foreshadowed certain ends, but when the courses were departed from, the ends would change. For those like us who do not reside in the book of prose, however, the hands of time cannot be turned back and wrongful conduct cannot be erased in the wake of each individual’s own human finitude. Everyone possesses an infinite awareness that death is final, irreversible and consequently, conduct leading up to it can only be judged through retrospect.

And isn’t that the rub? No one of us would consciously place ourselves in the throes of destruction and deliberately orchestrate the demise of our own existence. When we become the fact finders who must determine whether a flight crew deserved punishment either directly or through the corporate carrier, the dualistic struggle presented by the finality of human finitude arguably taints whatever justification exists for assessing exemplary damages in operational aviation incidents. Mass aviation disasters do not strike at the heart of those elements within the criminal law sector that are satisfied by the imposition of punishment and whatever societal gains attach thereto. Perhaps the proper alignment of the punitive rationale with civil aviation rests in preventive penalties specifically designed to force the carrier’s hand to implement “airtight” safeguards for its flight crews. The problem is, even in procuring more efficient overtraining and accu-

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rate simulation of impending doom, no one can be sure how the human system will respond when the dress rehearsal is over. The complexities of the human mind dictate a closer understanding of the appellation "pilot error" before punishment is appropriately assessed against the carrier.

The various scenarios portrayed throughout this article do show that "wilful misconduct" under the Warsaw Convention has seldom been assessed, regardless of whether that standard amounts to punitive damage liability. In at least one of the Warsaw cases finding wilful misconduct, the flight crew survived.\(^{439}\) Arguably, this factor serves as the impetus to view the flight crew as possessing the power over the passengers' fate. In aviation disasters falling under the Death on the High Seas Act, the judicial inclination to go beyond the parameters of the Act to permit recovery under foreign law has been minimal at best. Finally, despite the variance in state punitive damage statutes, the underlying theme constructed by the judiciary has been that punitive damages seldom have been warranted to punish conduct which makes no distinction over who survives disaster and who does not.

Is the punitive damage standard simply an insurmountable task for plaintiffs to prove? Is the issue of additional recovery under foreign jurisdictions pursuant to the DOHSA a red herring which United States courts prefer to avoid because of the intricate international questions of law which arise? Are most of the Warsaw Convention cases that hinge on being "wilful misconduct" prototypes unreported because they are settled out of court by realistic defense counsel?

Consideration and resolution of these issues certainly cannot be discounted in the overall analysis of punishment's role in the civil sector. But if calamity does, in fact, come like the whirlwind, is the design of punitive liability really facilitated by its application to the operational avia-

tion disaster? Perhaps the real burden of proof is not in some legal terminology, but resides instead in the very consciousness of each individual; that is, the awareness that the fear of death is almost as universal as mortality itself, and no commercial air carrier is ever motivated to foster human destruction within the parameters which define civil aviation.