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NO RESCUE IN SIGHT FOR WARSAW PLAINTIFFS FROM EITHER COURTS OR LEGISLATURE — MONTREAL PROTOCOL 3 DROWNS IN COMMITTEE

Eloise Cotugno

I. INTRODUCTION

CRITICS HAVE CONDEMNED the long-standing Warsaw Convention1 for years, calling it heinous, absurd, archaic, outmoded, and outrageous.2 Yet, the 1929 treaty regulating international air travel, to which one hundred thirty nations subscribe,3 remains the most widely adhered to treaty in the world.4 The focus of the outcry in the United States against the treaty has been the low liability limit for personal injury.

The Warsaw Convention, as modified by the 1966 Montreal Agreement,5 currently establishes a liability limit of $75,000 per passenger for personal injury or death ari-

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3 Montreal Protocols Have Better Chance of Approval This Year, AVIATION DAILY, May 24, 1990, at 376.
ing from an accident on board an international aircraft. Today in the United States, the harshness of the low limit in modern economic terms and recent judicial decisions strictly enforcing the $75,000 cap combine to create new pressures for change. The form of that change is the subject of ongoing debate and of this comment.

On January 29, 1991, the Committee on Foreign Relations of the United States Senate of the 102d Congress voted to report favorably to the Senate Montreal Protocol 3 and the Supplemental Compensation Plan, the latest attempt to raise the liability limit. But, in spite of pressure from Department of Transportation Secretary Andrew Card, the Protocols did not go before the Senate for a vote before the 102d Congress adjourned. Montreal

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6 Article 17 of the Warsaw Convention states:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention, supra note 1, art. 17.

The Montreal Agreement adds:

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs.

Montreal Agreement, supra note 5, at 748.

7 See In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991) (punitive damages are not available under the Warsaw Convention regardless of willful misconduct); Eastern Airlines v. Floyd, 111 S. Ct. 1489 (1991) (Article 17 of the Warsaw Convention allows no recovery of mental or psychic injuries without accompanying physical injury); Chan v. Korean Airlines, 490 U.S. 122 (1989) (failure to provide 10-point type notice does not defeat liability limits under Warsaw Convention).

8 Montreal Protocol 3 and the Supplemental Compensation Plan, LLOYD'S AVIATION L., Feb. 15, 1991, at 5. The vote was 13 to 2. Senators voting for the Protocol were Pell, Dodd, Kerry, Robb, Helms, Lugar, Kassebaum, Sarbanes, Pressler, Murkowski, McConnell, Cranston, and Mack; voting against were Biden and Simon. Id.

9 DOT Makes Last Minute Plea on Montreal Protocols, AVIATION DAILY, Sept. 28, 1992, at 539. Secretary Card threatened to recommend to the President that the United States renounce the Warsaw Convention if no action were taken on the Protocols. In stressing the need for prompt action on the Protocols, Card said, "if
Protocol 3 would raise the liability limit for personal injury or death to approximately $130,000 per passenger, and the Supplemental Compensation Plan would add damages up to $500 million per aircraft in separate insurance coverage funded by a mandatory surcharge on tickets for international flights, which is currently estimated to cost between $2 and $5 per ticket.\textsuperscript{10}

This comment briefly reviews the history of the Warsaw Convention and various attempts at its modification, examines judicial decisions applying its provisions in the area of personal injury or death, and concludes with a discussion of Montreal Protocol 3 in its current embodiment and a consideration of its potential impact on future cases. Section II presents the historical background of the Warsaw Convention, its original purposes, and a series of subsequent attempts to modify its provisions. A survey of judicial applications of the Warsaw Convention and of attempts by plaintiffs to avoid the liability limits follows in Section III. Section IV summarizes the currently proposed, but stalled, Montreal Protocol 3, which provides for a supplemental compensation plan to be funded by a mandatory surcharge on tickets purchased for international travel. The conclusion considers the current status of the Warsaw Convention liability limit and viable options for change.

\section*{II. HISTORICAL BACKGROUND}

\subsection*{A. The Warsaw Convention (1929)}

The Multilateral Convention for the Unification of Certain Rules Relating to International Transportation by Air was signed in Warsaw, Poland, in 1929, and is known as

\footnotesize{\textsuperscript{10} Montreal Protocol 3, LLOYD'S AVIATION L., May 15, 1990, at 1.}
The purposes of the Convention were to establish uniformity in the international aviation industry with respect to tickets, airbills, and ways of dealing with legal claims and to protect the infant airline industry by providing limited liability for accidents. Critics point out that, today, more than sixty years later, the mature airline industry no longer needs such protection, and that international uniformity on recoverable damages is neither a desirable nor practical goal.

A preliminary conference in Paris in 1925 created the Comité International Technique d’Experts Juridique Aériens (CITEJA), whose work led to the 1929 conference in Warsaw. By February 13, 1933, the required minimum number of nations had ratified the treaty, which then entered into force. The United States joined the treaty on July 31, 1934, following advice and consent by the Senate and proclamation by President Roosevelt.

B. ARTICLES OF THE WARSAW CONVENTION

The Warsaw Convention applies to “all international transportation of persons, baggage, or goods performed by aircraft for hire.” The Convention defines “international transportation” to include trips between two parties to the treaty or a trip with departure and destination points within a nation party to the treaty, but with an interim stop in another sovereign nation.

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16. Id. at 501-02. Spain, Brazil, Yugoslavia, Romania, France, Poland, Latvia, Great Britain and Italy were the first nations to ratify the Convention. *Id.*
17. Id. at 502.
18. Warsaw Convention, *supra* note 1, art. 1(1).
19. *Id.* art. 1(2). The article provides the following coverage:

For the purposes of this Convention the expression "international transportation" shall mean any transportation in which, according to
Article 3 requires carriers to deliver passenger tickets stating the place and date of issue, place of departure and destination, stopping places, name and address of carrier, and notice of the liability limitation. Article 3 further provides that failure to deliver the prescribed ticket to a passenger will result in the carrier’s loss of the protective liability limit.

Article 17 defines the elements necessary to establish a presumption of carrier liability for personal injury or death of a passenger, and article 22(1) sets the liability limit. The original limit was set at 125,000 Poincare
francs, amounting to $8,300.24 Article 25 permits the avoidance of the liability limitation if the carrier or its agent is guilty of "willful misconduct." 25

The passenger faces a formidable task to avoid the Convention liability limit. If the case is a cause of action under the Warsaw Convention, the plaintiff must show either 1) the event was not an accident, 2) the victim was not a passenger under Article 1, 3) the carrier did not deliver a ticket with proper notice under Article 3, or 4) the carrier or its agent committed willful misconduct under Article 25.26 If the plaintiff fails by these means to avoid the Convention, not only does the liability cap of $75,000 apply, but also the recovery is limited to certain damages. If the case is taken outside the Convention limits, the plaintiff must then proceed under general tort principles, which require proof of negligence, a difficult task that the Convention does not require.27 The plaintiff confronts a dilemma of whether to face the Convention's liability limit or attempt to win the case under a negligence theory.28

C. THE HAGUE PROTOCOL (1955)

Controversy regarding the Warsaw Convention erupted soon after its enactment.29 The dissatisfaction focused on the liability limit.30 In 1955 a conference convened at The Hague for the purpose of amending the Warsaw Convention.31 Delegates discussed two possibilities:

125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Id. Article 18 covers liability for loss or damage to baggage and Article 22(2) sets the baggage liability limitations. Id. arts. 18, 21(2). Liability for baggage is not within the subject matter of this comment.

24 Lowenfeld & Mendelsohn, supra note 12, at 499.
25 Warsaw Convention, supra note 1, arts. 25(1), 25(2).
26 Goldhirsh, supra note 11, at 55.
27 Id.
28 Id.
29 Lowenfeld & Mendelsohn, supra note 12, at 502.
30 Id. at 504.
31 Id. at 504-05.
more narrowly defining conditions under which the limit applied or raising the limit. The Hague Protocol doubled the liability limit for passengers to $16,600. In addition, due to pressure from the United States delegation, a provision allowing courts to award court costs and legal fees according to local law was tacked on to Article 22. Also, in an attempt to clarify the term "willful misconduct," which was undefined in the Warsaw Convention, the conference agreed the liability limit could be avoided if the damage was caused by an act "done with intent to cause damage or recklessly and with the knowledge that damage would probably result." President Eisenhower finally submitted the Hague Protocol to the Senate in 1959, but the United States never ratified the attempted modification because it thought the limit was too low.

D. NOTICE OF DENUNCIATION BY THE UNITED STATES (1965)

Two air crashes to which the Warsaw Convention liability limitation applied helped stall Senate consideration of the Hague Protocol. In addition, courts in the United States were now applying the doctrine of *res ipsa loquitur* to

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52 *Id.* at 505.
53 Goldhirsh, *supra* note 11, at 96. The problem of how to value compensation in an international setting continues to plague attempted modifications to the Warsaw Convention. The Warsaw Convention used the Poincare franc, the French gold franc, in an attempt to avoid effects of devaluation if local currency were used. By 1934, the 125,000 FP equaled $10,000 due to an increase in the value of gold. The Hague Protocol referred only to a "currency unit," deleting reference to the French franc. The Montreal Agreement of 1966 specified the amount in U.S. dollars. The Guatemala Protocol used the French franc again. The Montreal Protocols, not yet in effect, propose using a Special Drawing Right (SDR), which is based on the currency of five major nations. *Id.* at 96-97.
54 Lowenfeld & Mendelsohn, *supra* note 12, at 508.
57 Goldhirsh, *supra* note 11, at 96.
aid plaintiffs in proving negligence in a wide variety of situations, including aircraft accidents, which reduced the need to rely on the Convention's presumption of liability in Article 17. In 1961, the Department of State asked the Interagency Group on International Aviation (IGIA) to examine the Warsaw Convention and the Hague Protocol as they related to the United States at that time and to make recommendations. The combination of the low liability limit and the development of res ipsa loquitur stimulated calls for denunciation of the Convention. The IGIA tried to appease opponents of the Convention and the Hague Protocol by obtaining an agreement from the airlines to voluntarily increase their liability limits. Article 22 of the Convention offered an alternative. The liability limit can be raised by special agreement between the carrier and passenger. The IGIA proposed to representatives of the five major American airlines and the Air Transport Association (ATA) in August 1965 that the carriers waive their limit up to $100,000. No agreement resulted, as four of the airlines indicated the highest limit they might consider would be $50,000, and Pan American insisted the agreement be an international one, including

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39 Id. at 154. Conditions necessary to the application of res ipsa loquitur (the event "speaks for itself"), permitting an inference of negligence on the part of the defendant, include: 1) the event ordinarily would not occur without someone's negligence, 2) the agency or instrumentality was within the exclusive control of the defendant, and 3) the plaintiff did not voluntarily contribute in any way to the cause of the event. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 244 (5th ed. 1984). Since an airline accident does not ordinarily happen in the absence of negligence and the aircraft is under the control of the defendant carrier, the doctrine applies.


41 Cohen, supra note 35, at 154. A party may denounce the Warsaw Convention by written notification to the Government of the Republic of Poland. Six months after notification the denunciation shall take effect. Warsaw Convention, supra note 1, art. 39. To denounce a treaty means "the act of one nation in giving notice to another nation of its intention to terminate an existing treaty between the two nations." BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

42 Lowenfeld & Mendelsohn, supra note 12, at 547.

43 Warsaw Convention, supra note 1, art. 22.

44 Id.

45 Lowenfeld & Mendelsohn, supra note 12, at 547.
both foreign and domestic carriers.\textsuperscript{46} In September 1965, the International Air Transport Association (IATA) distributed a mail ballot and obtained the agreement of its members to raise the liability limit to $50,000 per passenger.\textsuperscript{47} The agreement was conditioned, however, on the United States' ratification of the Hague Protocol, a fact not mentioned in the IATA press release.\textsuperscript{48}

The United States considered the resulting agreement to be insufficient, and on November 15, 1965, the United States gave formal notice of its denunciation of the Warsaw Convention, to take effect in six months.\textsuperscript{49} The press release announcing the notice of denunciation also announced the willingness of the United States to withdraw the notice if the international air carriers could agree to a temporary $75,000 liability limit, with a prospect of a later agreement of a $100,000 ceiling.\textsuperscript{50}

E. THE MONTREAL INTERIM AGREEMENT (1966)

The threatened denunciation by the United States of the Warsaw Convention resulted in raising liability limits of airline carriers to $75,000 per passenger in the Montreal interim agreement.\textsuperscript{51} The $75,000 limit includes legal fees and costs, whereas in countries where legal fees and costs are awarded separately, the limit is $58,000.\textsuperscript{52}

The struggle to arrive at this "interim" agreement involved many organizations over a period of several months. Fifty-nine nations were represented at the Montreal Conference in February 1966. Initially they could not agree on a liability limit, on whether absolute liability should apply, or whether legal fees should be included.\textsuperscript{53}

\textsuperscript{46} Id. at 547-48.
\textsuperscript{47} Id. at 549.
\textsuperscript{48} Id. at 549 n.175 (citing $50,000 Liability Voted by Airlines, N.Y. TIMES, Nov. 4, 1965, at 93 col. 1).
\textsuperscript{50} 53 DEP'T ST. BULL. 923-24 (1965).
\textsuperscript{51} Montreal Agreement, supra note 5.
\textsuperscript{52} Id.
When the international conference failed to produce an agreement, the United States proposed a $75,000 limit with absolute liability as a basis for a temporary agreement.\textsuperscript{54} The IATA worked to get agreements from its member carriers and by April 27, 1966, announced that only three IATA member airlines (all American) had rejected the proposal, and only four foreign airlines had not yet accepted it.\textsuperscript{55} Despite strong opposition to the absolute liability provision of the proposal by the American Trial Lawyers Association (ATLA),\textsuperscript{56} Senator Robert Kennedy,\textsuperscript{57} and the Air Line Pilots Association,\textsuperscript{58} the State Department announced on May 13, 1966 its acceptance of the proposal (now called the IATA proposal) and on May, 14, 1966 its withdrawal of denunciation of the Warsaw Convention.\textsuperscript{59} The Civil Aeronautics Board (CAB) at the same time announced its approval of the agreement.\textsuperscript{60} The airlines had finally agreed to accept absolute liability, waiving Article 20 of the Warsaw Convention as a defense.\textsuperscript{61}

The third provision in the Montreal Agreement, which until recently led to some plaintiffs’ successful avoidance of the liability limitations, requires 10-point type notice of the limits on passenger tickets.\textsuperscript{62} This notice is to be cop-

\begin{itemize}
\item \textsuperscript{54} Lowenfeld & Mendelsohn, \textit{supra} note 12, at 574.
\item \textsuperscript{55} Id. at 591.
\item \textsuperscript{56} George Home, \textit{Lawyers Protest Air Liability Plan}, N.Y. TIMES, April 23, 1966, at 62, col. 1.
\item \textsuperscript{57} 112 Cong. Rec. 8920 (1966).
\item \textsuperscript{58} Liability Per Passenger Upped to $75,000 for World Flights, WASH. POST, May 1, 1966, at A-3, col. 6.
\item \textsuperscript{59} 54 DEP’T ST. BULL. 955-57 (1966).
\item \textsuperscript{60} 31 Fed. Reg. 7302 (1966).
\item \textsuperscript{61} Goldhirsh, \textit{supra} note 11, at 85. Article 20(1) allows a complete defense if the carrier or its agents can prove it took “all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.” Warsaw Convention, \textit{supra}, note 1, art. 20.
\item \textsuperscript{62} Montreal Agreement, \textit{supra} note 5.
\end{itemize}
ied verbatim from the agreement.63

Although viewed as an interim agreement only and primarily designed to prevent the denunciation by the United States from going into effect, the Montreal Agreement and its provisions are still in effect today. The Agreement is actually a private contract between the airlines and passengers as provided in Article 22(1) of the Warsaw Convention.64

F. THE GUATEMALA PROTOCOL (1971)

Continued efforts by the United States to address the problem of the liability limit led to a conference in Guatemala City in 1971.65 The resulting Guatemala Protocol66

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63 Id. Advice to International Passengers on Limitation of Liability.

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts for death of or personal injury to passengers, is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability shall not depend on the negligence of the carrier. The limit of liability of U.S. $75,000 is inclusive of legal fees and costs except that in case of a claim brought in a country where provision is made for separate award of legal fees and costs, the limits shall be the sum of U.S. $58,000 exclusive of legal fees and costs. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury is limited in most cases to approximately U.S. $10,000 or U.S. $20,000. The names of the carriers who are parties to such contracts, are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or special contracts of carriage. For further information please consult your airline or insurance company representative.

64 Warsaw Convention, supra note 1, art. 22.

provides for 1) a liability limitation based on Poincare francs to a maximum of approximately $120,000; 2) periodic revision of the liability limit; 3) absolute liability for death or personal injury; 4) permission for a supplemental national insurance plan; and 5) a settlement inducement clause, calling for the imposition of attorney's fees on the carrier if it wrongfully fails to settle within a reasonable time, as specified in the protocol. Even though the provisions were aimed at satisfying the complaints of the United States, the Nixon administration never sought the advice and consent of the Senate for ratification of the Guatemala Protocol. The Nixon administration objected to expressing the liability limit in terms of gold because of the great fluctuation of gold prices at that time.

G. THE MONTREAL PROTOCOLS (1975)

The next significant effort to modify the Warsaw Convention occurred at a diplomatic conference in Montreal in 1975, where international delegates replaced the gold standard with Special Drawing Rights (SDR). The International Monetary Fund determines the SDR, a unit of currency based on the currencies of France, Britain, Japan, Germany, and the United States. Montreal Protocol 3 called for 100,000 SDR, which in 1983 was approximately $120,000 per passenger, and today is worth about $132,000.

The protocol also provided for a passenger-funded Supplemental Compensation Plan (SCP). Passengers

66 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971, ICAO Doc. 8932/3, reprinted in Goldhirsch, supra note 11, at 319.
67 Matte, supra note 65, at 157.
68 Id. at 158.
69 Id.
70 Id.
71 Goldhirsch, supra note 11, at 97.
72 Matte, supra note 65, at 158.
would be required to pay a surcharge to fund additional insurance coverage providing up to $200,000 per passenger beyond the Convention limitation.\textsuperscript{74} In addition, the protocol eliminated the willful misconduct provision in Article 65 of the Warsaw Convention,\textsuperscript{75} removing one of the plaintiff's means of circumventing the liability limitation.\textsuperscript{76}

The protocol was stalled for seven years in the United States Senate Foreign Relations Committee, and finally went before the Senate in 1983.\textsuperscript{77} The Senate refused to give its advice and consent to the Montreal Protocol.\textsuperscript{78}

In a political maneuver to save the protocol at least temporarily, Senator Howard H. Baker, Jr. changed his vote to "nay" so he would have standing to enter a motion for reconsideration.\textsuperscript{79} As a result of Baker's action, the protocol was voted out of the Senate Foreign Relations Committee in both 1990 and 1991 but is still alive.\textsuperscript{80} In both the 101st and 102nd sessions of Congress, the full Senate failed to consider the revised protocol, thus leaving the 1966 Montreal Interim Agreement liability limit of $75,000 intact and postponing consideration of the protocol on the Senate floor yet another year.

The history of the Warsaw Convention and the various attempts at its modification or revision demonstrate that those who seek to abolish the liability limitation have been

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\textsuperscript{3} Montreal Protocol 4 deals with liability for baggage, not a subject of this comment.

\textsuperscript{74} Moller, \textit{supra} note 2, at 1041.

\textsuperscript{75} Id.

\textsuperscript{76} Id. Article 25(1) states:

\begin{quote}
The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his willful 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 willful misconduct.
\end{quote}

Warsaw Convention, \textit{supra} note 1, art. 25.

\textsuperscript{77} Tompkins, \textit{supra} note 14, at 26.

\textsuperscript{78} The vote took place on March 9, 1983, with the following results: 50 "yea," 42 "nay," and 7 not voting. Id.

\textsuperscript{79} Id.

\textsuperscript{80} Montreal Protocol 3 and the Supplemental Compensation Plan, \textit{supra} note 8, at 5.
instrumental in retaining the low limitation. By insisting that no limit should apply, opponents do not allow the out-of-date limit to rise to a more appropriate level. Even attorneys who support the scheme provided in the Warsaw Convention as modified by the Montreal Agreement readily admit that $75,000 is inadequate compensation today. While opponents of the Convention rail against even the idea of a liability limit and advocate outright denunciation of the system by the United States, they oppose efforts to raise the liability limit to a more conscionable level as an intermediary stopgap. Montreal Protocol 3 in its modified form providing for a liability limit of approximately $130,000 per passenger per incident and the Supplemental Compensation Plan providing additional insurance coverage of up to $500,000,000 per incident per aircraft have been unable to surmount hurdles necessary to gain full Senate consideration despite the support of the Bush administration, the Department of Transportation, the General Accounting Office, the American Bar Association, the Air Transport Association, and the World Travel and Tourism Council.

The impact of this legislative inaction on victims of international disasters is exacerbated by the judicial application of the Warsaw Convention. Courts have found the

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81 At the 25th Annual SMU Air Law Symposium, February 1991, Peter Martin, in his speech entitled "A Different Perspective of Some Liability Aspects of Aviation Terrorism," replying to well-known plaintiffs’ attorney Lee S. Kreindler, stated:

Most thinking air lawyers these days are agreed that the Warsaw Convention system is out of date as to its limits. Opportunity after opportunity for amendment has been missed. Guatemala is not in force. Montreal 3 is not in force either. No obvious progress is being made on substantially increased special contract limits.


82 See Kreindler, supra note 2, at 6; Hollings, supra note 2, at 24-25; Moller, supra note 2, at 1041; Kreindler, supra note 4, at 3; Tompkins, supra note 14, at 29.

Convention provides the exclusive remedy, have broadly defined accident, have expansively viewed notice, have denied all but actual damages, and have narrowly defined willful misconduct to hold plaintiffs under the Warsaw Convention and to apply the liability limitations of Article 22(1).

III. JUDICIAL APPLICATION OF LIABILITY LIMITATIONS

A study of American judicial application of the personal injury and death liability limitations of the Warsaw Convention reveals a growing trend toward strict application. Until recent United States Supreme Court decisions arising from the 1983 Korean Airlines 747 shot down over the Soviet Union and the 1988 bombing of the Pan American flight over Scotland, many judges disfavored the low liability limit and employed judicial means of circumventing the limit. These recent Supreme Court decisions toughening the application of the Warsaw Convention liability scheme as modified by the Montreal Agreement may attract new attention to and debate over the current limit of $75,000. The following discussion examines each of the means plaintiffs employ to avoid the liability limitation and reveals how courts have closed the doors to most of these attempts in recent cases.

A. CAUSE OF ACTION

The cause of action under which the plaintiff sues may determine the jurisdiction of the court, the plaintiff's standing to sue, and the damages available. Early cases held that the Warsaw Convention did not give rise to an

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84 Chan v. Korean Airlines, 490 U.S. 122 (1989) (sustaining the liability limit even though the carrier failed to provide notice of the limit in 10-point type, as required in the Montreal Agreement).

85 In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d Cir.), cert denied, 112 S. Ct. 331 (1991) (rejecting the recovery of punitive damages under the Warsaw Convention).

86 GOLDFIRSCH, supra note 11, at 97.

87 Id. at 56.
independent cause of action for personal injuries or wrongful death incurred in an international air accident and that the cause of action must arise from domestic law.\textsuperscript{88}

Overruling years of precedent,\textsuperscript{89} the Court of Appeals for the Second Circuit in \textit{Benjamins v. British European Airways}\textsuperscript{90} held that the Warsaw Convention does create a cause of action for wrongful death and that federal district courts do have jurisdiction.\textsuperscript{91} The main impact of the decision in \textit{Benjamins} is that diversity requirements under 28 U.S.C. § 1332 are eliminated for federal court jurisdiction under the court's interpretation of the Convention. The court predicted that most cases arising under the Convention would meet diversity requirements for federal jurisdiction, but in cases where diversity was not present a cause of action arose under 28 U.S.C. § 1331 because the treaty provided the cause of action.\textsuperscript{92}

Two groups of litigants benefit from the \textit{Benjamins} decision: 1) aliens who could not satisfy the diversity requirements of 28 U.S.C. § 1332, but who satisfy the venue requirements of Article 28 of the Convention;\textsuperscript{93} and 2) United States citizens who are residents of the same state as the defendant airline, and thus lack diversity.

Pointing out that courts in other signatories to the War-


\textsuperscript{89} Both \textit{Noel}, 247 F.2d at 679-80, and \textit{Komlos}, 111 F. Supp. at 401, held the Warsaw Convention did not create a cause of action. Interestingly, the same judge wrote both the \textit{Noel} opinion and the \textit{Benjamins} opinion which overruled \textit{Noel}.

\textsuperscript{90} 572 F.2d 913 (2d Cir. 1978), \textit{cert. denied}, 439 U.S. 1114 (1979).

\textsuperscript{91} \textit{Id.} at 919.

\textsuperscript{92} \textit{Id.}.

\textsuperscript{93} Article 28 of the Warsaw Convention provides:

\begin{quote}
An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.
\end{quote}

\textit{Warsaw Convention, supra} note 1, art. 28.
saw Convention had held that the Convention created a cause of action, the court in *Benjamins* sought to bring the United States into international conformity. The court commented that federal courts were particularly suitable forums for large air crash cases since they commonly handled such complex litigation. The court, however, limited its holding to the Benjamins' case against the airline and left the decision to the lower court as to whether to take pendant jurisdiction over the suit against the manufacturer.

Following *Benjamins*, courts addressed the issue of whether the Convention created an exclusive cause of action. A group of recent decisions arose from an Avianca Boeing 707 flight en route from Columbia to New York City which crashed on January 25, 1990, near Cove Neck, New York, killing sixty-five passengers and injuring eighty-four. Several plaintiffs filed wrongful death claims in Florida state court, and the defendant airline sought to remove the case to federal court, claiming the Warsaw Convention provided an exclusive cause of action for accidents involving international travel.

In *Velasquez v. Aerovias Nacionales de Colombia*, the United States district court in Florida pointed out that cases have uniformly held that the Warsaw Convention provides an exclusive cause of action for lost baggage and damaged goods and that the majority of the courts have found a similar exclusive cause of action with regard to personal injury and death. The court concluded, however, that federal and state courts had concurrent jurisdiction. Thus, the plaintiff could choose to file in state

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94 572 F.2d at 918-19.
95 Id. at 919.
96 Id.
99 Id. at 675-76.
100 Id. at 677.
court, but the defendant could then remove to federal court. Furthermore, the plaintiff need not bring a claim under the Warsaw Convention for the Convention to apply since plaintiff had already pleaded a federal cause of action. Therefore in this case, the court refused to remand the case to state court.

In direct opposition to the Velasquez decision, Judge King, a United States district court judge in Florida, ruled in Alvarez v. Aerovias Nacionales de Colombia that the Warsaw Convention does not create an exclusive cause of action. In this case, he granted permission to remand a case arising from the same accident as that in Valasquez. Relying on Rhymes v. Arrow Air, Inc., a decision King himself had written, Judge King acknowledged that the Convention gives rise to a cause of action, but he rejected the notion that it is an exclusive cause of action. Nevertheless, continued the court, the Convention does provide the exclusive remedy so that the liability limitation applies regardless of the forum where the case is heard. To date, the United States Supreme Court has not yet ruled on whether the Warsaw Convention provides an exclusive cause of action.

B. Accident

If a passenger's injury or death does not result from an accident while on board or while embarking or disembarking from the aircraft, under Article 17 the passenger may avoid the liability limitations by proving negligence. The United States Supreme Court in Air France v. Saks, defined "accident" as an "unexpected or

101 Id.
102 Id. at 678.
103 Id. at 679.
105 Id.
107 756 F. Supp. at 554.
108 Id.
unusual happening or event that is external to the passenger. Thus, the plaintiff's loss of hearing, which resulted from normal pressurization of the aircraft, was not an accident, and Article 17 of the Convention did not apply. Circuit and district courts have consistently held that passengers' illnesses or physical injuries sustained or aggravated during normal flight operations do not constitute "accidents."

A variety of events are "accidents" under the Warsaw Convention as long as they occur on board or while embarking or disembarking. Both the Court of Appeals for the Third Circuit and the Court of Appeals for the Second Circuit have held that terrorist attacks are within the definition of accident. A New York federal district court held that a bomb threat was an accident, and the same court held that an accident occurred during a hijacking.

The definition of accident also encompasses torts committed by fellow passengers. When a drunken passenger fell and injured a fellow passenger, a Maryland federal district court held an accident had occurred. Recently,
a New York federal district court also included a slip and fall accident under the Convention as long as it occurs while on board or while embarking or disembarking.\textsuperscript{118}

C. Passenger

If the person injured or killed is not a passenger, the claim is not included under the Warsaw Convention. Article 17 states, "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger . . . ." The Convention provides no definition of passenger, but Article 1 states the Convention applies to all international air transportation of "persons, baggage or goods."\textsuperscript{119} A passenger must be a person and, under Article 1, the person is a passenger whether he paid for his transportation or is transported gratuitously.\textsuperscript{120} Two types of cases address the issue of whether the plaintiff is a passenger: 1) employees on board for various purposes and 2) persons not accepted as passengers who claim injury as a result of not being on board.

The Court of Appeals for the Ninth Circuit in \textit{In re Mexico City Air Crash}\textsuperscript{121} held that crew members such as flight attendants working on board were not passengers under the Warsaw Convention, but that a "deadheading" flight attendant travelling home might be able to bring an action under the Convention.\textsuperscript{122} The court remanded the case to district court for a fact determination of the exact status of the flight attendant plaintiff when the accident took place.\textsuperscript{123}

\textsuperscript{118} Barratt v. Trinidad & Tobago Airways, 22 Av. Cas. (CCH) 18,393, 18,395 (E.D.N.Y. Aug. 28, 1990).
\textsuperscript{119} Article 1(1) states in full: "This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise." Warsaw Convention, \textit{supra} note 1, art. 1(1).
\textsuperscript{120} \textit{Id.} art. 17.
\textsuperscript{121} 708 F.2d 400 (9th Cir. 1983).
\textsuperscript{122} \textit{Id.} at 417-18.
\textsuperscript{123} \textit{Id.}
The Second Circuit in *Sulewski v. Federal Express Corp.* similarly held that an aircraft mechanic killed when a cargo carrier crashed was not a passenger. The court affirmed the district court’s granting of summary judgment to the defendant airline, saying that Sulewski was not issued a ticket and the Convention did not apply. Rejecting the idea that mere presence on board the aircraft would satisfy the definition of passenger, the court stressed that the Convention was intended to cover those persons traveling under a contract for carriage. Sulewski’s status as an employee was clear since he was not commuting to or from his job and he was required to be on board by virtue of his employment. Therefore, his claim did not arise under the Warsaw Convention, but arose exclusively under workers’ compensation.

The second type of passenger case is illustrated by *Adamsons v. American Airlines.* In *Adamsons* a plaintiff who had been refused passage on American Airlines sued for resulting medical injuries. Adamsons was attempting to leave Haiti to get medical care in New York City when American refused to board her due to her condition. Adamsons’ condition worsened significantly during the two-day wait for a Pan American flight off the island. Defendant American Airlines tried unsuccessfully to assert the Convention liability limit as a defense against Adamsons’ claim. The court held that since she was never accepted as a passenger, the Convention and its liability limit did not apply. Adamsons was awarded a judgment.
of $500,000 on her claim.\textsuperscript{132}

American federal district courts are in conflict on whether the Warsaw Convention applies to the airlines' practice of "bumping" passengers (denying boarding to passengers due to overbooking).\textsuperscript{133} Since a claim for damages for delay due to flight cancellation or "bumping" can usually be sustained under a contract action, the issue has not yet been resolved.

1. Embarkation and Disembarkation

Article 17 provides that the air carrier is liable for personal injuries or death that occur when the victim is a passenger on board the aircraft or while embarking or disembarking.\textsuperscript{134} Courts continue to try to define the parameters of "embarking or disembarking."

The Court of Appeals for the Second Circuit in \textit{Day v. Trans World Airlines}\textsuperscript{135} adopted a test that has been used in subsequent cases. The test considers "activity (what the plaintiffs were doing), control (at whose direction), and location."\textsuperscript{136} Thus, the analysis asks three questions: 1) what was the passenger doing, 2) at whose direction was the passenger acting, and 3) where was the passenger. The passengers in \textit{Day} were undergoing a baggage and personal search prior to boarding the aircraft in Athens, Greece, when terrorists attacked. Applying the three-factor test, the Second Circuit affirmed the district court's holding that the passengers were in the process of embarking and that the Convention applied.\textsuperscript{137} The court as-

\begin{itemize}
  \item \textsuperscript{132} Id. at 370.
  \item \textsuperscript{133} See Harpalani v. Air India, Inc., 622 F. Supp. 69, 73 (N.D. Ill. 1985) (delay due to overbooking of flight from India to New York comes under the Convention); Brunwasser v. Trans World Airlines, 541 F. Supp. 1338, 1340 (W.D. Pa. 1982) (delay caused by flight cancellation does not come under the Convention); Mahaney v. Air France, 474 F. Supp. 532, 534 (S.D.N.Y. 1979) (delay due to overbooking would fall under the Convention, but was filed beyond the two year statute of limitations established by the Convention).
  \item \textsuperscript{134} Warsaw Convention, \textit{supra} note 1, art. 17.
  \item \textsuperscript{135} 528 F.2d 31 (2d Cir. 1975), \textit{cert. denied}, 429 U.S. 890 (1976).
  \item \textsuperscript{136} Id. at 33.
  \item \textsuperscript{137} Id. at 38.
\end{itemize}
sferred its view of the benefits of the Convention, as modified by the Montreal Agreement, pointing out that the Convention allows passengers to avoid the burden of suing an airport operator in a foreign country. Disadvantages of that requirement would include expense, inconvenience, pretrial investigation, travel, and undue delay of payments urgently needed by the victim or his survivors.\textsuperscript{138}

In a subsequent case centering on the issue of embarkation, \textit{Buonocore v. Trans World Airlines},\textsuperscript{139} the Second Circuit, while applying the \textit{Day} test, took care to distinguish the facts in the two cases.\textsuperscript{140} Buonocare was killed in a terrorist attack in the Rome airport. Unlike the passengers in \textit{Day}, he had not gone through immigration, had just checked in, was free to roam about the airport, was nowhere near the gate, and had two hours before departure. In contrast, the passengers in \textit{Day} were at the gate preparing to board, in a restricted area, within minutes of boarding. In affirming summary judgment for TWA, the court refused to hold the airline liable for all accidents that occur in public areas of airports.\textsuperscript{141}

Other courts generally agree that under the Warsaw Convention accidents which occur in public areas of airport terminals are not the responsibility of the airlines.\textsuperscript{142} Following the district court’s reasoning in \textit{Day} that a disembarking passenger has fewer activities to perform than

\textsuperscript{138} \textit{Id.} at 34.

\textsuperscript{139} 900 F.2d 8 (2d Cir. 1990).

\textsuperscript{140} \textit{Id.} at 10, 11.

\textsuperscript{141} \textit{Id.} at 11.

\textsuperscript{142} See Hernandez v. Air France, 545 F.2d 279, 282 (1st Cir. 1976) (passengers have completed disembarking when they are waiting for luggage in terminal), \textit{cert. denied}, 430 U.S. 950 (1977); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441, 443-47 (S.D.N.Y. 1990) (airline is not liable for injury received on walkway in the airport during transfer to a connecting flight on the same airline); De la Cruz v. Dominican de Aviacion, 22 Av. Cas. (CCH) 17,639, 17,643 (S.D.N.Y. Dec. 7, 1989) (injury received while collecting baggage in the terminal is not covered by the Warsaw Convention); Upton v. Iran Nat’l Airlines, 450 F. Supp. 176, 178 (S.D.N.Y. 1978) (passengers had not started embarking when roof collapsed on them in main terminal after they had collected baggage), \textit{aff’d}, 603 F.2d 215 (2d Cir. 1979).
an embarking passenger, courts have excluded post-flight immigration and customs activities from the definition of disembarking, as well as transportation within the terminal. Until the passenger reaches the terminal, however, he is in the process of disembarking. Thus, a passenger who fell on board a bus transporting passengers from the aircraft to the terminal was within the Convention.

To summarize, the control test in Day supplies a broader application to embarking passengers than to disembarking passengers. Embarking passengers may be covered by Article 17 while still in the terminal if under the control of the airline and close to departure. Disembarking passengers are not covered under the Convention once they have reached the terminal.

2. On Board

To be a passenger, the victim must have been embarking, disembarking, or “on board” when the incident occurred. The phrase “on board” is easier to define than embarking and disembarking and has stimulated less litigation. The New York state trial court in Herman v. Trans World Airlines held the air carrier liable under the Warsaw Convention for passenger injuries suffered when the aircraft was hijacked on a runway in Jordan. Since the passengers had not disembarked, they were “on board.”

In a broad interpretation of “on board,” the district court in Husserl v. Swiss Air Transport held that injuries claimed by hijacked passengers for the period on board

145 Curran v. Aer Lingus, 17 Av. Cas. (CCH) 17,560, 17,562 (S.D.N.Y. Sept. 28, 1982) (riding an escalator to customs is not disembarking).
148 Id. at 833.
the aircraft, as well as in a hotel in Jordan, were covered by the Convention since the passengers had embarked in Zurich, Switzerland, and had not yet disembarked at their destination in New York.\textsuperscript{150}

D. Notice

1. Delivery of a Ticket

Article 3(1) of the Warsaw Convention requires the carrier to deliver a ticket to the passenger containing the following information: date of issue; names of departure, destination, and stopping places; name and address of carrier(s); and a statement of the Convention liability limits.\textsuperscript{151} Article 3(2) further specifies that accepting a passenger without having delivered a ticket will result in the air carrier's loss of the liability limit protections.\textsuperscript{152} For years, a carrier's violation of Article 3 has been a major means for the plaintiff to avoid damage limitations of the Convention.

\textsuperscript{150} Id. at 1247. The injuries suffered were strictly mental distress with no physical manifestations. The line of cases following \textit{Husserl} has recently been overruled by the United States Supreme Court in Eastern Airlines v. Floyd, 111 S. Ct. 1489 (1991), discussed infra at nn. 230-41 and accompanying text.

\textsuperscript{151} Warsaw Convention, supra note 1, art. 3(1). Article 3 of the Convention states:

\begin{enumerate}
\item For the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:
\begin{enumerate}
\item The place and date of issue;
\item The place of departure and of destination;
\item The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
\item The name and address of the carrier or carriers;
\item A statement that the transportation is subject to the rules relating to liability established by this Convention.
\end{enumerate}
\end{enumerate}

(2) The absence, irregularity or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.

\textit{Id.} art. 3.

\textsuperscript{152} Id. art. 3(2).
Courts have routinely held that to satisfy Article 3 the ticket must be delivered before the trip begins, so that the passengers may take precautionary measures, as desired, or at least be aware of the risk they are undertaking. The Second Circuit in *Mertens v. Flying Tiger Line, Inc.*,\(^{153}\) held that delivery of the ticket to passengers already on board the aircraft was inadequate.\(^{154}\) The court stated the common sense proposition that, once on board, the passengers could not exercise options such as deciding not to go, entering a special contract with the airline, or taking out extra insurance.\(^{155}\) Similarly, in *Warren v. Flying Tiger Line, Inc.*,\(^{156}\) the Ninth Circuit held that delivery of a ticket to passengers at the boarding ramp failed to satisfy Article 3.\(^{157}\) In both *Mertens* and *Warren*, the Convention liability limits did not apply to the awards for injuries and death resulting from the crashes.

Delivery of a ticket for the second leg of a trip was held to be inadequate delivery under the Convention in *Manion v. Pan Am World Airways, Inc.*\(^{158}\) The passenger was on a trip from New York to Saudi Arabia, with the first stop in Rome, where she was injured in a terrorist attack. Because the airline had accepted the passenger in New York without a ticket, Article 3(2) had not been satisfied, even though a ticket was delivered in Rome.\(^{159}\) Therefore, the liability limit did not apply. In *Domangue v. Eastern Airlines, Inc.* the court held that presenting a ticket at the ticket counter was an adequate delivery because the passenger had time to take precautions, if desired.\(^{160}\) According to the court, the passenger in *Domangue* had enough time between checking in and boarding the aircraft to decide whether to buy extra insurance.\(^{161}\)

\(^{153}\) 341 F.2d 851 (2d Cir.), cert. denied, 382 U.S. 816 (1965).

\(^{154}\) Id. at 857.

\(^{155}\) Id. at 856-57.

\(^{156}\) 352 F.2d 494 (9th Cir. 1965).

\(^{157}\) Id. at 498.

\(^{158}\) 434 N.E.2d 1060, 1061 (N.Y. 1982).

\(^{159}\) Id. at 1061.


\(^{161}\) Id. at 341.
2. **10-Point Type Requirement**

In 1966, the Montreal Agreement added a requirement that the tickets for international flights give notice of the liability limitations in type no smaller than 10-point. The Agreement also specified the exact language to be used in the notice on the tickets.

Until the recent United States Supreme Court ruling in *Chan v. Korean Airlines, Ltd.*, courts had consistently held that notice in type smaller than 10-point was inadequate and removed the liability limit. Tickets in 4-point type clearly failed to provide adequate notice in *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*. The court held that the notice was so small that it was "virtually invisible," and therefore the court refused to enforce the liability limitations. Notice in 4.5-type also barred the air carrier from asserting the limitations in another case. In 1983 the Second Circuit held 8.5-point type was not adequate notice in *In re Air Crash at Warsaw, Poland*. Even 9-point type, in *In re Air Crash Disaster Near New Orleans, Louisiana*, was held insufficient to afford liability limitation protection from the Warsaw Convention/Montreal Agreement scheme.

The United States Supreme Court ruling in *Chan v. Korean Airlines*, breaking with over twenty-five years of precedent, held that failure to provide 10-point type does not

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162 Montreal Agreement, supra note 5, at 305.
163 See Montreal Agreement, Advice to International Passengers on Limitation of Liability, supra note 62. The Civil Aeronautics Board had also adopted 10-point type as a minimum standard for Warsaw Convention liability limitations notice in 1963, and further specified contrasting ink as a requirement. Department of Transportation Economic Regulation, 14 C.F.R. § 221.175 (1992).
165 370 F.2d 508, 513-14 (2d Cir. 1966), aff'd, 390 U.S. 455 (1968).
166 Id. at 514.
167 Id.
170 789 F.2d 1092, 1098 (5th Cir.), vacated, 490 U.S. 1032 (1989).
defeat liability limitations.172 Justice Scalia, writing the majority opinion, stated that although Korean Airline’s tickets provided only 8-point notice, that irregularity did not trigger the sanction in Article 3(2) of unlimited liability.173 Justice Scalia stated that a ticket was delivered, and thus the liability limits were not forfeited.174 The Court’s rigid reading of Article 3 seems to say that airlines need not give notice of the personal injury damage limitation in order to protect themselves with that limitation. Justice Brennan, in his concurring opinion, agreed that 8-point type in this case was adequate notice, but expressed a concern that some minimum standard must apply.175 The ruling of the Supreme Court signals that a stricter reading of the Warsaw Convention is in order and lower courts may not so readily circumvent the liability limitation in the future.

E. WILLFUL MISCONDUCT

The most direct way to avoid the liability limit under the Warsaw Convention is to prove willful misconduct by the carrier under Article 25.176 Article 25 expressly states that the carrier cannot use the Convention to exclude or limit liability if willful misconduct caused the injury. The Montreal Agreement of 1966 does not affect the willful misconduct exception.177

Added to the Convention’s failure to define “willful misconduct” is the fact that the original French text used the word “dol,” which has no real English translation.178

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172 Id. at 124.
173 Id. at 127.
174 Id. at 128.
175 Id. at 150 (Brennan, J., concurring).
176 Warsaw Convention, supra note 1, art. 25.
177 U.S. Dept. of State Memorandum, U.S. Government Action Concerning the Warsaw Convention 4 (1966). The statement by the State Department expressly provides, “should the claimant succeed in proving willful misconduct, he would be subject to limitation on his recovery.” Id.
178 In French, Article 25(1) says:

La transporteur n’aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité,
The closest concept to *dol* in common law jurisdictions is willful misconduct. Making the test even more ambiguous, the provision in Article 25(1) states that willful misconduct may be defined by the court applying its own law.

Thus, courts across the United States have used varied definitions and arrived at varied results in cases where the plaintiff sought to prove willful misconduct by the carrier.

A panel of judges in *Koninklijke Luchtvaart Maatschappij N.V. v. Tuller* approved of the charge to the jury which defined willful misconduct as “the intentional performance of an act with knowledge that the . . . act will probably result in injury or damage, or . . . in some manner as to imply reckless disregard of the consequences of its performance.” The court added that the conduct may be an omission as well as an act.

The jury in *Tuller* found the carrier guilty of willful misconduct, and the D.C. Circuit affirmed, holding that the crew’s acts constituted a willful omission of a positive duty, providing adequate evidence for a jury finding. Among the airline’s wrongful acts were failing to establish crew procedures to inform passengers about the location and use of life vests, failing to send distress messages in violation of the airline’s own regulations, and failing to effectively use the life rafts.

Courts defining willful misconduct have stressed that an intention to do harm is not required for a finding of willful misconduct. In *Pekelis v. Transcontinental & Western Air, Inc.*, where a crash resulted from erroneously switching hose lines for altimeters, the jury charge, approved by the

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GOLDHirsch, supra note 11, at 193.

170 See Warsaw Convention, supra note 1, art. 25(1).
181 Id. at 778.
182 Id.
183 Id. at 779.
184 Id. at 779-80.
Second Circuit, stated willful misconduct "does not mean that the defendant, or any of its employees, had a deliberate intention to kill [the passenger] or to wreck this airplane." The only requirement is the intentional performance of an act either "with knowledge that the . . . act will probably result in injury or damage[s]" or "in such a manner as to imply reckless disregard of the probable consequences . . .".

Similarly, a jury charge in *Berner v. British Commonwealth Pac. Airlines, Ltd.* specifically eliminated deliberate intention to do harm as the test for willful misconduct. In *Berner* a fatal crash resulted when the pilot descended even though he was told to maintain altitude. The jury found for the defendant, but the judge granted the plaintiff's motion for judgment notwithstanding the verdict. The Second Circuit, however, reinstated the jury verdict. The jury instructions defined willful misconduct as a deliberate act performed with reckless disregard of the probable consequences.

Willful misconduct, then, is an issue of fact, depending on the circumstances of the case. Usually the claim involves the flight crew. In *Butler v. Aeromexico* the Court of Appeals for the Eleventh Circuit affirmed a jury finding of willful misconduct by the crew when it turned off the radar while flying in bad weather and a crash occurred.

The D.C. Circuit affirmed a jury verdict in *In re Korean Air Lines Disaster* which also found willful misconduct by the flight crew. Even though the court acknowledged that

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186 Id. at 124.
187 Id.
189 Id. at 360.
190 Id. at 326.
192 Id.
193 774 F.2d 429 (11th Cir. 1985).
194 Id. at 431-32.
evidence was "sparse," consisting of radar data, the report of the Secretary of the ICAO, and expert testimony based on the ICAO report, the court did not disturb the jury verdict of willful misconduct, although it did reverse the award of punitive damages.

The limited evidence available in this case demonstrates the need for an objective rather than a subjective test to prove willful misconduct. Since airline crashes often leave no hard evidence as to what actually happened, the plaintiff can only show that the pilot should have known the probable consequences of his act rather than what the pilot actually knew. The objective test is usually applied in the United States, since a subjective test, requiring proof of the wrongdoer's actual state of mind, is difficult to prove unless circumstantial evidence is permitted.

Two Lockerbie damage suits have succeeded in finding Pan Am guilty of willful misconduct at the trial court level. The first jury awarded the relatives of one victim of the Lockerbie crash $9.2 million, and the next week the widow of another victim received $9 million. Pan Am is now bankrupt, but its insurer plans to appeal. With more than 200 plaintiffs who won the liability portion of the suit against Pan Am potentially able to claim huge damages, the appeals process will be the focus of great attention by airlines, insurers, legislators, and litigators.

The Second Circuit in Ospina v. Trans World Airlines reversed the trial court's finding of willful misconduct in the 1986 bomb explosion on a TWA flight landing in Athens, Greece. According to the test applied in Ospina, to prove willful misconduct the plaintiff must show the airline "omitted to do an act (1) with knowledge that the

196 Id. at 1479.
197 Id. at 1490.
198 GOLDFIRSH, supra note 11, at 121-22.
200 Id.
201 975 F.2d 35 (2d Cir. 1992).
202 Id. at 97.
omission of that act probably would result in damage or injury, or (2) in a manner that implied a reckless disregard of the probable consequences." Because TWA complied with FAA procedures and the national laws in countries where it operated, the court held that TWA's failure to search the cabin and cockpit for bombs did not constitute willful misconduct. Conceding that such a search would have revealed the bomb, the court nevertheless concluded that "the test for willful misconduct is not 20-20 hindsight."

The dissent brought out the additional fact that even though TWA personnel in Cairo had identified the passenger who carried the bomb as a "profile selectee," airline employees failed to conduct a redundant screening, a procedure TWA and the United States government had agreed upon for Egyptian operations. The majority, evidently, did not view the failure of TWA to screen bags of the suspect passenger as willful misconduct since that practice was not a formal regulation. TWA's compliance with FAA regulations and local laws gave it Warsaw liability protection.

Whether a court may tell the jury that without a finding of willful misconduct the plaintiff will be limited to a $75,000 recovery is an unsettled question. In *In re Aircrash in Bali, Indonesia* the judge informed the jury of the Warsaw Convention liability limit and the requirement of a finding of willful misconduct in order to avoid the limitation. The Ninth Circuit held that the judge did not abuse his discretion since an issue in the case was whether adequate notice of the limitation was given. Thus, the information was necessary to the jury decision on other issues. The Second Circuit also has held that the jury may be informed as to the effect of its answers on special

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203 Id.
204 Id.
205 Id.
206 Id. at 38-39 (Nickerson, J., dissenting).
207 871 F.2d 812 (9th Cir. 1989).
208 Id. at 814.
interrogatories.\textsuperscript{209}

Two circuits reached contrary results in two other cases. In \textit{Gullett v. Saint Paul Fire and Marine Insurance Co.}\textsuperscript{210} the Court of Appeals for the Seventh Circuit noted the potential prejudicial effect of such information given to the jury,\textsuperscript{211} and in \textit{Carvahlo v. Raybestos-Manhattan, Inc.}\textsuperscript{212} the Ninth Circuit affirmed the trial judge's refusal to tell the jury of the legal effects of its responses to special interrogatories.\textsuperscript{213}

In sum, due to the little evidence remaining after most airline accidents, the difficult task of proving willful misconduct becomes even harder, even with the use of an objective test and circumstancial evidence. Perhaps a system offering absolute liability, requiring no proof of wrongdoing, together with a greatly increased liability limit is the solution. Proponents of Montreal Protocol 3 and the Supplemental Compensation Plan believe it provides the answer.\textsuperscript{214}

\section*{F. Damages}

Besides strictly applying the liability cap of $75,000 set by the Warsaw Convention, courts have limited the types of damages that may be collected under the Convention, in spite of the fact that the Convention itself does not so limit them.

\subsection*{1. Punitive Damages}

Neither the Warsaw Convention nor the Montreal Agreement specifies the types of damages a plaintiff may recover for personal injury or death. Article 24(2) of the Convention states which persons are entitled to sue under the Convention and that their rights are determined by

\begin{footnotesize}
\textsuperscript{209} Vinieri v. Byzantine Maritime Corp., 731 F.2d 1061, 1065 (2d Cir. 1984).
\textsuperscript{210} 446 F.2d 1100 (7th Cir. 1971).
\textsuperscript{211} Id. at 1105.
\textsuperscript{212} 794 F.2d 454 (9th Cir. 1986).
\textsuperscript{213} Id. at 456-57.
\textsuperscript{214} See discussion infra part IV.B.
\end{footnotesize}
local law.\textsuperscript{215}

The Second Circuit recently resolved a conflict in district court holdings as to whether punitive damages may be recovered under the Warsaw Convention. In \textit{In re Hijacking of Pan American World Airways Inc. Aircraft at Karachi Int'l Airport, Pakistan}\textsuperscript{216} the United States District Court in the Southern District of New York held that the Convention does not preempt recovery of punitive damages,\textsuperscript{217} while that same year the court in the Eastern District of New York held in \textit{In re Air Disaster in Lockerbie, Scotland}\textsuperscript{218} that the Convention rejects recovery of punitive damages.\textsuperscript{219} The Second Circuit reversed \textit{Karachi} and affirmed \textit{Lockerbie}, and the United States Supreme Court refused to hear the appeal.\textsuperscript{220}

The Second Circuit reasoned that the proper translation of the French phrase \textit{dommage survenu} in Article 17\textsuperscript{221} is "damages sustained," and refers only to monetary or compensatory damages, not punitive.\textsuperscript{222} Responding to the plaintiffs' argument that Article 24(2), by leaving the measure of damages to local law, permits punitive damages, the court held that the article applied only to calcu-

\textsuperscript{215} Warsaw Convention, \textit{supra} note 1, art. 24. Article 24 of the Convention states:

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

\textit{Id.}


\textsuperscript{217} \textit{Id.} at 19.


\textsuperscript{219} \textit{Id.} at 549.


\textsuperscript{221} The official version of the Warsaw Convention is written in French, which has created difficulties for United States courts attempting to interpret the strict language of the treaty.

\textsuperscript{222} 928 F.2d at 1281.
lating compensatory damages, not to recovery of punitive
damages.\textsuperscript{223} The court based its holding primarily on the
drafting history of the Convention, and the drafters' pur-
pose of the Convention to limit liability of international
air carriers.\textsuperscript{224} The court concluded its decision with
three policy considerations that punitive damages would
destroy uniformity, defeat the goal of making airlines in-
surable, and increase litigation.\textsuperscript{225}

The federal court in the Southern District of New York
has already followed the \textit{Lockerbie} precedent in \textit{Priestly v. American Airlines, Inc.}\textsuperscript{226} The plaintiff, whose broken leg
was refractured when airline employees dropped him
while carrying him to the aircraft at the Bermuda airport,
alleged willful conduct and demanded punitive damages.
The court refused to allow the plaintiff to amend his com-
plaint to add a plea for punitive damages, stating "the de-
mand for punitive damages is clearly futile in light of
existing case law."\textsuperscript{227}

\section*{2. Prejudgment Interest}

The issue of whether prejudgment interest may be
awarded in addition to the Warsaw limitation for death is
unsettled. Two prominent decisions, \textit{Domangue v. Eastern
Airlines, Inc.}\textsuperscript{228} and \textit{O'Rourke v. Eastern Airlines, Inc.}\textsuperscript{229} pres-
ent directly contrary holdings. In \textit{Domangue}, the Fifth Cir-
cuit held prejudgment interest may increase the award
because interest is to compensate for slow payment, not
for injuries.\textsuperscript{230} The court also expressed concern over
"the inequity of Eastern Airlines benefiting from the
length of time between the crash and a final judgment in

\footnotesize
\begin{itemize}
\item \textsuperscript{223} Id. at 1282-85.
\item \textsuperscript{224} Id. at 1284.
\item \textsuperscript{225} Id. at 1287-88.
\item \textsuperscript{226} No. 89 Civ. 8265 (JMC), 1991 WL 64459 (S.D.N.Y. Apr. 12, 1991).
\item \textsuperscript{227} Id. at *2.
\item \textsuperscript{228} 722 F.2d 256 (5th Cir. 1984).
\item \textsuperscript{229} 730 F.2d 842 (2d Cir. 1984).
\item \textsuperscript{230} 722 F.2d at 263.
\end{itemize}
this case to the detriment of decedent’s survivors.” However, in *O’Rourke*, the Second Circuit held prejudgment interest was not recoverable in a wrongful death action under the Convention since a fundamental principle of the Convention was to limit liability to a fixed sum. The issue is not resolved.

3. Emotional Distress

Article 17 applies to “the death or wounding of a passenger or any other bodily injury.” Prior to *Eastern Airlines, Inc. v. Floyd*, two lines of cases presented contrary views as to whether the Convention covers mental anguish or emotional distress, absent physical injury.

One line of cases follows *Husserl v. Swiss Air Transport Corp.* which held mental injuries are within the Convention’s coverage. The Eleventh Circuit in *Floyd v. Eastern Airlines* reached the same conclusion by an analysis of the French term “lésion corporelle,” translated into English as “bodily injury,” coupled with a broad interpretation of the treaty and its goals. The Eleventh Circuit took issue with the decision in *Rosman v. Trans World Airlines*, which had analyzed the phrase “bodily injury” and concluded mental injury alone was not compensable under the treaty.

The United States Supreme Court granted certiorari to *Floyd* to resolve the conflict in holdings. The case arose from a flight from Miami to the Bahamas, during which all three engines failed. The plane plunged and passengers were told to prepare to ditch in the Atlantic before the crew was able to make a safe trip back to Miami by re-

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231 *Id.* at 263-64.
232 730 F.2d at 852.
233 *Warsaw Convention, supra* note 1, art. 17.
236 *Id.* at 1250.
238 *Id.* at 1471-73.
starting an engine. Several passengers filed separate complaints alleging emotional distress. The Court determined that the correct translation for the French “lésion corporelle” is “bodily injury,” and thus “Article 17 does not permit recovery for purely psychic injuries.”

Therefore, no cause of action lies under the Convention for emotional injury unaccompanied by physical injury. The Court also considered the treaty’s history, purposes, and the intent of the signatories in arriving at its decision, emphasizing the purpose of international uniformity in the initial enactment of the Convention.

G. SUMMARY

By narrowly defining terms and adhering closely to the original purposes of the Warsaw Convention, American courts today generally are holding firm to the $75,000 personal injury and death liability limitation presently applied to international air travel accidents. The Convention, as modified by the Montreal Agreement, shows no signs of being diminished by present-day court decisions.

If plaintiffs are ever to collect more than the present $75,000 for personal injury or death, legislative action must be taken.

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241 Id. at 1494.
242 Id. at 1502. The Court pointed out the high degree of proof required for recovery of mental distress in many countries. For example, American courts require a showing of extreme and outrageous conduct by the tortfeasor, British courts limit recovery by use of foreseeability requirements, and French courts require proof of fault and direct and certain damages. Because the Convention, as modified by the Montreal Agreement, confers absolute liability on the carriers, the Court chose not to subject international air carriers to “strict liability for purely mental distress.” Id.
243 Contrast this tightening of the liability limitation in the United States with the recent decision of the ten airlines in Japan to waive liability limitations entirely for disasters on international passenger flights. The decision of the Japanese airlines should add pressure to the American industry to take similar action. Yumiko Ono & Bridget O’Brien, Japan’s Airlines Waive Limits for Accidents, WALL ST. J., Nov. 23, 1992, at A11.
244 In his speech entitled, “How Much is the Plaintiff at Sea with Warsaw?” given at the February, 1992 SMU Air Law Symposium, Gerald C. Sterns, after
IV. MONTREAL PROTOCOL 3
A. BACKGROUND AND PROVISIONS

Montreal Protocol 3 is a proposed amendment to the Warsaw Convention that has been in limbo since the draft was prepared at a diplomatic conference held in Montreal in 1975. Every United States president has supported the Protocol since it was first transmitted to the Senate in 1977. Following the defeat of the Protocol in the Senate in 1983, the Reagan administration revised the Supplemental Compensation Plan, and the Bush administration has called for Senate approval since 1989. The Senate Committee on Foreign Relations reported favorably on the Protocol most recently on January 29, 1991, but the Senate as a whole has not yet considered whether to give its advice and consent to ratification.

Article I of Montreal Protocol 3, together with Article XVII, states that Protocol 3 modifies the Warsaw Convention summarizing recent court holdings strictly upholding Warsaw liability limits, challenged the legislature to act. The system is skewed, and indefensibly so, in two directions: first as against the innocent passenger in the carrier accident-only case, and secondly in the involvement of the airframe, engine, component and air traffic control people in practically every case (the Warsaw Convention protects only airlines). Much of the creative product liability law in aviation matters has come about because of the Warsaw/Montreal aberration. So long as million dollar losses are going to be paid $75,000 by the airlines' insurers, the insurers of other aviation defendants, as well as the companies themselves, are going to take it on the chin.

The ball is firmly in the legislature's court. However, each decision in which a court is forced to uphold the now-ridiculous goal of nurturing the "fledgling" aviation industry highlights the need for change. These recent decisions should focus attention on long-awaited reforms.

Gerald C. Stems, Address at the 26th Annual SMU Air Law Symposium 19-20 (Feb. 1992) (on file with the Journal of Air Law and Commerce). Stems, however, did not address the form those "long-awaited reforms" should take.

245 S. EXEC. REP. No. 1, supra note 83, at 4.
246 Id. at 13.
247 Id.
248 The Senate Foreign Relations Committee had reported the Protocol favorably on June 21, 1990, as well, but the 101st Congress did not consider it before adjournment. Montreal Protocol 3 and the Supplemental Compensation Plan, supra note 8, at 5.
tion, as amended by both the Hague Protocol and the Guatemala City Protocol, and indicates that all three should be read together as one document.

Article II of the Protocol changes the requirement of ticket delivery. Failure to deliver a ticket will not result in lifting the liability limitations. Itinerary information can be preserved by "any other means" as a substitute for delivery of a ticket. The purpose of this article is to enable airlines to use automated ticketing procedures. How the passenger will be informed of the liability limitation is unclear.

Article IV of Montreal Protocol makes several changes in the language of Article 17 in the Warsaw Convention. Written in English, rather than French, the phrase "personal injury" replaces the term "bodily injury." A more important change is the replacement of the term "accident" with "the event which caused the death or injury." Hijackings and bombings can clearly fit into the new language, removing any doubt whether such acts are "accidents." Article IV adds one qualification to carrier liability which Article 17 of the Warsaw Convention did not expressly layout but which has been established by judicial decisions defining "accident." The

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250 Article XVII of Montreal Protocol expressly provides: "As between the Parties to this Protocol, the Warsaw Convention as amended at The Hague in 1955 and this Protocol shall be read and interpreted together as one single instrument and shall be known as the Warsaw Convention as amended at The Hague and at Guatemala City, 1971." Lee S. Kreindler, Aviation Accident Law, vol. 1, § 12B.03(1).
252 Id. at 42.
253 Article IV of Montreal Protocol states:

The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

Kreindler, supra note 249, § 12B.03(3).
254 Id.
255 Id.
qualification is that the carrier is not responsible for injuries resulting "solely from the state of health of the passenger." Thus, Article IV's new language clarifies issues which have generated case law and also expressly expands the carrier's liability.

Article VI further increases the carrier's liability by deleting Article 20(1) of the Warsaw Convention, which had provided a defense for the carrier if it showed that it had taken all "necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Montreal Protocol limits that defense to liability for injury to passengers caused by delay only and retains the defense for damage to cargo caused by destruction, loss, damage, or delay. Article VI tightens even further the carrier's absolute liability for personal injury or death.

Article VII of the Protocol retains one exception to
absolute liability by expanding and particularizing the contributory negligence provision of Article 21 of the Warsaw Convention. Because the Protocol includes a mandatory supplemental insurance plan added to the ticket cost, tracing a saboteur through insurance purchase for a particular flight will no longer be possible. If the carrier can prove the identity of the saboteur, however, revised Article 21 specifically excludes liability to him or his beneficiaries. Note also that by eliminating the language "in accordance with the provisions of its own law" in Article 21 of the Convention, but keeping the language "wholly or partly exonerated," revised Article 21 establishes the rule of comparative negligence, rather than contributory negligence, regardless of the forum.

Article VIII of the Guatemala Protocol substitutes Special Drawing Rights (SDR) of the International Monetary Fund for the gold franc. The liability limit for all claims for personal injury or death is 100,000 SDRs. A settlement inducement clause empowers courts to award attorneys' fees and court costs to plaintiffs if the carrier fails to offer to settle within six months of receiving the claim.

Articles IX and X of Montreal Protocol 3 make a significant change in the Warsaw Convention scheme as amended by the Montreal Agreement by removing the possibility that a plaintiff can exceed the liability limit for

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261 Article 21 of the Warsaw Convention had simply stated, "If the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of that passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger." Warsaw Convention, supra note 1, art. 21.


263 Id. As of May 14, 1991, 100,000 SDRs would equal approximately $143,000. Senators Predicting to Vote Soon on Montreal Protocols, Aviation Daily, May 14, 1991, at 300.

personal injury or death by showing gross negligence or willful misconduct by the carrier. Article 25 of the Convention, which allowed plaintiffs to exceed the liability limit if willful misconduct were proven, now only pertains to cargo. An example clarifies the distinction. An airline crash caused by an intentional act of an employee will permit unlimited recovery for damage to or loss of cargo, but will not affect the liability limit for personal injury or death. Note further that the language in the new Article 25 extends the liability limit to "servants or agents" of the carrier, clarifying a previous open question as to the extent of their protection.

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265 Article X of Montreal Protocol 3 provides:

Article 25 of the Convention shall be deleted and replaced by the following:

Article 25

The limit of liability specified in paragraph 2 of Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants, or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

266 KREINDLER, supra note 249, § 12B.03(4). Note the referenced paragraph 2 of Article 22 refers to the Guatemala Protocol section which permits unlimited recovery for cargo damage in the event of willful misconduct by the carrier. Paragraph 1 of Article 22, which refers to personal injury or death caused by willful misconduct, is eliminated.

267 In his speech entitled "Lessons of Lockerbie," Lee S. Kreindler discussed the issue of liability limit for agents, a crucial issue in the Pan Am disaster of 1988. Lee S. Kreindler, Address at the 25th Annual SMU Air Law Symposium (Feb. 1991) (on file with the Journal of Air Law and Commerce). Pan Am delegated security screening of passengers and baggage to a company called Alert Management Systems, a subsidiary of Pan Am. The bomb that destroyed Pan Am Flight 103 over Lockerbie, Scotland had successfully gone through baggage screening. Previous cases, led by Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir.), cert. denied, 434 U.S. 922 (1977), held that the liability limit under the Warsaw Convention extended to servants and agents of the airline. The language of the convention, however, does not expressly cover agents and servants. Since the United States Supreme Court in Chan v. Korean Airlines, 490 U.S. 122, 134 (1989), held that courts must be governed strictly by the text of the Convention, Kreindler hoped to see Reed overruled. The U.S. district court in New York, however, ruled on October 1991 that the agents that provided security services were protected by liability limitations of Warsaw because the responsibility to provide safety measures to passengers was Pan Am's. In re Air Disaster at Lockerbie, Scotland, 776 F. Supp. 710, 714 (E.D.N.Y. 1991). Therefore, the court dismissed all state claims brought against
Article XII\textsuperscript{268} expands the venue where an action may be brought, greatly increasing the possibility that a United States citizen may sue in a United States court for an international airline accident. Article 28 of the Warsaw Convention\textsuperscript{269} provided the following venue options to a plaintiff: the country of the carrier's domicile or principal place of business, the country where the ticket was bought, or the country of the final destination.\textsuperscript{270} By inserting a new paragraph (2) into Article 28, the Protocol adds the domicile or permanent residence of the passenger as a venue, as long as the airline has an establishment there. Accordingly, even if a United States citizen bought a ticket in a foreign country to a foreign destination, he might be able to bring an action in a United States court under the Protocol, whereas he could not have done so under the Convention.

Article XIV expressly recognizes the right of a signatory

Alert. Note that the new language of Montreal Protocol 3 reaches the same result without the need for litigation.

\textsuperscript{268} Article XII adds the following language to Article 28 of the Warsaw Convention:

In Article 28 of the Convention—the present paragraph 2 shall be renumbered as paragraph 3 and a new paragraph 2 shall be inserted as follows:

2. In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.

\textsuperscript{269} Warsaw Convention, \textit{supra} note 1, art. 28. Article 28 of the Convention provides:

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

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

\textit{Id.}

\textsuperscript{270} \textit{Id.}
nation to add a supplemental compensation plan to the treaty.\textsuperscript{271} The Supplemental Compensation Plan, as presently proposed, defines "covered damages" as "all compensatory damages supplementary to the compensation payable by the carrier under the Convention in respect of death or personal injury, including damages for economic loss and non-economic loss."\textsuperscript{272} Section 2.1 of the plan permits up to $500,000,000 coverage in the aggregate per incident, per aircraft.\textsuperscript{273} Section 2.4 expressly excludes liability for punitive damages.\textsuperscript{274} A surcharge paid by the passenger will fund the Supplemental Compensation Plan under Section 3.1, which requires collection by the carrier of a fee from every passenger departing from the United States.\textsuperscript{275} Proponents currently predict that the surcharge will be between $2 and $3 per ticket,\textsuperscript{276} but other estimates range as high as $5 per ticket, a concern to opponents of the Protocol.

\section*{B. Support for Protocol 3}

Senator Nancy Kassebaum, in a prepared statement inserted into the record of the Senate Foreign Relations Committee hearing on June 28, 1990,\textsuperscript{277} gave several reasons for her strong support for Montreal Protocol 3. Expressing puzzlement about the strong opposition to ratification of the Protocol, especially by the trial lawyers, Senator Kassebaum enumerated the advantages of the plan to victims of international airline accidents. First, the Supplemental Compensation Plan will cover non-economic damages as well as economic damages.\textsuperscript{278} Compensation should be quicker, since plaintiffs will no longer

\begin{footnotes}
\textsuperscript{271} S. Exec. Rep. No. 1, supra note 83, at 17.
\textsuperscript{272} Id. at 57.
\textsuperscript{273} Id. at 58.
\textsuperscript{274} Id. at 59.
\textsuperscript{275} Id.
\textsuperscript{276} Id. at 8.
\textsuperscript{278} Id. at 58.
\end{footnotes}
strive to prove willful misconduct. Senator Kassebaum refutes those who argue that litigating fault results in greater airline safety, pointing out that no statistics have proven a relationship between the two. Finally, Kassebaum notes that the Protocol has been languishing in the Senate for approximately ten years without action and calls for its ratification.

Kenneth M. Mead, Director, Transportation Issues, Resources, Community, and Economic Development Division, General Accounting Office, testifying before the Senate Foreign Relations Committee on June 28, 1990, also stressed the advantages of the proposed new system of compensation. Mead testified that the plan will speed awards to the victims and bring awards for international aviation accidents more in line with the awards for domestic aviation accidents. On the issue of eliminating the willful misconduct provision, Mead reported that U.S. courts have found willful misconduct by an air carrier in only nine cases since the Convention went into effect and that one case took fifteen years to litigate.

Regarding inadequacy of the proposed compensation under Protocol 3, Mead pointed out that the largest payout on record for a single airline disaster was $400 million in Japan, and that $500 million in the Supplementary Compensation Plan is in addition to the 100,000 SDRs per passenger. Provisions for absolute liability of the carrier and settlement inducement provisions are two other improvements in the plan, according to Mead. Finally, responding to criticisms that removing fault provisions would also remove incentives for airlines to oper-

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279 Id. Senator Kassebaum points out that victims of Korean Air Lines flight 007 are still awaiting compensation, more than six years after the accident. Id. at 56.
280 Id. at 56.
281 Id.
282 Id. at 56-87.
283 Id. at 57.
284 Id. at 58.
285 Id. at 60.
286 Id.
ate safely, Mead presented the view that "[m]arket forces and Government regulatory oversight are the most important determinants of airline safety." 287

Department of Transportation Secretary Samuel Skinner has encouraged the Senate to give its advice and consent to the Protocol since 1989, 288 and continued to urge approval in 1991. 289 His arguments in support of the protocol parallel those of Mead. Other supporters for prompt ratification of the Protocol include the American Bar Association, 290 the Air Transport Association, 291 and the World Travel and Tourism Council. 292

C. OPPOSITION TO PROTOCOL 3

Lee S. Kreindler, prominent plaintiffs' attorney, blasts the Warsaw Convention and Montreal Protocol 3 regularly in his column "Aviation Law" in the New York Law Journal and in other publications. 293 Kreindler's premise is that "[t]he American airline passenger . . . would be better off with no international treaty at all." 294 In the event of failing to achieve denunciation of the Warsaw Convention, Kreindler believes the American passenger fares better under the present Warsaw Convention, as amended by the Montreal Agreement, than he would under Montreal Protocol 3 because under the Protocol the limits would be entirely unbreakable. 295

287 Id. at 61.
289 S. EXEC. REP. NO. 1, supra note 83, at 55. (Letter from Skinner to Chairman Pell, Senate Committee on Foreign Relations).
290 Id. at 74-75. (Letter from Robert D. Evans of the ABA to Chairman Pell).
292 Id.
294 KREINDLER, supra note 249, § 12B.04(1).
295 Id. § 12B.04(2).
Kreindler further believes that the settlement inducement clauses and the imposition of absolute liability will not speed up recoveries because plaintiffs' attorneys (like himself) will continue to try to circumvent the limitations.\textsuperscript{296} Kreindler anticipates more lawsuits against the aircraft manufacturer and the U.S. Government for negligence by air traffic controllers.\textsuperscript{297} Finally, Kreindler objects to the mandated surcharge paid by the passenger for limited benefits.\textsuperscript{298} In sum, Kreindler advocates applying the American tort system to recover damages for victims of international air accidents.\textsuperscript{299}

Senators Joseph Biden and Paul Simon, members of the Senate Committee on Foreign Relations, express strong objections to Montreal Protocol 3.\textsuperscript{300} Like Kreindler, they not only want to defeat the Protocol but also want to denounce the Warsaw Convention entirely. In a minority statement inserted into the record of the Senate Foreign Relations Committee Report on Montreal Protocols 3 and 4, Biden and Simon agreed that proving willful misconduct is difficult and time-consuming, but they pointed out that without the Warsaw Convention plaintiffs would have to prove only negligence under standard tort theory.\textsuperscript{301} They argue that if the Senate will reject the Protocol, the United States will be forced to denounce the Convention.\textsuperscript{302} In summary, their statement expresses a fear that adoption of Montreal Protocol 3 will end any chance of denouncing the Warsaw Convention, their ultimate goal.\textsuperscript{303}

Senator Biden elaborated on his position in a Senate Foreign Relations Committee Hearing held on June 19,
1990. Biden stated his opposition to protecting airlines with limited liability and said that increasing the liability limit to $130,000 "merely tinkers with an outdated system."304 Furthermore, in his view, eliminating the willful misconduct exception makes the $130,000 limit literally unbreakable and would remove safety incentives for airlines.305 Finally, making the surcharge for the supplementary compensation mandatory requires the passenger to fund his own insurance and provides him with only limited coverage.306

V. CONCLUSION

The positions of both sides are clear. Arguments for supporting the Protocol include the significant increase in the liability limit to approximately $130,000 per passenger per incident plus up to $500 million per aircraft per incident, compensation for both economic and non-economic losses, incentives for quick settlement by the carrier, absolute liability on the part of the carrier, and greater venue selection for the plaintiff. Arguments against the Protocol include the mandatory surcharge for the Supplemental Compensation Plan, the unbreakable quality of the new liability limit with the elimination of the willful misconduct exception, the questionable value of continued protection for the mature airline industry, and concerns about the impact of the liability protection on the safety measures of the carriers.

The stalemate continues. At the end of the 102d Congress, the full Senate still had not considered Montreal Protocol 3 with its new Supplemental Compensation Plan. Even if the Protocol is adopted, opponents will be dissatisfied with anything less than full denunciation of the Warsaw Convention, and any liability limits will continue to require revision as the economy changes. Meanwhile, due to the inaction in the Senate, the $75,000 limitation,
established temporarily in 1966, on recovery for personal injury or death incurred in an international air accident continues to apply. In addition, the courts are applying a stricter interpretation of the Convention to hold plaintiffs to the liability limitations by closing doors to ways to avoid them. By broadly construing the words “accident” and “notice” to place the plaintiff under Warsaw, but narrowly construing types of damages available and the behavior that constitutes willful misconduct, victims or their survivors are bound by the $75,000 liability cap until either Warsaw is denounced or Montreal Protocol 3 is passed.

Those who oppose adopting Protocol 3 are instrumental in perpetuating the plan they abhor, the Warsaw Convention scheme, as modified by the Montreal Agreement. If they cannot get the votes to defeat Montreal Protocol 3 and to denounce the Warsaw Convention, why not show present-day concern for the traveling public and adopt the Protocol, which, today at least, offers compensation at realistic levels? In the meantime, when traveling overseas, read your ticket carefully and purchase your own supplemental insurance for additional protection.