

THE LOCKERBIE AIR DISASTER: PUNITIVE DAMAGES IN INTERNATIONAL AVIATION UNDER THE WARSAW CONVENTION

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I. INTRODUCTION

A consistent theme found in our current legal, social, and political environment is the growing dominance of the new global economy in all areas of daily life. All too often attorneys fail to recognize the importance of this rapidly evolving change. This is to be logically expected from the nature of law, which emphasizes the development of expertise in the rules and customs of a few rigidly defined geographic areas. Few lawyers would claim to be experts in the law of fifty states as well as the federal system. However, international treaties now create new laws to regulate matters long considered the subject of the local court systems. International conferences which draft laws that are worldwide in scope may well take the place of the uniform committees so familiar to the American legal system.

The problem in adjusting to this system is well reflected in the controversy arising out of the pursuit of punitive damage awards in cases resulting from accidents occurring during international air flights. This area of law is governed by the 1929 International Convention for the Unification of Certain Rules Relating to International Transportation by Air and its modifications and additions.¹ The Warsaw Convention is a

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention or Convention]. The original treaty nations are: Germany, Austria, Belgium, Brazil, Bulgaria, China, Denmark, Egypt, Spain, Estonia,

multinational treaty which governs liability in the airline industry with regard to losses or injuries to persons, baggage, or goods which result from a delay or accident while the aircraft is involved in an international flight, or while the aircraft is used for the domestic portion of an international flight.² In regulating tort matters, the Warsaw Convention is one of the oldest and most successful of international laws governing an economic and legal area long considered to be the subject of local law. The problems faced by attorneys in dealing with the Warsaw Convention are a good indication of possible future problems, as more international agreements of this nature become part of our legal system.

The Warsaw Convention sets the limits of recovery for which a passenger or shipper can recover as a result of personal injury, death, or property loss occurring during an international flight.³ In addition, it sets up uniform rules for the form of airline tickets,⁴ baggage checks,⁵ and waybills⁶ used in international transportation, as well as the procedure for making routine claims for lost or damaged goods shipped in international commerce.⁷

Beginning with the 1989 decision of *Chan v. Korean Air Lines, Ltd.*,⁸ the United States Supreme Court, along with a

Finland, France, Great Britain, India, Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, Netherlands, Poland, Romania, Sweden, Switzerland, Czechoslovakia, Union of Soviet Socialist Republics, Venezuela, and Yugoslavia. *Id.* at 3014.

2. Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967).

3. *Id.* Warsaw Convention, *supra* note 1, art. 22.

Article 22:

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

Id.

4. Warsaw Convention, *supra* note 1, art. 3.

5. Warsaw Convention, *supra* note 1, art. 4.

6. Warsaw Convention, *supra* note 1, arts. 5-16.

7. Warsaw Convention, *supra* note 1, arts. 26, 30(3).

8. 490 U.S. 122 (1989). The *Chan* decision is of significant importance because it eliminated the notorious "American Rule" traditionally used in the interpretation of the Warsaw Convention. The "American Rule", as it is called

series of lower federal court rulings, have defined how the Warsaw Convention will be interpreted in determining liability limits arising under this Convention.⁹ These rulings have resolved sixty years of controversy over some portions of the Convention.¹⁰ Other cases have decided whether mental or psychic injury can be the basis for a cause of action under the Warsaw Convention,¹¹ and whether punitive damages are allowed under the Convention.¹²

In this Article, the current state of the law governing the question of punitive damages under the Warsaw Convention is considered in light of the recent decision in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*.¹³ First reviewed is the background of this decision.

The background review is in three parts. The first part contains a brief history of the Warsaw Convention and its application in the United States. Willful misconduct, as used in the Convention, is defined in the second section. This definition is important because it is the only part of the Convention which might allow a plaintiff to avoid the damage limitations of the Convention and to sue for unlimited damages. Traditionally, willful misconduct has been one of the key elements in providing the basis for a punitive damage claim.

in other countries, developed based upon a provision of the Montreal Agreement, see *infra* note 18, which required that international airline tickets include the liability limits in ten-point type. Larry Moore, *Chan v. Korean Air Lines, Ltd.: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention*, 13 HASTINGS INT'L & COMP. L. REV. 229 (1990). Many American courts have held that any deviation from this rule by using smaller type would result in these limits being removed and unlimited liability allowed. *Id.* at 236-37. In light of these cases, the Supreme Court of Canada refused to apply the American Rule, even though not doing so would result in the harsh outcome the American courts were trying to alleviate, holding: "[T]he words of art. 3(2) are plain and can admit of no misunderstanding The benefit of the limitation will be lost only where no ticket is delivered. The American cases . . . ignore this plain language and fail to give effect to a precise statement of the law." *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52, 57 (1979).

9. Moore, *supra* note 8, at 234-37. See, e.g., *infra* notes 11, 12 and accompanying text.

10. LAWRENCE B. GOLDHIRSCH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* (1988).

11. *Eastern Airlines, Inc. v. Floyd*, 111 S. Ct. 1489 (1991).

12. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267 (2d Cir.) [hereinafter *Lockerbie II*] (to differentiate it from the crucial district court case), *cert. denied*, 112 S. Ct. 331 (1991).

13. *Id.*

The question of whether the Warsaw Convention creates a separate "cause of action" or merely creates a presumption of liability is examined in the third section. American courts have had a problem in determining whether the Convention provides the sole cause of action for injury and wrongful death resulting from international aviation accidents. If the cause of action is provided by the Convention, then no claim for punitive damages can be made, as punitive damages are not permitted under the Convention. However, if the Convention does not provide a cause of action, the courts can look to local state law, which in most states does allow for punitive damages.

In the final section of this Article, the development of punitive damages law under the Warsaw Convention and the effects of *Lockerbie II* on American decisional law in the area of international transportation are discussed.

II. BACKGROUND

A. *The Warsaw Convention and Related International Conferences*

The Warsaw Convention was enacted in 1929. Its stated purposes were to protect the fledgling aviation industry from the disastrously large judgments which could result from an air accident, and to provide some uniformity among countries as to the content of tickets, baggage claim checks, and airbills.¹⁴ Indeed, most of the information on the standard airline ticket is required pursuant to the Warsaw Convention. The Warsaw Convention has been the subject of a number of conferences and meetings,¹⁵ some of which have led to changes in the operation of the Convention.¹⁶ The most important Warsaw Convention modifications with regard to American law are the Hague Protocol¹⁷ and the Montreal Agreement.¹⁸

14. Lowenfeld & Mendelsohn, *supra* note 2.

15. Other major conferences were the Guadalajara Convention and the Guatemala City Protocol. See GEORGETTE MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT* 258, 380 (1977).

16. *Eastern Airlines*, 111 S.Ct. at 1497-1501.

17. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* at Warsaw, Oct. 12, 1929, *adopted* at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter *Hague Protocol*]. This agreement, ratified by the other member nations in 1955, was so unpopular in the United States that it was not submitted to the Senate

The Warsaw Convention was the result of two international conferences whose purpose was to draft a law which would aid the development of the airline industry.¹⁹ The first conference was held in Paris, France in 1925, in which a draft convention was produced.²⁰ The second conference was held in Warsaw, Poland in 1929.²¹ Representatives of thirty-two countries, the League of Nations, and the International Commission of Air Navigation officially attended this latter conference.²² The Warsaw Convention was ratified by the member nations in October, 1929,²³ and went into effect on February 13, 1933.²⁴

The United States did not officially attend the second Conference, but became a signatory to it in 1934.²⁵ However, from the beginning, there was controversy in the United States because of what was considered to be an inadequately low liability limit in cases of personal injury or death.²⁶ Under Article 22(1) of the Warsaw Convention, the total damages allowed were 125,000 Poincare francs²⁷ or approximately \$8,300 U.S.²⁸

for confirmation until 1961, and was still the subject of bitter debate in 1966, when the Montreal Agreement, *infra* note 18, was placed into effect. The Hague Protocol was never formally ratified in the United States.

18. Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol [hereinafter Montreal Agreement], Agreement CAB 18900, approved by order E-23680, May 13, 1966, *reprinted in* note following 49 U.S.C. § 1502 (1988) at 747-48.

19. Lowenfeld & Mendelsohn, *supra* note 2, at 499.

20. G. Nathan Calkins Jr., *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217, 218 (1959). The first draft conference was limited to the subject of carrier liability, but also created the International Technical Commission of Aeronautical Legal Experts (CITEJA). The draft was assigned to CITEJA for study prior to the second conference and at a time when the international group was also considering a draft on the air waybill. In a series of eight conferences and commissions, the two subjects were combined into a consolidated draft, which was eventually submitted to the second conference at Warsaw in 1929, and subject to amendments, was to become the Warsaw Convention. *Id.* at 218-21. See SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, Oct. 4-12, 1929, at 18 (R. Horner and D. Legrez trans. 1975) [hereinafter MINUTES].

21. Calkins, *supra* note 20, at 227.

22. Barbara J. Buono, *The Recoverability of Punitive Damages Under the Warsaw Convention in Cases of Willful Misconduct; Is the Sky the Limit?*, 13 FORDHAM INT'L L.J. 570, 575 (1990).

23. Warsaw Convention, *supra* note 1, at 3023.

24. Lowenfeld & Mendelsohn, *supra* note 2, at 501.

25. *Id.* at 504.

26. *Id.*

27. Warsaw Convention, *supra* note 1. For text of art. 22(1), see *supra* note

Criticism of the Warsaw Convention was intense²⁹ and reached a peak in *Ross v. Pan American Airways*.³⁰ In this case, a promising young American entertainer was critically injured while on a USO tour during World War II.³¹ After a trial, she was awarded \$8,291.87 U.S. for all of her personal injuries.³² This verdict heightened American complaints about the Warsaw Convention and led to an attempt by other nations, who were "High Contracting Parties,"³³ to modify the Convention amount in such a way as to satisfy the United States without offending other nations.³⁴ This attempt at compromise led to the 1955 Hague Protocol, which raised the Warsaw Convention limits to 250,000 Poincare francs or \$16,600 U.S.³⁵ The United States rejected this compromise because it wanted the limits increased to \$25,000 U.S.³⁶ Although the United States never ratified the Hague Protocol, the debate between the President and Congress as to whether to do so lasted for ten years.³⁷

Finally, in 1965, those opposing the Warsaw Convention and the compromise prevailed. The United States officially filed a Notice of Denunciation³⁸ of the Convention which not only rejected the Hague Protocol, but was the first step toward a withdrawal from the Warsaw Convention altogether.³⁹ The United States was prepared to withdraw unless the Convention limit for personal injury or death was raised to at least

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28. Lowenfeld & Mendelsohn, *supra* note 2, at 499.

29. *Id.* at 502-04.

30. 85 N.E.2d 880 (N.Y. 1949).

31. *Id.*

32. *Id.*

33. The term "High Contracting Party" was the term adopted by the drafters of the Convention to describe those sovereign nations which agreed to abide by the Convention and became signatories to it. See MINUTES, *supra* note 20, at 188-90. Cf. GOLDBIRSCHE, *supra* note 11 (noting that a High Contracting Party has been defined as "a country that has ratified the Convention and not merely signed it, [cites omitted] although some courts have decided that a mere signatory may be considered a High Contracting Party [cites omitted])."

34. Lowenfeld & Mendelsohn, *supra* note 2, at 507.

35. *Id.* at 504-09.

36. *Id.* at 506.

37. *Id.* at 510, 515, 545-52.

38. *U.S. Gives Notice Of Denunciation Of Warsaw Convention*, 53 DEPT ST. BULL. 923 (1965).

39. Lowenfeld & Mendelsohn, *supra* note 2, at 510, 515, 545-52.

\$100,000 U.S.⁴⁰ This led to further months of negotiations among the member nations and among the airlines in an attempt to keep the United States under the Warsaw Convention.⁴¹ In an unusual effort to save the Convention, the private air carriers of the member nations met in Montreal, Canada, and with strong endorsements from their governments, entered into a private agreement raising the liability limit for personal injuries or death to \$75,000 U.S.⁴² The individual airlines waived the normal negligence defenses and accepted strict liability for claims arising in international air transportation.⁴³

Notwithstanding the increase in liability limits and the ease in making a claim under the Warsaw Convention, the United States, as evidenced through its courts, still was not pleased with the relatively low compensation and began to seek ways to obviate the Convention.⁴⁴

B. *Willful Conduct Under the Warsaw Convention*

One means by which a court could theoretically circumvent the limits established by the Warsaw Convention was through the imposition of punitive damages, but only if the injury was caused by willful misconduct and only if the Convention did not preempt the use of this remedy.⁴⁵ An exception found in Article 25(1) of the Warsaw Convention⁴⁶ removes liability limits when the carrier is found guilty of willful misconduct.⁴⁷ How-

40. *Id.* at 552.

41. *Id.* at 549-51.

42. *Id.* at 595-96.

43. Montreal Agreement, *supra* note 18. Note that all further discussion hereinafter of damage limitations under the Warsaw Convention will refer to the \$75,000 limit of the Montreal Agreement.

44. Moore, *supra* note 8, at 234-37.

45. *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1487-89 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991) (Eleventh Circuit stated that the intent of the Convention to provide compensatory damages suggests that it would be inconsistent to allow punitive damages, as such damages serve a purpose very different from compensating victims).

46. Warsaw Convention, *supra* note 1, art. 25(1).
Article 25(1):

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his 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.

Id.

47. *See In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301

ever, as the Warsaw Convention contains no provisions for punitive damages, this claim would have to be made under state law,⁴⁸ provided there is no preemption by any cause of action contained within the Convention; or in the alternative, the court could find that punitive damages are a right created by the Convention.

C. Cause of Action or Presumption of Liability

In trying to determine exactly what claims were being protected by the Warsaw Convention, the courts have had to decide two questions: (1) did Article 17 of the Warsaw Convention create a separate cause of action,⁴⁹ or (2) did it merely create a presumption of liability?⁵⁰ In the event it was determined that the Convention created a cause of action, then the question became whether this cause of action contained a punitive damage claim, and whether that claim preempted any applicable state law.⁵¹ On the other hand, if the Convention only created a presumption of liability, then it would not bar any local remedies vested in the victim.

The question of whether the Warsaw Convention provided a separate cause of action was first considered in the New York case of *Wyman v. Pan American Airways, Inc.*⁵² In this case,

(9th Cir. 1982), *cert. denied*, 493 U.S. 917 (1989) (holding that the Warsaw Convention excepts from its limitation on a carrier's liability, injury or death caused by the carrier's willful misconduct).

48. Buono, *supra* note 22, at 593-96.

49. Article 17 of the Convention is generally considered to be the source of liability rights for personal injury or death.

Article 17:

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.

50. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1273 (2d Cir.) [hereinafter *Lockerbie II*] (ruling that the Warsaw Convention creates a cause of action enabling a plaintiff to sue directly under its terms), *cert. denied*, 112 S.Ct. 331 (1991). See *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (reversing prior cases that had held that under the Convention, there was created only a presumption of liability, not a cause of action).

51. *Id.* at 1275-76.

52. 43 N.Y.S.2d 420 (Sup. Ct. 1943), *cert. denied*, 342 U.S. 882 (1945).

the court, in upholding the Convention and its limitations, stated in dicta that the Convention created no new substantive rights.⁵³

The next court to consider this issue was also a New York court, in *Ross v. Pan American Airways*.⁵⁴ In this case the plaintiff was a performer for the USO during World War II. While en route to her destination abroad, the airplane the plaintiff was on crash-landed in Portugal. The plaintiff sued under Portuguese law for \$1,000,000 U.S. in damages. The airline alleged that the flight was "international transportation" subject to the rules of the Warsaw Convention and accordingly, it was liable for no more than 125,000 francs or \$8,291.87 U.S.⁵⁵ The court ruled that the Convention did provide an independent cause of action in that it defined the terms upon which liability would be allowed and set the limits on the amount of damages which could be collected, thereby preempting any local cause of action.⁵⁶ These limits could only be removed after a finding of willful misconduct under the Convention.⁵⁷

The real problems in this area of the law began with the federal district court case of *Komlos v. Compagnie Nationale Air France*.⁵⁸ In that case the main issue was whether the estate or the insurance company carrying the workers' compensation coverage had the right to sue the airline for the wrongful death of the plaintiff's son, who had been killed in an international air crash while on a work assignment.⁵⁹

The airline defended itself by arguing that the cause of action was created under the Warsaw Convention.⁶⁰ In rejecting this argument, the court held that the controlling law was the state workers' compensation act, which gave the right to

53. *Id.* at 423.

54. 85 N.E.2d 880 (N.Y. 1949).

55. *Id.* at 882.

56. *Id.* at 884-85.

57. *Id.* See also *Salamon v. Koninklijke Luchtvaart Maat-schappij, N.V.*, 107 N.Y.S.2d 768 (Sup. Ct. 1951). This case reviewed the Convention and decided that it was obvious that the Warsaw Convention established an independent right of action.

58. 111 F. Supp. 393 (S.D.N.Y. 1952).

59. *Id.* at 396-97.

60. *Id.* at 399.

sue to the insurer and not to the estate.⁶¹ The court rejected the well reasoned opinions of the New York Appellate court in *Ross*, which ruled that causes of action for international air accidents arose solely under the Convention,⁶² when member nations were involved.⁶³ Instead, it accepted the dicta from *Wyman*.⁶⁴

On appeal, the Second Circuit did not address the cause of action question,⁶⁵ nor did it mention the Warsaw Convention anywhere in its ruling, yet it reversed the lower court decision and gave the right to sue to the estate.⁶⁶ Oddly enough, even though the *Komlos* Second Circuit opinion never mentioned the Warsaw Convention, it, and not the district court opinion, is generally cited as the authority providing that there is no cause of action under the Warsaw Convention.⁶⁷

The question was considered again by the federal courts in *Noel v. Linea Aeropostal Venezolana*.⁶⁸ A corporate jet en route from New York to Venezuela crashed into the Atlantic Ocean. The plaintiffs attempted to establish jurisdiction in federal district court under the Warsaw Convention.⁶⁹ The trial court dismissed their suit holding that the Convention created no independent cause of action and that the case should have been brought in admiralty.⁷⁰ Judge Lumbard, writing the opinion for a unanimous Second Circuit, affirmed this decision.⁷¹

61. *Id.*

62. *Ross v. Pan American Airways*, 85 N.E.2d 880, 884-85 (N.Y. 1949).

63. *Komlos*, 111 F. Supp. at 400.

64. *Wyman v. Pan Am. Airways, Inc.*, 43 N.Y.S.2d 420, 420 (Sup. Ct. 1943) (stating in dicta that the Convention created no new substantive rights), *cert. denied*, 342 U.S. 882 (1945).

65. *Komlos v. Compagnie National Air France*, 209 F.2d 436 (2d Cir. 1953), *rev'g on other grounds*, 111 F. Supp. 393 (S.D.N.Y. 1952), *cert. denied*, 348 U.S. 820 (1954) (focusing on conflict of law and jurisdictional issues).

66. *Id.* (holding that a claim for moral damages allowed to the estate under Portuguese law prevented the court from splitting the cause of action with the insurer).

67. *See also* *Husserl v. Swiss Air Transport*, 388 F. Supp. 1238, 1251 (S.D.N.Y. 1975) (citing the district court opinion).

68. 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

69. *Id.* (holding that in an action based on the Convention, Convention law applied and not New York law).

70. *Id.* (stating that the rights created by the federal Death on the High Seas Act are only cognizable in admiralty).

71. *Id.* at 680 (stating that a federal court is not bound by a state court interpretation that the Convention granted an independent cause of action).

This so-called "rule", that there is no cause of action under the Warsaw Convention, lasted for twenty-one years. It was finally overruled in *Benjamins v. British European Airways*.⁷² This case exemplifies the kind of complex situation the Convention was enacted to regulate. It arose out of the crash of a Trident Jet bound for Brussels, Belgium, which killed 112 people while attempting to take off from London, England. The plaintiff was a Dutch citizen who was suing as the survivor of his wife, also a Dutch citizen, who was killed in the accident. The wife's ticket had been bought in Los Angeles, and the lawsuit was filed in the Federal District Court for the Eastern District of New York.⁷³

The plaintiff sued for wrongful death and alleged diversity as the basis for federal jurisdiction in the United States. The district court dismissed the first complaint for lack of subject matter jurisdiction. The plaintiff then amended his complaint to allege the Warsaw Convention as one of the bases for jurisdiction. The district court then dismissed this amended complaint citing the previous "rule" that no independent cause of action was created under the Warsaw Convention.⁷⁴

It should be noted that Judge Lumbard, who authored the majority opinion in the *Noel* case two decades earlier, was now the author of the *Benjamins* decision which overruled *Noel*. Looking to the history of the Warsaw Convention and its application in this country,⁷⁵ the *Benjamins*' court noted that earlier cases, which had been decided under the Convention before the rulings in *Komlos* and *Noel*, had held that a cause of action was allowable under the Convention.⁷⁶ The court then criticized the *Komlos* decision, which first established the "rule" that the Convention created no cause of action, for its heavy reliance on one letter by the then Secretary of State Cordell Hull, in determining what was the purpose of the

72. 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979) (holding that the Convention creates a cause of action for wrongful death).

73. *Id.* at 914-15.

74. *Id.* at 915-16.

75. *Id.* at 916 (stating that the Convention sets forth terms so that victims can recover damages in the event of a crash).

76. *Id.* The court specifically refers to *Salamon v. Koninklijke Luchtvart Maatschappij N.V.*, 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951) (stating that "[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do.>").

Convention.⁷⁷ The court then looked to subsequent cases following *Komlos* and *Noel* which raised doubts about this "rule."⁷⁸

The court decided that, in addition to placing limits on liability, the purpose of the Convention was to establish uniformity in international air law.⁷⁹ It further found that uniformity could only be achieved if causes of action for international air travel claims exclusively arose under the Warsaw Convention. The court overruled *Komlos* and *Noel*, and noted that a passing comment by Secretary of State Hull should not be the basis for deciding that the Warsaw Convention established no cause of action.⁸⁰

In dissent, Judge Van Graafeiland reasoned that the courts should be able to rely upon the interpretation of a convention as given to them by the administrative branch of government.⁸¹ Further, Judge Van Graafeiland noted that the Warsaw Convention itself, in Article 24, applies to other remedies. The implication is that state remedies are to be used in determining from where a cause of action is derived.⁸² Finally, in the dissent, it was noted that there was no great reason to overturn a precedent of long standing.⁸³

The next court to consider the "rule" that the Warsaw Convention does not provide an independent cause of action was the Ninth Circuit Court of Appeals in *In re Aircrash in Bali, Indonesia on April 22, 1974*.⁸⁴ In this case a jetliner owned by Pan American World Airways (Pan Am) crashed in Indonesia,

77. *Benjamins*, 572 F.2d at 916-17.

78. *Id.* at 917-18 (stating that another line of Warsaw Convention cases is inconsistent with the proposition that the Convention did not create a cause of action). See also *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977); *Eck v. United Arab Airlines*, 360 F.2d 804 (2d Cir. 1966); *Seth v. British Overseas Airways*, 329 F.2d 302 (1st Cir. 1964).

79. *Benjamins*, 572 F.2d at 919 (stating that the substantive law of the Convention, which is binding, has not been changed by later revisions).

80. *Id.* See also Secretary of State Cordell Hull's letter to President Roosevelt of March 31, 1934, stating that "[t]he effect of article 17 . . . of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain [d]efenses allowed under the Convention to the aerial carrier." 1934 U.S. AVIATION REP. 240.

81. *Benjamins*, 572 F.2d at 920.

82. *Id.* at 922.

83. *Id.* at 923.

84. 684 F.2d 1301 (9th Cir. 1982), cert. denied, 493 U.S. 917 (1989).

killing 104 passengers including the plaintiffs' relatives.⁸⁵ The plaintiffs brought suit in California and successfully argued before the trial court that California law should apply, and not the Warsaw Convention with its liability limit of \$75,000.00 U.S.⁸⁶ The jury returned a verdict of \$300,000.00 U.S. for one plaintiff, and \$651,000.00 U.S. for another.⁸⁷ On appeal, the court first conducted an article by article analysis of the Convention.⁸⁸ It then concluded from the language of the Convention and the subsequent acts of Congress, that while it was true that the Convention was not meant to preempt all state laws, it was meant to preempt state law in the area of establishing the limits for awarding damages.⁸⁹ Accordingly, the trial court decision was reversed.⁹⁰

The next year, the Ninth Circuit in *In re Mexico City Aircraft of October 31, 1979*,⁹¹ without reference to its earlier opinion in *Bali*, went beyond the holding of the *Bali* case, which held that the Convention preempted state law in limiting damage awards,⁹² to the position that the Convention established an independent cause of action under federal law.⁹³

The Fifth Circuit joined this new trend in *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am World*.⁹⁴ This case arose under Article 22 of the Warsaw Convention, which provides for and limits damages for goods lost or damaged during international air flight.⁹⁵ The plaintiffs won on the question of liability, and under Texas law, this made the defendant liable for attorney's fees.⁹⁶ On appeal, following the Second and Ninth Circuits, the court held that the Warsaw Convention created the cause of action and was the exclusive remedy open

85. *Id.* at 1304.

86. *Id.* at 1306. The court held that California law, which does not allow contracts to limit liability, was applicable. *Id.*

87. *Id.* at 1304.

88. *Id.* at 1304-05.

89. *Id.* at 1307-08.

90. *Id.* at 1316.

91. 708 F.2d 400 (9th Cir. 1983).

92. *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1307-08 (9th Cir. 1982), *cert. denied*, 493 U.S. 917 (1989).

93. *Mexico City*, 708 F.2d at 415.

94. 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985).

95. *Id.* at 457-58 (stating that the limit of liability under the Convention is not determined by the true price of gold).

96. *Id.* at 458.

to the plaintiffs.⁹⁷ To ensure uniformity in results, the court denied the attorney's fees, holding that attorneys' fees were preempted by the Convention.⁹⁸

However, the establishment of this new "rule" was not without some protest. In *Tokio Marine and Fire Ins. Co., Ltd. v. McDonnell Douglas Corp.*,⁹⁹ Judge Van Graafeiland, who had dissented in *Benjamins*, wrote the majority opinion for a Second Circuit panel that did not include Judge Lumbard. The court ruled that the cause of action under the Convention was not exclusive. In fact, this seemed gratuitous as the issues had little to do with any Warsaw Convention matter. The defendant manufacturer sold a defective airplane to Japan Air Lines, in a contract which specifically excluded all warranties or liability in the case of an accident.¹⁰⁰ An accident occurred as a result of the defect, and fifty-two people were killed.¹⁰¹ The airline's insurance company settled with the victims and then sued the manufacturer.¹⁰² The real issues concerned product liability, contracts, and insurance.¹⁰³ However, because the Convention had been mentioned, it gave Judge Van Graafeiland an occasion to weaken the rule he had so strongly opposed only two years earlier. He stated that the Convention remedy was not meant to be exclusive.¹⁰⁴

III. PUNITIVE DAMAGES UNDER THE WARSAW CONVENTION

A. *Early Cases*

Local law applied to punitive damages under the Warsaw Convention, prior to *Benjamins*, when liability limits were removed as a result of willful misconduct. That is, if the Convention provided no cause of action, then each case would be governed by the law of the appropriate High Contracting Party.¹⁰⁵ If the laws of that nation provided for punitive damages,

97. *Id.*

98. *Id.* at 459.

99. 617 F.2d 936 (2d Cir. 1980).

100. *Id.* at 939.

101. *Id.* at 938.

102. *Id.*

103. *Id.*

104. *Id.* at 942.

105. *Benjamins v. British European Airways*, 572 F.2d 913, 916-17 (2d Cir.

then the plaintiff would be permitted to seek those damages. However, after *Benjamins*, punitive damages based on state law would not seem to be available for a plaintiff as a general remedy, unless such damages could be founded upon some other article in the Convention.¹⁰⁶

After *Benjamins*, punitive damages in a Warsaw Convention case were first allowed in *Hill v. United Airlines*.¹⁰⁷ The remedy was founded upon Article 25(1) of the Warsaw Convention, in which the ability to limit liability is removed when the defendant is guilty of willful injury.¹⁰⁸ The cause of action was based upon Article 19 of the Warsaw Convention, which provided for damages "occasioned by delay in the transportation by air of passengers, baggage, or goods."¹⁰⁹ The plaintiffs were en route from Kansas to Japan, to order and purchase custom-made business machinery.¹¹⁰ Their first stop was in Denver, where they were told by the defendant that, because of weather conditions, it was not possible to fly to Seattle where the plaintiffs were to board an international flight to Japan. In fact, the defendant had no airplanes available to fly from Denver. Other airlines were sending flights to Seattle, which would have connected with the flight to Japan that the plaintiffs missed. As a direct cause of this delay, the part was not received for an additional month and profits were lost, for which plaintiffs sued.¹¹¹

The district court first established that venue, jurisdiction, and cause of action were proper under the Convention,¹¹² and that the Warsaw Convention did not preempt a suit for intentional tort.¹¹³ The court examined the Convention and determined that punitive damages were allowed,¹¹⁴ and that deliberately lying to a passenger constituted willful misconduct

1978), cert. denied, 439 U.S. 1114 (1979.)

106. See generally David I. Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653 (1980).

107. 550 F. Supp. 1048 (1982).

108. *Id.* at 1055.

109. *Id.* at 1051.

110. *Id.* at 1050.

111. *Id.* at 1050-51.

112. *Id.* at 1052-55.

113. *Id.* at 1054.

114. *Id.* at 1055.

under the Warsaw Convention.¹¹⁵ The court then held that the willful misconduct exception might allow the plaintiffs to sue for punitive damages and allowed for trial on that basis.¹¹⁶

However, with a cause of action established under the Warsaw Convention, which preempted the use of local law, subsequent punitive damage cases under the Convention were routinely denied. For example, in *Harpalani v. Air-India, Inc.*,¹¹⁷ the plaintiffs sued for an injury under Article 19 of the Warsaw Convention, caused by their being "bumped" from an international flight. The district court after a careful reading of the Convention found that "[o]nly three of the Convention's articles, Articles 17-19, created any basis for carrier liability, and the terms of each plainly limits liability to compensatory damages."¹¹⁸ In rejecting the rule from *Hill*, the court held that "[t]hat court did so in dicta and without carefully examining the authority for punitive awards, and this court declines to adopt its conclusion."¹¹⁹

Other courts have rejected the reasoning of *Hill*. In the case of *In re Air Crash Disaster At Gander, Newfoundland*,¹²⁰ the court looked at the original French text of Article 17 which established liability for personal injury and death under the Warsaw Convention. A transport plane carrying American servicemen from Newfoundland to Fort Campbell, Kentucky crashed, killing at least ninety people.¹²¹ The trial court looked to Article 17 of the Warsaw Convention and ruled that this section established liability only for "dommage survenu," which translates as "damages sustained" or "bodily injury suffered."¹²² However, the court found that punitive damages were "private fines leveled by civil juries to punish a defendant for his conduct and to deter others from engaging in similar

115. *Id.* at 1055-56.

116. *Id.* at 1056.

117. 634 F. Supp. 797, 798 (N.D. Ill. 1986).

118. *Id.* at 799.

119. *Id.*; see also *Wolgel v. Mexicana Airlines*, 821 F.2d 442 (7th Cir.), cert. denied, 484 U.S. 927 (1987) (holding that bumping was not a Warsaw violation at all, but, rather, a total nonperformance of a contract).

120. 684 F. Supp. 927, 931 (W.D. Ky. 1987).

121. *Id.* at 930.

122. *Id.* at 931.

conduct.¹²³ As such they are not damages sustained and thus not authorized by the Convention.¹²⁴ As Article 25(1) of the Convention only removes the limit on compensatory damages awards, punitive damages still would not be allowed as they would not be compensatory damages.¹²⁵

In *Floyd v. Eastern Airlines, Inc.*,¹²⁶ the Ninth Circuit fully analyzed the nature of punitive damages. An airplane bound from Miami to Nassau, Bahamas, had all three engines shut down simultaneously. The pilot was able to restart the plane and return safely to Miami.¹²⁷ Though no one was killed or injured, numerous lawsuits were filed for emotional injuries and punitive damages under Article 25(1) of the Convention.¹²⁸ The plaintiffs argued that they were entitled to damages because (1) Article 25(1) not only removed the limitations on compensatory damages contained in the Convention,¹²⁹ but also created a cause of action which allowed punitive damages, and (2) because they were entitled to claim punitive damages under state law.¹³⁰

Relying on the language of the Convention, the court found that Article 25(1) in removing liability limits only refers to the limits of Article 22, as modified by the Montreal Agreement.¹³¹ This did not have any effect on the Article 17 provision which limited claims only to damages sustained.¹³² Therefore, the court held that the Warsaw Convention did not create an independent cause of action for punitive damages, and disallowed this form of recovery.¹³³

123. *Id.*

124. *Id.* at 931-32.

125. *Id.*

126. 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

127. *Id.* at 1466.

128. *Id.* at 1483.

129. Warsaw Convention, *supra* note 1, art. 22. For text of art. 22, *see supra* note 3.

130. *Floyd*, 872 F.2d at 1483.

131. Article 22, as modified by the Montreal Agreement, imposes a \$75,000 limit on the carrier's liability. *Id.* at 1483. If, however, the damage is shown to be caused by the carrier's willful misconduct, then the carrier's liability limitation is removed under Article 25. *Id.* See Montreal Agreement, *supra* note 18, arts. 22, 25.

132. *Id.* at 1484.

133. *Id.* at 1485. The court also looked to case law addressing this issue. *See, e.g., In re Air Crash Disaster at Gander, Newfoundland*, 684 F. Supp. 927, 932

In determining whether state punitive damage claims could be allowed, *Floyd* looked at the nature of punitive damages and decided that these types of damages were not consistent with the purposes of the Convention.¹³⁴ The Court found that while in the United States, a few states held punitive damages to be compensatory in nature, most states used punitive damages to punish the wrongdoer in order to benefit society, not to compensate the victim.¹³⁵ As the purpose of Warsaw Convention was solely to compensate the victim for damages sustained, punitive damages would be beyond the purview of the Convention.¹³⁶ Further, it found that the Convention nations which used a civil law system considered the Warsaw Convention to be a contractual remedy which did not allow punitive damages.¹³⁷ Finally, with no specific language in the Convention providing for punitive damages, the court ruled that punitive damages were not allowed under the Convention.¹³⁸

This "rule" was followed and expanded in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*.¹³⁹ This case arose out of a terrorist bombing of a Pan Am flight from London to New York over Lockerbie, Scotland.¹⁴⁰ The plaintiffs argued that under Article 25 of the Warsaw Convention, the liability limits, meaning all limits, were removed for willful mis-

(W.D. Ky. 1987) (stating that Article 25 is an exception to limits on compensatory damages as authorized in Article 17, not an independent basis for awarding punitive damages); *Harpalani v. Air India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) (stating, "Article 25 is most reasonably interpreted as an exception to the Convention's limitation on recovery of compensatory damages, not as authority for a form of damages not permitted elsewhere in the Convention."); *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, 484 U.S. 927 (1987) (disapproved on other grounds); *Magnus Electronics, Inc. v. Royal Bank of Canada*, 611 F. Supp. 436, 443 (N.D. Ill. 1985) (stating, "All the cases teach the 'exclude or limit his liability' language was aimed at the familiar provisions of Article 22, not at Article 29(1) and its limitations provision.").

134. *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1485-86 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991).

135. *Id.* at 1486.

136. *Id.* at 1487.

137. *Id.* at 1486. See *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 331 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); NICOLAS MATCESCO MATTE, *TREATISE ON AIR-AERONAUTICAL LAW* 403-04 (1981).

138. *Floyd*, 872 F.2d at 1486-87.

139. 736 F. Supp. 18 (E.D.N.Y. 1990) [hereinafter *Lockerbie I*].

140. See *In re Air Disaster in Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1269 (2d Cir.) [hereinafter *Lockerbie II*], *cert. denied*, 112 S.Ct. 331 (1991).

conduct, and therefore a claim should be allowed for punitive damages.¹⁴¹ The trial court rejected this position. It differentiated this case from *Floyd*, where the plaintiffs attempted to found their claims for punitive damages on state law and then simply asked that the Convention not preclude their claims.¹⁴² In *Lockerbie I*, the plaintiffs sought a right to sue for punitive damages under the Convention. However, the court found nowhere in the Convention text a cause of action for punitive damages, and the removal of limitations on damages under Article 25(1) did not create such a cause of action.¹⁴³ The Court held that recovery was only for "damages sustained" and denied the plaintiffs' claim.¹⁴⁴

Thus, the *Hill* decision which allowed punitive damages was an oddity until the decision of *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986*.¹⁴⁵ This case arose out of a Pan American flight from Bombay, India, to New York City, which was hijacked at Karachi, Pakistan. Twenty people were killed, and a number were injured.¹⁴⁶ The district court found that the Warsaw Convention created an independent cause of action for wrongful death and personal injury, a right which was in addition to any others which the plaintiffs may have which were not expressly preempted by the Convention.¹⁴⁷ The court then decided that the common law right to punitive damages was such a right, though subject to the limitations of Article 17 of the Warsaw Convention, unless those limits were removed as a result of willful misconduct.¹⁴⁸ The court specifically rejected both the Eleventh Circuit decision in *Floyd*, which held that state claims were preempted, and the district court decision in *Lockerbie I*, which held that the Convention did not

141. *Lockerbie I*, 736 F. Supp. at 19.

142. *Id.*

143. *Id.* at 20.

144. "[T]his court relied on the *Floyd* decision and the authorities cited therein for the proposition that punitive damages are not damage sustained . . . [and] this court alternatively relied on its own finding that if Article 17 intended to provide a cause of action for punitive damages it would have read actions for damages." *Id.* at 20 n.3.

145. 729 F. Supp. 17 (S.D.N.Y. 1990).

146. *Id.* at 18 n.1.

147. *Id.* at 19.

148. *Id.* at 19-20. See also *Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989) (holding that punitive damages are a part of common law tort remedies).

provide for punitive damages,¹⁴⁹ stating that “[b]oth of these cases rely heavily upon a judicially perceived need to construe the Convention in accordance with the intention of the Contracting Parties. However, this Court does not believe that *Chan* permits the Court to amend the plain language of the Convention to effectuate what it believes the Contracting Parties intended.”¹⁵⁰ Further, in directly contradicting the decision in *Lockerbie I*, which was also a Second Circuit district court case, a conflict of authorities within the circuit was created. This was resolved in *Lockerbie II*.¹⁵¹

B. *The Lockerbie II Case*

The Second Circuit combined *Lockerbie I* and *Karachi* for purposes of appeal.¹⁵² On appeal, the Second Circuit first looked at the history and purpose of the Convention and found that its purpose was to place specific limits on the nature and amount of damages which could be recovered in air accidents, except in cases of willful misconduct.¹⁵³ It then looked to the purposes of punitive damages within the United States, and like the court in *Floyd*, found that most states generally hold that these damages were to punish and deter.¹⁵⁴ However, there were some states that looked at punitive damages as a further means of compensating the plaintiff for the loss of actual damages.¹⁵⁵ This would of necessity lead to different awards in different states.¹⁵⁶ However, the court found such a result would conflict with two purposes of the Convention:¹⁵⁷ to provide compensation only for damages sustained, and to provide

149. *Karachi*, 729 F. Supp. at 20.

150. *Id.*

151. *In re Air Disaster in Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267 (2d Cir.) [hereinafter *Lockerbie II*], cert. denied, 112 S.Ct. 331 (1991).

152. *Id.*

153. *Lockerbie II*, 928 F.2d at 1267, 1270-71. A New York federal district court jury found Pan Am guilty of willful conduct on July 10, 1992, which removed the damage limitation as to compensatory damages. Jonathan M. Moses, *Pan Am Found Negligent in Bombing of Flight 103; Damage Award to be Set*, WALL ST. J., July 13, 1992, at B5. The first judgment awarded under this finding was \$9.2 million. Over 150 families have the damage portion of their cases still pending. *Id.* at B7.

154. *Lockerbie II*, 928 F.2d at 1271-72.

155. *Id.*

156. *Id.* at 1273.

157. *Id.* at 1273-74.

uniformity of liability for air carriers.¹⁵⁸ Both of these purposes would be violated by the use of punitive damages.¹⁵⁹ The Court ruled that the Convention preempts all state laws conflicting with the principle of compensation.¹⁶⁰ Additionally, the court reviewed the text of the Convention and found it to be a complete regulatory scheme that was intended to serve as a uniform international law.¹⁶¹ After a detailed analysis of Articles 17, 24(2), & 25,¹⁶² and the policy considerations behind the Convention,¹⁶³ the court further decided that punitive damages could not be provided by the Warsaw Convention because they conflicted with the compensatory scheme desired by the framers.¹⁶⁴

IV. CONCLUSION

In view of the strict limits which have been upheld in Warsaw Convention cases in the United States Supreme Court on other issues within the last three years, and the fact that the Second Circuit's decision barring punitive damage claims under the Convention is consistent with the rulings of other circuits, it is likely that the ruling in *Lockerbie II* will be the final authority in the area of punitive damages in the international aviation industry for some time. While many commentators do not like this decision,¹⁶⁵ it is consistent with the language and intent of the Convention.

In the internal law of most nations, excepting the United States, the use of punitive damages appears to be extremely limited.¹⁶⁶ That there is no mention of punitive damages any-

158. *Id.* at 1273-76.

159. *Id.*

160. *Id.* at 1288.

161. *Id.*

162. *Id.* at 1281-87.

163. *Id.* at 1287-88.

164. *Id.* at 1281-88.

165. Buono, *supra* note 22, at 596-03.

166. Hans Stoll, *Penal Purposes in the Law of Torts*, 18 AM. J. COMP. L. 3 (1970). Surveyed is the question of punitive damages in the law of many of the major countries of the world, including a general look at the law of socialist countries. In most nations, there is no legal provision for punitive damages. In many states that do have punitive damage provisions, such remedies are compensatory in nature, to offset inconvenience or pain which may not be reflected in ordinary compensation. Even in states which appear to use punitive damages to punish, there is often a question as to whether awards are meant

where in the Convention must be considered significant, and it cannot be assumed that the drafters of the Convention had punitive damages in mind as either a remedy or cause of action allowable under the Warsaw Convention. Further, the form and language of the Convention indicates that if the law and remedies of the individual states were meant to be allowed, it would have been so stated as was done with several other matters in the Convention. For example, the Convention specifically requires that local law be used in determining what constitutes contributory negligence under Article 21 of the Convention;¹⁶⁷ what is considered to be willful damage under Article 25(1);¹⁶⁸ what legal procedures are to be followed in Article 28(2);¹⁶⁹ and how to calculate the period of limitation in Article 29(2).¹⁷⁰ The fact that the Convention failed to refer to local law to determine damages allowable for injuries is important, indicating that in this area, a consistent uniform international system is to be used, and not local law.

It may appear strange and even unfair to those of us in the United States, to have to proceed with a personal injury case without the weapon of punitive damages. However, the rest of the world is not as litigious as we are. Like American business leaders, for American lawyers to survive in this new global market, we must accept doing things in ways totally different from those in which we have been trained in the past.

to punish or to compensate.

167. Warsaw Convention, *supra* note 1, art. 21.

Article 21:

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Id.

168. Warsaw Convention, *supra* note 1, art. 25.

Article 25:

(1) [I]f 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.

Id.

169. Warsaw Convention, *supra* note 1, art. 28(2). ("Questions of procedure shall be governed by the law of the court to which the case is submitted.")

170. Warsaw Convention, *supra* note 1, art. 29(2) ("The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.")

It may be necessary for lawyers who are dissatisfied with the woefully low figure of \$75,000.00, as the total compensation for death or critical injury under the Warsaw Convention, to utilize their skill and persuasion to encourage those signatory countries of the Montreal Agreement to again raise the damage limit, rather than consistently file lawsuits in the local courts, in hopes of getting a dispensation from a world wide Convention. This latter behavior will eventually become a sign of parochialism in a world that is sure to see even more conventions of the nature and breadth of the Warsaw Convention. We, as American lawyers, have mastered the art of changing our nation through the courts. The time has now come in which we must develop skills which will allow us to change the world.

