International Responsibility in Preventing the Spread of Communicable Diseases Through Air Carriage – The SARS Crisis

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I. INTRODUCTION

Through the years, civil aviation has been used not only as the speediest means of communication and commercial transport between and beyond national boundaries, but also, as a means of solace, particularly in providing relief to communities in distress, whether from natural disaster, famine and ill health or war. Unfortunately, aviation has also been used as a weapon of mass destruction, particularly in the context of the catastrophic events of September 11, 2001. The latest concern of the international community may well be that, although aviation cannot be matched by other means of transportation in view of the speed inherent in air transport, it nonetheless presents certain threats to human health which may emerge as a result of its very nature, requiring the clustering of a large number of humans in a limited space where ventilation and air pressure have to be provided in a contrived manner.

In this regard, the most recent concern is the possible spread of Severe Acute Respiratory Syndrome (SARS), which has an alarmingly high

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and increasing morbidity rate currently approaching six percent.[1] A vaccine against this dreaded disease may be several years away and the prospects of a cure are still far away.[2] Some experts on communicable diseases have gone to the extent of predicting a global pandemic, along the lines of the Influenza, which afflicted the world in 1918-19, killing twenty million worldwide despite its low morbidity rate which approached three percent.[3] The threat posed by SARS is compounded by the fact that already large countries such as China are severely affected, along with countries that have a high rate of trans-border communication such as Hong Kong and Singapore. It could be envisioned that, unless contained, the disease could spread to other large countries such as Australia, Canada (which has already shown susceptibility), the States of Europe, and the United States. Stringent measures have already been taken by the countries afflicted such as enforcement of quarantines on thousands of hospital employees and patients, together with isolation of those not ill but have had some contact with infected individuals.

This article examines aspects of international responsibility involved in the exigency of a possible spread of communicable diseases through air transport, with focus on SARS.

II. Health Implications of SARS

From an aviation perspective, it is important to be aware of the grave risk that may be posed by the SARS virus in an in-flight situation. The nature of the disease and the manner in which it spreads has to be fully understood in order to appreciate the risk to the aviation industry. In general, SARS begins with a fever greater than 100.4°F [>38.0°C].[4] Other symptoms may include headache, an overall feeling of discomfort, and body aches.[5] Some people also experience mild respiratory symptoms.[6] After two to seven days, SARS patients may develop a dry cough and have trouble breathing.[7]

The primary way through which SARS appears to spread is by close

1. Michael D. Lemonick & Alice Park, *The Truth About SARS*, Time, May 5, 2003, at 48, 50.

2. Robert Walgate, *SARS Vaccine Race,* The Scientist, *at* http://www.biomedcentral.com/-news/20030502/03/ (last visited Oct. 13, 2003).

3. Lemonick & Park, *supra* note 1, at 50.

4. *Severe Acute Respiratory Syndrome (SARS), What is SARS?*, *at* http://content.health.msn.com/-content/healthwise/250/84679.htm (last visited Oct. 14, 2003); *see also* Lemonick & Park, *supra* note 1, at 53.

5. Lemonick & Park, *supra* note 1, at 53.

6. *Id.*

7. *Severe Acute Respiratory Syndrome (SARS), What is SARS?*, *at* http://content.health.msn.com/-content/healthwise/250/84679.htm (last visited Oct. 14, 2003).

person-to-person contact.[8] Most cases of SARS have involved people who cared for or lived with someone with SARS or had direct contact with infectious material (for example, respiratory secretions) from a person who has SARS.[9] Potential ways in which SARS can be spread include touching the skin of other people or objects that are contaminated with infectious droplets and then touching your own eyes, nose, or mouth.[10] This can happen when someone who has SARS coughs or sneezes droplets onto themselves, other people, or nearby surfaces.[11] It also is possible that SARS can be spread more broadly through the air or through other ways that are currently unknown.[12] Thus, the aircraft cabin environment is highly conducive to the spread of the SARS virus.

Cases of SARS continue to be reported, mainly among people who have had direct close contact with an infected person, such as those living with a SARS patient and healthcare workers who did not use infection control procedures while taking care of a patient with SARS.[13] Any airborne disease, such as SARS, is impacted by the environment particularly if such were to be an enclosed one as in an aircraft cabin. The ventilation system plays a critical part in this regard. Therefore, it is crucial to an air carrier's conduct to identify how an air carrier decides on ventilation systems in its aircraft. For instance, early jet aircraft until the last decade offered 100 percent fresh air in the cabin.[14] However, in the nineties, ironically with more evolved technology, ventilation systems in aircraft were built in such a way as to recycle stale air, thus increasing the chances of survival of bacteria in the aircraft cabin.[15] Even if such a practice were ineluctable, in that recycling is a universal practice, which is calculated to conserve fuel, a prudent airline would take other measures, such as change of air filters through which ventilation is provided.

Air in the cabin is usually dry and lacking in humidity since the outside air at cruising altitudes has an extremely low water content. The humidity level in the air of an aircraft cabin at cruising level has been recognized as being of ten to twenty percent humidity, which is approximately the same as desert air.[16] The lack of humidity, *per se*, does not facilitate the transmission of airborne vectors, but makes breathing diffi-

8. Lemonick & Park, *supra* note 1, at 53.

9. *Information for Close Contacts of SARS Patients*, *at* http://content.health.msn.com/-content/article/63/71890.htm (last viewed Oct 14, 2003).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Ruwantissa I.R. Abeyratne, *The Spread of Tuberculosis in the Aircraft Cabin—Air Carrier Liability*, 24 AIR & SPACE LAW 181, 182 (1999).

15. *Id.*

16. World Health Organization, Tuberculosis & Air Travel: Guidelines for Prevention &

cult, particularly for persons suffering from respiratory diseases such as Asthma.[17] When dry air becomes stale through recycling, the chance of removing droplets of air, which is usually accomplished by fresh air, becomes remote. A suggested solution for a prudent airline to take in this regard is to reintroduce 100 percent fresh air, which is humidified.[18]

One of the major preoccupations of the World Health Organization (WHO) is to ensure the international prevention of disease.[19] Quarantine regulation, which was the first step toward this aim, has a long history since being introduced during the tenth century.[20] WHO adopted International Health Regulations in 1969,[21] the philosophy of which was recognized subsequently as:

> The purpose of the International Health Regulations is to help prevent the international spread of diseases, and in the context of international travel, to do so with the minimum of inconvenience to the passenger. This requires international collaboration in the detection, reduction or elimination of the sources from which infection spreads rather than attempts to prevent the introduction of disease by legalistic barriers that over the years have proved to be ineffective.[22]

Of course, the purpose of this philosophy will be defeated if individual States have no willingness or the political will to notify the outbreak of communicable diseases to WHO, particularly in the absence of a monitoring body, incentives for states to notify, or sanctions. Therefore, the preeminent obligation of states is to ensure that the outbreak of any communicable disease is notified in a manner that would benefit the world and help prevent the spread of the disease across national boundaries. Regrettably, there have been instances recorded where WHO reports that no new instances of a communicable disease has been recorded while the news media give contrary information simultaneously.[23] One of the reasons adduced for the lack of interest on the part of states to report the incidence of communicable diseases to a world body such as WHO has

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Control, WHO/TB/98.256, at 23 (1998), *available at* http://www.who.int/gtb/publications/aircraft-/PDF/98_256.pdf.

17. Bruce Byran, *Beware, Thin Air*, 18 FLIGHT DECK 31 (Winter 1995-1996).

18. Farrol Kahn, "Sick Aircraft', *The Aviation Quarterly*, Part 3, July 1998, 167.

19. World Health Organization, *About WHO*, *at* http://www.who.int/about/en (last visited Oct. 14, 2003).

20. OLEG P. SHCHEPIN, INTERNATIONAL QUARANTINE 11 (1989).

21. World Health Organization, International Vaccination Certificate Requirements and Malaria Information, in INTERNATIONAL VACCINATION CERTIFICATE REQUIREMENTS AND HEALTH ADVICE FOR INTERNATIONAL TRAVEL 7 (1988).

22. *Id.* at 7.

23. *See* World Health Organization, *Functioning of the International Health Regulations for the Period 1 Jan. to 31 Dec.1984*, 60 WEEKLY EPIDEMIOLOGICAL RECORD, 386 (1985). *See also* Katarina Tomasevski, *Health*, *in* 2 UNITED NATIONS LEGAL ORDER 859, 865 (Oscar Schachter & Christopher C. Joyner eds., 1995).

been identified as the lack of importance attributed to International Health Regulations (IHR) by states that consider the regulations as an obsolete relic.[24]

The international health dimension of SARS involves human rights issues as well. International human rights law has laid down two critical aspects relating to public health: (1) that protection of public health constitutes legitimate grounds for limiting human rights in certain circumstances (such as detention of persons or house arrest tantamount to quarantine exercises would be justified in order to contain a disease); and (2) individuals have an inherent right to health.[25] In this context, it is not only the State or nation that has an obligation to notify WHO of communicable disease but as well as the human concerned who has an abiding moral and legal obligation. In 1975, WHO issued a policy statement, which subsumed its philosophy on health and human rights that stated:

> The individual is obliged to notify the health authorities when he is suffering from a communicable disease (including venereal diseases) or has been exposed to infection, and must undergo examination, treatment, surveillance, isolation or hospitalization. In particular, obligatory isolation or hospitalization in such cases constitutes a limitation on freedom of movement and the right to liberty and security of person.[26]

It is critical for an evaluation of the aeronautical implications of SARS that the term "health" be defined in context. The WHO Constitution identifies as an objective of the organization "attainment by all peoples of the highest possible level of health," and health is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[27] In an aeronautical perspective, as will be seen later in this article, this is a tough act to follow, as international responsibility in the carriage of persons extends only as far as the obligation to prevent injury, wounding or death, and not to the physical or mental well-being of a person.

III. Aeronautical Implications of SARS

A. Reactions of the Aviation Community

During the period November 1, 2002 to April 22, 2003, the WHO

24. World Health Organization, *Functioning of the International Health Regulations for the Period Jan. 1 to Dec. 31 1984*, 60 Weekly Epidemiological Record 385 (1985).

25. *Id.* at 385.

26. The Individual's Duty to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights, 100 UN Sales No. E.82.XIV.1 (1983).

27. World Health Organization, Constitution of the World Health Organization, 2-3 (July 22, 1946), *available at* http://www.who.int/rarebooks/official_records/constitution.pdf.

had recorded seventy-eight SARS related deaths and 2,223 suspected cases of SARS in eighteen countries.[28] Following these statistics, WHO declared that passengers with symptoms of SARS or those who may have been exposed to the virus should not be allowed to fly.[29] Some countries took immediate action, one of the first being the United States, which advised its citizens to defer non-essential travel to affected regions.[30] Canada declared a health emergency and Taiwan advised against travel to the mainland.[31] It was reported that Airbus Industrie had revealed in early May 2003 that several airlines hit by the SARS crisis requested formal postponement of aircraft deliveries.[32] According to this report, the SARS crisis was persistent and affected traffic figures adversely, compounding problems already caused by the war in Iraq.[33] The enormity of the problem is brought to bear by the response of the International Civil Aviation Organization (ICAO), which issued guidelines on May 2, 2003, urging member states to:

[a.] provide all incoming passengers with a detailed information leaflet on SARS;
[b.] implement medical screening of passengers arriving directly from or via affected areas;
[c.] advise pilots to radio ahead if someone on board exhibits SARS symptoms;
[d.] instruct crew on dealing with suspected SARS-patients in flight; and
[e.] disinfect aircraft on which a suspected SARS-patient has travelled.[34]

The International Air Transport Association (IATA) as part of its response to the crisis, set up a SARS operations Centre in Singapore, one of the worst hit states, in order to help coordinate efforts in the region in containing the disease.[35] IATA's aim was to assist in the establishment of effective and efficient screening processes that could be the result of combined public health expertise offered by governments along with operational expertise of airports and airlines.[36] Furthermore, IATA and WHO met in Bangkok in April 2003 to coordinate and refine plans to curb the possibility of the disease affecting air transport, where IATA identified

28. Frances Fiorino et al., *SARS: A New Blow*, 158 AVIATION WK. & SPACE TECH., 59, 59 (2003).

29. *WHO Urges Screening of Air Passengers for SARS on Some Flights*, WASHINGTON AVIATION SUMMARY, (Apr. 2003).

30. *Id.* at 4.

31. *Id.*

32. *Some SARS Hit Airlines Want Deliveries Postponed*, AIR LETTER, May 2, 2003, at 3.

33. *Id.* at 5.

34. Press Release, ICAO Issues Guidelines Regarding SARS, *at* http://www.icao.int/icao/en/nr/pio200307.htm (last visited Oct. 14, 2003).

35. *IATA Sets up Regional SARS Centre*, AIR LETTER, Apr. 30, 2003, at 3.

36. *Id.*

the disease as a "global problem, requiring a global solution, needing the coordinated support and understanding of governments . . . which meant that the imposition of reactionary and inefficient countermeasures must be avoided."[37] IATA's official view pertaining to the effects of SARS on the air transport industry was that the virus posed the biggest threat the airlines have ever faced and that SARS related airline losses would overtake the $10 billion loss suffered as a result of the Iraq war.[38] According to IATA, passenger loads on all airlines plunged as a result directly or indirectly of SARS, and Hong Kong carriers such as Cathay Pacific and Dragonair had suffered losses as much as seventy percent.[39]

On the insurance front, the London underwriters were reported to have withdrawn aviation insurance coverage for travel to countries affected by SARS.[40] The Air Transport Association of the United States announced that "the world situation continues to play havoc with the airline market place . . . and that for the week ending 6 April, system-wide traffic for the biggest US carriers had dropped by 17.4% and domestic travel had fallen almost 15% compared to the same period in 2002."[41] Elsewhere, there were at least two airlines that reduced scheduled flights or operations as a result of the crisis: KLM announced its reduction of flights to Asia and its intent to fly smaller aircraft with lesser capacity to Asian destinations, thus reducing its total capacity by three percent;[42] and QANTAS delayed its aircraft orders and downsized its staff by 400.[43] Cathay Pacific announced the most comprehensive and aggressive cabin health program ever launched by a commercial carrier in order to ensure the health of passengers and reassure aircrews of cabin safety despite the SARS threat.[44]

B. International Responsibility

The pre-eminent legal provision, which governs this issue, is contained in the *Convention on International Civil Aviation* (*Chicago Convention*);[45] Article 14 of which states:

37. *Airlines Refine Battle Plans to Fight SARS*, Washington Aviation Summary, (May 2003).

38. *IATA Predicts Tough Six Months head for Aviation Industry*, Aviation Daily, Apr. 25, 2003, at 5.

39. *Id.*

40. *Travel Insurers Take Fright Over SARS*, Air Letter, Apr. 28, 2003 at 1.

41. *Iraq, SARS send Travel to New Low*, Air Letter, Apr. 11, 2003, at 1.

42. *KLM Cuts Flights to Asia due to SARS*, Air Letter, Apr. 29, 2003, at 3.

43. *Qantas May Delay Orders Due to SARS*, Air Letter, Apr. 25, 2003, at 2.

44. *Risk of Deadly Respiratory Infection Fuels Fear of Air Travel*, 17 Air Safety Week, 1 (Apr. 14, 2003).

45. *Convention on International Civil Aviation*, Chicago Dec. 7, 1944, ICAO Doc. 7300/6 (8th ed. 2000), 61 Stat. 1180, T.I.A.S. No. 1591 [hereinafter *Chicago Convention*].

> Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties.[46]

This provision explicitly devolves primary responsibility on States to take effective measures to prevent airborne diseases in aircraft and implicitly requires States to issue guidelines for airlines, by liaising with the international agencies concerned. *Non obstante*, airlines have to face certain legal issues themselves in terms of their conduct. Primarily, airlines are expected to conform to applicable international health regulations and the laws of the countries in their aircraft land.[47] Furthermore, the airline owes its passengers a duty of care to exercise all caution in protecting their rights, so that a blatant instance of a person who looks sickly and coughs incessantly at the check-in counter cannot be ignored. Common law principles of tort law vigorously distinguish between negligence, recklessness and wilful blindness. Of these elements of liability, wilful blindness is particularly relevant since it brings to bear the need for an airline to be vigilant in observing passenger profiles in potentially dangerous or threatening situations. The Canadian Supreme Court has stated:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.[48]

Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation are one of four classes of wrongs.[49] Therefore, the tort of misfeasance[50] and nonfeasance,[51] such as wilful blindness

46. *Id.* at art. 14.

47. World Health Organization, INTERNATIONAL HEALTH REGULATIONS, (3d annot. ed. 1983).

48. Sansregret v. The Queen, [1985] 18 C.C.C. (3d) 234.

49. The other types of wrongs are: wrongs exclusively criminal; civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively; and civil wrongs which are exclusively breaches of contract.

50. A lawful act performed in a wrongful manner. BLACKS LAW DICTIONARY (8th ed. 2004).

to a possible wrong that may be committed, both of which an imprudent and careless airline may be guilty of in the case of the spread of disease in the aircraft cabin, becomes "a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."[52]

Therefore, in general terms a tort arises from an act performed by the defendant whereby he/she has without just cause or excuse caused some harm to the plaintiff.[53] This rationale is grounded on the classical juridical maxim *sic utere tuo ut alienum non laedes*, which essentially means that no one can hurt another by word or deed.[54] It follows naturally, therefore, that a person aggrieved as a result of a tort of another can claim pecuniary compensation in respect of damage suffered. For example, under this principle a person who contracts SARS while traveling in an aircraft which carried an infected person whose disease was transmitted to that person can expect compensation from the airline concerned if the airline is found to have breached its duty of care by either positively contributing to the damage by knowingly allowing the infected person to travel, by knowingly installing a ventilator system in the aircraft which is not effective in preventing the spread of airborne disease, or by wilfully blinding itself to the potential danger of a sickly person entering the aircraft cabin without making further inquiry.

It is incontrovertible that proof of negligence of the airline, whether through wilful neglect or through wilful blindness, would be extremely difficult to establish in the case of the spread of an airborne disease such as SARS, as against such diseases as cholera. The former cannot be linked to unsanitary conditions in the cabin *per se*, whereas the latter can readily be determined through an *ex post facto* examination of the cabin. The only instance imaginable where an airline can be held reprehensible and consequently liable for pecuniary compensation is when an obviously sickly passenger is checked in by the airline without making an inquiry; when the airline knows beforehand that a particular passenger is positively infected with the disease; or when the aircraft cabin is not properly equipped to prevent the spread of disease. Therefore, air carrier liability for this particular tort would invariably be addressed after the fact, i.e. after passengers have been infected with the disease, when action taken by the airline to assist both those infected and the health authorities concerned would become relevant.

51. The failure to act when a duty to act existed. BLACKS LAW DICTIONARY (8th ed. 2004).

52. This definition of a tort was cited with approval in the following case: Philip Morris Ltd. v. Airley (1975) V.R. 345 at 347.

53. *See* Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 73 (1942).

54. *See generally*, G. EDWARD WHITE, TORT LAW IN AMERICA (1980).

Of course, in the case of SARS, the court will also assess the period during which the incapacity will continue.[55] Invariably, there will be consideration in this regard whether these will be total incapacity for a particular period, followed by partial incapacity for a further period.[56] The following four considerations would be critical to a court's assessment of future income loss:

1. for what period would income be probably lost;
2. what would the average loss of income be through that period;
3. what is the appropriate multiple to give the value an annuity of that loss for the period concerned; and
4. what sum should be deducted from the multiple for contingencies.[57]

In the case of a young child not yet in employment and who is expected to be adversely affected by the disease contracted, the courts would have to determine whether the child could be permanently or temporarily disabled as a result of ill effects of the disease. In addition, courts would have to hazard a conjecture as to the child's future progression had he/she not contracted the disease. In the 1975 case of *Taylor v. Bristol Omnibus Co. Ltd.*,[58] the court assumed that the child's earning capacity would be similar to that of the father's and assessed the loss at sixteen years' purchase, and reduced it by fifty percent to give current value.[59] In a later case, *Conolly v. Camden and Islington Area Health Authority*,[60] where a child of five years was expected to live only up to the age of twenty-seven years owing to a disease contracted, the court awarded a modest sum for that period concerned but refused to recognize that compensation should be awarded for "lost years," which the court found to be nebulous and therefore valued at nil.[61] In the 1981 case of *Croke v. Wiseman*,[62] which concerned a child, aged two, with brain damage who would live up to the age of forty, the court assumed that the child would earn the national average wage for twenty-two years and valued this figure at just under nine years' purchase, reducing the multiple to five years to arrive at the current value.[63]

Irrespective of the plaintiff's age, the rationale for determining future income loss was well established in the 1977 case of *Moeliker v. A. Reyrolle & Co. Ltd.*[64] According to this decision, what has to be quanti-

55. *See* Abeyratne, *supra* note 14, at 185.
56. *Id.*
57. *Id.*
58. 1 W.L.R. 1054 (C.A. 1975).
59. *Id.* at 1057.
60. 3 All ER 250 (Q.B. 1981).
61. *Id.* at 256.
62. 1 W.L.R. 71 (C.A. 1981).
63. *Id.* at 83.
64. 1 WLR 132 (C.A. 1977).

fied in determining compensation is the present value of the risk of future financial loss.[65] If there is no actual loss of earnings sooner or later, there should be no award.[66] If, however, there is a significant risk, its value would depend on the magnitude of the risk and how far in the future.[67] Based on this premise, another case, *Cook v. Consolidated Fisheries Ltd.*,[68] decided in the same year ended with the award of substantial compensation to a young man with an arm injury on the basis that he was likely to suffer from osteo arthritis later in life although this would be many years ahead.[69]

Loss of career, which a person injured or infected already is in, is another significant consideration. Of course, some occupations are more attractive than others, not necessarily in monetary terms but rather in the job satisfaction they offer. When a person is already enjoying such a career, for instance as an airline pilot or surgeon, two professions for which there are stringent health requirements, infection by a disease such as SARS could be critical. In such instances courts would be compelled to take into account the damage caused by total loss of career.[70]

As for loss of earning capacity, which the plaintiff avers he/she would have had if not for the injury and which the plaintiff did not have at the time of injury, the obiter dictum of Lord Justice Diplock in *Browning v. War Office*[71] is relevant: "[a] plaintiff is not entitled to damages for loss of capacity to earn money unless it is established that he would, but for his injuries, have exercised that capacity in order to earn money."[72]

In every claim for specific compensation concerning earning capacity, the plaintiff has the burden of showing clearly and convincingly that there was actual loss of future income due to the injury or illness caused.[73]

C. Liability Under International Convention

When there is incontrovertible evidence of a person contracting a disease such as SARS as a result of being infected in an aircraft while on board, liability issues pertaining to the airline arising from the incident may involve principles of private air carrier liability. The *Montreal Con-*

65. *Id.* at 142.
66. *Id.* at 141.
67. *Id.*
68. Cook v. Consolidated Fisheries Ltd., 1 All ER 36 (C.A. 1977).
69. *Id.* at 42.
70. *See* Morris v. Johnson Matthey & Co. Ltd., 112 Sol. J. 32 (C.A. 1967); Hearnshaw v. English Steel Corp. Ltd., 11 KIR 306 (C.A. 1971).
71. Browning v. War Office, 1 Q.B. 750 (1963).
72. *Id.* at 766.
73. *Id.*

vention of 1999,[74] which emerged consequent to the Diplomatic Conference on Private Air Law of the International Civil Aviation Organization ("ICAO") held from May 10 to 28, 1999, provides that the carrier is liable for damage sustained in the event of death or bodily injury of a passenger upon condition only that the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[75] The *Warsaw Convention of 1929*[76] provides that the carrier is liable for damage sustained in the event of 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.[77] Both these Conventions have similar wording, admitting only of death or bodily injury or wounding. Of course, on the face of the provision, the words "wounding" and "bodily injury" do not necessarily lend themselves to be associated with infection. *A fortiori*, according to the *Montreal Convention*, the bodily injury must be caused as a result of an accident, and, according to the *Warsaw Convention*, the wounding or injury must be caused by accident. An accident is not typically a synonym for "infection" in both cases. However, the recent decision in *El Al Israel Airlines Ltd. v. Tseng*[78] introduced a new dimension to the word "accident" under the *Warsaw Convention* by giving it pervasive scope to include such acts as security body searches performed by the airlines.[79] In this context, the word "accident" loses its fortuity and it becomes applicable to an expected or calculated act. Thus, if an airline knows or ought to have known that an infected passenger was on board its flight, causing others on board to be infected, it may well mean that the act of the airline would be construed by the courts as an accident within the purview of the *Warsaw Convention*. Later in this article, liability issues under the Montreal/Warsaw regime will be addressed with a view to determining whether, in general terms, the infection of a passenger with SARS could be considered an "accident" if the negligence of the carrier can be shown.

Generally, in law, an accusation has to be proved by the person who alleges it. Therefore, a presumption of innocence applies to an accused person until he is proven guilty. However, in the instance of carriage by

74. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999. (Fifty-two Contracting States of the ICAO signed this convention on May 28, 1999. It came into effect on Sept. 5, 2003 with the thirtieth ratification by the United States.) [hereinafter *Montreal Convention*].

75. *Id.* at art. 21.

76. Convention for the Unification of Certain Rules for International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000 [hereinafter *Warsaw Convention*].

77. *Id.* at art. 17.

78. 525 U.S. 155 (1999).

79. *Id.*

air of passengers the airline is presumed liable if a passenger alleges personal injury or if his dependants allege his death as having been caused by the airline.[80] Of course, the airline can show in its defense that it had taken all necessary measures to avoid the damage[81] or that there was contributory negligence[82] that would obviate or vitiate its liability. This curious anomaly of the law imposing on the airline a presumption of liability is contained in the *Warsaw Convention*, Article 17, which states "[t]he carrier is liable for damage sustained in the event of the death or wounding of 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."[83]

To control the floodgates of litigation and discourage spurious claimants, the Convention admits of certain defences the airline may invoke and above all limits the liability of the airline to passengers and dependents of deceased passengers in monetary terms. The Warsaw System therefore presents to the lawyer an interesting and different area of the law that is worthy of discussion.

Article 17 of the *Warsaw Convention* needs to be analyzed in some detail so that the circumstances in which a claim may be sustained against an airline for passenger injury or death can be clearly identified. Further, the defenses available to the airline and the monetary limits of liability need also to be discussed.

D. Defenses Available to the Airlines

The foregoing discussion involved two key factors that govern the civil liability of airlines: first, the presumption of liability that is imposed upon the airline and second, the liability limits that apply to the protected the airline from unlimited liability and spurious claimants. There are two other factors that operate as adjuncts to the initial concepts. These factors are that the airline may show certain facts in its defense to rebut the presumption and that if the airline is found to be guilty of wilful misconduct it is precluded from invoking the liability limits under the *Warsaw Convention*.[84] Viewed at a glance, the above four concepts seem to be grouped into two sets of balancing measures. The end result is that while, on the one hand, the airline is subject to stringent standards of liability, on the other, it is protected by two provisions that limit its liability in

80. Shawcross and Beaumont: Air Law, § VII, 152 (J. David McClean et al. eds., 4th ed. 2003) [hereinafter Shawcross & Beaumont].

81. *Id.* at § VII, 161.

82. *Id.*

83. *Warsaw Convention*, *supra* note 76, at art. 17.

84. *Id.* at art. 25.

monetary terms and allows a complete or partial defense in rebuttal of the presumption.

Article 20(1) of the *Warsaw Convention* provides that the airline shall not be liable if it proves that the airline and its agents had taken all necessary measures to avoid the damage or that it was impossible for the airline and its agent to take such measures.[85] Shawcross and Beaumont are of the view that the phrase "all necessary measures" is an unhappy one in that the mere occurrence of the passenger injury or death presupposes the fact that the airline or its agents had not in fact taken all necessary measures to prevent the occurrence.[86] The airline usually takes such precautions as making regular announcements to passengers on the status of a flight starting with instructions on security and safety measures that are available in the aircraft. These measures are taken by the airline to conform to the requirements of the *Warsaw Convention* that the airline has to take all necessary measures to prevent an accident in order that the presumption of liability is rebutted. Thus in *Chisholm v. British European Airways*,[87] a case decided in 1963, it was held that a passenger who leaves her seat when the aircraft goes through turbulent atmosphere is barred from claiming under the *Warsaw Convention* for personal injury.[88] Here it was held that an admonition of the airline that the passengers were to remain seated with their seat belts fastened during the time in question was proof of the airline having taken the necessary measures as envisaged in the *Warsaw Convention*.[89] This case also established the fact that "all necessary measures" was too wide in scope and that a proper interpretation of the intention of the *Warsaw Convention* would be to consider the airline to require taking all "reasonably necessary measures."[90] In a more recent case, *Goldman v. Thai Airways International Ltd.*,[91] Justice Chapman imputed objectivity to the phrase "reasonably necessary measures" by declaring that such measures should be considered necessary by "the reasonable man."[92] The United States follows a similar approach of objectivity. In *Manufacturers Hanover Trust Co. v. Alitalia Airlines*,[93] it was emphasized that the airline must show that all reasonable measures had been taken from an objective standpoint in order that the benefit of the defense is accrued to the airline.[94] Some French decisions have also ap-

85. *Id.* at art. 20.
86. SHAWCROSS & BEAUMONT, *supra* note 80, §VII at 161.
87. 1 Lloyd's Rep. 626 (1963).
88. *Id.* at 634.
89. *Id.* at 629.
90. *Id.* at 628.
91. 125 S.J. 413 (1981) *rev'd* 3 All ER 693 (C.A. 1983).
92. *Id.*
93. 429 F. Supp. 964 (S.D.N.Y. 1977).
94. *Id.* at 967.

proached this defense on similar lines and required a stringent test of generality in order that the criteria for allowing the defense be approved.[95]

The airline that has the burden of proof cannot seek refuge in showing that normal precautions were taken. For example, normal precautions in attending to the safety of the passengers prior to a flight is not sufficient. Therefore, the airline is unlikely to succeed in its defense if it cannot adduce a reasonable explanation as to why the accident occurred despite the reasonably necessary precautions being taken.[96] Insofar as the requirement of impossibility to take precautions is concerned, the courts have required clear evidence of the difficulties faced by the airline in avoiding the disaster. In one case of a crash landing, the court required that it was insufficient for the airline to show that the aircraft was in perfect condition and that the pilot took all steps to affect a good landing.[97] The airline had to show that the weather conditions were so bad that the aircraft could not land in another airport.[98] In *Haddad v. Cie Air France*,[99] where an airline had to accept suspicious passengers who later perpetrated a hijacking, the court held that the airline could not deny boarding to the passengers who later proved to be hijackers.[100] In that instance, the airline had found it impossible to take all necessary precautions and was considered sound in defense under Article 20(1). A similar approach was taken in the case of *Barboni v. Cie Air-France*[101] where the court held that when an airline receives a bomb threat whilst in flight and performs an emergency evacuation, a passenger who is injured by evacuation through the escape chute cannot claim liability of the airline since it would have been impossible for the airline to take any other measure.[102]

If the airline 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.[103] Contributory negligence under the *Warsaw Convention* has been treated subjectively as and when cases are adjudicated. The courts have not set an objective standard as in the earlier defense. For

95. Preyvel v. Cie Air France (1973) 27 R.F.D.A. 198. *Also* Riviere-Girret v. Ste-Aer-Inter (1979) Uniform L.R. 173.

96. Panalpina Int'l Transp. Ltd. v. Densil Underwear Ltd., 1 Lloyds Rep. 187, 187 (Q.B. 1980).

97. Mandreoli v. Cie Belge d'Assurance Aviation, Milan (1974) 1972 Dir. Mar. 157, 160.

98. *Id.*

99. (1982) 36 R.F.D.A. 342 (Cour de Cass.).

100. *Id.* at 346.

101. (1982) 36 R.F.D.A. 355.

102. *Id.*

103. *Warsaw Convention*, *supra* note 76, at art. 21.

instance in *Goldman v. Thai Airways International Ltd.*[104] it was held that a passenger is not guilty of contributory negligence if he keeps his seat belt unfastened through the flight and suffers injury when there is no sign given by the aircraft control panel to keep the seat belt on.[105]

Article 25(1) of the *Warsaw Convention* states that the airline shall not be entitled to avail itself of the provisions of the *Warsaw Convention* which excludes or limits its liability, if the damage is caused by the wilful misconduct or by such default on the part of the airline as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.[106] Article 25(2) extends this liability to acts of the agent of the airline acting within the scope of his employment and attributes such wilful misconduct to the airline.[107] Such action as the failure of the technical crew of the aircraft to monitor weather conditions and the failure to execute a proper approach on adverse weather conditions are examples of wilful misconduct of the airline.[108]

The effect of Article 25 is that the plaintiff becomes entitled to lift the limit of liability of the airline as prescribed in Article 22 of the *Warsaw Convention* if he proves that the airline was guilty of wilful misconduct. Thus, the burden of proof falls on the plaintiff and if he succeeds he may claim an amount over and above the prescribed limits of airline liability.

The limitation of liability of the carrier that the *Warsaw Convention* imposes could be circumvented by the plaintiff proving that the carrier was guilty of wilful misconduct in causing the injury. Wilful misconduct as an exception to the limitation of liability rule appears in all three air law conventions that admit of liability limitations.[109] The original French text of the *Warsaw Convention* states that if the carrier causes the damage intentionally or wrongfully or by such fault as, in accordance with the court seized of the case, is equivalent thereto, he shall not be entitled to claim the limitation of liability.[110] One author, Drion, maintains that the English translation inaccurately states that the liability limitations of a carrier will be obviated if the damage is caused by his wilful misconduct or by such default.[111] The contentious issue in this question is what kind

104. 3 All ER 693 (C.A. 1983).

105. Id. at 693.

106. *Warsaw Convention*, *supra* note 76, at art. 25(1).

107. Id. at art. 25(2).

108. Butler v. Aeromexico, 774 F. 2d. 429, 432 (11th Cir. 1985).

109. *Warsaw Convention*, *supra* note 76, at art. 25; Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181; Brussels Convention for the Unification of Certain Rules Relating to the Assistance and Salvage of Aircraft at Sea, Sept. 29 1938 (has not been ratified).

110. *Warsaw Convention*, *supra* note 76, at art. 25.

111. HUIBERT DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 195 (1954).

of misconduct is required? Drion is of the opinion that by approaching the issue in terms of conflicting concepts, the question whether *faute lourde* as proposed originally in the French text and for which there was an English equivalent of gross negligence was in fact more appropriate than the word *dol* which now occupies the document and for which no accurate English translation exists, has emerged as to what standards may be used in extrapolating the words *dol* or wilful misconduct.[112] Miller takes a similar view when she states that the evils of conceptualistic thinking that had pervaded the drafting of Article 25 which rendered it destitute of coherence,[113] has now been rectified by the *Hague Protocol* which has introduced the words "done with intent to cause damage or recklessly and with knowledge that the damage would probably result. . . ."[114]

This confusion was really the precursor to diverse interpretations and approaches to the concept of wilful misconduct under Article 25 of the *Warsaw Convention*. The French Government took steps in its Air Carrier Act of 1957 to rectify ambiguities in this area by interpreting *dol* in the Convention as *faute inexcusable*, or deliberate fault which implies knowledge of the probability of damage and its reckless acceptance without valid reason,[115] making a strong analogy with the *Hague Protocol's* contents. This interpretation, needless to say, brought out the question whether such reckless acceptance would be viewed subjectively or objectively.

The Belgian decision of *Tondriau v. Air India*[116] considered the issue of Article 25 of the Convention and the Hague interpretation.[117] The facts of the case involved the death of a passenger and a consequent claim under the Convention by his dependants.[118] However, the significance of the case lay in the fact that the Belgian court followed the decision of *Emery v. Sabena*[119] and held that in the consideration of the pilot's negligence under Article 25 an objective test would apply and the normal behavior of a good pilot would be the applicable criterion.[120] The court held "whereas the plaintiffs need not prove, apart from the wrongful act, that the pilot of the aircraft personally had knowledge that damage would probably result from it; it is sufficient that they prove that a reasonably

112. *Id.* at 200.

113. GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 200 (1977).

114. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, (The Hague Protocol to the Warsaw Convention 1955), Sept. 28, 1955, art. XIII.

115. MILLER, *supra* note 113, at 202.

116. (1977) R.F.D.A. 193.

117. *Id.* at 193.

118. *Id.* at 195.

119. (1968) 22 R.F.D.A. 184.

120. Belgium Court Record Transcript at 3.

prudent pilot ought to have had this knowledge."[121] The court rationalized that a good pilot ought in the circumstances to have known the existence of a risk and no pilot of an aircraft engaged in air transport ought to take any risk needlessly.[122] The Brussels Court of Appeals however, reversed this judgment and applied a subjective test, asserting that the Hague protocol called for "effective knowledge."[123] Professor Bin Cheng seems to prefer the objective test in the interpretation of "wilful misconduct" in Article 25, on the grounds that a subjective test would defeat the spirit of the Convention and would be "flying in the face of [justice] in search of absolute equity in individual cases."[124]

Peter Martin, analyzing the Court of Appeals decision in *Goldman v. Thai Airways International Ltd.*,[125] agrees with Bin Cheng and criticizes the lower court decision which awarded Mr. Goldman substantial damages for injuring his hip as a result of being thrown around in his seat in turbulence in an instance where the captain had not switched on the "fasten seat belt" sign.[126] Martin maintains that Mr. Goldman failed to prove that the pilot knew that damage would probably result from his act as envisaged in the Hague Protocol principle.[127] Being an aviation insurance lawyer, Martin is concerned that while the English courts have a proclivity towards deciding Article 25 issues subjectively, insurance underwriters could view the breach of the limits stringently.[128] Both agree on the need for objectivity and of the adverse effects on insurance, it is difficult to disagree with Cheng and Martin.

The question of air carrier liability and the approach taken in its context by the *Warsaw Convention* has seen the emergence of the scholarly analysis of two issues: should liability of the carrier be based on fault and consequently on the principles of negligence and limited liability or should liability be based on strict liability? Drion, in his 1954 treatise on liability, inquires into the various rationales and scenarios that may come up in an intellectual extrapolation of the subject.[129] He examines the fact that an insurance system for liability, which would inextricably be linked to a strict liability concept, would be desirable as a plaintiff would be able to claim compensation from an impecunious defendant through the lat-

121. *Id.* at 4.

122. *Id.*

123. (1969) R.F.D.A. 202.

124. Bin Cheng, *Wilful Misconduct, From Warsaw to the Hague and From Brussels to Paris*, 11 ANNALS OF AIR & SPACE L.55, 99 (1977).

125. 3 All ER 693 (C.A. 1983).

126. *See generally*, Peter Martin, *Intentional or Reckless Misconduct: From London to Bangkok and Back Again*, VIII ANNALS OF AIR & SPACE L. 145 (1983).

127. *Id.* at 148.

128. *Id.* at 149.

129. DRION, *supra* note 111, at 7.

ter's insurer on the deep pocket theory, and that insurance underwriters may, in their own interest, be impelled to formulate aviation accident preventive schemes, strengthening the effects of accident prevention.[130] Drion also puts forward nine rationales for the rebuttable limitation of liability presumption that appears in Article 17, quantified by Article 22 of the Convention.[131] These are: maritime principles carry a limitation policy; the protection of the financially weak aviation industry; the risks should not be borne by aviation alone; the existence of back-up insurance; the possibility of the claimants obtaining insurance; limitation of liability being imposed on a quid pro quo basis on both the carrier and operator; the possibility of quick settlement under a liability limitation regime; and the ability to unify the law regarding damages.[132]

These rationales, and whatever else that form considerations of policy in the assessment whether a liability system should be based on negligence or strict liability should be addressed with the conscious awareness that while the Convention imposes a rebuttable presumption of limited liability on the carrier,[133] the contributory negligence of the plaintiff can exculpate the carrier and obviate or apportion compensation.[134] More importantly, wilful misconduct of the carrier transcends liability limits and makes the liability of the carrier unlimited.[135] Strict liability on the other hand, as proposed in the *Montreal Protocol*, does not admit breaking liability limits, sets a maximum limit of compensation that the carrier has to pay, and makes this limit unbreakable by such extraneous factors as the carrier's wilful misconduct.[136]

E. Wilful Misconduct of the Carrier

Of the two instances in which the *Warsaw Convention* provides that the carrier's liability is unlimited, one relates to the absence of documentation (absence of the passenger ticket and baggage check or air waybill) on the grounds that the document of carriage evidences the special regime of limited liability as prescribed in the *Warsaw Convention*.[137] The other, which has turned out to be contentious, deals with instances where the damage is caused by the carrier's wilful misconduct, or such default on his part as, in accordance with the law of the court which exercises jurisdiction in the case, is considered to be the equivalent of wilful mis-

130. *Id.* at 8.
131. *Id.* at 12-13.
132. *Id.*
133. *Warsaw Convention*, *supra* note 76, at art. 17.
134. *Id.* at art. 21.
135. *Id.* at art. 25.
136. Bradfield v. Trans World Airlines, Inc., 152 Cal. Rptr. 172, 175 (Cal. Ct. App. 1979).
137. *Warsaw Convention*, *supra* note 76, at art. 3.

conduct.[138] Article 25 of the *Warsaw Convention* provides:

> The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.[139]

The provision further stipulates that the carrier shall not be entitled to avail himself of the above provisions "if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment."[140]

The primary significance of Article 25 is that it addresses both wilful misconduct and the "equivalent" of wilful misconduct. The authentic and original text of the *Warsaw Convention*, which is in the French Language, uses the words "*dol*" and "*faute . . . equivalente au dol.*"[141] There is a palpable inconsistency between English translation of the original text and the original text itself in that the French word "*dol*" personifies the intention to inflict an injury on a person, whereas the English words "wilful misconduct" requires the defendant carrier to be aware of both his conduct and the reasonable and probable consequences of his conduct in the nature of the damage which may ensue from the carriers act.[142] Wilful misconduct, therefore, may not necessarily involve the intention of the carrier, his servants or agents and remains wider in scope as a ground of liability.

Most civil law jurisdictions have equated "*dol*" with "gross negligence."[143] Drion dismisses the element of intention by citing examples such as the theft or pilferage of goods or baggage, which are more frequent in occurrence than aircraft accidents, which may not necessarily always occur with the concurrence or knowledge of the carrier and cites a list of possible instances where gross negligence would form more justification for the invocation of Article 25.[144] Notable examples are assault or indecent behavior by personnel of carrier; accidents caused by conduct of personnel; serving bad food; bumpy rides causing passenger injury; and failure to instruct passengers of rough weather.[145] Drion also makes the valid point of citing delay in carriage as having many dimensions which

138. *Id.* at art. 25.
139. *Id.*
140. *Id.*
141. DRION, *supra* note 111, at 165 n.2.
142. *See id.* at 197-210 (discussing the original text of the Warsaw Convention and its translation from French to English).
143. *Id.* at 208.
144. *Id.* at 212-14.
145. *Id.* at 213.

may be accommodated within the purview of Article 25 without warranting the consideration of intention.[146]

Common law jurisdictions on the other hand have separated "wilful misconduct" from "negligence" and insisted that the conduct of the carrier has to be "wilful" or intentional for a successful case to be grounded on Article 25 of the *Warsaw Convention.*[147] This approach is consistent with the original contention of the British delegate to the Warsaw Conference, who claimed that wilful misconduct should pertain to "deliberate acts but also [to] careless acts done without regard for the consequences."[148] In the 1952 British case of *Horabin v. British Overseas Airways Corporation*[149] the Court held:

> To be guilty of wilful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be.[150]

In the same year, in the United States, the Supreme Court of New York, Appellate Division, held that wilful misconduct:

> depends upon the facts of a particular case, but in order that an act may be characterized as wilful there must be on the part of the person or persons sought to be charged, a conscious intent to do or to omit doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct and a disregard of the probable consequences of such conduct.[151]

The above approach has been followed by subsequent American decisions which have classified wilful misconduct as requiring "conscious intent to do or omit doing an act from which harm results to another. . ."[152] and "wilful performance of an act that is likely to result in damage or wilful action with a reckless disregard of the probable consequences."[153]

As to the second limb of Article 25(1), which provides that the equivalent of wilful misconduct would suffice to impose liability, the Convention leaves the scope of the provision wide open to include an instance of the carrier knowingly providing small seats and not advising the

146. *Id.*

147. Ruwantissa I.R. Abeyratne, *Notion of Wilful Misconduct in the Warsaw System*, XXII ANNALS OF AIR & SPACE LAW 187, 189 (1997).

148. ROBERT C. HORNER & DIDIER LEGREZ, SECOND INTERNATIONAL CONFERENCE ON PRIVATE INTERNATIONAL LAW MINUTES, WARSAW 1929 59-60 (1975).

149. 2 Lloyd's Rep. 450 (Q.B. 1952).

150. *Id.* at 486.

151. Goepp v. Am. Overseas Airlines Inc., 117 N.Y.S.2d 276, 281 (N.Y. App. Div. 1952).

152. Grey v. Am. Airlines, Inc., 227 F.2d 282, 285 (2d Cir. 1955).

153. Wing Hang Bank, Ltd. v. Japan Air Lines Co., 357 F. Supp. 94, 96-97 (S.D.N.Y. 1973).

passenger of the inherent dangers related thereto.[154]

Arguably the watershed decision on the notion of wilful misconduct in recent times was contained in the case *In re Korean Airlines Disaster of September 1, 1983*[155], where the trial court considered wilful misconduct to be "the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard for the consequences of its performance."[156] The above pronouncement was used by an American court in the 1994 decision of *Pasinato v. American Airlines, Inc.*,[157] which concluded that the act in question of a flight attendant did not constitute wilful misconduct within the purview of Article 25(2) of the *Warsaw Convention*.[158] In the *Pasinato* case, a passenger of an American Airlines flight, which was bound for Chicago from Italy, was struck on the head when a heavy tote bag fell from an overhead bin in the cabin.[159] The incident was the outcome of an initial request by the passenger for a pillow immediately after take off, where the flight attendant, in a bid to open the overhead bin above the passenger to retrieve the pillow, was unable to prevent a tote bag falling from the bin onto the passenger's head.[160] The passenger and her husband sued American Airlines under Article 25 on the grounds of wilful misconduct.[161] The trial court was of the view:

> There is no dispute that [the flight attendant] opened the overhead bin to get a pillow for another passenger. [The flight attendant's] disposition indicates that she opened the bin with one hand, in her customary manner, with the other placed defensively above her head near the bin to prevent an object from falling upon her or a passenger sitting below. Further, [the flight attendant] stated that she tried to catch the tote bag that fell from the bin (and may have touched it as it fell), but that it fell too quickly.[162]

The court took notice of the contention by American Airlines that the technical and cabin crews give reported warnings to passengers of the dangers of opening overhead bins, both over the public address system of the aircraft and by personal messages.[163] The evidence of the flight attendant that incidents of objects falling from overhead bins were infrequent and generally harmless, based on her experience, was also

154. *Warsaw Convention, supra* note 76, at art. 25. *See generally* Ruwantissa Abeyratne, *The Economy Class Syndrome & Air Carrier Liability*, 28 TRANSP. L.J. 251 (2001).
155. 932 F.2d 1475 (D.C. Cir. 1991).
156. *Id.* at 1479.
157. No. 93 C 1510, 1994 U.S. Dist. LEXIS 5676 (N.D. Ill. May 2, 1994).
158. *Id.* at *8.
159. *Id.* at *8-*9.
160. *Id.* at *7.
161. *Id.* at *1.
162. *Id.* at *8-9 (citations omitted).
163. *Id.* at *9.

considered relevant.[164] The court found difficulty in applying the criterion of the *Korean Airlines Disaster* case in that it was difficult for the Court, if not impossible, to envision how the flight attendant's actions could amount to wilful misconduct.[165] It was of the view that the pivotal criterion for determining the existence of wilful misconduct — knowledge that the act would probably result in an injury or damage — was absent.[166] *A fortiori*, the court observed that the other criterion established in the *Korean Airlines* case, that of an act which is performed in a manner indicating reckless disregard for the consequences, was also missing in the *Pasinato* case.[167]

In the 1994 case of *Saba v. Compagnie Nationale Air France*,[168] involving damage to cargo, a Federal trial court found for the plaintiff and awarded damages against the act of the defendant carrier for improperly packing and storing hand-woven Persian carpets, as a result of which some of the carpets were damaged owing to the seepage of rain water when the carpets were kept outside by the carrier pending their loading onto the aircraft.[169] The court in this instance followed the decision in *Pasinato* by reiterating the criteria for the proof of wilful misconduct as established by the *Korean Airlines* litigation.[170] A compelling piece of evidence which enabled the court to arrive at its conclusion in this case was the fact that the air carrier had disregarded its own cargo handling regulations in storing the carpets outdoors, in the rain.[171] In its findings, the court held "[i]n short, through a series of acts, the performance of which were intentional, Air France has demonstrated a reckless disregard of the consequences of its performance. This disregard is emphasized by the fact that no damage report was ever produced."[172] The court, while waiving the liability limits of the *Warsaw Convention*, noted "that a combination of factors can, taken together, amount to wilful misconduct."[173] It was sufficient, in the court's view for an act to be intended and not necessary for "the resulting injury or the wrongfulness of the act" to reflect intention or knowledge.[174] It was also significant that the Court further observed that "a finding of wilful misconduct [was] appropriate when the act or omission constitute[d] a violation of a rule or regulation of the

164. *Id.*
165. *Id.* at *10.
166. *Id.* at *10-11.
167. *Id.* at *11.
168. 866 F. Supp. 588 (D.D.C. 1994), *rev'd*, 78 F.3d 664 (D.C. Cir. 1996).
169. *Id.* at 592-94.
170. *Id.* at 593.
171. *Id.* at 593-94.
172. *Id.* at 594.
173. *Id.* at 593.
174. *Id.*

defendant carrier itself."[175]

Courts in the United States have been cautious to determine the parameters of "scope of employment" as envisaged in Article 25(2) of the *Warsaw Convention*, which imputes liability to the carrier with regard to acts of its employers acting within the scope of their employment. In the 1995 case of *Uzochukwu v. Air Express International Ltd.*[176] where a New York Federal trial court heard a case about the theft by two airline employees of cargo of the two carriers, it was held that the fact that the employers had used forged documents to perpetrate the offence of theft was sufficient to conclude that the act was outside the scope of employment and that the carrier could not be held liable under Article 25(2).[177] It is arguable that the conclusion of the court was based on the fact that generally, in the United States, "wilful misconduct" is regarded as the intentional performance of an act with knowledge that the performance of that act would probably result in injury or damage or that intentional performance of an act in such a manner as to imply reckless disregard of the probably consequences.

In *Robinson v. Northwest Airlines Inc.*,[178] a case decided in March 1996 and involving circumstances similar to the *Pasinato* case, the United States Court of Appeals dismissed the appeal of the plaintiff who had lost judgment in the trial court against the carrier.[179] The trial court had allowed a motion of the carrier that the plaintiff's claim in relation to her being injured by a piece of hand luggage falling from an overhead bin while the plane was taxiing, and additional injuries caused to her by a passenger striking her on the head with the latter's baggage were valid at law.[180]

The Court of Appeals, in affirming the dismissal of the action of the plaintiff, noted that while "a common carrier [a carrier who opens itself to the world to conduct business in the carriage by air of passengers, baggage and goods] owes a high duty of care to its passengers. . . . [it] is not an insurer of a passenger's safety."[181] The court found that the plaintiff failed to raise an issue of fact regarding the carrier's breach of duty towards her.[182] The court was of the view:

> Short of physical constraint of each passenger until each is individually escorted off the plane, we fail to see what Northwest could have done to pre-

175. *Id.*
176. No. 93 CV 5525, 1995 WL 151793 (E.D.N.Y. Mar. 27, 1995).
177. *Id.* at *4.
178. No. 94-2392, 1996 WL 117512 (6th Cir. Mar. 15, 1996).
179. *Id.* at **3.
180. *Id.*
181. *Id.* at **2.
182. *Id.* at **3.

vent this accident. At best, that is precisely what Robinson has established; the fact that an accident occurred. However, as noted above, common carriers are not absolute insurers of their passengers' safety.[183]

A similar approach can be seen in the contemporaneous case of *Bell v. Swiss Air Transport Co. Ltd.*[184] where the New York Supreme Court refused to allow the plaintiffs' claim that the loss of his laptop computer during a security check of the airline was due to the airline's wilful misconduct.[185] In the court's view, the "plaintiffs failed to prove that [the airline] intentionally mishandled the checked baggage with knowledge or reckless disregard for the probable consequences of its conduct."[186] The court also noted that it was the local police, and not the airline, who had required the carrying out of the security check.[187]

The case of *Singh v. Pan American World Airways, Inc.*,[188] decided in February 1996, offers a helpful insight into the rationale for determination of wilful misconduct. In wrongful death and personal injury actions arising out of the 1995 hijacking of a Pan Am flight between Bombay and New York, the jury concluded that the carrier had been guilty of wilful misconduct on the reasoning that the management of the carrier knew or ought to have known of serious lapses in its security program.[189] In fact, there had been representations made by the carrier's staff to the management on several occasions prior to the hijacking.[190] Furthermore, the jury was influenced in its conclusion by the fact that the carrier was aware of terrorist activity at European, Middle Eastern and Asian high-risk airports and that very little had been done by the carrier to provide enhanced security at these airports.[191]

In the case involving the crash of Thai Airways Flight TG-311 near Katmandu, Nepal in July 1992,[192] the question at issue was whether the aircrew had been guilty of wilful misconduct in flying into difficult terrain.[193] The fatal crash occurred during approach to Kathmandu airport — an airport known to be one of the most difficult in the world to land.[194] Evidence had revealed that the captain had given the bearings of

183. *Id.*
184. 25 Av. Cas. (CCH) ¶ 17,259 (N.Y. Sup. Ct. 1996).
185. *Id.*
186. *Id.*
187. *Id.* at 17,260.
188. 920 F. Supp. 408 (S.D.N.Y. 1996).
189. *Id.* at 411.
190. *Id.* at 412.
191. *Id.* at 412-13.
192. *See* Koirala v. Thai Airways Int'l, Nos. C-94-2644 SC & C-95-0082 SC, 1996 WL 40243 (N.D. Cal. 1996), *aff'd*, 126 F.3d 1205 (9th Cir. 1997).
193. *Id.* at *1.
194. *Id.*

the aircraft to the control tower shortly before the crash, and that such were inconsistent with instruction previously given by the tower to the crew in the cockpit of the aircraft.[195] The court concluded that the plane had veered towards terrain surrounding the airport due to the crew's conscious failure to monitor their navigational instruments.[196] The court held:

> [t]he captain and the first officer knew or should have known that failing to perform their duty to continuously monitor the aircraft's navigational instruments would create a grave danger under the circumstances. . . .
>
> . . . .
>
> [B]oth the captain and first officer were well aware that their duty to consciously monitor navigational instruments was an *act necessary for safety*. . . . [T]heir duty to perform this crucial act was *so obvious* under the circumstances that failing to perform it was *reckless in the extreme*.[197]

The Thai Airways case, therefore, marks an instance where the elements of wilful misconduct were imputed to the crew on the basis that due to their expertise, they knew or ought to have known the reasonable and probable consequences of their act.[198]

A further dimension to the notion of wilful misconduct was added in the *Northwest Airlines Air Crash* Case[199] of August 1996, where the Sixth Circuit Court of Appeals added that a finding of wilful misconduct "may be based upon consideration of a series of actions or inactions. . . ."[200] The court was of the view that since "[m]any complex safety systems interact during an airplane flight. . .", an air disaster would usually require multiple acts of error.[201] In other words, the court held that it was permissible for a jury to consider an airline's individual errors or a series of errors and not restrict itself to the only act that seemingly caused an accident.[202]

If one were to analyze the rationale of wilful misconduct in the light of the cursus curiae so far discussed, one would conclude that wilful misconduct hinges itself on knowledge of the perpetrator that damage would result or reckless disregard for consequences of an act on the part of the perpetrator. The question which then arises is whether an instance of the carrier knowingly providing small seats and not advising the passengers of the dangers of prolonged air travel in confined spaces or as would sub-

195. *Id.* at *2 n.2.
196. *Id.* at *6.
197. *Id.* at *3, *6 (emphasis in original).
198. *Id.* at *3.
199. Polec v. N.W. Airlines, Inc., 86 F.3d 498 (6th Cir. 1996).
200. *Id.* at 546.
201. *Id.*
202. *Id.* at 545.

scribe to the notion of wilful misconduct as it is perceived at the present time.

IV. Conclusion

Admittedly, it would be extremely difficult for an airline to determine latent illnesses such as SARS of its passengers. Therefore, instances of negligence pertaining to an airline accepting for travel a person infected with the SARS virus may be rare. However, it would not be uncommon to critically evaluate the conduct of an airline after the fact — i.e. by an assessment of the quality of air in the cabin and assistance offered to those infected in flight. Airlines have to carefully follow the guidelines issued by the World Health Organization (WHO), and take initiatives on their own, such as those discussed in the introduction of this article, so that they can convince a court that they acted like prudent, caring business enterprises in the face of a calamity.

It must be emphasized that, in selling an airline ticket for travel by air, an airline offers a composite service, not only to carry a passenger from point A to B, but also to ensure that transportation is accomplished in a safe and sanitary manner. Therefore, the services offered by the airline in the area of clean air in the cabin become extremely relevant and critical to the issue.

As for issues of liability under the *Warsaw Convention*, although the *Tseng*[203] case widened the scope of the word "accident," the case itself addressed a personal security check on a passenger and it remains to be seen whether courts would interpret negligence on the part of the airline to warn the passenger of his liability if he were to conceal the fact of personal infection and advise him of the appropriate precautions as wilful misconduct under the *Warsaw Convention*. It certainly could be argued, that in the light of the varied interpretations emerging from the *cursus curiae* that an accident under the Convention, although not explicitly defined in any past instance, could be considered as "any incident unexpected and external to the passenger which is avoidable by the airline and which causes death, wounding or injury to a passenger." Therefore, although no conclusive medical evidence has been released distinctly and conclusively linking SARS as a critical threat to air travel, since there is some evidence to suggest a risk factor in air travel, the airline could be expected to take or seen to take some precaution against the danger.

As for responsibility of states, effective border control is the preeminent factor in a state's defense. One way of reacting to the problem may be to crack down on illegal immigration. However, this method, although effective in the war against terrorism, may not be expeditious in a public

203. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999).

health context where a carrier of the virus may not be aware that he is carrying the virus and may have acquired the disease through contact and a chain of happenstance. A counterintuitive approach may well be the best way for a state to handle the problem where legal, and therefore supervised immigration in which health screening is possible and quarantine measures can be effectively applied should be the norm.

There are ongoing and intensive multilateral efforts at containing the SARS crisis. If one were to assume that the epidemic could be contained, the experience gained may be sufficiently persuasive in getting states to adopt more proactive approaches under international law in future situations.