The Spread of Tuberculosis in the Aircraft Cabin—Issues of Air Carrier Liability

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I. INTRODUCTION

When there is incontrovertible evidence of a person contracting a disease, such as tuberculosis, as a result of being infected in an aircraft, liability issues pertaining to the airline arising from the incident may involve principles of private air carrier liability. The Warsaw Convention of 1929 provides that the carrier is liable for damage sustained in the event of death, wounding or any other bodily injury suffered by a passenger, if the accident causing the damage took place on board the aircraft or in the course of the operations of embarking or disembarking.[1] 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 Warsaw Convention, the wounding or injury must be caused by "accident" which is not typically a synonym for "infection." However, the recent decision in *El Al Israel Airlines Limited* v. *Tseng* introduced a new dimension to the word "accident" under the Warsaw Convention by giving it pervasive scope to include such acts as security

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1. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018 [hereinafter Warsaw Convention].

body searches performed by the airlines.[2] 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.

This article evaluates the principles of legal liability that may apply to air carriers with regard to passengers contracting tuberculosis while flying in their aircraft. This evaluation will be made both under the common law principles of tort law and the liability principles contained in the Warsaw Convention.

II. TUBERCULOSIS

Mycobacterium tuberculosis was identified in the 19th Century as causing tuberculosis ("TB"), which now ranks as the world's most deadly infectious disease. An estimated three million people die from TB annually, and scientists have yet to find a vaccine for the prevention of the disease.[3] The World Health Organization ("WHO") has recorded that approximately one third of the world's population is infected with the TB bacterium, and it is estimated that nearly eight million cases may have occurred worldwide in 1996.[4]

The mycobacteria settle in and destroy a person's lungs over time. The mycobacteria can also move to other organs such as the brain, liver, kidneys, and spine, triggering off a battle between the bacteria and the body's immune system. Mycobacteria are transmitted from an infected person in a sneeze or cough, carried through the air in what are known as "droplet nuclei" to be inhaled by others. Although the confined environment of an aircraft cabin is conducive for the transmission of airborne bacteria, there is no medical evidence concluding the transmission of bacteria can occur on short flights.[5]

In 1996, three medical scientists investigated the likelihood of transmission of TB from a highly infectious passenger with pulmonary/laryngeal TB to others on board two short flights of approximately 1.25 hours in duration.[6] The scientists followed up the event with questionnaires ad-

2. El Al Israel Airlines Limited v. Tseng, 525 U.S. 155 (1999).

3. World Health Organization, Tuberculosis and Air Travel, Guidelines for Prevention and Control, WHO/TB/98-256, Geneva: 1998 at 7.

4. *Id.*

5. Marisa Moore et al., *A Passenger with Pulmonary/Laryngeal Tuberculosis: No Evidence of Transmission on Two Short Flights*, 67 AVIATION SPACE ENVT. MEDICINE 1097, 1097-1100 (1996).

6. *Id.* at 1097.

dressed to all 146 passengers on the flights.[7] Their conclusion, based on the responses received, was that although the possibility of transmission cannot be excluded, there was a very low likelihood of the transmission of the disease during the flights in question.[8]

One commentator records that the only time the air transport industry focused on the ramifications of the spread of TB in the aircraft cabin was in 1996, when a 32-year old woman succumbed to TB as a result of contracting the disease during a flight on a Boeing 747-100 aircraft from Chicago to Hawaii.[9] On this flight, six passengers in the rear of the aircraft, thirteen rows away from the identified carrier of the disease, were infected.[10] However, the air transport industry has not been lacking in its cooperation with health officials in handling the aftermath of infection. In the fall of 1998, an infected passenger on board an eight-hour flight from Paris to New York suffered from a particularly virulent form of TB, and the health authorities received every cooperation from the airline concerned in tracking down the thirteen passengers who were infected during the flight.[11]

III. Air Carrier Liability at Tort Law

Principles of liability of air carriers with respect to negligence from the spread of TB in their aircraft cabins are no different from liability principles pertaining to the spread of other diseases transmitted through food, such as salmonella poisoning, cholera, and staphylococcal food poisoning.[12] In the case of the transmission of the TB mycobacterium in the aircraft cabin, like the other diseases mentioned, the air carrier has a two-phased prospect of facing a claim for damages: prevention and contingency planning.

A. Prevention

The environment affects any airborne disease such as TB, particularly if the environment is an enclosed one such as an aircraft. The ventilation system plays a critical part in this regard, therefore, it is crucial for

7. *Id.*
8. *Id.*
9. Farrol Kahn, *Sick Aircraft*, 3 Aviation Q. 167 (1998).
10. *Id.*
11. *World's Next Epidemic: Resistant Tuberculosis*, Montreal Gazette, Mar. 17, 1999, at B1.
12. *See* A.S.R. Peffers, et al., *Vibrio Parahemolyticus Gastroenteritis and International Air Travel*, Lancet, Jan. 20, 1973, at 143; *see also* R.G.A. Sutton, *An Outbreak of Cholera in Australia Due to Food Served in Flight on an International Aircraft*, 72 J. Hygiene 441, 441-51 (1974); M.S. Eisenberg et al, Staphylococcal Food Poisoning During Air Travel, Lancet, Sept. 27, 1975, at 595-99; F.R. Ratzinger, *Disease Transmission by Aircraft*, 4 Aeromedical Review 1, 1-10 (1065).

an air carrier to determine how it will ventilate its aircraft. Early jet aircraft (until the last decade) offered 100% fresh air in the cabin. However, in the 1990's (ironically with more evolved technology) ventilation systems in aircraft were built in such a way as to recycle stale air, thus increasing the chances for survival of bacteria in the aircraft cabin. Even if such a practice were ineluctable, in that recycling is a universal practice that is calculated to conserve fuel, a prudent airline would take other measures, such as changing ventilation filters.

Air in the cabin is usually dry and lacking in humidity since the outside air at cruising altitudes has extremely low water content. The humidity level in the air of an aircraft cabin at cruising level has been recognized as being at about a 10% to 20% humidity level, approximately the same as desert air.[13] The lack of humidity *per se* does not facilitate the transmission of bacteria, but it does make breathing difficult, particularly for persons suffering from respiratory diseases, such as asthma. When dry air becomes stale through recycling, the chance of removing droplets of air (which is usually accomplished by ventilating fresh air) becomes remote. A suggested solution for a prudent airline is to reintroduce 100% fresh air that is humidified.[14]

B. Contingency Planning

The other limb under which an airline could face a liability claim lies in the area of contingency planning through effective communications. Although it is incontrovertible that an airline cannot know beforehand whether one of its passengers carries the TB mycobacterium, it can, once advised of the fact, take effective measures to ensure fullest cooperation with the health authorities involved.

Although, the health department is usually advised of an airline passenger who traveled while infected, there may be instances where a passenger, or his physician, might contact an airline first. In such instances, the airline is obligated to advise the health authorities immediately of all details, not only of the patient concerned, but also of all passengers who were on the flight with the infected person.

An essential prerequisite of airline contingency planning is the establishment of a link between the airline's medical center and its central booking or reservations system. When necessary, the reservations department of the airline can transmit full information to the medical center to follow up on instances of possible infections, particularly in the airline's home base. It is not sufficient for the airline to merely wash its

13. Tuberculosis and Air Travel, *supra.* note 3, at 23. The humidity level of a home or office building is usually 40% to 60%. *Id.*

14. *See* Kahn, *supra* note 9, at 166.

hands of an infected flight by merely giving the passenger manifest to the health authorities. The airline's reservation system should be sufficiently well-equipped to have all data relating to passengers' addresses, telephone numbers, etc., which can be given to both the airline medical staff and the state health authorities.

A prudent airline would diligently follow up the list of infected passengers, to ensure that they receive proper medical care and provide documentation necessary for obtaining any assistance required. It is critical that the airline, at every moment, keep its own medical staff involved in instances where its passengers have been or may have been infected, in order for the proper clinical determination of quarantine times and isolation to be professionally followed.

In case of potential TB exposure to passengers, airlines should have a mechanism in place that would immediately advise the health authorities of the state concerned. Airlines should give special training to its crews in using first aid for precautionary purposes. All necessary medical equipment should be stored in the aircraft. In case of possible infection, airlines should vigorously maintain contact with those who may have been infected, offering them medical attention, in addition to that provided by state authorities. In stations other than their own home stations, airlines should maintain their own medical contacts to assist infected persons from a flight.

C. Legal Issues

Article 14 of the Convention on International Civil Aviation (Chicago Convention) contains the pre-eminent legal provision governing this issue.[15] It states:

> 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.[16]

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 working with the inter-

15. Convention on International Civil Aviation, December 7, 1944. Seventh Edition, 1997, Doc 7300/7.

16. *Id.*

national 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 where their aircraft land.[17] 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 willful blindness. Of these elements of liability, willful 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:

> Willful 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, willful 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 willful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.[18]

Civil wrongs that are exclusively breaches of trust or of some other equitable obligation fit in one of the four classes of wrongs.[19] An imprudent and careless airline may be guilty in the case of the spread of disease in the aircraft cabin of the torts of misfeasance (deliberate wrong), and nonfeasance (failure to take action to perform an owed duty of care). Both of the torts are civil wrongs for which the remedy at common law is an action for unliquidated damages.[20]

Therefore, in general terms, a tort arises from an act performed by the defendant whereby the defendant has, without just cause or excuse, caused some harm to the plaintiff.[21] 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. It follows naturally, therefore, that a person aggrieved because of the tort of another can claim pecuniary compensation in respect to damage suffered.

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17. WORLD HEALTH ORGANIZATION, GENEVA, INTERNATIONAL HEALTH REGULATIONS, 1969 (3d ed. 1983).

18. R. v. Sansregret [1985] S.C.R. 570, 584.

19. 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.

20. This definition of a tort was cited with approval of *Anglo-Saxon Petroleum Co. v. Damant* [1947] K.B. 794, 796.

21. *See* A. Seavey, *Principles of Torts*, 56 HARV. L.R. 72, 73 (1942).

A person who contracts TB while travelling in an aircraft carrying an infected person can, under this principle, expect compensation from the airline concerned, if the airline is found to have breached its duty of care. This duty is breached by either positively contributing to the damage (by knowingly allowing the infected person to travel or by knowingly installing a ventilator system in the aircraft which is not effective in preventing the spread of airborne disease), or by willfully 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 willful neglect or through willful blindness would be extremely difficult to establish in the case of the spread of an airborne disease such as TB, 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 responsible, and consequently liable, for pecuniary compensation is when: (1) an obviously sick passenger is checked in by the airline without making any inquiry; (2) when the airline knows beforehand that a particular passenger is positively infected with a disease; or (3) 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.

In an instance where an airline is found liable, courts would be charged with quantifying the personal loss incurred by a person contracting the disease. In *H. West & Son, Ltd. v. Shephard*, Ltd., decided in the House of Lords in Britain, Lord Morris of Borth-y-Gest rejected the argument that courts should decide whether a person, who was so debilitated by disease, was in a position to enjoy monies awarded in compensation.[22] His Lordship was of the view that the award of compensation was symbolic of reparation made, irrespective of its practical importance to the plaintiff:

> I consider that it is sufficient to say that a money award is given by way of compensation and that it must take into account the actual consequences which have resulted from the tort .... If damages are awarded to a plaintiff on a correct basis it seems to me that it can be of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded.[23]

22. H. West & Son, Ltd. v. Shephard, Ltd. [1964] 2 All E.R. 625 (A.C.).

23. *Id.* at 633.

Lord Morris of Borth-y-Gest made the distinction between money given in the form of compensation as above, in recognition of the damage caused, and compensation given to cover financial loss, such as payment for nursing and medical services and the cost of medicine, as two different elements of compensation.[24] The overall point made by the *Shephard* decision is that compensation should be substantial and not merely a token, irrespective of whether the plaintiff was able to enjoy the money or not. In this sense, compensation is awarded for what the plaintiff suffers, not for the value of a thing lost. In the Australian case of *Skelton v. Collins*, Justice Taylor of the High Court of Australia observed that "compensation cannot be based on evaluation of a thing lost.[25] It surely must be based upon solace for a condition created, not upon payment for something taken away."[26] This reasoning was further developed by the House of Lords three years later in the case of *Baker v. Willoughby*, where Lord Reid said:

> A man is not compensated for the physical injury; he is compensated for the loss which he suffers because of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned.[27]

The issue of quantum of damages for personal injury has been addressed by courts, on the basis that the damages awarded should be such that the ordinary rational man would not instinctively regard them as either mean or extravagant, but would consider them to be sensible and fair.[28] Indeed, as Lord Denning observed in 1966, "the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases."[29]

In addition to the compensation for damage caused, the plaintiff is also entitled to compensation for pretrial pecuniary loss, as a result of expenses actually and reasonably incurred on account of the injury. Compensation under this heading may cover clothing, medical expenses,[30] and nursing expenses.[31] As for future pecuniary loss, the usual consideration is towards loss of future income, although if the injured

24. *Id.*

25. Skelton v. Collins [1966] 39 A.L.R. 480.

26. *Id.* at 486. This view was endorsed at English common law. *See* Lim Poh.Choo v. Camden & Islington Area Health Auth. [1980] A. C. 174.

27. Baker v. Willoughby [1970] A.C. 467.

28. *See* Fletcher v. Autocar & Transporters, Ltd. [1968] 2 Q.B. 322 (Salmond, L.J. dissenting).

29. Ward v. James [1966] 1 Q.B. 273.

30. Gage v. King [1961] 1Q.B. 188.

31. Shearman v. Folland [1950] 2 K.B. 43.

person dies, there could also be a claim for lost dependency.[32] Future pecuniary loss is usually calculated by the "multiplier" method. This method is based on a calculation of the plaintiff's net annual loss multiplied by a figure chosen to produce an overall sum intended to provide, by withdrawals of both interest and capital, compensation for the lost income in the years ahead. The "multiplier" is not dependant upon the number of working years the plaintiff would have had ahead if not for the illness, since allowance is made in the calculation for contingencies—such as illness which might have struck the plaintiff. Therefore, in practice the multiplier rarely exceeds eighteen, even in very young plaintiffs.

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

1. the period when income would be lost;
2. the average loss of income for that period;
3. the appropriate multiple to give the value lost for the period; and
4. the deduction from the multiple for contingencies.

In the case of a young child not yet employed, 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 had he not contracted the disease. In *Taylor v. Bristol Omnibus Co.*, 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', then reduced it by 50% to give current value.[33] In a later case a child of five years was expected to live only up to the age of twenty-seven years owing to a contracted disease.[34] The court awarded the child a modest sum for the 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.[35] In *Croke v. Wiseman*, a child aged two with brain damage was ex-

32. *See* Esso Malaysia [1975] 1 Q.B. 198. In the case of loss of future income, courts may take into account the sums that may have been payable in the future by the plaintiff as income taxes, which would naturally be deducted from the compensation payment. *See* British Transp. Comm. v. Gourley [1956] A. C. 185.

33. Taylor v. Bristol Omnibus Co. [1975] 2 All E.R. 1107 (A.C.).

34. Connolly v. Camden & Islington Area Health Auth. [1981] 3 All E.R. 250 (Q.B.).

35. *Id.*

pected to only live up to the age of forty, therefore, the court assumed that the child would earn the national average wage for twenty-two years.[36] The court put a current money value on this amount, using actuarial tables, of nine times the average wage.[37] It then reduced the multiple to five to arrive at the current value as the child might never become a wage earner.[38]

Irrespective of the plaintiff's age, the rationale for determining future income loss was laid down in *Moeliker v. A. Reyrolle & Co.*, where the court gave the correct criteria for determining compensation .[39] According to the decision, what has to be quantified is the present value of the risk of future financial loss.[40] If there is no actual loss of earnings, there should be no award.[41] If, however, there is a significant risk of loss of earnings, the value depends on the magnitude of the risk.[42] Using this premise, a young man with an arm injury was awarded substantial compensation, as he was likely to suffer from osteoarthritis later in life.[43] The court awarded damages even though the risk of lost wages would not occur for many years.[44]

Loss of career, in which a person injured or infected is already engaged, 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 TB could be critical. In such instances, courts would be compelled to take into account the damage caused by total loss of that career.[45]

As for loss of earning capacity that the plaintiff avers he would have had if not for the injury (and which the plaintiff did not have at the time of injury), the observation of Judge Diplock, in *Browning v. War Office* is relevant.[46] Diplock, stated, "A plaintiff is not entitled to damages for loss of capacity to earn money unless it is established that he would, but for

36. Croke v. Wiseman [1981] 3 All E.R. 852 (A.C.).

37. *Id.*

38. *Id.*

39. Moeliker v. A. Reyrolle & Co. [1977] 1 All E.R. 9 (A.C.).

40. *Id.*

41. *Id*

42. *Id.*

43. Cook v. Consolidated Fisheries Ltd. [1977] 1 CR 635 (Eng. C.A.).

44. *Id.*

45. *See* Morris v. Johnson Matthey & Co. (1967) 112 Sol.J. 32; Hearnshaw v. English Steel Corp. [1971] 11 K.I.R. 306 (Eng. C.A.).

46. Browning v. War Office [1963] Q.B. 750.

his injuries, have exercised that capacity in order to earn money."[47]

In every claim for specific compensation for earning capacity, the plaintiff must clearly and convincingly show that there was actual loss of future income owing to the injury or illness caused.

IV. Liability under the Warsaw Convention

It is an incontrovertible principle of tort law that tortious liability exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage he has done.[48] The Second International Conference on Private International Law ("Conference"),[49] which led to the introduction of the Warsaw Convention,[50] followed this basic principle. However, it deviated from the principle so as to align the provisions of the Warsaw Convention to existing exigencies of civil aviation. The Conference based its approach toward air carrier liability on the fault theory of tort that has its genesis in the Industrial Revolution. In fault theory the principle is that a wrongdoer or tortfeasor must be at fault in order to be compelled to compensate the injured. Fault theory was introduced as a solution to the problems caused by injury to persons by the proliferation of machinery during the industrial revolution. On this basis those responsible for introducing faulty machinery should pay those who are injured by them.

One fundamental deviation from the fault liability principle by the Warsaw Conference was that, instead of retaining the basic premise that a person who alleges injury must prove his injury was caused by the alleged wrongdoer, the Conference put the burden of proof on the carrier. This was done, seemingly, to obviate the inherent difficulties that are posed in situations of air carriage, where it would be difficult, if not impossible, to determine fault from evidence which is reduced to debris after an aircraft accident.

The Conference succinctly subsumed its views on liability through the words of its Reporter:

> These rules sprang from the fault theory of the liability of the carrier toward passengers and goods, and from the obligation of the carrier to assume the burden of proof. The presumption of fault on the shoulders of the carrier was, however, limited by the nature itself of the carriage in question, carriage whose risks are known by the passenger and consignor. The conference had agreed that the carrier could be absolved from all liability when he had taken reasonable and ordinary measures to avoid the damage . . . . One

47. *Id.* at 754.

48. John G. Fleming, The Law of Torts 1 (6th ed. 1983).

49. Second International Conference on Private International Law, Oct. 4-12, 1929, Warsaw, Minutes, (Robert C. Horner and Didier Legrez trans., 1975) [hereinafter Conference].

50. Warsaw Convention, *supra* note 1.

> restriction on this liability had been agreed upon. If for commercial transactions one could concede the liability of the carrier, it did not seem logical to maintain this liability for the navigational errors of his servants, if he proves that he himself took proper measures to avoid damage.[51]

The Conference went on to suggest that if the damage arises from an "intentional illicit act" for which the carrier was liable, it should not have the right to avail itself to the Conventions provisions.[52] The words "intentional illicit act" were later changed to "wilful misconduct" by the Conference, at the request of the British delegate Sir Alfred Dennis and the Greek delegate Mr. Youpis.[53]

Deeming that it was not equitable to impose absolute liability upon the carrier, the Conference admitted that the carrier's responsibility would be limited.[54] Furthermore, the carrier would be freed of all liability when it had taken reasonable and normal measures to avoid the damage.[55]

The Conference, obviously, based the Warsaw Convention on tort law principles of liability, where tort duties are primarily fixed by law—in contrast to contractual obligations that can arise only from voluntary agreement.[56] Sixty-six years after the Warsaw Convention was introduced, however, there has been a palpable shift towards introducing a contractual element by the 1995 International Air Transportation Association ("IATA") Inter Carrier Agreement.[57] Although the agreement does not have the legal status of a convention, it remains an agreement among air carriers which retains the Convention's basic presumption of air carrier liability, while rejecting the liability limitations of the Warsaw Convention and its Protocols.[58] It recognises that the compensatory amount that a carrier should pay for personal injury or death may be contractually agreed by the carrier and claimant, according to the law of the domicile of the claimant.[59]

Admittedly, this is not what the Conference envisaged. However, it must be borne in mind that the Conference recognised that the Warsaw Convention applied only to the unification of "certain" rules as proposed by the delegate of Czechoslovakia. Also, the underlying purpose of the IATA initiative is to allow for greater flexibility for insurance underwriters on the one hand, and more leverage for airlines in their risk manage-

51. *See* Conference, *supra* note 49, at 21.
52. *Id.* at 58.
53. *Id.* at 59-66.
54. *Id.* at 251-52
55. *Id.*
56. FLEMING, *supra* note 48, at 2.
57. *See* Lee S. Kreindler, *The I.A.T.A. Solution*, XIV LLOYD'S AVIATION L. 4, 5 (1996).
58. *Id.*
59. *Id.*

ment on the other—is fundamentally consistent with the views of the Conference. At the same time, the Convention does not preclude the right of a carrier to enter into an agreement with a claimant on the issue of compensation. The Conference itself recognised that:

> [I]n reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. The carrier is free to insert in the contract clauses that exclude or reduce his liability, as much as for goods as for travellers . . . .[60]

The Inter-Carrier Agreement, which was approved by IATA carriers at their annual general meeting in Kuala Lumpur in October 1995, claims to preserve the Warsaw Convention; but carriers agree to take action to waive the limitation of liability on recoverable compensatory damages in claims for death, wounding, or other bodily injury, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.[61] In effect, this provision introduces a contractual element to an otherwise pure tortious liability regime. The agreement attacks the monetary limits of liability from the Convention and retains all other provisions of liability, which are essentially the presumption of liability of the carrier, and its defenses against such a presumption.

With the rejection of the liability limits, the provision relating to breaking such limits in instances where the carrier is guilty of wilful misconduct have also been rejected. Therefore, effectively, certain elements of tortious liability have been expunged from the Convention. In the final analysis the principles of fault that the architects of the Warsaw Convention created have been rejected by the IATA Agreement. Lee Kreindler observed:

> The fault system is extremely important to the public. It is a public protection. It has improved aviation safety and security. While I don't profess to understand what the international airlines are now up to, it is clear to me that one of their purposes is to put an end to the tort system, in international airline transportation, at least as between the passenger and the airline, and that I oppose.[62]

Kreindler points out the ambivalence of the IATA Agreement in designating the law of the domicile of the passenger as being applicable for the award of compensatory damages, while it retains the provision of the Warsaw Convention, which designates jurisdictions.[63] Sean Gates

60. Conference, *supra* note 49, at 47.
61. Kreindler, *supra* note 57, at 5.
62. *Id.*
63. *Id.* at 6.

looks at the issue of "domicile" and observes that the IATA Agreement refers to Article 28 of the Warsaw Convention, which it claims relates to "domicile," but in actual fact does not. In fact, Gates questions whether "domicile" would cover personal or corporate domicile, and holds that this is another area where the IATA Agreement has not shown clarity.[64]

A. The ICAO Draft Convention

Integral to the agenda of the Diplomatic Conference on Private Air Law of the International Civil Aviation Organization ("ICAO") of May 1999, is the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*.[65] The ICAO seeks to replace the existing Warsaw Convention of 1929 in its totality.[66]

Article 17 of the Warsaw Convention states that the carrier is liable for damage sustained in the event of death, wounding or any other bodily injury suffered by a passenger, if the accident that caused the damage sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[67]

From its inception, this provision has proved contentious in its application, as courts adjudicating a claim under Article 17 have been consistently constrained to interpret the words "bodily injury" either as pure physical injury or as mental suffering accompanied by physical injury, where the latter was a causative factor in bringing about the former. These rulings held that there could not be compensation under Article 17 for pure mental shock, psychic trauma, anxiety, or mental discomfort. In *Eastern Airlines, Inc.* v. *Floyd,* the United States Supreme Court concluded that there must be at least physical manifestation of injury, if not death or physical injury, in order for a claimant to successfully sue an air carrier under Article 17.[68] The court, however, did not address the issue as to whether mental injury accompanied by physical injury was a compensable element.[69] The *Floyd* decision is consistent with its precursor, *Rosman v.Trans World Airlines*, Inc.[70] In *Rosman*, a hijacking case, the court held that there have to be palpable objective bodily injuries for recovery.[71] However, the court allowed recovery for psychic trauma, re-

64. Sean Gates, *IATA Inter Carrier Agreement—The Trojan Horse for a Fifth Jurisdiction?*, XIV Lloyd's Aviation L. 1, 2 (1995).

65. Draft Convention for the Unification of Certain Rules for International Carriage by Air; Refernece Text, May 3, 1999, art. 16.1, DCW Doc. No. 4 [hereinafter Draft Convention].

66. Warsaw Convention, *supra* note 1.

67. *See* Warsaw Convention, *supra* note 1.

68. Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991).

69. *Id.*

70. Rosman v.Trans World Airlines, 314 N.E.2d 848 (1974).

71. *Id.* at 856.

lated to the incident, that caused bodily injuries.[72] Also, the court allowed recovery for mental anguish flowing from the bodily injuries and not from the trauma *per se*.[73] The *Rosman* decision followed in the wake of a 1973 decision that held the same.[74]

The inclination of the courts to insist on pure physical injury as an essential element of compensability is arguably due to the reason that courts took refuge in the original French terminology of the Convention which was "*lésion corporelle*," which means "physical wound"—as against "*lésion mentale*," which means "mental wound."[75]

The differences of courts over compensation for mental harm will be resolved as they start to apply the new ICAO Convention, which has gone through several drafts through the ICAO Legal Committee. In its first draft, the new Convention, under Article 16, provided as follows:

> The carrier is liable for damage sustained in case of death or bodily injury or mental injury of a passenger upon condition only that 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. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.[76]

This draft, which was the result of the deliberations of the ICAO Study Group on the subject in 1995, underwent further "surgery" at a later stage of the Group's deliberations, which introduced the element of "personal injury" into the provision to cover both physical and mental injury. However, the final draft submitted to the May 1999 Diplomatic Conference reads that the carrier is liable for damage sustained in case of death or bodily injury of a passenger, upon condition only that the accident that caused the damage took place on board the aircraft, or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of the passenger.[77]

The re-introduction of the words "bodily injury" and the removal of "personal and mental injury" lead to two possible interpretations. Either the final draft intended to exclusively retain physical injury with no hint of mental injury, or mental injury is imputed to "bodily injury," consider-

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72. *Id.*

73. *Id.*

74. Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1158 (1973).

75. For a detailed discussion on this subject see Caroline Desbiens, *Air Carrier's Liability for Emotional Distress Under Article 17 of the Warsaw Convention: Can it Still be Invoked?*, XVII ANNALS AIR SPACE L. 153, 159-66 (1992).

76. *See* Report of the Rapporteur on the Modernization and Consolidation of the Warsaw System, 5 AVIATION Q. 286, 313 (1997).

77. Draft Convention, *supra* note 65.

ing the emerging trend of balancing mental injury with a tangible bodily injury.

Although courts have been somewhat preoccupied with the term "bodily injury" as against "mental injury," the crux of the matter essentially lies earlier in the provision that speaks of "damage" caused. In *Zicherman* v. *Korean Air Lines*, the court ruled that it was quite evident that the English word "damage" or "harm," which was reflected in the official French text of the Convention as "dommage," has a wide application and was, in fact, used by the Warsaw Convention drafters in its classical French law sense of "legally cognisable harm."[78] The *Zicherman* decision incontrovertibly brings to bear the compelling significance of legally cognisable harm as being a compensable element, and, therefore, admits of mental injury as "damage" under Article 17 (if the domestic law applicable to a case were to deem "mental injury" as such). Therefore, the operative issue remains as to whether "mental injury" is a legally cognisable harm.

The ICAO Draft Convention has been preoccupied, quite understandably, with the two most contentious and frequent issues within air carrier liability—physical and mental injury. However, if the Draft Convention retains the words "personal injury," it would certainly be arguable that it may give courts wider scope to examine whether the infliction of a disease would be determinable as a personal injury.

B. General Principles

Generally, in law, an accusation has to be proven by the person alleging it. Therefore, a presumption of innocence applies to an accused person until proven guilty. However, in the instance of carriage by 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.[79] Of course, the airline can show in its defence that it had taken all necessary measures to avoid the damage,[80] or that there was contributory negligence,[81] and 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 shall be 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."[82]

78. Richerman v. Korean Airlines Co., 516 U.S. 217, 221-22 (1996).
79. Peter Martin et al., Shawcross and Beaumont Air Law § 152 (4th ed. 1988).
80. *Id.* at § 116.
81. *Id.* at § 117.
82. Warsaw Convention, *supra* note 1.

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 detailed analysis in order that the circumstances in which a claim may be sustained against an airline for passenger injury or death be clearly identified. Further, the defences available to the airline, and the monetary limits of liability, need to be discussed.

C. Accident Generally Defined

The Warsaw Convention stipulates that an "accident" should cause injury or death to a passenger for liability to be considered.[83] As Halsbury states:

> The word accident (or its adjective accidental) is no doubt used with the intention of excluding the operation of natural causes such as old age, congenital or insidious disease, or the natural progression of some constitutional, physical or mental defect; but the ambit of what is included by the word is not entirely clear . . . what is postulated is the intervention of some cause . . . so as to be fairly describable as fortuitous . . . it covers any unlooked for mishap or an untoward event which is not expected or designed . . . .[84]

Perhaps the first known attempt to define "accident" was in a case reported in England in 1900, where a man in the course of lifting heavy machinery vomited blood due to abnormality of his internal organs.[85] Smith, L.J., interpreting Section 1 (1) of the Workmen's Compensation Act of 1897 under which the action was brought for compensation under a personal accident insurance policy, held that the death of the man was due to disease, and therefore did not accord with the true sense of the word accident.[86] Collins, L.J., agreeing with the view expressed by Smith, L.J., decided that an accident should be fortuitous and unexpected, and in this case the event which led to the death of the worker was not fortuitous.[87] In a case that followed, a workman had to balance a beam in such a way as to avoid falling and in the course of this precarious exercise he strained the muscles of his back.[88] Collins, M.R. held that an accident, to

83. *Id.*
84. 22 Earl of Halsbury, The Laws of England ¶ 585 (3d ed. 1958).
85. Hensey v. White [1900] 1 Q.B. 481.
86. *Id.* at 484.
87. *Id.* at 485.
88. *See* Boardman v. Scott & Witworth [1902] 1 K.B. 43.

be compensated, should be fortuitous and unexpected (to which Matthew, L.J. added that the criterion should be to determine what would happen within the course of employment and what would not).[89]

Both the cases cited seem to accord with Halsbury's inclination to treat an accident as a fortuitous event. By analogy, the approach of the judges to an accident caused to an airline passenger would seemingly have included the dual criteria of (1) there being an unexpected or fortuitous event not contributed to by the inherent ill health of the passenger, and (2) which should have occurred within the course of his carriage by air. *Fenton v. Thorley* later qualified the somewhat restrictive definition of the word "accident" adopted in the earlier cases.[90] Lord Macnaghten, while recognising that an accident should be an unlooked for mishap, or an untoward event which is not expected or designed, observed that the earlier definition could make even a stupid act performed by a person compensable, if the act was fortuitous.[91] In *Fenton*, an apparently healthy man, who ruptured himself by an act of over exertion during employment, was allowed compensation under the rubric of "accident." Perhaps the most significant statement on the applicant's position was by Lord Robertson, who said, "[n]o one out of a law court would ever hesitate to say that this man met with an accident . . . . The word 'accident' is not made inappropriate by the fact that the man hurt himself."[92]

Lord Lindley, dealing with the term "accident" in the same case, held that "[t]he word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss."[93] His Lordship went on to say:

> Every injury must have a cause. The proximate cause may be an internal strain; but if, as in this case, the strain is occasioned by an effort to overcome an obstacle accidentally presented to a workman in the course of his employment, I am not prepared to say that the Act [the Workmen's Compensation Act of 1897] does not apply.[94]

In a later case, Viscount Haldane, L.C., while agreeing with Lord Macnaghten's view in *Fenton*, qualified the decisions further by stating that Lord Macnaghten did not exclude intentional acts by third parties

89. *Id.* at 46.

90. *See* Fenton v. Thorley [1903] 89 L.T.R 314 (H.L.).

91. *Id.* at 316.

92. *Id.* at 317.

93. *Id.*

94. Id. at 318; *see also* Trim Joint Dist. School Bd. of Mgmt. v. Kelly [1914] 30 T.L.R. 452, 453 (H.L.); *see generally* Anderson v. Balfour [1910] 2 I.R. 497; Nisbet v. Rayne [1910] 2 K.B. 689 (finding that potential robbery of a cashier is a risk incidental to employment and, therefore, accidental).

from the purview of the term "accident."[95] In *Trim Joint*, a schoolmaster was killed during the premeditated assault by two school boys, the assault was considered an accident, and compensation was allowed.[96]

In the more recent case of *R. v. Morris*, the term "accident" was interpreted to mean, in the broadest possible terms, "any unintended occurrence."[97] This was a case where two cars interlocked in pursuance of the driver of one vehicle pushing the other when it refused to start.[98] Lord Widgery, C.J., in examining the word "accident," has seemingly depended upon the quantum of damage more than on anything else to determine whether an accident had occurred.[99] If this approach were to be followed, the English Law would show a decided inconsistency with the more laudable approach taken in *Fenton.*

A valid criticism, which may lie against the English common law, is that at no point has there been an attempt to define the term "accident" in concrete terms. The only positive step seems to have been that taken by Lord Lindley in *Fenton*, where he noted that, although there was no technical definition of the term itself, an occurrence may be considered "accidental" in the case of a workman, if an obstacle presents itself within the course of the activity which led to the occurrence.[100] In assessing the term "accident," American law is not as explicit as the English law (although it is noteworthy that American courts have excluded unforeseen and unexpected incidents from the purview of the word "accident"). In *Kinavey v. Prudential Ins. Co.*, the deceased fell from a railway bridge after becoming intoxicating and placing himself in a position of grave risk.[101] The court held that nothing unusual or unforeseen occurred, as the result was extremely likely under the circumstances.[102] Accordingly, the insurance company that had covered the life of the deceased was not required to pay compensation.[103]

In a later case the principles applied by the court were substantially the same as in *Kinavey*, the operative criterion applied was that any act of the deceased or wounded, in which he voluntarily undertook a grave risk, would effectively preclude the dependents of the deceased from invoking the word "accident" in their claim.[104] In this case, the deceased had lain

95. *See* Trim Joint [1914] 30 T.L.R. at 455.
96. *Id.* at 452, 455.
97. R. v. Morris [1971] 1 All E.R. 384 (Eng. C.A.).
98. *Id.*
99. *Id.*
100. *See Fenton*, 89 L.T.R. at 314.
101. Kinavey v. Prudential Ins. Co., 27 A.2d. 286, 287 (Pa. Super. Ct. 1942).
102. *Id.* at 288.
103. *Id.*
104. *See* Allred v. Prudential Ins. Co., 100 S.E.2d. 226, 230-31 (N.C. 1957).

down on a busy highway and been killed by a vehicle.[105] He was of sound mind and had been warned by his companions of the grave danger of his act.[106] The court held that death was due to the voluntary assumption of risk by the deceased, and that the incident did not occur accidentally.[107]

Voluntary assumption of risk appears to be the prominent factor that excludes compensation in the United States of America for claims relating to death or injury by accident. In a 1951 case, this principal was expressly laid down, when a court refused the award of compensation where the insured died as a result of participating in "Russian Roulette."[108] Similarly, in an earlier case, a court held that, there is no accident "when a deliberate act is performed, unless [there is] some additional, unexpected independent, and unforeseen happening."[109] It appears to be clear, therefore, that American law seems to run parallel to the English common law in insisting on unexpected events to be classified as accidental. The heavy reliance on voluntary assumptions of risk underscores this fact.

The common law of Canada has, in more than one instance, expressly recognised the principal enunciated by Lord Macnaghten in *Fenton*—that the word "accident" can be attributed to an unexpected incident, or one that is undesigned. In a 1940 decision, judge Crocket, spelt out the fact that an accident is an untoward event.[110] In this case, a worker incurred internal injury in the course of her duties while operating a new hand-embossing machine.[111] The decision is very clear, as in *Fenton*, that the claim was found to be compensable, notwithstanding the risk, since the employee had to take the risk involved to perform her duties.[112] Courts in Canada have refused compensation in instances where consequential damage is caused by a person's voluntary behaviour that leads to injury. In *Travellers' Insurance Company v. Elder*, where a customer in a restaurant used abusive language and was assaulted as a result, the court held that the injuries were effected directly and independently of causes other than through accidental means[113].

A noteworthy feature in the *Travellers* case is that the court relied

105. *Id.* at 228.

106. *Id.*

107. *Id.* at 231.

108. *See* Thompson v. Prudential Ins. Co., 66 S.E.2d. 119, 120, 124 (Ga. Ct. App. 1951).

109. *See* Evans v. Metropolitan Life Ins. Co., 174 P.2d. 961, 976 (Wash. 1946).

110. *See* Workmen's Comp. Bd. v. Theed [1940] 3 D.L.R. 561, 564.

111. *Id.*

112. *Id.*

113. *See, e.g.*, Travellers' Insurance Company v. Elder [1940] 2 D.L.R. 444, 450 (dismissing an insurance claim by a customer in a restaurant who used abusive language and was assaulted as a result; the court held that the injuries were effected directly and independently of causes other than through accidental means).

upon the fault of the claimant as a basis for rejecting his claim, and on the fact that the claimant had placed himself in a position that would objectively be considered to have brought about his assault.[114] This approach was seen in another case, where a deer poacher shot at another poacher, who in turn retaliated and killed the deer poacher.[115] The Nova Scotia Supreme Court held that death had not been caused accidentally, since the deceased, by his act of firing at the other, had invited the retaliatory shot.[116] The rationale in the case appears to be that, if the injury caused is foreseeable by the injured, such injury would not be considered accidental.

The test of foreseeability was applied in *Candler v. London & Lancashire Guarantee & Accident Co.*, where the court pronounced that an injury, which is the reasonable consequence of a voluntary act of the injured, could not be considered as having been caused by accidental means.[117] In this case the deceased met with his death by falling off the twelfth floor of a hotel.[118] The deceased's insurance company denied compensation, on the grounds that the deceased had been in an advanced state of intoxication. Judge Grant stated:

> The purpose of his (the deceased's) action was to show his friend that he had sufficient nerve to take the risk of falling that was obviously associated with his actions, was so evident to Simmonds (the friend) that, to use his words, he was petrified at the display. His efforts to dissuade Candler from engaging in such act consisted partly in telling him that he need not so act .... His statement that he would show he still had nerve is the conclusive evidence that he appreciated the risk involved.[119]

Judge Grant went on to say:

> His acts on the night in question in assuming the dangerous position he did on the top of the coping could have no useful purpose whatever except the obvious opportunity to convince Simmonds that he possessed sufficient nerve to accept the challenge that was associated therewith. His conduct was foolhardy and attended with the most obvious danger .... I therefore hold that Candler's death was not caused either by accidental means or by accident ....[120]

The judge seems to have assiduously followed the objective test of foreseeability and attributed the cause of death to consequential injury arising from the initial act of intoxication of the deceased. This

114. *Id.* at 448-49.
115. *See* Turner v. Northern Life Ass'ce Co. [1953] 1 D.L.R. 427, 429.
116. *Id.* at 432.
117. Candler v. London & Lancashire Guarantee & Accident Co. [1963] 40 D.L.R. 408, 421.
118. *Id.* at 409.
119. *Id.* at 422.
120. *Id.* at 423.

interpretation has precluded the death of the deceased from being considered an accident.

There are two assumptions that emerge from the decision in *Candler*. One is that in determining the occurrence of an "accident," Canada will consider the cause of the accident as a relevant fact. The other is the incontrovertible assumption that, if the incident arises out of the foreseeable consequences of an act of the deceased or injured person, the incident itself will not be considered for compensation.

It is very clear that the three jurisdictions of the United Kingdom, the United States and Canada recognise at common law certain basic facts in determining whether a given incident can be termed an "accident." They are that the incident should constitute the following:

a) An unexpected, fortuitous or untoward happening;

b) It should not be a consequence of irrational conduct of the deceased or injured person; and

c) The incident should be one that is not reasonably foreseeable by the deceased or injured.

Perhaps the only exception is *Fenton*, where it was recognized that an injury might be compensable even if a person puts himself or herself at risk.[121] However, the most critical problem in this area, is that the common law has not offered an acceptable definition of the word "accident."

D. "Accident" in Air Law

In commercial aviation, the word "accident" is sometimes given as broad a definition as those just considered. The Chicago Convention of 1944 defines accident as an "occurrence associated with the operation of an aircraft."[122] The Warsaw Convention in Article 17 speaks of the "the accident which caused the damage," reducing the accident to the cause rather than to the death or injury.[123] The United States Supreme Court has held *in limine* that an accident must be unexpected and external to the passenger.[124] It is not sufficient that the plaintiff suffers injury as a result of his own internal reaction to the usual, normal and expected operation of the aircraft.[125] Incidents, such as hijackings, terrorist attacks and bomb threats, have been considered to be accidents, together with aircraft crashes.[126] An accident could even involve such lesser incidents

121. Fenton v. Thorley [1903] 89 L.T.R 314, 314 (H.L.).
122. Convention on International Civil Aviation, annex 13, 1944.
123. Martin, *supra* note 79, div. VII, § 153.
124. *See* Air France v. Saks, 470 U.S. 392, 400 (1985).
125. *Id.* at 406.
126. *See generally* Husserl v. Swiss Air Transp. Co., 485 F.2d. 1240 (2d Cir. 1975); Day v.

as tire failure on take-off.[127]

In 1982, a passenger travelling from New York to Manila suffered a massive coronary seizure in flight.[128] The allegation against the airline was that, becuse the airline's employees failed to render medical assistance, the patient suffered irreparable deterioration resulting in death.[129] Responsibility devolved upon the court to fit this incident to that of an "accident" within the meaning of the Warsaw Convention. The court readily did this by deeming that the word "accident", in air law in this instance, did not mean the heart attack itself, but the failure on the part of the airline to render in flight medical assistance.[130] The court said, "[t]his is somewhat analogous to the hijacking cases where the "accident" which caused the injury is not the act of the hijackers but the alleged failure of the carrier to provide adequate security."[131] The court, therefore, found the case was within the terms and conditions of the Warsaw Convention.[132]

In a contemporaneous case, a passenger brought an action for a hernia sustained by the lifting of a heavy suitcase from an airport conveyor belt.[133] A baggage handler of the defendant airline had refused to carry the suitcase, and the plaintiff had solicited aid from her relatives, who were not allowed to enter the baggage area by a guard on duty.[134] The court dismissed the action against the airline, primarily on the grounds that the plaintiff did not suffer an unexpected injury, as she had previously undergone a gall bladder operation and knew her condition was delicate.[135]

In 1980, a medical practitioner suffering from a head cold and respiratory infection boarded an aircraft.[136] He disembarked completely deaf.[137] The plaintiff averred that he suffered discomfort in his ears at descent, probably due to sudden pressure changes.[138] He alleged that the airline knew, or ought to have known, that passengers suffering from

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Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975); Evangelinos v. Trans World Airlines, Inc., 550 F.2d. 152 (3d Cir. 1976); Salerno v. Pan American World Airways, 606 F.Supp. 656 (S.D.N.Y. 1985).

127. *See* Arkin v. Trans Int'l Airlines, Inc., 568 F.Supp. 11, 12 (E.D.N.Y. 1985).

128. Seguritan v. Northwest Airlines, Inc., 446 N.Y.S.2d 397, 398 (1982).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 399.

133. *See* Vincenty v. Eastern Air Lines, 528 F.Supp. 171, 172 (P.R. 1981).

134. *Id.*

135. *See id.* at 174.

136. *See* Sprayregen v. American Airlines, Inc., 570 F.Supp. 16, 17 (S.D.N.Y. 1983).

137. *Id.*

138. *Id.*

head colds would risk losing their hearing.[139] In addition, he alleged that the airline owed a duty to its passengers to warn them that it was dangerous to travel with a head cold.[140] The airline denied the existence of such a duty.[141] The court reasoned that it would be incongruous to impose a duty on an airline to envisage all possible human afflictions, assess their effect on air travel, and warn passengers accordingly.[142] In any event, in this instance the airline was not aware that the passenger was suffering from a head cold.[143] In its decision, the court clearly indicated that the presumption of liability, imposed by the Warsaw Convention on airlines, and the "highest-degree-of-care doctrine" applicable thereto, should not be taken advantage of by plaintiffs.[144]

In April, 1984, an intermediate Appellate Court in New York was faced with the task of deciding whether an airline can be held liable for the death of a passenger who chokes to death owing to his own intoxication.[145] The court held that the plaintiff had made out a cause of action for negligence. The airline serves its passengers with drink, and thus undertakes the responsibility not to serve in excess, and to exercise reasonable care for the safety of passengers.[146] In addition, in the event of excessive intoxication of a passenger, the airline is under a legal duty to render such medical assistance as is necessary to revive the passenger, or, in any event, to keep him out of danger.[147] In light of this principle, the airline has a further duty to protect others from a drunken passenger who gets out of control.[148]

In *Air France v. Saks*, the court interpreted the word "accident" in the context of the Warsaw Convention to mean an occurrence whereby a passenger is injured owing to an unexpected or unusual event or happening external to the passenger.[149] The court found that where injury results from the passengers own internal reaction to the normal exigencies of air travel such injury would not be construed as having resulted from an accident.[150] In this case, the plaintiff was a passenger on an Air France flight from Paris to Los Angeles.[151] During the descent the plaintiff suf-

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 18.
143. *Id.*
144. *See id.*; *see also* Warshaw v. Trans World Airlines, Inc., 442 F.Supp. 400, 413 (E.D. Pa. 1977). *Cf.* De Marines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978).
145. *See* O'Leary v. American Airlines, 475 N.Y.S.2d 285, 286-87 (N.Y. App. Div. 1984).
146. *Id.* at 288.
147. *Id.*
148. *Id.*
149. Air France v. Saks, 470 U.S. 392, 404 (1985).
150. *Id.*
151. *Id.* at 392.

fered severe pain in her left ear, which was aggravated thereafter.[152] The plaintiff—who consulted a doctor after the plane landed—was informed that she was rendered completely deaf in her left ear.[153] The plaintiff brought an action in *California State Court*, on the grounds that her hearing loss was due to the airlines negligent maintenance of the pressurization system of the aircraft which transported her.[154] Air France argued that the plaintiff's allegation was not an "accident," a unusual and unexpected happening, under Article 17 of the Warsaw Convention. Further, the airline alleged that, at all times, the pressurization system of the aircraft had been normal.[155] *The District Court* granted summary judgment to the plaintiff on the basis that "accident" in Article 17 was meant to be an unusual and unexpected happening.[156] The Supreme Court rejected the rationale adopted by the lower court, on the ground that Article 17 refers to an accident that causes an injury, and, therefore, it is the cause and not the effect that is the determinant.[157] Accordingly, the Supreme Court held that air carriers would be liable only if an accident caused the passenger injury.[158] Thus an injury that was in itself an accident was insufficient to satisfy the requirements of Article 17 of the Warsaw Convention.

There will be no accident, if in a normal flight, free of turbulence, a passenger suffers discomfort from a condition he suffers from such as a hiatus hernia[159] or thrombophlebitis.[160] In *Abramson v. Japan Airlines*, an airline passenger suffered an aggravation of a pre-existing hiatal hernia shortly after take-off.[161] The passenger, who was under medication for his condition for six years, had not informed the carrier prior to boarding.[162] The passenger, however, claimed that, had he been given occupation of a few empty seats, he could have massaged his stomach to normalcy. The airline claimed there were no empty seats in flight, contrary to the passenger's claim that there were nine empty seats in flight in the first class section of the aircraft.[163] The passenger claimed that his hernia attack constituted an "accident" within the provisions of Article 17

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 406.
158. *Id.* at 406-07.
159. *See* Abramson v. Japan Airlines Co., 739 F.2d 130, 131, 135 (3d Cir. 1984).
160. *See* Scherer v. Pan American World Airways, Inc., 387 N.Y.S.2d 580, 581 (N.Y. App. Div. 1976).
161. *See Abramson*, 739 F.2d at 131.
162. *Id.*
163. *Id.*

of the Convention.[164] The court rejected this claim, holding that the plaintiff's difficulty was not in any way related to his transportation by air, and, accordingly, there was no accident under Article 17.[165]

It would have been interesting if the *Abramson* court had applied the principle of *Seguritan*, where failure to render medical assistance by the airline was construed as falling within the purview of the word "accident."[166] After all, the airline did not make any attempt to render assistance to the passenger in *Abramson*.[167] The court's reasoning in the latter case contradicts the earlier decision and leads to a logical absurdity. The intention of the Convention was seemingly to provide a uniform system of compensation for passengers bringing claims against airlines operating international air services. To suggest that the failure of an airline to render required assistance is excusable under the Convention is completely at odds with earlier decisions, and also, arguably, with the intention and purpose of the Convention itself.

Insofar as the word "wounding" of a passenger in Article 17 is concerned, courts have initially held that claims are only actionable if there is "bodily injury" and consequently require palpably conspicuous physical injury.[168] This excluded mental injury. However, a later decision held that the injuries enumerated in the Warsaw Convention should be construed expansively to encompass as many types of injury within the ambit of the enumerated injuries including mental and psychosomatic injuries.[169] In the United States mental injury is now entrenched in most jurisdictions as an independently compensable injury.[170] As Burnett, said in *Medlin v. Allied Investment Co:*

> Memory and empathy tells us that "hurt" perceived through sensory media other than that of touch may be just as painful if not more than the hurt perceived by the tactile sense. Moreover, physicians tell us that the consequences of invasion of the person accomplished through the perceptory media of sight and sound may be also as damaging if not more damaging than invasions of the persons accomplished through the sense of touch.[171]

Indeed, therefore, mental anguish or injury would now be recognized by most jurisdictions, as falling within the purview of "wounding" of a passenger under Article 17 of the Warsaw Convention.

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164. *Id.*

165. *Id.* at 135.

166. *See* Seguritan v. Northwest Airlines, Inc., 446 N.Y.S.2d 397, 398 (N.Y. App. Div. 1982).

167. *See Abramson*, 739 F.2d at 131.

168. *See* Rosman v. Trans World Airlines, Inc., 314 N.E.2d 848 (N.Y. 1974).

169. *See* Husserl v. Swiss Air Transp. Co., 388 F.Supp 1238, 1247 (S.D.N.Y. 1975).

170. *See* R.I.R. Abeyratne, *The Human Stress Factor and Mental Injury in American Tort Law - A Patchwork Quilt?*, 15 ANGLO AM. L. REV. 338 (1986).

171. *See* Medlin v. Allied Investment Co., 398 S.W.2d 270, 273-74 (Tenn. 1966).

It is apparent from the *cursus curiae* that a stringent standard of proof of the nature of the occurrence is insisted upon by the courts if liability of the carrier is to be established under Article 17 of the Warsaw Convention. In *Salce v. Aer Lingus Air Lines*, the court required the plaintiff to show that the landing of the aircraft in which the plaintiff travelled was anything other than a normal landing.[172] The plaintiff averred that he had received personal injuries due to the hard landing of the aircraft.[173] In the absence of clear evidence of a hard landing, the court would presume that the landing performed by the aircraft in this instance was not an unexpected or unusual event that would satisfy the requirements of an "accident" under the Warsaw Convention.[174]

However, when facts clearly show an accident, as in *Salerno v. Pan American World Airways, Inc.*, courts will not hesitate to award damages to a plaintiff passenger.[175] In this case, the court held that knowledge of a bomb threat, which subsequently caused a miscarriage to a passenger came within the meaning of the word "accident."[176] The plaintiff, together with her two children, were passengers aboard a Pan American Airways flight from Miami to Uruguay.[177] The cockpit crew, after take off, instructed the cabin crew to look for a bomb that the former had been informed by air traffic control to be on board. The crew notified the passengers including the plaintiff.[178] The Plaintiff suffered a miscarriage 24 hours after having been informed of the alleged bomb on board and having watched the cabin crew looking for the object.[179] The court held that an "accident" within the meaning of the Warsaw Convention caused the plaintiff's injuries because a bomb threat is "external to the passenger" and in an unexpected and unusual event outside the usual, normal and expected operation of the aircraft.[180]

The above discussion surfaces the salutary principle that the word "accident" is considered far more liberally in modern air law than is done under other areas of common law. It also underscores the fact that courts are more inclined to treat acts of omission on the part of airlines as an "accident," as was shown in *Seguritan*.[181] The airline is presumed liable for an "accident" where a person is assaulted by a drunken passenger, or

172. Salce v. Aer Lingus Air Lines, No. 84 Civ. 3444(CES), 1985 WL 1029, at *5 (S.D.N.Y. 1985).
173. *Id.*
174. *Id.*
175. Salerno v. Pan American World Airways, Inc., 606 F.Supp. 656 (S.D.N.Y. 1985).
176. *Id.* at 657.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. Seguritan v. Northwest Airlines, Inc., 446 N.Y.S.2d 397, 398 (N.Y. App. Div. 1982).

where a passenger suffers a heart attack and is not given the necessary medical attention in flight as is possible, just to name two instances. Of course, the claimant has to adduce clear evidence of the event and the ensuing injury.

E. Embarking and Disembarking

Article 17 further provides that an accident that causes damage should take place on board the aircraft or in the course of any of the operations of embarking or disembarking.[182] The first alternative, that of being on board, is self-explanatory and does not require discussion. The second alternative, involving embarking or disembarking, has been subject to sustained judicial discussion and analysis. Although *ex facie*, the words "on board the aircraft" are not problematical the phrase has been interpreted to include time spent by passengers in a hotel consequent to a hijacking.[183] The argument in this case was that the passengers would have been on board, if not for the hijacking.[184] This is an extreme interpretation that an airline is liable for all accidents within that period of time from the start of embarkation to the end of disembarkation.

Current law on the subject seems to favour the test known as the "Day-Evangelinos Test," which was developed as a consequence of a series of terrorist acts on passengers in airport departure lounges. This is a test with three elements of consideration: (1) the location of the passenger; (2) the nature of his activity at the time of the accident; and (3) the degree of control exercised by the airline at the relevant time.[185] A number of United States cases have accepted this test.[186] This test clearly establishes the fact that unless the passenger is under the control or direction of the airline at the terminal there is no liability for injury or death caused to the passenger under the provisions of the Warsaw Convention.

The test obviates the need to painstakingly go through every possible exigency in light of the requirement that the accident occur during embarkation or disembarkation. Prior to the adoption of this test there was no uniformity in the judicial reasoning behind the definition of embarkation and disembarkation. It was left to each individual court to determine whether a given situation would fall within the scope of chronology of

182. Warsaw Convention *supra* note 1.

183. Husserl v. Swiss Air Transp. Co., 388 F.Supp. 1238, 1245-46 (S.D.N.Y. 1975); *see also* People *ex rel.* Compagni Nat'l Air France v. Giliberto, 383 N.E.2d 977, 980 (Ill. 1978).

184. *Id.*

185. Day v. Trans World Airlines, Inc., 528 F.2d. 31 (2d Cir. 1975); Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (2d Cir. 1977).

186. Leppo v. Trans World Airline, Inc., 392 N.Y.S.2d 660 (N.Y. App. Div. 1977); Rolnick v. El Al Isr. Airlines, Ltd., 551 F.Supp. 261 (E.D.N.Y. 1982).

these two extremities. Now, the tripartite test has made the task of the courts much easier.

F. Liability Limits

The Warsaw Convention states in Article 22:

> 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 such payments shall not exceed 125,000 francs. Nevertheless by special contract, the carrier and the passenger may agree to a higher limit of liability.[187]

The currency of denomination of the franc refers to the "French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths."[188] "These sums may be converted into any national currency in round figures."[189] At the time the Convention was signed in 1929, twelve and a half French francs equalled one United States dollar, making the airline's liability for passenger death or injury a maximum of US $20,000. The question today is what conversion rate applies to the French franc as stipulated in the Warsaw Convention. Admittedly, the currency fluctuations of today would not make the old conversion standards practicable. This has given rise to many debates, particularly in the United States.

The Supreme Court of Puerto Rico in 1982 held that the limits of liability of the Warsaw Convention should be converted from francs to dollars by reference to the last official price of gold in the United States, as set forth in the last Civil Aeronautics Board ("CAB") order dealing with the dollar equivalents of the Warsaw Convention limits of liability.[190] The most significant and recent development on this point is seen in *Trans World Airlines, Inc.* v. *Franklin Mint Corp.* where the Court held that the limit of liability under the Warsaw Convention, is to be converted into United States currency by using the last official price of gold.[191] The facts of the case were that Franklin Mint paid Trans World Airlines for the transportation of certain numismatic material from Philadelphia to London.[192] The cargo was lost, and Franklin mint sought US $250,000 as damages from the defendant airline.[193]

The court, somewhat unexpectedly, pronounced that Trans World

187. *See* Warsaw Convention, *supra* note 1, at 3019.
188. *Id.*
189. *Id.*
190. Delgado v. Pan American World Airways, Inc., 112 P.R. Dec. 329 (1982).
191. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984).
192. *Id.*
193. *Id.*

Airlines' liability was limited under Article 22 of the Warsaw Convention, but the limits were unenforceable because of the inapplicability of the Convention and the impracticability of converting currency as envisaged by the Convention in 1929.[194] The Supreme Court found the limits enforceable and cited with approval the decision of the CAB to use the last official price of gold as the basis for conversion within the authority of that agency and consistent with the Constitution.[195]

Franklin Mint concerned the carriage of cargo, and the question arose whether the decision would apply to passenger liability in terms of the applicability of the provisions of the Warsaw Convention to cases of passenger liability. In 1984, this problem was solved when the court held that the principal of the *Franklin Mint* decision applied to personal injury and wrongful death claims.[196] The *Franklin Mint* standards are, however, not absolute and static. In other words the United States Supreme Court considered that the use of a limit, based on gold, was designed to deal with the fluctuations of inflation; in an inflationary economic environment, a fixed limit in national currency might fail to meet the desired result envisaged by the Convention. To give effect to the objective of Article 22 and the envisaged economic uniformity, the Court recognized that it might be necessary for periodic adjustments of the limit as converted into dollars. The CAB was charged with making such adjustments to accord with values of other Western currencies and of changes in conversion rates of currencies of other Warsaw signatories. Since the Court considered the last valuation of the CAB in 1978 for its decision in *Franklin Mint*, such was taken to apply at the time the case was adjudicated in 1984.

It has also been suggested that a successful solution to the problem of matching the franc with the dollar would be to seek parity of the dollar with special drawing rights ("SDR"), a basket of currencies that adjust themselves with currency fluctuations. This, arguably, would also allow a ready conversion of the SDR to any currency of any jurisdiction hearing a case of passenger death or injury under the Warsaw Convention. There is no logically compelling argument for either the *Franklin Mint* principle or the SDR principle. In most jurisdictions courts may have to interpret the Convention on this point as best as they can, particularly in the absence of specific legislation.

194. Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303, 311 (2d Cir. 1982).

195. *Franklin Mint*, 466 U.S. at 254-60.

196. *In re* Aircrash at Kimpo Int'l Airport, Korea, on Nov. 18 1980, 558 F.Supp. 72, 72 (C.D. Cal. 1983).

G. Defences Available to the Airlines

The foregoing discussion involved two key factors governing the civil liability of airlines. These factors are:(1) the presumption of liability imposed upon the airline, and (2) the liability limits protecting the airline from unlimited liability and spurious claimants. However, two additional factors operate as adjuncts to the initial concepts: (1) the airline may show certain facts in its defense to rebut the presumption, and (2) if the airline is found guilty of wilful misconduct, it is precluded from invoking the liability limits under the Warsaw Convention. These concepts seem to be grouped into two sets of balancing measures. The end result is that, on one hand the airline is subject to stringent standards of liability, and on the other, two provisions limit its liability in 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 [it] and [its] agents had taken all necessary measures to avoid the damage, or that it was impossible for [it] or them to take such measures."[197] Shawcross and Beaumont are of the view that the phrase "all necessary measures" is an unhappy one, in that the death or injury of the passenger presupposes the fact that the airline or its agents had not taken all necessary measures to prevent the occurrence.[198] Airlines usually take precautions such as making regular announcements to passengers on the status of a flight, and giving instructions on security and safety measures available in the aircraft. These measures are taken by the airline to conform to the Warsaw Convention requirements, that the airline take all necessary measures to prevent an accident, and rebut the presumption of liability. Thus, in a case decided in 1963, it was held that a passenger who left her seat when the aircraft went through turbulent atmosphere was barred from claiming damages for personal injury under the Warsaw Convention.[199] The court 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 envisaged in the Warsaw Convention.[200] 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 require an airline to take all "reasonably necessary measures." In a more recent case judge Chapman, imputed objectivity to the phrase "reasonably necessary measures" by declaring that such measures should be considered necessary by "the rea-

197. *See* Warsaw Convention, *supra* note 1, at 3019.

198. Shawcross & Beaumont, 2 Air Law 116 (4th ed. 1999).

199. Chisholm v. British European Airways [1963] 1 Lloyds Rep. 626 (U.K.); *see also*, Grein v. Imperial Airways, Ltd. [1937] 1 K.B. 50, 69-71.

200. *See Chisholm*, 1 Lloyds Rep. at 629.

sonable man."[201] The United States follows this approach of objectivity. In *Manufacturers Hanover Trust Co. v. Alitalia Airlines,* it was emphasised that the airline must show that all reasonable measures were taken from an objective standpoint in order for the airline to use the defense.[202] Some French decisions have also approached this defence on similar lines and required a stringent test of generality, in order for the defence to be used.[203]

The airline, which 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 are not sufficient. Therefore, if the airline cannot adduce a reasonable explanation as to why the accident occurred despite the reasonably necessary precautions being taken, it is unlikely to succeed in its defence.[204] Insofar as the requirement of impossibility to take precautions is concerned, courts have required clear evidence of the difficulties faced by the airline in avoiding the disaster.[205] In the case of a crash landing, a court said that it was an insufficient defence for the airline to merely show that the aircraft was in perfect condition and that the pilot took all steps to affect a good landing.[206] The court required the airline show that weather conditions were so bad that the aircraft could not land at another airport.[207] In *Haddad v. Cie Air France*, an airline had to allow suspicious passengers to board its plane. The passengers later hijacked the plane.[208] The court held that as the airline could not deny boarding to the passengers it was impossible to take all necessary safety precautions and the airline's defense was sound under Article 20 (1).[209] A similar approach was taken in the case of *Barboni v. Cie Air-France*, where the court held that when an airline receives a bomb threat while in flight and performs an emergency evacuation, a passenger injured by evacuation through the escape chute could not claim that the airline is liable, since it would have been impossible for the airline to take any other measure.[210]

If the airline proves that the damage was caused by, or contributed to, the negligence of the injured person, the court may, in accordance

201. Goldman v. Thai Airways Int'l [1983] 1 W.L.R. 1186 (U.K.).

202. *See* Manufacturers Hanover Trust Co. v. Alitalia Airlines, 429 F.Supp. 964 (S.D.N.Y. 1977).

203. Preyvel v. Cie Air France [1973] 27 R.F.D.A. 198 (Fr.); *see also*, Riviere-Girret v. Ste-Aer-Inter [1979] Uniform L.R. 173 (Fr.).

204. Panalpina Int'l Transp. Ltd. v. Densil Underwear, Ltd. [1981] 1 Lloyds Rep. 187 (U.K.).

205. *See, e.g.,* Mandreoli v. Cie Belge d'Assurance Aviation [1974] Dir. Mar. 157 (Belg.).

206. *Id.*

207. *Id.*

208. Haddad v. Cie Air France [1982] 36 R.F.D.A. 342 (Fr.).

209. *Id.*

210. Barboni v. Cie Air-France [1982] 36 R.F.D.A. 355 (Fr.).

with the provisions of its own law, exonerate the carrier wholly or partly from its liability.[211] Contributory negligence under the Warsaw Convention has been treated subjectively when cases are adjudicated. The courts have not set an objective standard as in the earlier defense. For instance in *Goldman v. Thai Airways International Ltd.,* a passenger was not guilty of contributory negligence even though he kept his seat belt unfastened throughout the flight because there was no sign given by the aircraft control panel to keep the seat belt fastened.[212] However, courts have recognized that contributory negligence may be raised by airlines as a defense in some situations.[213]

Article 25(1) of the Warsaw Convention states that an airline:

> [S]hall not be entitled to avail [itself] of the provisions of [the Warsaw Convention] which exclude 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.[214]

Article 25 (1) 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.[215] 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[216]

Under Article 25 the plaintiff proving that the carrier was guilty of wilful misconduct in causing the injury could circumvent the liability limits of the carrier that the Warsaw Convention imposes.[217] 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, it shall not be entitled to claim the limitation of liability.[218] It has been maintained that the English translation inaccurately states that the liability limitations of a carrier will be obviated if the damage is caused by its *wilful misconduct* or by such *default.*[219] The contentious issue in this question is what kind of misconduct is required. Drion is of the opinion that by approaching the issue in terms of conflicting concepts, the question whether *faute lourde*

211. Warsaw Convention, *supra* note 1, at 3019.
212. *See* Goldman v. Thai Airways International Ltd [1983] 1 W.L.R. 1186 (U.K.).
213. *See* Bradfield v. Trans World Airlines, Inc., 88 Cal. App.3d 681, 686 (1972).
214. Warsaw Convention, supra note 1, at 3020.
215. *Id.*
216. Butler v. Aeromexico, 774 F.2d. 429 (11th Cir. 1985).
217. Warsaw Convention, *supra* note 1, at 3020.
218. Warsaw Convention, *supra* note 1, art. 25.
219. H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 195 (1954).

(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.[220] Miller[221] 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, has now been rectified by the Hague Convention which has introduced the words "done with intent to cause damage or recklessly and with knowledge that the damage would probably result."[222]

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 by 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,[223] 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,* considered the issue of Article 25 of the Convention and The Hague interpretation.[224] The facts of the case were usual, involving the death of a passenger and a consequent claim under the Convention by his dependents. The significance of the case lay, however, in the fact that the Belgian court followed the decision of *Emery* v. *Sabena*[225] and held that, in the consideration of the pilot's negligence under Article 25, an objective test would apply, and the normal behaviour of a good pilot would be the applicable criterion.[226] 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 prudent pilot ought to have had this knowledge."[227] The

220. Id. at 200.

221. GEORGETTE MILLER, AIR CARRIER'S LIABILITY UNDER THE WARSAW SYSTEM 200 (1977).

222. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Done at the Hague on 28 September 1955.

223. MILLER, *supra* note 221, at 202.

224. Tondriau v. Air India [1977] 31 R.F.D.A. 193 (Belg.).

225. Emery v. Sabena [1967] 22 R.F.D.A. 184 (Fr.).

226. *Tondriau*, 31 R.F.D.A. at 193.

227. *Id.*

court rationalised 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.[228] The Brussels Court of Appeal, however, reversed this judgment and applied a subjective test, asserting that the Hague protocol called for "effective knowledge." Professor Bin Cheng seems to prefer the objective test in the interpretation of "wilful misconduct" under Article 25, on the grounds that a subjective test would defeat the spirit of the Convention and that judges would be "flying in the face of justice in search of absolute equity in individual cases."[229]

Peter Martin, analysing the Court of Appeals decision in *Goldman* v. *Thai Airways International Ltd.*,[230] 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).[231] 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. 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. Both on the count of the need for objectivity and on the count 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— (1) should liability of the carrier be based on fault and, consequently, the principles of negligence and limited liability, or (2) 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.[232] He examines the fact that an insurance system for liability, which would inextricably be linked to a strict liability concept, would be desirable. Under this concept a plaintiff would be able to claim compensation from an impecunious defendant through the latter's insurer on the deep pocket theory.[233] Consequently, insurance underwriters may, in their own interest, be im-

228. *Id.*

229. Bin Cheng, *Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris*, II ANNALS OF AIR Space L. 55, 99 (1977).

230. Goldman v. Thai Airways Int'l [1983] 1 W.L.R. 1186 (U.K.).

231. Peter Martin, *Intentional or Reckless Misconduct: From London To Bangkok and Back Again*, VIII ANNALS AIR SPACE L. 145, 149 (1983).

232. DRION, *supra* note 219, at 7.

233. *Id.* at 8.

pelled to formulate aviation accident preventive schemes, strengthening the effects of accident prevention.[234] Drion also puts forward eight rationales for the rebuttable limitation of liability presumption appearing in Article 17 and quantified by Article 22 of the Convention. These are: maritime principles carry a limitation policy; the protection of the financially weak aviation industry; the catastrophic risks should 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.[235]

These rationales, and whatever else forms 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, the contributory negligence of the plaintiff can exculpate the carrier and obviate or apportion compensation. More importantly, wilful misconduct of the carrier transcends liability limits and makes the liability of the carrier unlimited. Strict liability, on the other hand, as proposed in the Montreal Protocols 3 and 4, does not admit of breaking liability limits, sets a maximum limit of compensation that the carrier has to pay, making this limit unbreakable by such extraneous factors as the carrier's wilful misconduct.

Therefore, the ultimate question is whether one keeps the Warsaw-Hague concept of fault and limited liability, or does one embrace a system of strict liability which assures the aggrieved party of pecuniary or compensatory damages, while obviating the need for lengthy determinations of who was at fault after the fact. In other words, does one point a finger at the carrier in the first instance, then limit his liability and again break the limit if he is at fault? Alternatively, does one make the carrier pay a sum of money, the maximum limits of which have been set, with the assurance that such limits would not shoot up unconscionably if the carrier were negligent?

The Convention unified legal principles relating to air carrier liability, thus precluding the application of scores of differing domestic laws. It, however, did not succeed in presenting to the world unequivocally objective and quantified rules of liability. This precludes a plaintiff from knowing that he would be, as a rule, compensated if he is injured in an air accident, since the Convention admits of challenge on the grounds of the plaintiff's conduct before, during or after the accident. The strict liability

234. *Id.* at 10.
235. *Id.* at 12-13.

principle introduced by the Guatemala City Protocol and carried through by the Montreal protocols on the other hand has been applauded on the grounds that:

> First, it gets money into the hands of the passengers much more quickly. Second, it saves transaction expenses, which include legal fees and other substantial litigation costs. Third, it provides compensation to passengers in those factual situations where no responsible party is at fault, such as an act of terrorism.[236]

Alexander Tobolewski validly points out that actual aviation practice in terms of aviation insurance by the airlines has nothing to do with limitation of liability and claims, since airlines insure their fleets and liabilities for colossal amounts in the insurance market.[237] He suggests therefore, the harmonisation of the law and actual practice (presumably by infusing more specific quantum in damages) and simplification of the system of recovery *inter alia*, both of which strongly suggests a regime such as the one envisaged in the Montreal Protocols.[238] Werner Guldimann concludes, "The most important and urgent matter in the present decade is the continuation of the efforts undertaken by ICAO to re-establish the former uniformity and universality of the Warsaw System by having the Montreal Protocols No. 3 and No. 4 rapidly ratified by the greatest possible number of Contracting States."[239] Although Professor Bin Cheng holds the view that the Montreal Protocols are (1) heavily weighted towards the carrier, (2) the limits therein are inadequate, and (3) that the limit of the SDR value cannot be changed is undesirable;[240] the view that strict liability should be embraced seems more sensible, in view of the inconceivable number of passengers carried every year by air, the possible eradication of legal contingency fees, and above all, giving teeth to the meaning and purpose of law—that it should be an instrument of solace, not an opportunity for debate.

In an evaluation of the Warsaw System in 1979,[241] it has been said that during the first 25 years of the existence of the Warsaw Convention,

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236. Nicholas Mateesco Matte, *The Warsaw System and the Hesitations of the U.S. Senate*, VIII ANNALS AIR SPACE L. 151, 164 (1983).

237. Aleksander Tobolewski, *Against Limitation of Liability; A Radical Proposal*, III ANNALS AIR SPACE L. 261, 263 (1978).

238. *Id.* at 266.

239. Werner Guldimann, *A Future System of Liability in Air Carriage*, 16 ANNALS AIR SPACE L. 93, 103-04 (1991).

240. *See* Bin Cheng, *What is Wrong with the 1975 Montreal Additional Protocol No. 3?*, XIV AIR SPACE L. 220 (1989).

241. Convention 1961, the Guatemala City Protocol, 1971, and the Montreal Protocols 1, 2, 3, 4, of varying dates. It should also be noted that the Montreal Agreement of 1966—a private arrangement between air carriers—also purported to amend the Warsaw Convention. Hereinafter, joint references to all these instruments shall be referred to as the "Warsaw System."

it served the aviation community satisfactorily.[242] Peter Martin bases this observation on the argument that when the Hague Protocol was being drafted in 1955, it was recorded that only 53 Warsaw cases had been adjudicated (a very small number of cases for an instrument of the stature of the Warsaw Convention).[243] The unifying process of the liability of an air carrier, started by the Warsaw Convention, dealt with liability concepts, quantum of compensation, exceptions on liability, jurisdictional issues and prescription of action. It is sad, however, that with the original Warsaw Convention, there are now seven other international agreements, few of which have ever seen the light of day. This means that the unification process started by the Warsaw Convention had been criticised and found wanting at various stages of its chequered history. The original document has been excoriated many times, prompting Professor Cheng to call it a "disgraceful shambles"[244] (although it remained, when these comments were made of it, the most widely implemented private international law convention).[245]

Ex facie, from a strictly practical standpoint, it would appear that many facets of unification of the Warsaw Convention have come under interpretation by different philosophies, presumably due to the lack of specificity of the principles of unification and, *a fortiori*, the language used. For instance, the delivery of the passenger ticket and the attendant carrier liability came under a series of confounding judicial thought processes, where in two cases[246] the courts decided that the ticket had to be delivered in such a manner as to afford the passenger a reasonable opportunity to take measures to protect against liability insurance (only to decide in *Chan v. Korean Airlines Ltd.*[247] that the only requirement of Article 3 of the Convention was that a ticket be delivered). *Goldman* v. *Thai Airways International Ltd.*,[248] was another case where two confusing issues were decided. The first issue was whether the concept of "wilful misconduct," as reflected in Article 25 of the Convention, was to be interpreted objectively or subjectively. The second issue concerned compensatory limits, which were so confusing to both the courts and the parties

242. Peter Martin, *50 Years of the Warsaw Convention: A Practical Man's Guide*, 4 ANNALS AIR SPACE L. 233, 234 (1979).

243. *Id.*

244. Bin Cheng, *Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris*, 2 ANNALS AIR SPACE L. 55, 55 (1977); *see also* Rene H. Mankiewicz, *From Warsaw to Montreal With Certain Intermediate Stops; Marginal Notes on the Warsaw System*, XIV AIR L. 239 (1989) (also using the word "shambles" to describe the Warsaw Convention).

245. Martin, *supra* note 242, at 239.

246. Mertens v. Flying Tiger Line Inc., 341 F.2d 851, 856 (9th Cir. 1965), *abrogated by* Chan v. Korean Airlines, Ltd., 490 U.S. 122 (1989).

247. Chan v. Korean Airlines Ltd, 490 U.S. 122, 128 (1989).

248. Goldman v. Thai Airways Int'l Ltd [1983] 3 All E. R. 693.

that an outside settlement was effected on a mutually acceptable basis.[249] The issue regarding compensatory limits for death or personal injury has had a consistent evolution, starting from the Warsaw Convention at approximately 8300/US dollar, increased twofold by The Hague Protocol 1955, increased again by the Guatemala City Protocol to 100,000 SDR (about 130,000/US dollar) with the Montreal Protocols going even higher. The currency conversion to gold value has been another contention of many parties to litigation. *Goldman* v. *Thai Airways International Ltd.*, left the situation in fiscal anarchy by deciding in the United States that the Poincare gold franc has to be converted to the last official price of gold before the United States left the gold market, and not the free market price of gold.[250] This not only made the overall American attitude towards seeking enhanced compensation turn 360 degrees, but also awarded unrealistically low compensation to the plaintiff. Further, a case in Australia has given a new interpretation to the notion of carrier negligence in the carriage of cargo,[251] and a New Zealand case has decided that any interested party can now claim compensation under a cargo claim.[252]

The Montreal Agreement of 1966, a private agreement between carriers flying the United States, was also the result of failure by contracting States to reach an international solution to the problem of unifying principles of liability, particularly the quantum of damages. The Montreal Agreement amply demonstrates, as an ICAO document points out, that a private agreement between air carriers, sponsored by IATA, can unhinge and question the credibility of a multilateral international treaty between sovereign States. Mankiewicz attributes this chaotic state of disagreement to the stand taken by the United States when he states:

> Indeed, there is real irony in the history of the Warsaw Convention. For more than 30 years the United States of America have steadily and successfully fought for, and obtained and signed, 6 Protocols to amend the Warsaw Convention as well as a 'Convention Supplementary to the Warsaw Convention.' But, they have ratified not one of these Warsaw instruments. In spite of the huge amount of time and money spent all these years by ICAO and it's Member States, the US judiciary is still saddled with the awkward task of applying, construing constructively or destructively, misinterpreting and circumventing a Convention which is now 60 years old . . . .[253]

The only viable alternative towards rectifying this anomaly and preserv-

249. D.A. Kilbride, *Six Decades of Insuring Liability under Warsaw*, XIV AIR L. 183, 187 (1989).

250. Goldman v. Thai Airways Int'l Ltd, 466 U.S. 243 (1984).

251. SS Pharmaceutical Co. v. Qantas Airways Ltd., 1 LLOYDS L. REP. 319 (1988).

252. Tasman Pulp & Paper Co. v. Brambles J.B. O'Loghlen [1981] 2 N.Z.L.R. 225.

253. Mankiewicz, *supra* note 244, at 259.

ing the unification efforts of the Warsaw Convention is ratifying the Montreal Protocols 3 and 4. As Professor Michael Milde states:

> There is hardly any viable alternative to a determined effort to bring the Montreal Protocols Nos. 3 and 4 into force. If that aim is not accomplished in the very near future, we may witness a trend to denunciation of the Warsaw System by several States with the ensuing chaotic conflicts of laws, conflicts of jurisdiction, unpredictably high compensation claims, and skyrocketing increase in insurance premiums.[254]

The civil liability of an airline for causing death or injury to passengers has been established by international treaty and entrenched in law by judicial interpretation. Courts have attempted to balance the interest of both airlines and passengers, as indeed has been the perceived intention of the Warsaw Convention. The predominant feature of this area of civil liability is that air transport, in terms of commercial transportation of passengers, is incontrovertibly the mode of transport involving the highest levels of technology. Therefore, courts may find difficulty in ascertaining negligence, wilful misconduct, and overall liability of an airline in the face of complex technical arguments and defence. However, this reason alone should not justify obviating the tortious element that has so carefully been entrenched in the Warsaw Convention by its founders and used by courts over the last 66 years. As the foregoing discussions reflect, liability issues under the Warsaw Convention has been consistently addressed by courts on the basis of their interpretation of negligence, wilful misconduct, and contributory negligence, all of which are exclusively issues involving principles of tort law.

V. Analysis of Air Carrier Liability under the Warsaw Convention

It is clear that the conventional interpretation of the term "accident" in tort liability has been extended in aviation cases under Article 17 of the Warsaw Convention where the Courts have imputed intention to the carrier in certain instances. To this extent, *Seguritan*[255] (which addressed the issue of the carrier's liability in not being able to give medical assistance when necessary) and *O'Leary*[256] (more liquor than he could consume in flight) prove that courts have interpreted the Warsaw Convention to enforce liability of the carrier on the principles of intention. Therefore, wilful misconduct has played an important role in establishing, in certain

254. Michael Milde, *ICAO Work on the Modernization of the Warsaw System*, XIV Air L. 193, 206 (1989).

255. Seguritan v. Northwest Airlines, Inc., 446 N.Y.S.2d 397 (N.Y. App. Div. 1982).

256. O'Leary v. American Airlines, 475 N.Y.S.2d 285 (N.Y. App. Div. 1984).

circumstances at least, that it would be justified in considering that the extent of the carrier's fault is a valid consideration in awarding damages.

Fault liability, as enforced by the Warsaw Convention, may also be adequately reflected in intentional negligence, where the carrier intentionally breaches the duty of care owed to a passenger. Determining a breach of duty or care, as a distinct evidentiary tool by courts, would act towards accident prevention in that instances of carrier liability which emerge from accident investigations could then be used as admissible evidence.

The new trend, in doing away with fault liability and introducing a system of liability that may apply irrespective of fault but aligned to monetary compensation based upon subjective assessments of jurisdictional liability, has its genesis in the decade between 1960 and 1970. During this period, civil law liability in tort entered a new phase, effectively superannuating the existing system of liability and replacing it with a system of liability insurance. Tortious liability was no longer considered cost-effective, and was no match for less expensive insurance. Jurists thought it more equitable and, above all, practical to embrace a legal system that espoused loss distribution, which acted as the national precursor to liability insurance. This system of liability was assisted along the way by three reasons which militated against fault liability and acted as catalysts towards the successful launch of liability insurance. First, a tort system based upon fault was expensive to administer when compared with any system of insurance; second, litigation was fraught with delay, which often a plaintiff could ill-afford; and third, the unpredictability of cases based upon fault liability often put plaintiffs under pressure to settle their claims for amounts less than they would receive if their claims went successfully to trial.

The question that now arises is whether the international aviation community should retain fault liability or embrace strict liability, which is designed to obviate adjudication for tortious liability and settle claims on a subjective basis.

Drion discussed rationales for the limitation of liability in private air law in 1954.[257] The task that now has to be accomplished is to inquire whether private air law needs the concept of limited liability or whether another system could be recommended. The most compelling arguments for the limitation of liability in private air law are that it protects the financially weak aviation industry, unifies private air law against draconian domestic laws, and expedites the payment of compensation. It is interesting to analyze these concepts in today's aviation context. We live in a world where complex litigation issues emerge. These issues are care-

257. DRION, *supra* note 219, at 12.

fully thought out by contingency-fee lawyers who have an inexplicable capacity to produce a variety of defendants out of a hat. For instance, now, there is a conscious awareness that there are co-liable parties - manufacturers of component parts, air traffic controllers, and even government agencies such as airport authorities. Would it be fair to limit the liability of the carrier and expose these three categories of defendants to unlimited liability? There may also be the instance where the deceased or injured may have had enormous capacity to earn during his working life, which would be interrupted or terminated by an air accident. Does it mean that such a defendant settles for a limited sum of money as compensation and bears his losses? Professor Bin Cheng claims that the 100,000 SDR's of the Montreal System is woefully inadequate and implies that a higher limit should be considered or the possibility of breakability of the limits should be endorsed in the lines of the Warsaw Convention.[258]

It is prudent to approach this question with due emphasis laid on the economic ramifications of this strictly legal consideration, since, at its core, the question addresses not principles of legal rectitude, nor issues of justice, but matters of financial interest to the parties concerned. It is inevitable, therefore, to consider the effect of limitation of liability as against unlimited liability and rationalise between the two, thus arriving at a synthesis of the concepts, or (if possible) a totally new concept. To determine this situation, it is necessary to assess the Warsaw Convention (principles of limitation of liability as coupled with unlimited liability in the event of gross negligence of the carrier), the Montreal Protocols (strict liability and higher limits of liability with no possibility to accommodate unlimited liability under any circumstances), and a pure instance of general liability with no inhibitions whatsoever. Of course, these three alternatives would be viewed from the standpoint of the plaintiff passenger or his dependant and the defendant airline. The operative theme of this inquiry would be money and not complex legal issues, since it is money in which both parties are ultimately interested.

It is incontrovertible that aviation insurers, when faced with increasing levels of claims and declining premium income, would naturally increase their policy deductibles and seek to incorporate exclusions of cover. The aviation insurance market increasingly feels that there is no closeness at all between the underwriters and brokers on the one hand and the insured (airline) on the other.[259] One commentator recommends either a substantial increase in voluntary limits of liability or total abandonment of limiting air carrier liability, implying that either would benefit

258. Cheng, *supra* note 240, at 232.

259. Kilbride, *supra* note 249, at 191.

both the plaintiff and the defendant.[260] Peter Martin suggests that the best future for the Warsaw system is the abandonment of limitations.[261] He states:

> There are very good reasons for imposing on carriers at least a very high standard of care, and even strict liability. Strict liability without limitations already applies in many States to third party liability to persons other than passengers and that is generally believed to be right . . . . Why should a passenger, therefore, be in a worse position than a person or owners of property on the ground?[262]

The insurance lawyers obviously need higher liability limits and specificity in this area. The steady disintegration of the Warsaw system (mainly attributable to its incompetence in providing for satisfactory compensatory limits) has been proved by figures, released by the Rand Corporation, that in a cross-section of cases studied, Warsaw-Montreal tickets obtained a per capita compensation of US$184,000, while non Warsaw-Montreal tickets had received double this amount. This amount has further increased over the years, demonstrating that the Warsaw limits are being left behind rapidly.[263] Therefore, it is clear that one of the viable alternatives to the IATA Intercarrier Agreement's strict liability and private contract proposal is to consider the extension of the Warsaw Limits. The first step towards this goal is the States' ratification of the Montreal Protocols. If such a measure is accepted, it is also imperative that the scope of the Convention be extended to third parties (such as air traffic controllers and manufacturers of component parts of aircraft) to seek consistency and to give the insurance market a clear picture, and a more accurate assessment. By bringing these parties under the Warsaw umbrella, both the plaintiff and the defendant would be well served. The plaintiff would be assured of quick settlement, and the defendant would be comfortable with the thought that liability is limited. This could also preclude contingency-fee appearances by lawyers.

One must at the same time, not lose sight of the importance of the insurance aspect to liability under the Warsaw Convention. It must be noted that, when the subject of insurance was addressed at the Warsaw Conference, the President of the drafting committee Mr. Gianini observed:

> I may remind you that, under present conditions of air navigation, we have arrived at the conclusion that the problem is not yet ripe. But, given the importance of the problem, given that no one is disposed to consider the

260. *Id.* at 192.

261. Martin, *supra* note 242, at 248.

262. *Id.*

263. Guldimann, *supra* note 239, at 96.

> work already done as an end, we have expressed, on my proposal, wishes by which we indicate that the study of the problem deserves to be pursued. That is to say that we leave the door open for later discussions. In order to advance the solution of this problem, we have also expressed a wish, signed by all governments, by which we ask the governments to bring insurance into practice as much as possible. It is only then that one will be able to envisage the possibility of setting up an international rule.[264]

These futuristic words of 67 years ago, which show vision and deep understanding of the future of civil aviation, should not be disregarded. It is time that the international aviation community looked hard at emerging trends relating to the Warsaw Convention and attempts a balanced and workable solution.

VI. Emerging Trends in 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. The other, which has turned out to be contentious, deals with instances where 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 misconduct. Article 25 of the Warsaw Convention provides:

> The carrier shall not be entitled to avail himself of the provisions of this Convention or 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.[265]

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.[266]

The primary significance of Article 25 is that it addresses both wilful misconduct and the "equivalent" of wilful misconduct.[267] The authentic and original text of the Warsaw Convention, which is in the French Language, uses the words "dol" and "faute. . .equivalente au dol."[268] There is a palpable inconsistency between English translation of the original text and the original text itself. The French word "dol" personifies the inten-

264. Conference, *supra* note 49, at 183.
265. *See* Warsaw Convention, *supra* note 1, at 3020.
266. *Id.*
267. *Id.*
268. *Id.* at 3006.

tion to inflict an injury on a person, whereas the English words "wilful misconduct" requires the defendant carrier to be aware of both its conduct, and the reasonable and probable consequences of its conduct, in the nature of the damage that may ensue from the carriers act. Wilful misconduct, therefore, may not necessarily involve the intention of the carrier, its servants or agents, and remains wider in scope as a ground of liability.

Most civil law jurisdictions have equilibrated "dol" with "gross negligence." 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, and 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.[269] Notable examples are assault or indecent behavior by personnel of the carrier; accidents caused by conduct of personnel; serving bad food; bumpy rides which cause passenger injury; and failure to instruct passengers of rough weather, etc.[270] Drion also makes the valid point of citing delay in carriage as having many dimensions that may be accommodated within the purview of Article 25 without warranting the consideration of intention.[271]

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. This approach is consistent with the original contention of the British delegate to the Warsaw Conference, who claimed that wilful misconduct should pertain to "acts committed deliberately or acts of carelessness without any regard for the consequences."[272] In the 1952 British case of *Horabin* v. *British Overseas Airways Corp.*, 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 result may be.[273]

In the same year, the New York Supreme Court Appellate Division held that wilful misconduct was:

> [D]epend[ant] 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

269. DRION, *supra* note 219, at 212.
270. *Id.* at 213.
271. *Id.*
272. Conference, *supra* note 49, at 59.
273. Horabin v. British Overseas Airways Corp. [1952] 2 All E.R. 1016, 1022.

> 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.[274]

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"[275] and "wilful performance of an act that is likely to result in damage or wilful action with a reckless disregard of the probable consequences."[276]

As to the second limb of Article 25, which provides that the equivalent of wilful misconduct suffices to impose liability, the Convention leaves the scope of the provision wide open, including such topical issues as substance abuse at the work place and aircrew fatigue.[277] A discussion of these issues follows.

VII. Recent Judicial Decisions on Wilful Misconduct

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*, where the trial court considered wilful misconduct to be the "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."[278] This pronouncement was used by the American Courts, in *Pasinato v. American Airlines Inc.*, concluding that the act of the flight attendant in question did not constitute wilful misconduct within the purview of Article 25 of the Warsaw Convention.[279] In *Pasinato,* a passenger on an American Airlines flight was struck on the head when a heavy tote bag fell from an overhead bin in the cabin.[280] The incident was the outcome of an initial request, immediately after take-off, by the passenger for a pillow.[281] 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's falling from the bin onto the passenger's head.[282] The passenger and her husband sued

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

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

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

277. Warsaw Convention, *supra* note 1, at 3020.

278. In re Korean Airlines Disaster of September 1, 1983, 932 F.2d 1475, 1479 (D.C. Cir. 1991).

279. Pasinato v. American Airlines, Inc., No. 93C1510, 1994 WL 171522, at *3 (N.D. Ill. May 2, 1994).

280. *Id.*

281. *Id.*

282. *Id.*

American Airlines under Article 25 on the grounds of wilful misconduct.[283] 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] deposition 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.[284]

The court took cognizance of the contention of 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.[285] 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 considered relevant.[286] The Court found difficulty in applying the criterion of *Korean Airlines Disaster*,[287] in that it was difficult, if not impossible, for the Court to envision how the flight attendant's actions could amount to wilful misconduct.[288] 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.[289] *A fortiori*, the Court observed that the other criterion established in *Korean Airlines*, that of an act which is performed in a manner indicating reckless disregard for the consequences, was also missing in *Pasinato*.[290]

In *Saba* v. *Compagnie Nationale Air France, (*involving damage to cargo), a federal trial court in Washington found for the plaintiff awarding 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 the carrier pending their loading onto the aircraft).[291] The Court in this instance followed *Pasinato* by reiterating the criteria for the proof of wilful misconduct as established by the *Korean Air* litigation.[292] A compelling piece of evidence, which enabled the

283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *In re Korean Airlines*, 932 F.2d at 1479.
288. *Pasinato*, 1994 WL 171522, at *3.
289. *Id.*
290. *Id.*
291. Saba v. Compagnie Nationale Air France, 866 F.Supp. 588 (D.C. Cir. 1994).
292. *Id.*

court to arrive at its conclusion in *Saba*, was the fact that the air carrier had disregarded its own cargo handling regulations in storing the carpets outdoors in the rain.[293] In its findings the court held, "In short, through a series of acts, the performance of which were intentional, [the carrier] 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."[294] The court, while waiving the liability limits of the Warsaw Convention in *Saba*, noted that a combination of facts, taken together, may amount to wilful misconduct.[295] In the courts view for an act to be intended it is sufficient, but not necessary, for the resulting injury or wrongfulness to reflect intention or knowledge.[296] It was also significant that the Court further observed that a finding of wilful misconduct was appropriate when the act or omission constituted a violation of a rule or regulation of the defendant carrier itself.[297]

Courts in the United States have been cautious to determine the parameters of "scope of employment" as envisaged in Article 25 of the Warsaw convention, which imputes liability to the carrier with regard to acts of its employees acting within the scope of their employment. In *Uzochukwu* v. *Air Express International Ltd.*, where a New York federal trial court confronted issues of theft by two airline employees of two carriers. The court held that the fact that the employees used forged documents to perpetrate the offence of theft sufficient to conclude that the act was outside the scope of employment, and that the carrier could not be held liable under Article 25.[298] 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 probable consequences.

In *Robinson v. Northwest Airlines, Inc.*, (decided in March 1996, involving circumstances similar to *Pasinato*), the court dismissed the appeal of the plaintiff who had lost in the trial court against the carrier.[299] The trial court permitted the carriers motion asserting the plaintiff's injury claims, stemming from her being injured by a piece of luggage falling from an overhead bin while the plane was taxiing and additional injuries

293. *Id.*

294. *Id.* at 594.

295. *Id.*

296. *Id.*

297. *Id.*

298. Uzochukwu v. Air Express Int'l, Ltd., No. 93CV5525, 1995 WL 151793 (E.D.N.Y. Mar. 27, 1995).

299. Robinson v. Northwest Airlines, Inc., 79 F.3d 1148 (6th Cir. 1996).

caused to her by a passenger striking her on the head with the latter's baggage, were valid at law.[300]

The Court of Appeals, in affirming the dismissal of the plaintiff's action, 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 degree of care to its passengers, it cannot be considered an insurer of the passenger's safety.[301] The court found that the plaintiff failed to raise an issue of fact regarding the carrier's breach of duty towards her.[302] 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 prevent this accident. At best, that is precisely what [the plaintiff] has established; the fact that an accident occurred. However, as noted above, common carriers are not absolute insurers of their passengers safety.[303]

Singh v. Pan American World Airways, Inc., offers a helpful insight into the rationale for determination of wilful misconduct.[304] 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 was 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.[305] In fact, there had been representations made to the management by the carrier's staff on several occasions prior to the hijacking.[306] 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.[307]

In the case of the Crash of Thai Airways Flight TG-311 near Kathmandu, Nepal in July 1992, the question at issue was whether the aircrew had been guilty of wilful misconduct in flying into terrain.[308] The fatal crash occurred during approach to Kathmandu airport, an airport known to be one of the most difficult in the world at which to land.[309] Evidence revealed that the captain gave the bearings of the aircraft to the control

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Singh v. Pan American World Airways, Inc*, 920 F.Supp. 408 (S.D.N.Y. 1996).
305. *Id.*
306. *Id.*
307. *Id.*
308. *See* Koirola v. Thai Airways Int'l, Nos. C942644SC, C950082SC, 1996 WL 402403 (N.D. Cal. Jan. 26, 1996).
309. *See Thai Airways Found Guilty of Wilful Misconduct in 1992 Kathmandu Crash Litigation*, XV LLOYD'S AVIATION L. 1 (1996).

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.[310] 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.[311] The court held:

> The 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 the 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*. . ..[312]

Thai Airways, 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.

A further dimension to the notion of wilful misconduct was added in Northwest Airlines Air Crash of August 1996, where the court added that a finding of wilful misconduct may be based upon consideration of a series of actions or inactions.[313] The court was of the view that, since many complex safety systems interact during an airplane flight, an air disaster would usually require multiple acts.[314] 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 only to the act that seemingly caused an accident.[315]

If one were to analyse 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 that then arises is whether such issues as substance abuse in the workplace and aircrew fatigue would subscribe to the notion of wilful misconduct, as it is presently perceived.

VIII. Conclusion

Admittedly, it would be extremely difficult for an airline to determine latent illnesses, such as tuberculosis of its passengers. Therefore, instances of negligence pertaining to an airline accepting for travel a person

310. *Id.*
311. *Id.*
312. *Id.* at 2-3.
313. Polec v. Northwest Airlines, Inc., 86 F.3d 498 (6th Cir. 1996).
314. *Id.*
315. *Id.*

infected with tuberculosis 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 and take initiatives on their own (such as those discussed in the introduction of this article), in order to convince a court they acted like a prudent and caring business enterprise in the face of a calamity.

It must be emphasized that an airline, in selling an airline ticket for travel, 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 *Tseng*[316] widened the scope of the word "accident," the case itself addressed a personal security check on a passenger), it remains to be seen whether courts would interpret infection as an accident *per se* under the Warsaw Convention. It certainly could be argued, 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 to be "any incident unexpected and external to the passenger which is avoidable by the airline and which causes death, wounding or injury to a passenger." Of course, the words "death, wounding or injury" would become more clear once the future of the ICAO Convention of 1999 is known.

316. El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999).