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I. INTRODUCTION

The terrorist bombing of an airliner, such as the much litigated Lockerbie disaster[1] several years prior, is not simply a horrible disaster but a vicious international crime of epic dimensions against hundreds of innocent people including many children. Instinctively, any person, including judges and jurors, cannot but feel some sympathy for the victims and their grieving families. These feelings can sometimes become an influential part of any litigation on the matter against the targeted airline.

The 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air[2] along with its modifications and additions governs monetary damages for injuries or deaths arising out of such an international aircrash.[3] The Warsaw Convention sharply limits the amounts that may be awarded, and as a result, United States courts, even in minor cases, have always had a strong hostility toward the Warsaw Convention.[4]

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1. *See* Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988), 37 F.3d 804 (2d Cir. 1994), *cert. denied,* 115 S. Ct. 934 (1995) (*Lockerbie*).

2. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40,105 (1994) [hereinafter Warsaw Convention].

3. *See infra* note 22.

4. *See generally* Larry Moore, *Chan v. Korean Air Lines, Ltd.: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention,* 13 HASTINGS INT'L & COMP. L. REV. 229 (1990) (discussing the Supreme Court's elimination, in its interpretation of the Warsaw Convention, of the American Rule, which previously set aside the limits of the treaty if the required warning on the ticket was set in a print size that was smaller than 10 point type) [Hereinafter Moore, *Chan v. Korean Air Lines, Ltd.*]; Larry Moore, *Mental Injury and Lesion Corporelle in International Aviation Under the Warsaw Convention: Eastern Airlines v. Floyd,* 22 ACAD. LEGAL STUD. IN BUS. NAT'L PROC. 504 (1993) (analyzing the Supreme Court's rejection of mental or psychic injury as an independent ground for recovering damages under the Warsaw Convention); Larry Moore, *The Lockerbie Air Disaster: Punitive Damages in International Aviation,* 15 HOUS. J. INT'L L. 67 (1992) (commenting

It is, therefore, manifestly important that the airline, which is also a victim in a terrorist tragedy, receives a full and complete hearing before judgment. Otherwise, the defendant airline incurs the full force of the anger and hostility that should be directed at the real murderers. Upon reading the dissenting justice's opinion in *Lockerbie*, it appears that such hostilities may have been transferred to the defendant Pan Am at the hands of the trial judge.[5]

The Warsaw Convention is a multinational treaty governing all liability in the airline industry with regards to losses or injuries to persons, baggage, or goods resulting from a delay or an accident while the aircraft is involved in an international flight, or while the aircraft serves as a leg of any other international flight.[6] From 1988 until the Second Circuit's *Lockerbie* decision, the decisions in Warsaw Convention cases were so consistent that it appeared there would be little excitement or interest in future cases litigated under this international treaty.[7] However, with the decision in *Lockerbie* and the Supreme Court's refusal to grant certiorari,[8] this view seems premature. New questions now arise as to what latitude may be given to the United States district courts in setting aside the damage limitations of the Warsaw Convention and in awarding compensation beyond those of the treaty.[9] Such questions were previously considered answered.[10]

This article addresses the utilization and treatment of international law in this area by the courts and the attorneys in *Lockerbie*. First, this article looks at the unusual nature of this case and at its possible effects on the settled law. If indeed this case signals a return to the days when the United States courts tended to frequently set aside the Warsaw Convention at will, then we are back, in terms of law, to where we were in 1988. Second, this article examines the strategy utilized in this case to determine if the defense made the best use of international law in presenting its case.

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on a Second Circuit ruling that brought the Court of Appeals into uniformity when it held that punitive damages could not be allowed under the treaty and that the Warsaw Convention was the sole cause of action for international air accidents) [herinafter Moore, *The Lockerbie Air Disaster*]; Larry Moore, *Air Disasters: Cause of Actions in International Aviation Under the Warsaw Convention; Burying the Ghost of Komlos*, 2 SE. J. LEGAL STUD. BUS. 57 (1993) (discussing an eleventh Circuit decision reaffirming the rule that the treaty provides the only cause of action in international air accidents) [hereinafter Moore, *Air Disasters*]. *See also* L. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK (1988).

5. *See Lockerbie*, 37 F.3d at 830 (Van Graafeiland, J., dissenting).

6. Andreas Lowenfeld & Allan Mendelsohn, *The U.S. and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-501 (1967).

7. Moore, *The Lockerbie Air Disaster*, *supra* note 4.

8. Pan Am. World Airways, Inc. v. Pagnucco, 115 S. Ct. 934 (1995).

9. *See generally Lockerbie*, 37 F.3d 804.

10. Moore, *The Lockerbie Air Disaster*, *supra* note 4.

As the global business and legal community becomes ever more a part of our daily lives, even skilled attorneys may find that attempting to try these cases entirely in terms of domestic practices, without the inclusion of substantial international techniques, limits the options and results available.

II. THE WARSAW CONVENTION

The Warsaw Convention is one of the world's oldest general international treaties and exclusively governs international commercial air travel. It was enacted in 1929 to protect the new aviation industry from the disastrously large judgments possible in air accidents at the time.[11] It also provided uniformity among countries as to the content of tickets, baggage claim checks, and airbills.[12] The information, found on the standard international traveler's airline ticket, is required by this treaty.[13]

Since its enactment, the treaty has been changed by a number of conferences and meetings.[14] To the United States, most of these conferences amounted to little,[15] having accepted only one modification from them.[16] Even that modification was not an official one, rather it was an indirect change resulting from an agreement reached in Montreal by major commercial airlines agreeing to both strict liability and to an increase in liability limits to $75,000.00 in international accidents.[17] This agreement was at the time enforced by the Civil Aeronautic Board, now the Federal Aviation Administration (FAA).[18]

The original Warsaw Convention was the result of two international conferences whose purposes were to draft a law aiding the development of the fledgling airline industry.[19] The idea came from a proposal by the French called the *Avant-Project*, which proposed to fix liability and provide for uniformity in the regulation of international aviation.[20] This proposal was submitted to the 1925 Paris Conference on Private International Air Law, the first of two conferences held for

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11. Larry Moore & Stephen P. Ferris, *Air Disasters And Their Financial Effects On The International Aviation Industry: Justification For The Warsaw Convention?* 4 J. LEGAL STUD. IN BUS. 107, 107 (1995).

12. Lowenfeld & Mendelsohn, *supra* note 6, at 498.

13. Warsaw Convention, *supra* note 2, art. 3.

14. *See* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 37-38 (1977).

15. *See* Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 549-50 (1991).

16. MILLER, *supra* note 14, at 37.

17. Agreement Relating to the Liability Limitations of the Warsaw Convention and the Hague Protocol, May 16, 1966, CAB 18,900, approved by Order E-23680, 31 Fed. Reg. 7302, *reprinted in* note following 49 U.S.C. § 40,105 (1994) at 1147-48 [hereinafter Montreal Agreement].

18. *Id.*

19. Lowenfeld & Mendelsohn, *supra* note 6, at 498.

20. MILLER, *supra* note 14, at 12-13.

this purpose.[21] The first draft of the Warsaw Treaty came out of this 1925 Conference.[22] A commission was formed and a panel of experts was appointed to study the problems of aviation and to present proposed solutions to an international convention, specifically called on to ratify these proposals.[23] The commission was called the Comite International Technique d'Experts Juridiques Aeriens.[24] It considered this problem over a four year period and made its final report to the second conference held in Warsaw, Poland, in 1929.[25] There, the treaty was ratified by the member nations in October, 1929,[26] and went into effect on February 13, 1933.[27]

The League of Nations and an additional 44 countries were invited to attend the 1929 Conference.[28] Thirty-two nations officially attended this conference, along with the representatives of the League of Nations and the International Commission of Air Navigation.[29] The United States sent a representative, but did not make a formal appearance as a participant and was listed as an unofficial attendant.[30] The United States became a formal signatory to the treaty in 1934.[31]

The United States never accepted the treaty because of its low liability limit in cases of personal injury or death.[32] Under Article 22(1) of the Warsaw Convention, the total damages allowed was 125,000 Poincare francs[33] or approximately $8,300.[34] The United States eliminated even the opportunity for inflation adjustments when it froze the value of gold. The United States later abandoned the gold standard altogether.[35] As a result of this abandonment of the gold

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21. *Id.* at 12.

22. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, October 4-12, 1929, Warsaw, 11-12 (Robert Horner & Didier Legrez trans., 2d ed. 1975) [hereinafter MINUTES].

23. G. Nathan Calkins, Jr., *The Cause of Action Under The Warsaw Convention*, 26 J. AIR L. & COM. 217, 220, 227 (1959). *See also* MINUTES, *supra* note 22, at 17-18.

24. Calkins, *supra* note 23, at 218 n.7.

25. *Id.* at 227.

26. *Id.* at 236.

27. Lowenfeld & Mendelsohn, *supra* note 6, at 501.

28. MINUTES, *supra* note 22, at 3.

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

30. Lowenfeld & Mendelsohn, *supra* note 6, at 502.

31. *Id.*

32. *Id.* at 504-05.

33. Warsaw Convention, *supra* note 2, art. 22.

34. Lowenfeld & Mendelsohn, *supra* note 6, at 49.

35. Rene Mankiewicz, *The Judicial Diversification of Uniform Private Law Warsaw Conventions*, 21 INT'L & COMP. L.Q. 718, 719 (1972). Warsaw Convention article 22(4) states that the 125,000 francs "mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national cur-

standard, the damage limits have been frozen at the last official U.S. gold to dollar exchange rate set by the Civil Aeronautics Board in 1958.[36] Because of the low amount of recovery with no adjustments for inflation, the United States courts have sought ways to avoid the limits of this Warsaw Convention.[37]

Due to the displeasure of the United States, the other member nations sought a compromise and called a number of later conferences and meetings to find an agreeable solution.[38] Few of these meetings led to any major changes.[39] The most important modifications were the Hague Protocol,[40] the Montreal Agreement,[41] the Guatemala City Protocol,[42] and the Guadalajara Warsaw Convention.[43]

None of these treaties, however, satisfied the United States, and none were ever ratified by Congress.[44] Only the Montreal Agreement has became a part of American law.[45] Criticism of the treaty and its limit on damage awards was always severe in the United States[46] and reached its climax in *Ross v. Pan American Airways*.[47] The protest caused by this case led other nations, who were parties to the treaty, to seek a compromise to the treaty amount without offending other nations.[48]

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rency in round figures." Warsaw Convention, *supra* note 2, art. 22.

36. Trans World Airlines, Inc. v. Franklin Mint Corp., 446 U.S. 243, 243 (1984).

37. Moore, *Chan v. Korean Air Lines, Ltd.*, *supra* note 4.

38. MILLER, *supra* note 14, at 37-38.

39. *Id.* at 38, 258.

40. Protocol to Amend the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* at Warsaw on Oct. 12, 1929, *done* at the Hague, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter the Hague Protocol]. This agreement, ratified by the other member nations in 1955, was so unpopular in the United States that it was not submitted to the Senate for confirmation until 1961. Though the entire purpose of the Hague Warsaw Convention was to appease the United States, its decision to raise the maximum damage award to only $16,000 was still too low for the United States. The Hague Protocol was still the subject of bitter debate until 1966 when the Montreal Agreement was placed into effect. It was never formally ratified in this country. MILLER, *supra* note 14, at 498-501.

41. *Montreal Agreement*, *supra* note 17. *See also* MILLER, *supra* note 14, at 37.

42. MILLER, *supra* note 14, at 37-38. This 1971 Protocol raised the limits for damages for nations signing it to $100,000. However, this was one of a number of later modifications to the Warsaw Convention that the United States did not sign. Moore & Ferris, *supra* note 11, at 110 n.27.

43. MILLER, *supra* note 14, at 38, 258. "This Protocol sought to solve the problems which arose when the contracting carrier used a third party carrier for some part of the international flight." Moore & Ferris, *supra* note 11, at 110 n.28.

44. Moore & Ferris, *supra* note 11, at 110.

45. Lowenfeld & Mendelsohn, *supra* note 6, at 595-96.

46. *Id.* at 502-04.

47. Ross v. Pan Am. Airways, 85 N.E.2d 880 (N.Y. 1949). *See also* Moore & Ferris, *supra* note 11, at 110.

48. Moore & Ferris, *supra* note 11, at 110.

The result was the 1955 Hague Protocol, which raised the treaty limits to 250,000 Poincare francs or approximately $16,600.[49] The United States rejected this compromise because it was still lower than the $25,000 increase, recommended by the United States at the time.[50] Congress never ratified the Hague Protocol though it was debated within the Office of the President and within Congress for ten years.[51] In 1965, those opposing the treaty prevailed and the United States officially filed a Notice of Denunciation of the treaty which was the first step in withdrawing from the Treaty.[52] This led to further negotiations among the member nations and among the airlines in an attempt to keep the United States under the Warsaw Convention.[53]

In a special meeting of the major air carriers of the member nations held in Montreal, Canada, in February of 1966, the private agreement that is still in effect today was reached.[54] This agreement mollified, but did not eliminate criticism of the Warsaw Convention within the United States as evidenced through its courts, which over the years allowed numerous exceptions to the limitations of the Warsaw Convention.[55]

However, beginning in 1989 with *Chan v. Korean Air Lines, Ltd.*,[56] the United States Supreme Court and appellate courts have issued a series of rulings sharply limiting the ability of lower courts to look for rights and remedies outside the Warsaw Convention in adjudicating cases that arise under it.[57]

III. THE LOCKERBIE CASE

One means by which a court may still circumvent the limits established by the Warsaw Convention is to find that the injury was caused by willful misconduct of the defendants as set forth in article 25(1) of the treaty.[58] A number of cases have been tried upon this is-

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49. *Id.*

50. Lowenfeld & Mendelsohn, *supra* note 6, at 506.

51. Moore & Ferris, *supra* note 11, at 111.

52. Lowenfeld & Mendelsohn, *supra* note 6, at 551. The United States was fully prepared to denounce the treaty unless the limits of liability were raised to at least $100,000. *See* Notice of Denunciation, 53 DEP'T ST. BULL. at 924-25 (1965).

53. Moore & Ferris, *supra* note 11, at 111.

54. *Id.*

55. *Id. See also* Moore, *The Lockerbie Air Disaster*, *supra* note 4.

56. Chan v. Korean Air Lines, Ltd., 109 S. Ct. 1676 (1989).

57. Moore, *Chan v. Korean Air Lines, Ltd.*, *supra* note 4.

58. Warsaw Convention, *supra* note 2, art. 25. Article 25 (1) states:

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

Id.

sue[59] and it has been a major issue in several others.[60] *Lockerbie* is such an Article 25(1) case. The manner in which it was conducted at the trial level resulted in the defendants getting what can at best be described as "minimal" due process and represents the attitude that many U.S. judges have exhibited toward the Warsaw Convention since its inception and represents the hazards to any defendant who does not fully understand or utilize the treaty.[61]

The known facts, as based upon all of the evidence as summarized in a straightforward analysis by the Court of Appeal's dissenting opinion, follow.[62] On December 21, 1988, Pan Am Flight 103 from London to New York exploded over Lockerbie, Scotland.[63] There was no hard evidence to prove when, where, or how the bomb was placed on the airplane.[64] No one knows if the bomb was placed on an unmatched piece of luggage,[65] that is a bag placed on board the plane but not accompanying any passenger,[66] or if it was brought aboard by some unwitting pawn.[67] How the bomb got on board was a matter of controversy and its proof was a highly contested issue among experts.[68] However, this was not the picture that the jury was allowed to see.[69]

A. *Trial Issues*

The Plaintiffs in this case proceeded under Article 25(1) of the Warsaw Convention.[70] This means that if the plaintiffs proved that the defendants were guilty of willful misconduct, the defendants could not then avail themselves of the liability limits of Article 22(1) of the

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59. *See* Rowe v. Gatke, 126 F.2d 61 (7th Cir 1942); American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949); Pekelis v. Transcontinental and W. Air, Inc., 187 F.2d 122 (2d Cir. 1951); Grey v. American Airlines, Inc., 227 F.2d 282 (2d Cir. 1955); Koninklijke Luchtvaart Maatschappij v. Tuller, 292 F.2d 775 (D.C. Cir. 1961); Leroy v. Sabena Belg. World Airlines, 344 F.2d 266 (2d Cir. 1965); Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965); Goepp v. American Overseas Airlines, 117 N.Y.S.2d 276 (1952); Froman v. Pan Am. Airways, 135 N.Y.S.2d 619 (1954).

60. *See* Hill v. United Airlines, Inc., 550 F. Supp. 1048 (D. Kan. 1982); Republic Nat'l Bank v. Eastern Airlines, Inc., 815 F.2d 232 (2d Cir. 1987); Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11 Cir. 1989), *rev'd* on other grounds, 499 U.S. 530 (1991); Harpalani v. Air India, Inc., 634 F. Supp. 797 (N.D. Ill. 1986); *In re* Air Crash Disaster at Gander, 684 F. Supp. 927 (W.D. Kan. 1987).

61. Lowenfeld & Mendelsohn, *supra* note 6, at 499.

62. Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988), 37 F.3d 804, 830-37 (2nd Cir. 1994), *cert. denied,* 115 S. Ct. 934(1995) (Van Graafeiland, J., dissenting).

63. *Id.* at 811.

64. *Id.* at 834 (Van Graafeiland, J., dissenting).

65. *Id.*

66. *Id.* at 819.

67. *Id.* at 834 (Van Graafeiland, J., dissenting).

68. *Id.*

69. *Id.*

70. *Id.* at 811.

treaty[71] and thus become subject to unlimited liability under Article 25(1).[72] Under the Warsaw Convention, willful misconduct means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death[73] or 2) in a conscious or reckless disregard of the fact that death or injury would be the probable consequences of its actions.[74] Under this definition, the Warsaw Convention's concept of willful misconduct involves an act or acts that are a flagrant violation of a duty intended to protect passengers, luggage, and cargo.[75] Thus, willful misconduct goes beyond the United States' common law concept of ordinary negligence and raises it to a level of fault that makes it more akin to our concept of gross negligence or reckless disregard of safety.[76]

Further, if there is no willful misconduct in the law of a particular nation in which a Warsaw Convention case is being tried, that case must be tried under whatever principles exist in that nation's legal system that is the equivalent of willful misconduct under the Warsaw Convention.[77] Note that this means that Article 25(1) is not to be read in such a manner as to allow the individual nation to determine if the act or actions in question would be considered willful misconduct by local standards. In other words, though Article 25(1) refers to local customs, because of its insistence on equivalence, it is obvious that there is the intent to establish a uniform international standard.[78]

If a plaintiff is successful in proving that the defendant was guilty of willful misconduct, this removes the limitations on damages established in Article 17 regarding amounts that may be awarded for injury or death.[79] This is not a blanket waiver of damage limitations

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71. Warsaw Convention, *supra* note 2, art. 22. *See supra* note 33 and accompanying text.

72. Warsaw Convention, *supra* note 2, art. 25. For text of article 25(1), *see supra* note 58.

73. *Lockerbie*, 37 F.3d at 812; *See also* Juan Acosta, *Willful Misconduct under the Warsaw Convention: Recent Trends and Developments*, 19 U. MIAMI L. R. 575, 575 (1965).

74. *Lockerbie*, 37 F.3d at 812; *see also* Acosta, *supra* note 73, at 575.

75. Acosta, *supra* note 73, at 589.

76. *See* RESTATEMENT (SECOND) OF TORTS Sec. 500 (1977).

> An actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act that was his duty to the other to do, knowing or having reason to know of facts that would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

77. Warsaw Convention, *supra* note 2, art. 25. For the text of article 25(1), *see supra* note 58.

78. *Id.*

79. Warsaw convention, *supra* note 2, art. 17. Article 17 states that:

though.[80] The defendant does not become liable for all manner of damages resulting from the accident, that is, it does not expand the types of damages beyond those allowed under Article 17.[81] It merely removes the dollar limit for Article 17 damages which only allow damages for personal injury.[82] The damage limit is determined in gold francs, because the United States was subject to the gold standard until 1958.[83] Additionally, the damages are subject, in this country, to the modification of the 1965 Montreal Agreement which raised the award limitation to $75,000.00.[84]

B. *Judicial Proceedings*

At trial, the plaintiffs proceeded to show that the defendants' security measures were so defective, specifically in its failure to comply with FAA regulations concerning unaccompanied baggage, as to amount to willful misconduct under Article 25(1).[85] The defense countered with a straightforward denial of misconduct and proceeded to attempt to offer proof in support of this position.[86] However, in relying solely on Article 25(1), the defendants unintentionally damaged both their case on appeal and their successful application to the Supreme Court to grant certiorari. To help fully understand what happened in this case, it may be best to summarize what was proven at the trial based upon all the facts gleaned from both the majority and dissenting opinion.

The plaintiffs' position was that the defendants' baggage handling procedure violated accepted FAA procedure and that there was no oral waiver from the agency of this procedure.[87] Because of this defective procedure, a terrorist was able to hide a bomb, disguised as a Toshiba radio, in a suitcase[88] that was then placed on an airplane in Malta, Spain.[89] This luggage was then transferred to the targeted Pan Am

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

Id.

80. *Id.*

81. *Id.*

82. *Id.*

83. Trans World Airlines, Inc. v. Franklin Mint Corp., 446 U.S. 243, 243 (1984).

84. Moore & Ferris, *supra* note 11, at 112.

85. Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988), 37 F.3d 804, 811 (2nd Cir. 1994), *cert. denied,* 115 S. Ct. 934 (1995).

86. *Id.* at 812.

87. *Id.* at 813-17.

88. *Id.* at 811.

89. *Id.*

flight in Frankfurt, Germany.[90] The bag was x-rayed, but not physically examined, at the Frankfurt airport in violation of FAA regulations.[91] The plane stopped in London before taking off for the United States.[92] Over Lockerbie, Scotland, the bomb exploded, killing all aboard.[93] Further, the defendants ignored repeated warnings, even to the point of hiding warnings from the crew and passengers.[94]

The plaintiffs' proof, as well as that offered by the defendants, was to be derived primarily through the testimony of expert witnesses.[95] This was because causation, the most important issue in this case, could not proven by any direct evidence and had to be developed by the testimony of experts.[96] At trial, as a result of the trial judge's rulings on a series of plaintiffs' objections, almost all of the defendants' experts, and therefore, their case was excluded from the jury.[97] The jury thus heard only the plaintiffs' side of the case and returned a verdict against the defendants.[98] An award of damages was granted to the estate of three victims as a test case for appeal on certain questions concerning damages under the treaty.[99] The damage award issue was whether the awards went beyond the provisions of the Warsaw Convention both as to the amount under Article 22 and as to the type under Article 17 of the Warsaw Convention.[100] The damage award for the remaining plaintiffs was to await the appellate decision on these issues.[101]

On appeal, the majority for the Court of Appeals, obviously, had a great deal of trouble in both deciding and in explaining its position in this case.[102] The initial decision was found unsatisfactory and a new decision issued.[103] Conceptually, the opinion decided two classes of

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90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 820.
95. *Id.* at 811.
96. *Id.* at 824-25.
97. Id. at 824-25. The dissenting judge, believed that:

> [t]he district judge treated this case as if Pan Am were being prosecuted for criminally violating a federal statute and, relying on his erroneous interpretation of criminal law, precluded every attempt by Pan Am to demonstrate that it did not know or believe that the probable result of its conduct would be injury to the plaintiffs.

Id. at 841 (Van Graafeiland, J., dissenting).

98. *Id.* at 811. "At the conclusion of the damages phase $9,225,000 was awarded to the Pagnucco family, $9,000,000 to the Bainbridge family, and $1,735,000 to the Porter family." *Id.*
99. *Id.* at 810.
100. *Id.* at 811.
101. *Id.* at 810.
102. *Id.* at 810 n.1.
103. *Id.*

issues. The main issue concerned the admissibility of evidence.[104] The other issue regarded the nature of the damages that may be permitted.[105]

It was the issue regarding the admissibility of evidence that caused the difficulties for the Court of Appeals. In analyzing the question of evidence, the court looked at a series of issues and rulings on testimony. First, it ruled that the lower court's rejection of the defendants' evidence, which the defendants claimed showed its state of mind, was not enough to warrant a new trial since the trial court decided that the defendant had received numerous warnings and ignored them.[106]

Although the court found there was error in rejecting the evidence of the defendants, showing that their security procedures were the same as those required by British security regulations, the court determined this was harmless error, as the defendants were able to place some evidence before the jury in other parts of the trial showing the effectiveness of their x-ray system.[107] The court also held that the trial court's exclusion of the defendants' expert to counter the testimony of the plaintiffs' expert, as to the security risk of unaccompanied luggage, was corrected by the trial court's curative instruction to the jury.[108]

While the trial court's acceptance of the plaintiffs' presentation of unrelated security issues was found to be prejudicial, this was considered proper because it showed causation.[109] The court further held that there was no error in barring the defendants' expert witnesses as to causation and in limiting the defendants' cross-examination of the plaintiffs' witness.[110] The court also found it was harmless error to have allowed the plaintiffs' expert to conclude that the defendants were in violation of the FAA regulation.[111] Finally, the court concluded that the defendants were not harmed by being denied the right to demonstrate the effectiveness of their x-ray because the plaintiffs stipulated as to its operation.[112]

Regarding the question of damages, the jury not only awarded damages for wrongful death, it also allowed damages for loss of society and companionship.[113] The court looked at the damages permitted

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104. *Id.* at 811.
105. *Id.*
106. *Id.* at 819.
107. *Id.* at 821.
108. *Id.* at 822.
109. *Id.* at 824.
110. *Id.* at 825.
111. *Id.* at 827.
112. *Id.* at 828.
113. *Id.* at 830 (Van Graafeiland, J., dissenting).

under Article 17 of the Warsaw Convention and held that losses had to be limited to those allowed under the treaty.[114] It ruled that the loss of companionship and society would not be allowed to adult children of victims and reversed the trial court on this issue.[115]

In the defendants' petition for writ of certiorari to the Supreme Court, the only issues left for consideration, though critical to the defendants' case, were questions regarding the admissibility of evidence in areas where the law was well established.[116] The Supreme Court has maintained a practice in Warsaw Convention cases in recent years of only taking those cases in which there is either some new questions about the treaty, or where the court had to correct an improper use or interpretation of the treaty in the lower courts.[117] With nothing to consider here but a relatively mundane question of admissibility of evidence, it is not surprising that certiorari was denied in this case.

C. *Article 20(1) As A Defense Tool In Warsaw Convention Cases*

As one reads through the Circuit Court of Appeal's summary of the defendants' actions in this case as laid out by the plaintiffs, one can easily become embittered towards the defendants. It is only after reading the dissenting opinion, which painstakingly laid out the elements of the defendants' case that was kept from the jury, does the case come back into perspective and allows one to see that the defendants had a legitimate and reasonable defense to the charge of willful misconduct. If hearing only one side of the case can enrage this author, who is an expert in Warsaw Convention cases, the subsequent verdict from a jury is not surprising. The Court of Appeals decision that the evidentiary rulings were harmless error is not persuasive.

The defendants cannot be faulted for the strategy used in this case. Because they had a fairly good defense, they decided to meet the plaintiffs' allegations head on, challenging the plaintiffs' facts with their facts, and the plaintiffs' experts with their own.[118] The defendants could not have reasonably anticipated that the trial judge would allow all of the plaintiffs' proof and bar almost all of the defendants' proof to the jury.[119] The trial judge treated this case as if it were a criminal case where the defendants knowingly broke the law, instead of as a civil suit where the issue was whether the defendants did all

114. *Id.* at 829-30.
115. *Id.*
116. *Id.* at 838-39.
117. Moore, *Air Disasters*, *supra* note 4.
118. Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988), 37 F.3d 804, 834 (2nd Cir. 1994), *cert. denied,* 115 S. Ct. 934 (1995) (Van Graafeiland, J., dissenting).
119. *Id.* at 845-46.

that they could do to carry out the goals of an administrative regulation.[120]

In retrospect, had the defendants utilized Article 20(1) of the convention[121] in framing their defense, it would have enhanced the ability to get their case before the jury, or in getting the Supreme Court to grant an appeal for the following reasons.

Article 20(1), among other things, absolves the defendant from liability if the defendant proves that it and its agents had taken all necessary measures to avoid the damage that has been caused.[122] The language of Article 20(1) places an affirmative duty on the defendant to prove that it took reasonable and necessary steps to prevent the accident.[123] Thus, if the defendant proceeds under this section, its actions become a jury question where the evidence is evaluated to determine if the defendant's actions satisfied the language of Article 20(1). Most importantly, the trial judge would not be in a position to exclude the defendant's evidence, as was done so easily and completely in this case, where evidence was offered only in opposition to the plaintiffs' proof presented under Article 25(1). In other words, since the burden of proof falls upon the defendant, under Article 20(1) it becomes more difficult for the court to exclude evidence on grounds that it is immaterial, or reduce it to a cautionary warning to the jury, without placing such rulings in jeopardy of being reversed as prejudicial error. More importantly, however, it allows the defendant to raise an issue under the Warsaw Convention for appeal purposes. In the past, appeals on these grounds have received far greater attention by the Supreme Court than other types of issues, such as questions of evidence as in this case.[124]

Using Article 20(1), the defendants could have then called their experts and through their testimony presented critical evidence. For instance, no one knew who placed the bomb on the airplane.[125] Next, any theories of how the bomb got on board were just that, theories of the testifying experts.[126] The questions of whether the bomb was in a Toshiba radio in an unaccompanied bag or whether it was carried on

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120. *Id.* at 841 (Van Graafeiland, J., dissenting).

121. Warsaw Convention, *supra* note 2, art. 20. Article 20(1) states that "the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." *Id.*

122. *Id.*

123. *Id.*

124. Moore, *Air Disasters*, *supra* note 4.

125. Pagnucco v. Pan American World Airways, Inc. (*In re* Air Disaster at Lockerbie Scot. on Dec. 21, 1988), 37 F.3d 804, 834 (2nd Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (Van Graafeiland, J., dissenting).

126. *Id.*

board by an unsuspecting passenger was all a matter of complete speculation.[127]

Another argument is that the company had asked for and believed it had obtained an interpretation of the FAA airport security regulations which allowed x-ray inspection as an acceptable alternate to physical examination, a request it was allowed to make.[128] The defendants could have also shown that they had numerous FAA inspections at the Frankfurt airport before and after the attack; that the defendants were never cited for their use of x-rays;[129] that the Pentagon relied on x-ray scanning;[130] that shortly after this disaster, the FAA approved x-ray examination at all airports;[131] that Great Britain, facing Irish Republican Army terrorism, used x-ray to guard against terrorist bombs;[132] that the x-ray used by the defendant was the most expensive and effective machine on the market and was one that would have easily shown a Toshiba radio in a suitcase;[133] and that the warning did not apply to the defendants because the defendants had been told a bomb would be placed on its plane by an unsuspecting Flemish female passenger and, as a precaution, had increased security looking for a person of that description.[134]

The defendants could have shown that it would have been highly unlikely for a terrorist to have taken a chance on a complicated bombing scheme in which a suitcase would criss-cross a continent subject to uncertain airline schedules, delays, and multiple take-offs and landing.[135] That would have made it impossible to guarantee that the bomb would not go off on the ground or get misplaced altogether.[136] Finally, the defendants would have been allowed to show that no such luggage as described in the defendants' case had been placed on the airplane.[137]

The defendants would then be in a position to take evidence presented in their affirmative defense pursuant to Article 20(1) and utilize it as a defense against the charge of willful misconduct under Article 25(1) on the grounds this proof showed a *mens rea* to avoid the terrorist attack for which they were warned. Therefore, the defendants could not have been guilty of willfully allowing the attack.

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127. *Id.*
128. *Id.* at 845.
129. *Id.* at 841.
130. *Id.* at 836 (Van Graafeiland, J., dissenting).
131. *Id.* at 846.
132. *Id.*
133. *Id.* at 833.
134. *Id.*
135. *Id.* at 836 (Van Graafeiland, J., dissenting).
136. *Id.*
137. *Id.* at 835.

IV. CONCLUSION

Even after hearing all of the defendants' proof, the jury might possibly have returned the same verdict. However, in such a case, this would be a verdict based upon all of the relevant facts and the defendants would have received the due process rights guaranteed to them under the constitution. Conversely, the results of the trial and appeal in this case gave the defendant minimum due process, if any at all.

It comes as no surprise, however, that the Supreme Court did not grant certiorari. On the crucial question of evidence, the defense did not question either the management of the Warsaw Convention by the United States courts or the terms of the treaty. All that remained was whether the trial court properly ruled on the admissibility of evidence.

Indeed, though not discussed at length in this paper, the defendants, at the Circuit Court level, won the only Warsaw Convention question raised at trial.[138] The Court agreed that the jury could not award damages for certain parental losses because they were not of the type allowed under Article 17 of the Warsaw Convention, as the damages could not be applied to adult children not under their parents supervision for purposes of the treaty.[139] The Circuit Court treated every other issue as merely a bad call by the trial judge, whose rulings changed neither the interpretation nor the application of the treaty in the United States. It has been these latter issues that have been the main concern of the Supreme Court in Warsaw Convention cases.[140] Because the issues on appeal did not raise any new questions of law in evidence or under the treaty, this case would be little more than a footnote to the history of the treaty in this country; therefore, it was of little appellant value for the Supreme Court.

To attorneys and practitioners under this treaty or any other international treaty, the lessons from this case are enormous. Attorneys must realize that when proceeding under a treaty they must utilize all elements of the treaty and not necessarily the most obvious sections in question. Attorneys must also be able to recognize when a trial court is lapsing into local considerations so that the attorney can remind the court of the cases international aspects. If this is not successful, then the attorney must be able to draft the appeal in terms that will bring forth the international questions, possibly hidden in the case, so as to force a true consideration of the treaty and their case on the merits. Otherwise, the results could be the same as in *Lockerbie*, where a magnificent international legal issue was reduced to a ruling on the admissibility of evidence.

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138. *Id.* at 828-30.
139. *Id.*
140. Moore, *Air Disasters*, *supra* note 4.