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Warsaw from the French Perspective: A Comparative Study of Liability Limits under the Warsaw Convention

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WARSAW FROM THE FRENCH PERSPECTIVE: A COMPARATIVE STUDY OF LIABILITY LIMITS UNDER THE WARSAW CONVENTION

I. INTRODUCTION

The Warsaw Convention, now over 45 years old, was originally designed to aid the growth of a new, undeveloped, and somewhat perplexing commercial enterprise—the international air transportation industry. Unfortunately, the drafters of the Convention took a narrow, and perhaps ill-advised, view of regulation of liability. They limited the carriers' liability for damage to an amount that could easily have been foreseen to be unworkable and they defined the concept of fault in ambiguous terms. While this fledgling attempt to codify an area of private international law was meant to provide a uniformity of terms that would be workable in a variety of legal systems, the result has been an increasing breakdown of the Convention's concepts in the courts of the ratifying states.

This note will analyze one of the inadequacies of the Warsaw Convention—the limitation of liability for passenger injury—on a comparative basis. The analysis will first give a brief historical background of the Warsaw Convention. Second, the basic nature of French tort concepts in relation to carrier liability and the specific application of those concepts to airline cases in France will be discussed. Finally, a brief overview of the standards employed in England, Germany, and the Soviet Union will be given.

II. THE WARSAW CONVENTION

A. *Historical Background*

The Warsaw Convention[1] was concluded in 1929 by representatives of the "air nations" of the world.[2] Called "[o]ne of the major achievements in the international unification of rules of private law,"[3] it was one of the first multinational agreements to impose

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature,* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 87, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

2. Note, *The Warsaw Convention: A New Look at Jurisdiction under Articles 17 and 28 and the Problem of Manufacturers' Liability,* 9 CORNELL INT'L L.J. 251, 252 (1976). *See also* 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES, ch. 7 at 4-5 (1968).

3. Cheng & Austin, *Air Law,* in THE PRESENT STATE OF INTERNATIONAL LAW AND

uniform limits on the liability of air carriers, lending aspects of predictability and certainty to the risks these carriers faced.[4] Chief among the innovations of the Warsaw Convention was the contractualization of the passenger-carrier relationship,[5] the imposition of a monetary limit on passenger recovery for injuries,[6] and a precise definition of the jurisdictional limits on suits against an airline.[7] While there has been some discussion as to whether the United States ratification of the Convention was legal,[8] the treaty nevertheless became federal law in 1934.[9] England ratified the treaty and made it into law in 1932, France and Germany in 1933, and the Soviet Union in 1934.[10]

The greatest weakness in the Warsaw Convention appears to be the liability ceiling established in article 22. The limit was originally set at 125,000 Poincaré gold francs, which was approximately U.S. $8,300.00.[11] Linking the liability limit to the price of gold was an attempt to account for the rise in cost of living.[12] As this proved insufficient in the face of rapidly rising costs, however, courts began to loosely interpret other terms of the Convention in order to compensate injury more adequately.[13]

As a result of these difficulties, the Hague Protocol, the product of ten years' work by the International Civil Aviation Organization (ICAO), was concluded on September 20, 1955.[14] The Protocol included three important provisions: it doubled the liability limit to $16,000; it authorized the award of litigation costs and fees; and it

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OTHER ESSAYS 183, 186 (M. Bos ed. 1973).

4. Note, *supra* note 2, at 251.

5. Warsaw Convention, *supra* note 1, art. 3. *See also* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 3 (1954).

6. Warsaw Convention, *supra* note 1, art. 22. *See generally,* Rosman v. Trans World Airlines, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

7. Warsaw Convention, *supra* note 1, art. 28(1). *See also* Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention,* 33 J. AIR L. & COM. 624 (1967).

8. *See* Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis,* 6 CAL. W. INT'L L.J. 86 (1975).

9. 49 Stat. 3000 (1934). The official text is in French, the English text is to be found at 49 Stat. 3014 (1934).

10. *See* 2 C. SHAWCROSS & K. BEAUMONT, AIR LAW (3d ed. P. Kennan, A. Lester & P. Martin 1975) app. A at 5, 6, 8B.

11. Cheng & Austin, *supra* note 3, at 186; Comment, *Legal Problems in Compensation under the Gold Clauses of Private International Law Agreements,* 63 GEO. L. J. 817, 818 (1975).

12. Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions,* 21 INT'L & COMP. L.Q. 718, 719 (1972).

13. Cheng & Austin, *supra* note 3, at 187.

14. The Hague Protocol, September 28, 1955, 478 U.N.T.S. 371.

amended article 25 of the Warsaw Convention to impose absolute liability for intentional or reckless harm.[15]

The text of the Protocol was not transmitted to the United States Senate until 1959, and the hearings on ratification did not begin until 1965, ten years after the Protocol was opened for signature.[16] By that time, despite suggestions to supplement recovery with legislatively-provided insurance, the higher liability limit contained in the Protocol did not provide adequate compensation to United States passengers.[17] Though many nations did ratify the Protocol, the United States did not. The Protocol does apply, however, to United States citizens who are passengers on flights originating and terminating in countries which are signatories to the Protocol.[18]

The rejection of the Hague Protocol in the Senate resulted in even greater dissatisfaction in the United States with the Warsaw Convention liability limits. On November 15, 1965, the Department of State gave formal notice of withdrawal from the Convention itself, to be effective in May 1966.[19] The United States courts supported this stance by refusing to apply the Convention's provisions on practically implausible grounds.[20] The ICAO held a special meeting of Warsaw signatories in February 1966 to negotiate higher liability limits but the discussions failed.[21] Through the efforts of prominent members of the International Air Transport Association (IATA), the international airlines themselves then

15. Boyle, *The Guatemala Protocol to the Warsaw Convention,* 6 CAL. W. INT'L L.J. 41, 43-44 (1975).

16. *See generally* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 (1967).

17. Boyle, *supra* note 15, at 44-45.

18. Welner, *The Continuing Attacks by American Courts on the Warsaw Convention,* 4 INT'L L. 915 (1970). There must be no agreed stopping place in the United States during the flight, however. *See* Cheng & Austin, *supra* note 3, at 190-91.

19. 53 DEP'T STATE BULL. 923 (1965). In the years after the Hague Protocol, the United States proposed increasingly higher liability limits. Other governments regarded the need for higher liability limits as a problem for which the United States should seek its own solution. *See* Cheng & Austin, *supra* note 3, at 187.

20. *See* Lisi v. Alitalia Linee Aeree Italiane, S.P.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd,* 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455 (1968), *reh. denied,* 391 U.S. 929 (1968). The court of appeals simply disregarded the Warsaw Convention because of the small print on the ticket. 370 F.2d at 513-14. The dissent charged that the majority was re-writing the Convention by "judicial fiat." *Id.* at 515.

21. Cheng & Austin, *supra* note 3, at 188.

began to look for a solution to the problem. The result was a voluntary special contract, called the Montreal Agreement, in which all air carriers operating to and from the United States bound themselves, in contravention of article 20(1) of the Warsaw Convention, to accept a liability limit of $75,000 and absolute liability for passenger injury.[22] The Agreement is applicable only to carriage under the Convention that includes a point of origin, a point of destination, or an agreed stopping place in the United States.[23] The Civil Aeronautics Board approved the Agreement on May 13, 1966,[24] and the denunciation of the Convention was simultaneously withdrawn.[25]

The Guatemala City Protocol of 1971 constituted a further effort to modify the Warsaw Convention.[26] This document was formulated at a diplomatic conference attended by many of the signatories to the Warsaw Convention and thus, unlike the Montreal Agreement, has international legal effect where ratified. It incorporated the principle of absolute liability by providing that a carrier is liable for passenger injury "upon condition only" that the tortious event took place on board the aircraft or during embarking or disembarking.[27] The defense of contributory negligence was retained,[28] and the liability ceiling was raised to 1,500,000 gold francs.[29] The Protocol also allows parties to adopt "domestic supplements" which would provide additional compensation beyond Convention limits to victims of international air accidents.[30] Although the proposals in this Protocol have been well received in the United States,[31] the United States has not ratified the Protocol.

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22. Boyle, *supra* note 15, at 47. *See* Cheng & Austin, *supra* note 3, at 189.

23. *See The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. AIR L. & COM. 243, 248 (1966) (Dep't of State press release).

24. C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966).

25. C.A.B. Order No. E-23680, *supra* note 24.

26. Guatemala City Protocol, March 8, 1971, *reprinted in* A. LOWENFELD, AVIATION LAW 437 (1972). For a discussion of United States negotiations and strategy, *see* Boyle, *supra* note 15, at 49-56.

27. Guatemala City Protocol, art. 4, *reprinted in* A. LOWENFELD *supra* note 26, at 438.

28. *Id.* art. 7, *reprinted in* A. LOWENFELD, *supra* note 26, at 439.

29. *Id.* art. 8, *reprinted in* A. LOWENFELD, *supra* note 26, at 440. As of 1973 this figure represented US $120,000.

30. For an explanation of this plan, *see* Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. AIR L. & COM. 273, 279 & nn.17-21 (1976).

31. *See id.* It has been suggested that the United States ratification of the

B. *The Modern Perspective*

Written primarily to support an infant industry and providing a level of monetary recovery for injury that is no longer reasonable, the Warsaw Convention is, in 1978, somewhat of an anomaly. It should be noted that the Convention's regulation of baggage, ticketing, and air shipping, while not within the scope of this analysis, is also outdated, and the provisions covering these areas have also been subject to frequent attack and revision.[32]

Extensive revisions and amendments[33] to the Convention attest to the inflexibility of its scope as originally drafted. The basic difficulty is evidenced by the discrimination between the rights of passengers resulting from the different "levels" at which nations have adhered to the Convention. The Convention and the Hague Protocol apply only to travel between those ticketed nations of origin and destination that have ratified either or both treaties, while the Montreal Agreement applies to air travel that has a "contact" with the United States. Thus, any one of three results can be reached. A passenger on a flight from London to Iran, for example, would not be limited in his recovery because Iran, the state of destination, is not a party to the Warsaw Convention. A passenger on a flight from Italy to Greece would be limited, however, to a $16,000 recovery because both origin and destination states ratified the Hague Protocol. If that same passenger had started his journey in New York, he could recover up to $75,000 because his flight would be governed by the Montreal Agreement.

The Warsaw Convention continues to be the basis for the international regulation of air travel, but no analysis of the Convention could proceed without mentioning the difficulties currently undermining many of its provisions. If the Convention was indeed aimed at providing a just and uniform scheme of recovery for injuries sustained in international aviation, its achievements in this regard

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Guatemala Protocol would really entail acceptance of the Hague Protocol. *See* Boyle, *supra* note 15, at 56-57.

32. *See* Fitzgerald, *supra* note 30.

33. Revisions include not only the Hague Protocol, the Montreal Agreement, and the Guatemala City Protocol, but also other documents relating to highjacking and international charter. The latter include: (1) the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 2 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971); (2) The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 1 U.S.T. 565, T.I.A.S. No. 7570 (effective Jan. 26, 1973); (3) The Guadalajara Convention of 1961, Int'l Civ. Av. Org. Doc. No. 8181 (1961). *See also* Fitzgerald, *supra* note 30.

are questionable. However, the prospect of revision of the treaty should encourage continuing analyses.

III. FRENCH LAW AND THE WARSAW CONVENTION

A. *French Tort Concepts*

French law is often characterized as "written law." It is the basis of the civil law system in which legal principles are codified and the actual development of the law depends not on precedent, as in the common law, but on the cumulative effect of interpretations of statutes.[34] French judicial decisions always cite articles from the appropriate code as support for holdings. The codes are broadly worded, stating basic rules rather than specific, factual commands. This generality facilitates the dependence of French law on statutory provisions. Legal rules are found in the statutes themselves, not in the application of rules to particular facts. Seemingly correspondent terms contained in the English and French texts of a treaty, therefore, may not in fact be equivalent because the common law derives the meaning of the term from a line of cases while the civil law codifies and defines the term first, then lets case holdings develop from it.[35] The primary purpose of codification in France is to unify the law nationally, simplify it, and eliminate practical problems.[36]

The French law of torts is founded on the judicial application of five provisions in the Civil Code, articles 1382 through 1386. The most important and broadly stated is article 1382, which provides that any one person has an obligation to make good the damage that he has caused another.[37] Article 1382 governs unintentional harm by providing that everyone is responsible not only for intentional damage but also for any damage caused by his negligence or carelessness.[38] The next three articles apply respectively to vi-

34. C. CIV. art. 5 (Fr. 1975); *see generally* Loussouarn, *The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law,* 18 LA. L. REV. 235, 256 (1958).

35. *See generally* R. DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY 81 (1972).

36. *Id.* at 11-12.

37. "Every act whatever of human agency which causes damage to another obliges the person by whose fault that damage has occurred to repair it." C. CIV. art. 1382 (Fr. 1975) (translation by the author). For an unofficial translation of the French Civil Code see J. CRABB, THE FRENCH CIVIL CODE (1977).

38. "Each person is liable for the damage that he has caused not only by his actions, but also by his negligence or by his imprudence." C. CIV. art. 1383 (Fr. 1975) (translation by the author).

carious liability,[39] liability for damage caused by animals,[40] and liability for buildings in need of repair.[41]

Fault is a prerequisite for all liability under the concept of "obligation." While the common law divides obligation into two distinct areas of tort and contract, French law considers it conceptually immaterial how the obligation arose.[42] Questions of damage and causation are the same in both cases.[43] To recover in tort, a plaintiff must show that he actually suffered existing and certain damage. French law distinguishes between material damage and moral damage: the former encompassing any loss measurable in terms of money, the latter encompassing mental anguish and pain and suffering.[44] Causation must exist between the act for which the defendant was responsible and the damage. Whether or not such a connection exists is a question of law that is reserved for the highest French court, the Cour de Cassation.[45] French courts need only find a slight degree of fault to impose liability[46] and French law allows the defenses of intervening causation, including supervening force and accident, contributory negligence, and assump-

39. "One is liable not only for the damage which he causes by his own action, but also for that damage which is caused by persons for whom he is responsible, or by those things which he has in his keeping." C. Civ. art. 1384 (Fr. 1975) (translation by the author). This article has been the most important source of liability for damage caused by vehicles. Whereas the plaintiff must prove the defendant at fault under articles 1382-1383, fault is presumed under this article, if it applies. The presumption of fault may be rebutted only if there is strict proof of an unavoidable and unforeseen event that could be imputed to the defendant. H. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 320 (1976).

40. "The owner of an animal or he who avails himself of it while it is being put to his use, is liable for the damage which the animal causes, whether the animal was in his keeping or whether it had strayed or escaped." C. CIV. art. 1385 (Fr. 1975) *translated in* J. CRABB, *supra* note 37, at 253.

41. "The proprietor of a building is liable for the damage caused by its collapse when it has happened by the fault of upkeep or through the defect of its construction." C. CIV. art. 1386 (Fr. 1975) (translation by the author).

42. Crabb, *Fault and* Faute, 5 INTER-AM. L. REV. 151, 152 (1963).

43. Catala & Weir, *Delict and Torts: A Study in Parallel,* 37 TUL. L. REV. 573, 576 (1963).

44. M. AMOS & F. WALTON, INTRODUCTION TO FRENCH LAW 202, 209 (3d ed. F. Lawson, A. Anton & L. Neville Brown eds. 1967). Material damage covers destruction of property, loss of profit, wages and support, and expenses. Moral damage is effected by injury to those things outside a person's "patrimony," the French legal concept of assets and liabilities appreciable in cash. For example, such extrapatrimonial rights include honor, liberty and privacy. *Id.*

45. *Id.* at 211.

46. *See, e.g.*, W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 32 (4th ed. 1971).

tion of the risk.[47] The latter two defenses are a complete bar to recovery, however, only if the plaintiff was solely responsible for his own injury.[48]

B. *Aviation Law in France*

The French Codes are divided into specific subject areas which cover five major fields of law: civil law, civil procedure, commerce, criminal law, and criminal procedure.[49] A major portion of the Code of Civil and Commercial Aviation (Code de l'aviation civile et commerciale), a minor code,[50] is contained within the Code de Commerce under articles concerning the general requirements for a freight waybill.[51] The Code Civil also contains a statement of an air carrier's liability concerning *respondeat superior* and liability for "things within one's protection."[52]

Articles 321-1, 321-4, 322-3, and 322-4 of the Code of Civil and Commercial Aviation govern the liability of an air carrier for passenger injury. The first article simply provides that the Code de Commerce applies to air carriers subject to the limitation of the other provisions.[53] Article 321-4 provides that under article 25 of the Warsaw Convention (a carrier cannot limit his liability if injury was caused by his "wilful misconduct"),[54] the standard of conduct shall be interpreted as "inexcusable fault."[55] Inexcusable fault is that deliberate conduct which implies a consciousness of the probability of damage and its reckless acceptance without a

47. H. DEVRIES, *supra* note 39, at 313.
48. *Id.*
49. *Id.* at 183.
50. 1 C. SZLADITS, GUIDE TO FOREIGN LEGAL MATERIALS 6 n.8 (1959).
51. C. COM. art. 102 (Fr. 1975).
52. C. CIV. art. 1384 (Fr. 1975) (translation by the author).
53. "Les règles du Code de commerce relatives aux transports par terre et par eau sont applicables au transport par air sous resérve des dispositions suivantes." Code de l'aviation civile, L. 321-1, *under*, C. COM. art. 102.
54. "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct." Warsaw Convention, *supra* note 1, art. 25(1), *reprinted in* A. LOWENFELD, *supra* note 26, at 419.
55. "Pour l'application de l'article 25 de ladite convention, la faute considérée comme equipollente au dol est la faute inexcusable. Est inexcusable la faute délibérée qui implique la conscience de la probabilité du dommage et son acceptation téméraire sans raison valable." Code de l'aviation civile, L. 321-4, *under*, C. COM. art. 102.

valid reason. Article 322-3 provides that the Warsaw Convention will govern the liability of carriers of air passengers in all cases except where the carriage is free. In such cases, the carrier's liability will not be limited under the Convention if it is proved that the damage was caused by the carrier or his employees.[56] The final article provides that the head officer of the flight crew has the statutory right to remove any passenger presenting a threat to the security of the airplane.[57] The aviation code article contained in the Code Civil provides that one who uses an aircraft is strictly liable to persons or things situated on the ground for damage caused by the movements of the aircraft.[58] This provision follows the recent trend of French decisions which hold the operator of a vehicle responsible for damage caused in its operation.[59]

While the Code of Civil and Commercial Aviation, considered in conjunction with the terms of the Warsaw Convention, gives an adequate overview of air carrier liability under French law, the role played by French courts in helping to fashion this law is noteworthy. Of particular interest in this regard is the standard of wilful misconduct. Article 25 of the Convention caused notable confusion after the full treaty came into effect,[60] not only in France but in all the signatory nations. Article 25 provided that the liability limit would not apply if passenger injury was caused by the misconduct of the carrier or any of its agents or servants acting within the scope

56. "La responsabilité du transporteur de personnes est regie par les dispositions de la Convention de Varsovie comme prévu aux articles L. 321-3, L. 321-4 et L. 321-5. Toutefois, sauf stipulations conventionelles contraires, la responsi-bilité du transporteur effectuant un transport gratuit ne sera éngagee dans la limite prevue par ladite convention, que s'il est etabli que le dommage a pour cause une faute imputable au transporteur ou a ses preposes." Code de l'aviation civile art. L. 322-3, *under*, C. COM. art. 102.

57. "Le commandant de bord a la fäculté de débarquer toute personne parmi les passagers qui peut présenter un danger pour la sécurité ou le bon ordre á bord d'un áeronef." Code de l'aviation civile art. L. 322-4, *under*, C. COM. art. 102.

58. "L'exploitant d'un áeronef est responsable de plein droit des dommages causés par les évolutions de l'áeronef ou les objets qui s'en detachéraient aux personnes et aux biens situés ä la surface."

"Cette responsabilité ne peut être atténuée ou ecartee que par la preuve de la faute de la victime." Code de l'aviation civile art. L. 141-2, *under*, C. CIV. art. 1384.

59. For a discussion of liability for cars and other vehicles, see H. DEVRIES, *supra* note 39, at 319-34.

60. *See* DuPontavice, *La loi du 2 mars 1957 sur la responsabilité de transporteur au cas de transports áeriens*, 28 REVUE GÉNERÁLE DE L'AIR 189 (1965), *reprinted in* [1965] Y.B. AIR & SPACE L. 335 (McGill U. Inst. Air & Space L.) [hereinafter cited as Y.B.].

of their employment. Judges often found such misconduct to have occurred, in order to by-pass the liability limits and compensate the plaintiff fully.[61] Decisions in both civil and common law countries differed on what constituted wilful misconduct. While German and Swiss courts found that the concept of gross negligence sufficed,[62] the French courts held to the concept of *dol*, the term used in the official French text of the Convention and translated in the English text as wilful misconduct. Unfortunately, *dol* differs from the English term in that it implies an intention to cause damage but does not necessarily include the elements of recklessness often associated with wilful misconduct in common law.[63] The discrepancies in the interpretation of article 25 led, at the Hague Conference in 1955, to its redrafting to provide that liability limits would not apply if "damage resulted from an act . . . done with intent to cause damage or recklessly and with knowledge that damage would probably result . . . ."[64]

France anticipated the change. Spurred on by the difficulty in applying the concept of *dol* and the feeling that such behavior by an airline pilot would amount to virtual suicide,[65] the French legislature had enacted in 1957 the provisions of what is now article L. 321-4 of the Code of Civil and Commercial Aviation.[66] The "inexcusable fault" of the code provision differed from the traditional definition given the term *dol* by French courts,[67] but it had the practical effect of bringing French decisions into line with the Hague Protocol even before France ratified it in 1959.[68] Article L. 321-4 has caused problems that continue in French courts. First, the law only applied to accidents that occurred after its implementation,[69] which meant recovery limits would be imposed only on the basis of occurrence in time. Though this problem has been resolved by the effect of statutes of limitation, there remained the question of what is meant by the term *conscience* (knowledge) in the statute. The varying interpretations of this term have involved precise analyses not only of particular fact situations, but also of tort

61. Mankiewicz, *supra* note 12, at 722.
62. *Id.* at 723.
63. *Id.* at 737.
64. A. LOWENFELD, *supra* note 26, at 429.
65. Mankiewicz, *supra* note 12, at 724.
66. *See* note 55 *supra.*
67. Mankiewicz, *supra* note 12, at 723-24.
68. The Hague Protocol entered into force in France on August 1, 1963. 2 C. SHAWCROSS & K. BEAUMONT, *supra* note 10, app. A. at 5.
69. *See* DuPontavice, *supra* note 60.

notions peculiar to civil law, and of the intent of the Hague Protocol itself.

The Cour de Cassation began in 1967 to develop an objective standard for knowledge of the likelihood of damage. It held in *Emery v. Sabena* that the fact that a pilot was unaware that his plane was 30 miles off course did not exonerate the airline from liability for the deaths of passengers when the plane crashed into mountainous terrain as it attempted to land.[70] The Court found, instead, that the crew of the plane knew that they had to stay within a ten-mile wide airway in order to avoid both atmospheric turbulence and the mountains, and that they should have used the full capabilities of the radio equipment at their disposal to avoid the danger. In *Air France v. Diop,* decided a year later, the Court elaborated on the objective standard, holding that *conscience* meant a presumption that the facts of the situation made it impossible for a pilot *not* to have been aware of the certain risks, as well as the mere probability, of damage.[71] The pilot in *Diop* had attempted a landing without instruments in stormy weather, even though he was unable to contact the radio tower, was barely able to see the landing strip, and had sufficient fuel to keep the plane in the air until landing conditions improved. There was also evidence that he was known for reckless behavior. In finding that knowledge should have existed, the Cour de Cassation stated that deliberate fault within the statute was characterized by "a persistance in confronting the foreseen risk, an obstinancy in the error."[72]

The insistence upon an objective standard has produced a conflict between the intent of the Hague Protocol, as evidenced in the French text, and article L. 321-4. The literal translation of the Protocol wording is "knowledge that damage will probably result from it (the act of the carrier or its employees)." This seems to imply that the defendant must actually know that damage can result. If he does not have that actual knowledge, liability will be limited. Article L. 321-4 states that the defendant must know of the probability of damage and accept it recklessly, without a valid

70. Reported in Verplaetse, *From Warsaw to the French Cour de Cassation: Article 25 of the Warsaw Convention,* 36 J. AIR L. & COM. 50, 53 n.10 (1970). An explanation of the facts can be found in the American case concerning the same accident, Leroy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965).

71. Judgment of June 24, 1968, Cass. civ. lre, France, [1968] Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 569, *cited in* Verplaetse, *supra* note 70, at 53.

72. Judgment of Jan. 5, 1967, Cour d'appel, Rennes, [1967] Revue Français de Droit Aérien 222, *summarized sub nom.* Kerdranvat v. Belliard [1967] Y.B. 224.

reason; this wording also seems to imply a need for actual knowledge. But the cases have interpreted article L. 321-4 to require only that a defendant *should have* had knowledge.[73] A pilot who flew his helicopter under cable car lines was held liable on grounds that such a stunt implied an awareness of the risks.[74] In a case that combined the worst elements of *Emery* and *Diop,* a pilot flew his plane into an area ringed by cliffs and encountered a thunderstorm, the existence of which would have been made known to him had he used his radio equipment. A court of appeals held that his conduct showed an "obstinancy [which established] his awareness of the probability of damage."[75]

This objective standard has also shifted the burden of proof in air crash cases brought in French courts. Where the plaintiff once had to prove intent to cause the damage, he may now benefit from a rebuttable presumption akin to *res ipsa loquitur* in the common law.[76] The courts seem to view certain fact patterns in air crash cases as egregious enough to establish an inexcusable fault sufficient to erase the limitations of the Warsaw Convention, or to bring the presumptive fault article L. 321-4 into play. Of course, once the fault is established, the elements of proof must be certain as regards recovery for individual injuries.[77]

A final caveat about translation problems must be added to any analysis of French dealings with the Warsaw Convention. The authentic text of the Convention is in French. The difficulty in reconciling the civil law term of *dol* with common law concepts of fault has already been discussed. There are further problems with the scope of vicarious liability and the general authority of the official text. Article 25 provides that the carrier is liable for the wilful misconduct of his "preposé" acting within the scope of his employment. While this term has been translated as "servant and agent" in the English text, in civil law it also includes the independent contractor. The carrier can thus be held liable by French courts for the acts of persons who are not his agents or servants

73. Verplaetse, *supra* note 70, at 54.

74. Judgment of June 9, 1966, Cass. civ., [Oct. 11, 1966] Gazette du Palais, *summarized sub nom.* Lambert v. Guiron, [1966] Y.B., *supra* note 72, at 433.

75. Judgment of February 9, 1966, Cour d'appel, Rouen, [1966] Revue Français de Droit Aérien 235, *summarized sub nom.* Mutuelle d'Assurances Aériennes v. Rioult, [1966] Y.B., *supra* note 72.

76. Verplaetse, *supra* note 70, at 54.

77. *See* Judgment of April 25, 1967, Trib. gr. inst., Grenoble, [1967] Revue Français de Droit Aérien 355, *summarized in* [1967] Y.B., *supra* note 72, at 224.

within the common law meaning.[78] In the case of aircraft charters, French courts will find that the liability of the contractual carrier (the charterer) is governed by the Convention because the actual carrier (the airline) is acting as his "preposé." Common law jurisdictions will find, however, that only the actual carrier is protected by the Convention because it is the party exercising the most important functions in the transportation of passengers.[79] The authority of the French text has also been brought into question in so seemingly small a dispute as whether the word "and" should be included in a phrase in article 8. In *Corocraft Ltd. v. Pan American Airways, Inc.*,[80] the plaintiff's right to recover full value of a lost parcel depended on whether the English translation of the French text was correct in requiring three particulars in an air waybill rather than one. The English courts that decided the case heard extensive testimony from French attorneys on the meaning of the text and finally decided that the English insertion of "and" was a translator's gloss that could not be given preference over the wording of the French phrase.[81] A plaintiff who has relied on the English text, but who is forced by venue, time, or circumstance to bring suit on his claim in France, must be prepared to deal with the French text.

IV. Comparative Liability Limits

A. *The United States*

While the question of air carrier liability in French law has developed around standards of tortious conduct, it has been effectively rendered moot in the United States by the Montreal Agreement of 1966. Each carrier joining in the Agreement waived the right to claim the Warsaw Convention article 20(1) defense. That article limited liability when the carrier and its agents had taken all necessary measures to avoid damage to passengers, or when it was impossible for the carrier and agents to take such measures. This waiver, coupled with the article 25 liability for wilful misconduct, effectively submits the airlines to absolute liability for pas-

78. Mankiewicz, *supra* note 12, at 740.

79. Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

80. [1968] 3 W.L.R. 1273.

81. *See* Mankiewicz, *Conflicting Interpretations of the Warsaw Air Transport Treaty*, 18 Am. J. Comp. L. 177 (1970).

senger injury.[82] In return for the carriers' submission to such stringent liability standards, the Agreement limits recovery for death or bodily injury to $75,000, including legal fees and costs. The effect of the Agreement is to protect signatory airlines from a judicial determination by an American court that its conduct in an accident was so grievous as to remove it from the Warsaw limitation and subject it to an unlimited adverse judgment.

Before the Agreement was implemented, American courts followed a liberal definition of wilful misconduct. In *American Airlines v. Ulen,*[83] the court charged that the standard was met if the act was intentional with the knowledge that injury would likely result, and further, was done "with a wanton and reckless disregard of the consequences."[84] The Warsaw Convention was inapplicable, the court held, because the pilot's failure to plan his flight so as to miss a high mountain that he knew was within his altitude range was evidence of deliberate and reprehensible action. Soon after *Ulen,* a New York district court interpreted wilful misconduct the same way, stating in its charge to the jury that it involved *either* deliberate intent to injure *or* intentional misconduct which implied willingness to injure *or* "complete disregard for the natural consequences of the act."[85] The Second Circuit, in *Pekelis v. Transcontinental & Western Air, Inc.,*[86] upheld a lower court judgment that defined wilful misconduct in four alternative ways, ranging from intentional commission of an act with knowledge of probable injury to intentional omission of an act which implied reckless disregard of the consequences.[87]

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82. *See* Montreal Agreement, para. 1, *cited in* A. LOWENFELD, *supra* note 26, at 434.

83. 186 F.2d 529 (D.C. Cir. 1949).

84. *Id.* at 533. Note also the carrier's argument re the term "dol".

85. Ritts v. American Overseas Airlines, [1949] U.S. Av. REP. 65, 69-70 (S.D.N.Y. 1949) (transcript of jury instructions). The jury held in favor of the airline. *Id.* at 71.

86. 187 F.2d 122 (2d Cir. 1951).

87. *Id.* at 124. The judgment for the plaintiff, under the limits of the Warsaw Convention, was reversed and a new trial ordered. *Id.* at 131. The charge stated that wilful misconduct is:

> (1) the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or (2) the intentional performance of an act in such a manner as to imply reckless disregard of probable consequences, or (3) the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or (4) the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission.

Beginning in the 1950's, however, American courts began to retrench and take a restrictive view of the conduct necessary to defeat the Warsaw Convention's limited liability provisions. The New York Supreme Court charged in *Froman v. Pan American Airways, Inc.*,[88] that the actor must have intended the result that came about or must have conducted himself "with knowledge of what the consequences would be and have gone ahead recklessly despite his knowledge of those conditions."[89] Two years later, in 1955, the District Court for the Southern District of New York retreated from its earlier perspective on wilful misconduct and applied a definition much like that in *Froman.*[90] The Second Circuit also relented that year. In *Grey v. American Airlines,*[91] it approved a charge that stated that there "must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences."[92] The evidence showed that when the plane's fourth engine malfunctioned, it caused the plane to swerve as it started to land. The Captain and First Officer tried conflicting safety measures in the confusion, and the plane crashed. In affirming the jury's verdict for the defendant, the court of appeals said that the actions of the crew indicated a sincere attempt to save both plane and passengers and it was reasonable for the jury to find that there was no wilful misconduct. Subsequent Second Circuit decisions reiterated the view that knowledge of the consequences was required. *Berner v. British Commonwealth Pacific Airlines, Ltd.*,[93] held that knowledge must be coupled with recklessness, not offered as an alternative to it. *Leroy v. Sabena Belgian World Airlines,*[94] decided in the same year, adopted a similar position. *Leroy,* it should be noted, concerned the same air crash that was the basis for *Emery v. Sabena,* the 1967 case before the Cour de Cassation. Though the French court had found that the pilot was unaware of the plane being off course, the Second Circuit thought

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Lacey, *Recent Developments in the Warsaw Convention,* 33 J. AIR L. & COM. 385, 391 (1967).

88. [1953] U.S. & CAN. Av. 1 (N.Y. Sup. Ct. 1953) *aff'd,* 284 App. Div. 935, 135 N.Y.S.2d 619 (1955) (mem.).

89. *Id.* at 6.

90. Rashap v. American Airlines, [1955] U.S. & CAN. Av. 593 (S.D.N.Y. 1955).

91. 227 F.2d 282 (2d Cir. 1955), *cert. denied,* 350 U.S. 989 (1956).

92. *Id.* at 285. The Court cited *Ulen, supra* note 83, and *Pekelis, supra* note 86, as precedent for its approval.

93. 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966).

94. 344 F.2d 266 (2d Cir. 1965), *cert. denied,* 382 U.S. 878 (1965).

the facts implied that the crew of the plane deliberately misled the air controller in Rome who was giving them landing instructions. The significance of the two decisions, however, lies in the finding by both courts that the carrier was liable without limit. The French court used a standard of implied knowledge while the American court found intentional misconduct, but both bypassed the Warsaw limits because of the egregious circumstances and recklessness of the actions.

Even though the Montreal Agreement took the question of liability out of the hands of the jury, American courts have nevertheless been active in extending carrier liability under the Warsaw Convention. Several recent American opinions, for example, have dealt with carrier liability for injuries incurred during disembarkation. A passenger injured in a fall in the baggage delivery and customs area of the terminal was denied recovery in *McDonald v. Air Canada*[95] because she had reached what the court termed a "safe point" after leaving the plane. The First Circuit held the carrier's liability ceased when she reached this undefined area, even though she was still a passenger of the carrier while in the building. Several later New York cases adopted the "safe point" theory,[96] and in *Hernandez v. Air France*,[97] the First Circuit reaffirmed it. Recently-landed passengers, who had left the airplane and had been taken to the terminal one-half mile away, were attacked by terrorists. The passengers had already presented their passports to authorities, and were waiting in the main baggage area, a fact that the court said established their "separation from the aircraft." The court's holding contravened the decisions of the Second and Third Circuit Courts of Appeal, where passengers who had been injured in a similar terrorist attack during a search prerequisite to boarding, had been allowed to recover under article 17 of the Warsaw Convention.[98] It is significant that one of the primary sources of

95. 439 F.2d 1402 (1st Cir. 1971).

96. *See* Felismina v. Trans World Airlines, Inc., 13 Av. Cas. 17 & 145 (S.D.N.Y. 1974); Klein v. K.L.M. Royal Dutch Airlines, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (1974). Neither court, however, defines this point other than to note that it is reached once the passenger descends from the plane and enters the terminal. The most recent articulation of this theory can be found in Maugnie v. Compagnie National Air France, 549 F.2d 1256 (9th Cir. 1977), *cert. denied,* 45 U.S.L.W. 3807.

97. 545 F.2d 279 (1st Cir. 1976), *cert. denied,* 45 U.S.L.W. 3652.

98. *See* Evangelinos v. Trans World Airlines, 550 F.2d 152 (3d Cir. 1977); Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975), *cert. denied,* 429 U.S. 890 (1976). The First Circuit distinguished these cases on the facts presented. 545

precedent in this narrow question is a 1966 decision by the French Cour de Cassation where a passenger was denied recovery for an injury incurred while crossing the "customs garden" to the side of the airport traffic apron. The Court had concluded that the customs garden did not present "risks inherent" in air transportaion.[99]

B. *England*

The question of air carrier liability has not been widely litigated in England. One of the primary factors cited is the "reversed burden of proof system," *i.e.*, the absolute liability provisions, brought into play by the Hague Protocol and the Montreal Agreement.[100] That the evolving provisions of the Warsaw Convention have been fully absorbed into English law may have contributed to the lack of lawsuits. The Carriage by Air Act of 1932 gave effect to the original Convention on May 15, 1933.[101] The Convention was then incorporated into domestic law, with certain exceptions, in the Order of 1952.[102] The most notable of these exceptions was that the carrier could escape liability for the tortious acts of his employees only if he was not in privity with the employees. Contrary to the Warsaw provision that all necessary measures had to be taken to avoid the damage, the carrier and his employees had only to prove that all reasonable measures had been taken.[103] Thus, the common law rule of vicarious liability was considerably narrowed in English domestic air transportation cases.

These provisions were rendered obsolete, however, by the Carriage by Air Act of 1961,[104] which actually came into force in 1967.[105] The Order of 1967 applied the amendments of the Hague Protocol to the provisions of the Warsaw Convention as enacted in English law. While the treatment of international air carriage by English

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F.2d at 282-84. *Accord,* Leppo v. Trans World Airlines, 56 App. Div. 2d 813, 392 N.Y.S.2d 660 (1977).

99. Judgment of Jan. 18, 1966, Cass. civ. lre, France, [1966] Dalloz-Sirey Sommaires 85, *noted as* Mache v. Air France, 33 J. AIR L. & COM. 208 (1967).

100. Martin, *Death and Injury in International Air Transport,* 41 J. AIR L. & COM. 255, 255-56 (1975). He also cites other factors, including the inclination of Europeans to settle cases and the respect for the Convention held by the European judiciary.

101. *See* 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 10, at 400.

102. *See id.* at 465.

103. *Id.* at 469.

104. 9 & 10 Eliz. 2, ch. 27, *reprinted in* 2 C. SHAWCROSS & K. BEAUMONT, *supra* note 10, app. B at 118.

105. *See* 2 C. SHAWCROSS & K. BEAUMONT, *supra* note 10, app. B, at 118.

courts changed only to reflect the new liability limits of the Protocol, the status of domestic air carriage changed significantly. The carrier no longer has to prove lack of privity with his employees. The 1967 Order also revoked all previous legislation that had clouded the effect of the Convention in England, and made the treaty a law with total authority.[106] In effect, the Warsaw Convention now governs every aspect of air transportation in England, both international and domestic.

English case law on the carrier's loss of Warsaw protection through wilful misconduct is minimal. The interpretation of "wilful misconduct" in place of the French "dol" excludes any form of negligence. In arriving at that interpretation, English courts relied exclusively upon the English law of railway carriage, and did not examine the usage of the terms in any other legal system.[107] The only English decision defining the term has been *Horabin v. British Overseas Airways Corp.*[108] There, in its charge to the jury, the court stated that wilful misconduct could be established only if it were shown that the pilot knowingly (and in that sense wilfully) did the wrongful act and that he was aware that it was a wrongful act during its commission.[109] The facts showed that the pilot was unfamiliar with the flight pattern he was to follow, refused to land in France when given permission, or to fly to an alternate landing sight, but instead, struck out for southeast England where the weather conditions were bad. The jury found, however, that the pilot had made only a grave error in judgment which did not amount to wilful misconduct, and the court held for the defendants.

C. *Germany and the Soviet Union*

The Warsaw Convention, as amended by the Hague Protocol, came into force in the Federal Republic of Germany on August 1, 1963.[110] The Warsaw provisions expressly cover international air carriage; domestic air carriage is govened by the so-called Air Navigation Act of 1959. Liability under this legislation is remarkably broad. The owner or operator of a plane is absolutely liable for the injury to or death of any person employed in connection with the

106. *See* 2 C. SHAWCROSS & K. BEAUMONT, *supra* note 10, at 426.
107. *Id.*
108. [1952] 2 All. E.R. 1016.
109. *Id.* at 1022.
110. LuftVG § 34 *in* DEUTSCHE GESETZE (SCHONFELDER) (W. Ger.).

aircraft and its operation.[111] The owner's only defense is the contributory negligence of the victim, but that is difficult to prove. Acts of God and *force majeur* are not defenses.[112] The carrier's liability for injury to passengers is the same as that under the Warsaw Convention. Passengers injured in domestic air transportation may recover from the carrier whenever the carrier cannot show that he and his employees took all necessary measures to prevent the damage or that it was impossible to take such measures.[113]

The standard of wilful misconduct under the Warsaw Convention has been likened by the German courts to gross negligence. Such conduct is defined as total disregard of something which is clear to an individual in the particular case, or the omission of obvious and simple considerations. In the case where this definition was formulated, the plaintiff claimed damages in excess of the Warsaw limits for injury incurred when the plane in which he was being carried crashed at a Rio de Janeiro airport. The airport lacked modern facilities and the plane's crew did not speak Portuguese, which caused communications problems with the control tower. The court held, however, that these events did not constitute gross negligence because the airport was used by all planes flying in and out of the area and English was widely used in radio communications with the tower.[114]

In the Soviet Union, air law is subject primarily to the Air Code of December 26, 1961, and secondarily to the Warsaw Convention as amended by the Hague Protocol.[115] In the event of passenger injury on a domestic flight, the carrier is liable unless he proves that the injury resulted from the intentional act of the victim.[116] The Air Code extends liability on the theory that air travel is a source of increased danger and further, omits *force majeur* as a circumstance excluding the carrier's liability. The carrier's liability will be limited under international agreements to which the U.S.S.R. is a party unless the damage occurred as a result of the intent or gross negligence of the carrier or persons authorized by him while performing their official duties.[117] Under the Air Code,

111. LuftVG § 33 *in* DEUTSCHE GESETZE (SCHONFELDER) (W. Ger.). *See also* 1 E. COHN, MANUAL OF GERMAN LAW § 332 (2d Ed. 1968); [1967] Y.B., *supra* note 72, at 92.

112. [1967] Y.B., *supra* note 72.

113. §§ 44 & 45 LuftVG (W. Ger.).

114. [1967] Y.B., *supra* note 72, at 229.

115. 1 F. FELDBRUGGE, ENCYCLOPEDIA OF SOVIET LAW 33 (1973).

116. J. HAZARD, COMMUNISTS AND THEIR LAW 394 (1969).

117. 1 F. FELDBRUGGE, *supra* note 115, 34-36.

then, wilful misconduct is interpreted as "intent or gross negligence."[118]

V. CONCLUSION

The most important question governing Warsaw Convention liability is whether the Convention applies at all. First, both the ticketed state of origin and the ticketed state of destination must be parties to the Convention. If either state is not an adherent, then liability is not limited. Second, the injury must come within the purview of the language of the Convention. If, for example, a passenger has already disembarked, then the carrier is not liable for an injury. Third, the status of a state's adherence to the Convention must be determined. If the state has ratified the Hague Protocol, the liability limit is higher than if the Protocol has not been ratified. Fourth, the Montreal Agreement must be considered. If the carrier is a party to that Agreement, as all United States carriers are, then the liability limit is a flat $75,000. For the states whose treatment of the Warsaw Convention has been discussed, the first consideration is moot because all are parties to the Convention. A step-by-step delineation of different liability considerations is often lacking, however, in the reported opinions. Most courts treat Convention adherence and liability as an ironclad rule, seeming to forget that the Convention, no matter what its treatment in their native country, is neither universally nor consistently accepted, nor are many of its terms usable within the context of the modern air industry. These factors are important to the formulation of decisions affecting policy, such as the assignment of responsibility to protect against terrorism aimed at air passengers. When a court decides that the carrier should bear the cost of injury primarily because the thrust of the Warsaw Convention was to allocate that cost in *that* direction, it overlooks the simple fact that when the Convention was written no other party *could* bear the costs. In 1929, the risk was too great to make the passenger suffer. The risk and the costs are still considerable in 1977, but perhaps the allocation should no longer be one-sided. Governmental assistance might be the answer, and the courts could point that out.

The problem with the wilful misconduct standard could also be approached more realistically if the policy behind application of the Convention were considered. Seemingly, article 25 was in-

118. *Id.*

cluded in the Convention as a sort of safety-valve measure, a "last clear chance" type doctrine that would assure an unlimited recovery for a badly injured plaintiff. The safety-valve made sense when air transportation was still largely experimental. It makes little sense today, now that government regulation and industry innovations have made air travel the safest mode of transportation. Furthermore, the standard has produced much confusion since courts of different nations interpret it differently. The French recognized this problem when they redefined *dol* in 1957. All in all, the standard has proved troublesome and of questionable worth. It is suggested that the wilful misconduct standard be discarded and the limits raised. The results would be two-fold: uniformity would be achieved in one area of air carrier liability and the nature of the industry would be more accurately reflected.

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