Flying the Warsaw Convention's Not-So-Friendly Skies: Should Air Carriers' Wilful Misconduct Go Unpunished?

This Comment examines the possibility of awarding punitive damages under the Warsaw Convention. A review of United States judicial decisions regarding this issue is provided, along with an examination of how the United States Supreme Court has interpreted the Warsaw Convention in the past.

INTRODUCTION

A much disputed issue in the field of aviation litigation currently surrounds the awarding of punitive damages under the 1929 International Convention for the Unification of Certain Rules Relating to International Carriage By Air (Warsaw Convention or Convention).[1] As the governing law[2] regarding the rights and liabilities of passengers and cargo involved in international air travel,[3] the Warsaw Convention is remarkably silent on the question of whether punitive damages can be recovered from an air carrier whose wilful misconduct results in passengers injured or killed during an international air flight. This silence has led to a variety of United States judicial interpretations regarding the availability of punitive damages, which in turn has caused a split of authority involving such damages.[4]

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1933) [hereinafter Warsaw Convention]. This treaty is widely referred to as the Warsaw Convention, as it was signed in that city in 1929.

2. In the United States, all treaties are made a part of the "Supreme Law of the Land." U.S. CONST. art. VI, cl. 2; Abramson v. Japan Airlines, 587 F. Supp. 1099 (D.C. N.J. 1983). This Comment will restrict its scope to interpretation of the Convention by courts in the United States.

3. "This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise." Warsaw Convention, *supra* note 1, art. 1 (1), 49 Stat. at 3014, T.S. No. 876 at 16, 137 L.N.T.S. at 15.

4. Two courts allowed the awarding of punitive damages in cases involving wilful misconduct by the air carrier. *See In re* Hijacking of Pan American World Airways, Inc.

This Comment explores the recent dilemma[5] surrounding punitive damages under the Warsaw Convention in an attempt to further define the issues and to suggest the correct resolution of this matter. Part I provides a brief review of the Warsaw Convention's history and its specific provisions relating to air carrier liability and damage awards. Part II reviews the various United States circuit court and court of appeals' decisions which have been reached in this matter. Part III explores previous United States Supreme Court decisions on the Warsaw Convention and relevant United States Supreme Court decisions regarding treaty language interpretation. Finally, Part IV suggests that the United States Supreme Court should resolve the issue by allowing the awarding of punitive damages under the Warsaw Convention.

I. WARSAW CONVENTION HISTORY

The Warsaw Convention was drafted with the purpose of regulating international air travel in a uniform manner and limiting air carrier liability.[6] The driving force behind the Convention was an international desire to aid the new airline industry in expanding its routes and allowing air carriers to obtain insurance coverage.[7] The 1929 Convention was attended by representatives from thirty-two countries; although the United States was not represented by an official delegate, United States observers were in attendance.[8]

Aircraft at Karachi International Airport, Pakistan on September 5, 1986, 729 F. Supp. 17 (S.D.N.Y. 1990), *cert. denied sub nom.*, Rein v. Pan American World Airways, Inc., 112 S. Ct. 331 (1991). The District Court held that the Warsaw Convention did not preempt a claim for punitive damages. *See also In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171 (D.D.C. 1987), *cert. granted sub nom.*, Chan v. Korean Air Lines, Ltd., 485 U.S. 986 (1988). A third court also seemed to indicate in dicta that punitive damages would not be disallowed under the Warsaw Convention. Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).

Several courts have found contra by denying punitive damages in cases of wilful misconduct. *See In re* Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267 (2d Cir. 1991); Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990), *rev'd*, 111 S. Ct. 1489 (1991).

5. The United States Supreme Court has only construed the meaning of the Warsaw Convention four times; all four Court decisions were reached in the last eight years. Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489 (1991); Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Air France v. Saks, 470 U.S. 392 (1985); Trans World Airlines, Inc. v. Franklin Mint Corp. 466 U.S. 243 (1984). *See infra* Part III.

6. The Convention "recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Warsaw Convention, *supra* note 1, Preamble, 49 Stat. at 3014, T.S. No. 876 at 16, 137 L.N.T.S. at 15.

7. *See generally* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Kimberlee S. Cagle, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953 (1986).

8. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, 3-10 (Robert C. Horner & Didier Legrez trans., 1975).

The Warsaw Convention has been ratified by over 120 countries.[9] In 1934, President Franklin D. Roosevelt signed the treaty, thereby incorporating the treaty into the law of the United States.[10] The Warsaw Convention was modified by the Hague Protocol[11] in 1955, the Guadalajara Convention[12] of 1961, and the Montreal Agreement[13] in 1966.

A. Specific Provisions Regarding Liability

Three of the Warsaw Convention's articles[14] relate specifically to air carrier liability. Article 17 states:

> The carrier is 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.[15]

Article 18 provides for the air carrier's liability involving the loss or damage to baggage.[16] Article 19 states that "[t]he carrier shall be liable for damage occasioned by delay in the transportation by air of

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9. LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 285-93 (1988) [hereinafter LEGAL HANDBOOK].

10. Warsaw Convention, *supra* note 1.

11. This modification, signed in Hague in 1955, amended a number of the Warsaw Convention Articles. The Hague Protocol was never signed by the United States. *See* AERONAUTICAL STATUTES AND RELATED MATERIAL, 324 Office of the General Counsel of the Civil Aeronautics Board (1967).

12. The Guadalajara Convention was formed in order to clarify the liability of the actual carrier as well as the contracting carrier. LEGAL HANDBOOK, *supra* note 9, at 6-7. The Guadalajara Convention made several additional modifications to the Warsaw Convention which are not relevant here.

13. The Montreal Agreement raised the liability limits of air carriers, as defined in Article 22, to $75,000. The carriers also agreed to provide notice of this limit to passengers by providing notice with the ticket. The Montreal Agreement is basically a contract between the carrier and the passenger. *Id.* at 7.

Unless specifically noted differently, all currency references throughout this Comment are in United States dollars.

14. The Warsaw Convention consists of 41 articles. Warsaw Convention, *supra* note 1. The three articles relating specifically to air carrier liability are Articles 17, 18, and 19. *See infra* notes 15-17.

15. Warsaw Convention, *supra* note 1, art. 17, 49 Stat. at 3018, T.S. No. 876 at 21, 137 L.N.T.S at 23.

16. Warsaw Convention, *supra* note 1, art. 18, 49 Stat. at 3019, T.S. No. 876 at 21, 137 L.N.T.S. at 23, 25. Article 18(1) states that "[t]he carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." *Id.* Articles 18(2) and 18(3) define air transportation within the meaning of 18(1). *Id.*

passengers, baggage, or goods."[17]

B. Specific Provisions Regarding Damages

Damage claims arising under any of these three articles are subject to the limitations in Article 24.[18] The damage "conditions and limits" described in Article 24 are found in Article 22.[19] The Article 22 monetary limit of a damage award of 125,000 francs[20] has been modified by the Hague Protocol[21] and the Montreal Agreement.[22]

Article 25, however, eliminates these monetary limitations if the carrier, or any of its employees, causes damage to a passenger or his baggage by "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."[23] In essence,

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17. Warsaw Convention, *supra* note 1, art. 19, 49 Stat. at 3019, T.S. No. 876 at 22, 137 L.N.T.S. at 25.

18. Article 24 states:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, *supra* note 1, art. 24, 49 Stat. at 3020, T.S. No. 876 at 22, 137 L.N.T.S. at 27.

19. Article 22(1) provides:

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

Warsaw Convention, *supra* note 1, art. 22, 49 Stat. at 3019, T.S. No. 876 at 22, 137 L.N.T.S. at 25. Article 22(2) involves the monetary limit on baggage; Article 22(3) limits the damage amount recoverable for property in passengers' charge; Article 22(4) defines the standard of currency. *Id.*

20. At the time of the execution of the Warsaw Convention in 1929, 125,000 francs was equivalent to $4,898 U.S. dollars. John E.J. Clare, *Evaluation of Proposals to Increase the "Warsaw Convention" Limit of Passenger Liability*, 16 J. AIR L. & COM., 53, 54, 57 (1949).

21. The Hague Protocol doubled the passenger damage limitation from 125,000 francs to 250,000 francs. The United States never ratified the Protocol, however, as the damage limit was still considered to be too low. *See* LEGAL HANDBOOK, *supra* note 9, at 96.

22. In 1965, the United States threatened to denounce the Warsaw Convention unless the limits on damages were raised. The Montreal Agreement raised the passenger limit to $75,000 U.S. dollars, inclusive of attorney fees and costs. This agreement is not a treaty, but an agreement which raises the limits on all flights into and out of the United States. *Id.* at 96-97.

23. The full text of Article 25 reads:

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

then, the air carrier may take advantage of the monetary damage "cap" in Article 22 only when the air carrier does not engage in wilful misconduct.

II. COURT DECISIONS REGARDING PUNITIVE DAMAGES

In the cases that have addressed the issue of punitive damages under the Warsaw Convention, plaintiffs usually ground their causes of action for punitive damages in either Article 17 or Article 25 of the Warsaw Convention. Based on Article 17, the plaintiffs' claim is simply that air carriers are liable for "damage sustained" and the Convention framers intended this to include punitive damage awards. Under Article 25, plaintiffs contend that the limitations on all damages under the Warsaw Convention dissolve under a finding of air carrier wilful misconduct,[24] and punitive damages are therefore appropriate. Alternatively, plaintiffs argue that the Warsaw Convention's remedies are not exclusive so that punitive damages can be awarded under state law or federal common law. In addressing these causes of action, United States courts have split on whether punitive damages are allowable under the Warsaw Convention.

A. Cases in Which Punitive Damages Have Been Granted

1. In re Korean Air Lines Disaster of September 1, 1983

In *In re Korean Air Lines Disaster of September 1, 1983*,[25] plaintiffs brought an action seeking, *inter alia,* punitive damages for injuries sustained when Korean Air Lines Flight 007 was shot down by a Soviet fighter over the Sea of Japan. The jury awarded $50 million in punitive damages to the plaintiffs. Chief United States District

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wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Warsaw Convention, art. 25, 49 Stat. at 3020, T.S. No. 876 at 23, 137 L.N.T.S. at 27.

24. This wilful misconduct under the Warsaw Convention has been defined by United States courts as either "the intentional performance of an act with knowledge that the performance of that act will probably result in injury" or "the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences." *See* Republic Nat'l Bank v. Eastern Airlines, Inc., 815 F.2d 232, 238-39 (2d Cir. 1987) (quoting Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122, 124 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951)).

25. M.D.L. 565 Misc. No. 83-0345 (D.D.C. August 3, 1989).

Judge Aubrey E. Robinson affirmed[26] the jury's punitive award without an opinion.[27]

2. *In re* Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986

The United States District Court for the Southern District of New York appeared to also clear the way for the recovery of punitive damages. In *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986*,[28] a motion was brought by defendant Pan American World Airways, Inc. (Pan Am) seeking partial summary judgment in dismissing plaintiffs' claim for punitive damages.[29] Pan Am argued that since Article 17[30] of the Warsaw Convention, as supplemented by the Montreal Agreement,[31] created the cause of action for compensatory damages (as well as invoking a recovery limit of $75,000), any recovery for punitive damages was pre-empted by the Warsaw Convention.[32]

District Judge Sprizzo relied on the Second Circuit decision in *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*[33] in holding that "the remedy provided by the [Warsaw] Convention is not exclusive."[34] Further, the judge stated that "[p]unitive damages are a part of common law tort remedies . . . and no language in the Convention expressly preempts or precludes such claims . . . . Nor may such preemption be implied in the absence of some clear indication in the text itself or its legislative history that supports that conclusion."[35] Judge Sprizzo interpreted the Convention's language as strongly suggesting that independent state causes of action, including

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26. *Id.* at *2; No. 83-0345, 1989 U.S. Dist. LEXIS 11954 (D.D.C. Oct. 11, 1989).

27. In an appellate proceeding in 1987, United States Court of Appeals for the District of Columbia Circuit Judge Ruth Bader Ginsburg stated that "the proper interpretation of the Convention and [Montreal] Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system." *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

28. 729 F. Supp. 17 (S.D.N.Y. 1990). This holding was subsequently overturned on March 22, 1991, by the United States Court of Appeals for the Second Circuit. *See infra* notes 69-77 and accompanying text.

29. This case involved the hijacking of Pan American Flight 073 from Bombay to New York with 386 passengers on board. The aircraft was seized by terrorists during a scheduled stop in Karachi; 20 passengers were killed and many were wounded. *Id.* at 18.

30. *See supra* note 15 and accompanying text.

31. *See supra* notes 13, 22.

32. 729 F. Supp. at 17.

33. 617 F.2d 936 (2d Cir. 1980).

34. 729 F. Supp. at 19. *See* 617 F.2d at 941-42.

35. 729 F. Supp. at 19.

those for punitive damages, could be brought outside of the Convention. The *Karachi* court supported this interpretation by noting that the Convention leaves many issues to be decided by the internal laws of the parties bringing the action.[36]

Judge Sprizzo could not find any clear indication in the Warsaw Convention language that would pre-empt a punitive damage claim; in fact, the judge stated that the language in the Warsaw Convention leads to the opposite conclusion:

> Article 24(1) provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." This language strongly suggests that the Convention contemplates state causes of action, including those for punitive damages, not founded in or created by the Convention. Indeed, Article 24(2) expressly states that the Convention applies "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."[37]

Therefore, based upon a plain reading of the Convention's treaty language, the court ruled that punitive damages are available to plaintiffs.

The *Karachi* court's second basis for allowing punitive damages involved its interpretation of Article 25. The court ruled that even if punitive damages were normally barred under the Convention, an air carrier may not rely on Article 17 in cases of wilful misconduct.[38] The court rejected Pan Am's argument that the only provision excluding or limiting liability under Article 25 is the monetary limit of Article 22 (leaving Article 17 intact) because this reading of the Convention would require a judicial alteration of the plain meaning of the Convention.[39] The *Karachi* court also found it significant that an amendment to Article 25, which specifically lifted Article 22's monetary limits in cases of air carrier wilful misconduct, had never been ratified by the United States Senate.[40] This legislative refusal to adopt the amendment strengthened the court's resolve in precluding a judicial amendment of Article 25.

In addition, the *Karachi* court criticized two other United States

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36. *Id.*

37. *Id.* (citations omitted).

38. Pan Am could not rely on Article 17's restrictions in cases of wilful misconduct because, "to the extent that Article 17 is construed to preempt a claim for punitive damages, it would be a limitation or exclusion of liability within the meaning of Article 25, and such claims would not be barred in cases involving wilful misconduct." *Id.* at 20.

39. *Id.*

40. *Id.* This amendment was included in the Hague Protocol art. XIII; *see supra* note 11.

District Court decisions[41] as relying too "heavily upon a judicially perceived need to construe the Convention in accordance with the intention of the Contracting Parties . . . . This court does not believe that *Chan*[42] permits the Court to amend the plain language of the Convention to effectuate what it believes the Contracting Parties intended."[43] The *Karachi* court concluded that the awarding of punitive damages was not prohibited by the Warsaw Convention and denied Pan Am's motion for partial summary judgment.

B. Cases in Which Punitive Damages Have Been Denied

1. In re Air Crash Disaster at Gander, Newfoundland on December 12, 1985

In 1987, the United States District Court for the Western Division of Kentucky, Paducah Division, denied the awarding of punitive damages to plaintiffs under the Warsaw Convention in *In re Air Crash Disaster at Gander, Newfoundland, on December 12, 1985.*[44] Chief Judge Edward H. Johnstone examined the text of the Warsaw Convention and the context in which its terms were used and declared that Article 17 was entirely compensatory in tone.[45] The *Gander* court held that punitive damages do not fall within the liability outlined by Article 17.[46] Further, even in cases of "wilful misconduct," the court held that the Article 25 exclusions are properly interpreted as exceptions to the limitations on compensatory damages only, and not as an implied authority for recovery of punitive damages.[47]

After reviewing the Convention's history, Chief Judge Johnstone found no evidence indicating that the Convention signatories intended to allow punitive damages.[48] The *Gander* court approvingly

41. The two decisions are Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1483-89 (11th Cir. 1989), and *In re* Air Disaster in Lockerbie, Scotland on December 21, 1980 v. Pan American World Airways, Inc., 928 F.2d 1267 (2nd Cir. 1991). *See infra* notes 59 and 69 and accompanying text. These cases are examined in detail below.

42. Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

43. *In re* Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986, 729 F. Supp. at 20.

44. 684 F. Supp. 927 (W.D. Ky. 1987). On December 12, 1985, Arrow Air flight 950's DC-8 aircraft crashed on takeoff from Gander International Airport, Gander, Newfoundland, killing everyone on board. Plaintiffs' decedents were United States servicemen travelling from Cairo, United Arab Republic, to Fort Campbell, Kentucky, with scheduled stops in Cologne, West Germany and Gander, Newfoundland. *Id.* at 930.

45. The court held that "[o]n its face, the text of Article 17, as set forth above, is entirely compensatory in tone. It establishes liability only for 'damages sustained' or 'bodily injury suffered' by a passenger." *Id.* at 931.

46. "Punitive damages are not 'damages sustained' by a particular plaintiff. Rather, they are private fines levied by civil juries to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future." *Id.*

47. *Id.* at 932.

48. Chief Judge Johnstone examined several treatises, journal articles, cases, and a

cited other decisions disallowing punitive damage awards under the Convention, including *Butler v. Aeromexico*[49] and *Harpalani v. Air-India, Inc.*,[50] and refused to follow the Kansas District Court's reasoning in *Hill v. United Airlines, Inc.*[51] to allow a claim for punitive damages.[52]

2. Thompson v. British Airways

The District Court for the District of Columbia also disallowed punitive damages in *Thompson v. British Airways*.[53] Judge Penn determined that liability was limited under Article 22 of the Warsaw Convention, and to allow punitive damages would be contrary to the intent of the Warsaw Convention.[54] Also, the court asserted that the plaintiffs had not alleged facts sufficient to constitute wilful misconduct by the airline, and, therefore, Article 25 was not available to the plaintiffs.[55]

In an unpublished opinion,[56] the appellate court affirmed the lower *Thompson* court's decision regarding dismissal of plaintiffs' claim for punitive damages.[57] The appellate court held that the plaintiffs had

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transcript of the Convention minutes before concluding that "[n]either uniformity, insurability nor an effective limitation of liability would be achieved if punitive damages could be recovered against an air carrier under the Convention. Consequently, punitive damages may not be recovered under the Convention." *Id.* at 933.

49. 774 F. 2d 429 (11th Cir. 1985).

50. 634 F. Supp. 797 (N.D. Ill. 1986).

51. 550 F. Supp. 1048 (D. Kan. 1982). *See supra* note 4.

52. The *Gander* court did not find the decision in *Hill v. United Airlines, Inc.* to be persuasive:

> In *Hill*, the plaintiffs claimed damages for 'intentional misrepresentation' under the Warsaw Convention. The court in *Hill* found that such a claim was 'completely outside the Warsaw Convention.' Inexplicably, the court went on to allow a claim for punitive damages under the Article 25 'wilful misconduct' exception from limitation. The court did not explain how the claim before it could be outside the Convention but grounded in the language of Article 25 . . . . The reasoning in *Hill* is not logically consistent and the court's holding is of dubious precedential value in this case. Consequently, this court declines to follow the rule or the decision in *Hill*.

684 F. Supp. at 933 (citations omitted).

53. M.D.L. No. 87-3352, 1989 WL 43997 (D.D.C. Apr. 18, 1989). The plaintiffs herein had missed a connecting flight from Washington, D.C. to Freetown, were erroneously downgraded by the airline, and their baggage arrived late and damaged. *Id.*

54. *Id.* at *4.

55. *Id.* at *2.

56. D.C. Circuit Local Rule 11(c) states that unpublished orders, judgments, and explanatory memoranda may not be cited as precedents, but counsel may refer to unpublished dispositions when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

57. Thompson v. British Airways, Inc., 901 F.2d 1131 (D.C. Cir. Apr. 20,

not alleged any facts indicating that the air carrier had committed any reckless or intentional bad acts. Therefore, the appellate court found it unnecessary to address the issue of punitive damages under the Warsaw Convention.[58]

3. Floyd v. Eastern Airlines, Inc.

Approximately one month later, the Eleventh Circuit Court of Appeals directly addressed the punitive damages issue in *Floyd v. Eastern Airlines, Inc.*[59] The case was dismissed by the trial court for failure to state a claim[60] upon which relief could be granted (under either Florida or federal law).[61] The appellate court remanded the case on the issue of intentional infliction of emotional distress[62] before addressing the punitive damage claim.[63]

Circuit Judge Anderson examined the Convention's structure, subsequent interpretation by the parties, and case law before concluding that Article 25 operated only to remove the liability damage limitations in cases of 'wilful misconduct' and did not create an independent cause of action.[64] Although the plaintiffs in *Floyd* did not argue that the cause of action for injuries under Article 17 authorized recovery of punitive damages, the court did note that Article 17 only contemplated compensatory damages.[65] The court of appeals also

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1990)(table)(text available in Westlaw under 901 F.2d 1131 with this case name), *cert. denied*, 111 S. Ct. 752 (1991).

58. *Id.* Regarding the requirement of "intentional or reckless acts" to justify a punitive damage award, see Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989).

59. 872 F.2d 1462. In *Floyd*, plaintiffs brought an action for intentional infliction of emotional distress when their aircraft, en route from Miami to Nassau, lost power in all three engines. As the aircraft began a powerless descent towards the Atlantic Ocean, the flight crew informed the passengers to prepare for ditching. Fortunately, the crew was able to restart one of the failed engines and the aircraft was landed safely in Miami. *Id.*

60. The plaintiffs' claims were grounded on two theories. The first was a cause of action for intentional infliction of emotional distress under Florida law. The plaintiffs alleged: (1) Eastern's maintenance personnel failed to install the required oil rings on the engines to prevent leaks; (2) Eastern's own records indicated that its aircraft had experienced 12 previous engine failures due to the same faulty maintenance; and (3) the airline knowingly failed to correct its maintenance problems.

The second claim was an action for punitive damages under the Warsaw Convention. *Id.*

61. *In re* Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport on May 5, 1983, 629 F. Supp. 307, 309 n.1 (S.D. Fla 1986), *rev'd*, 872 F.2d 1462 (11th Cir. 1989), *rev'd*, 111 S. Ct. 1489 (1991).

62. This issue was eventually decided by the United States Supreme Court in Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489 (1991), and will be examined in this Comment in Part III below. *See infra* notes 97-108 and accompanying text.

63. 872 F.2d at 1467.

64. Plaintiffs contended that Article 25 created an independent cause of action which authorized the recovery of punitive damages. *Id.* at 1483.

65. *Id.* at 1485 n.37. The *Floyd* court later added:

It is true that the text of the Convention does not explicitly address the issue of

concluded that a claim for punitive damages under state law is preempted by the Warsaw Convention and is therefore disallowed.[66]

Lastly, the *Floyd* court distinguished punitive damage from compensatory damage awards. Because punitive awards are not intended to compensate victims, and the Convention was compensatory in nature, the court determined that punitive damages were not contemplated by the Convention's drafters.[67] The court reasoned that disallowing punitive damages would also be consistent with the Convention's purpose of establishing international uniformity.[68]

4. *In re* Air Disaster at Lockerbie, Scotland on December 21, 1988 v. Pan American World Airways Inc.

The most recent United States court of appeals decision regarding punitive damages was a joint decision on this same issue on March 22, 1991, in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988 v. Pan American Airways Inc.* and *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986.*[69] After acknowledging that the Convention's silence on the subject of punitive damages, as well as the lack of legislative materials, made interpretation difficult, the court of appeals ruled that the Convention's purposes would be contravened by allowing plaintiffs to recover punitive damages.[70] Circuit Judge Cardamone wrote a painstakingly detailed analysis of the issue in six parts, including:

1) A discussion of the Convention's purposes, structure, and history.[71]

> punitive damages. However, we do not think plaintiffs can take much comfort in this 'silence.' The basis for recovery for passengers who suffer death or personal injury in international air travel is Article 17 of the Convention. Our study of the text and structure of the Convention, and the concurrent and subsequent legislative history persuade us that Article 17 is entirely compensatory in nature.

Id. at 1486.

66. *Id.* at 1485.

67. *Id.* at 1486-89.

68. *Id.* at 1488.

69. 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991). The facts of the *Karachi* case are outlined above. *See supra* note 29. The *Lockerbie* case arose from the terrorist bombing of Pan Am Flight 103, en route from London to New York on December 21, 1988. The Boeing 747 aircraft crashed in Lockerbie, Scotland; all passengers and crew were killed.

70. 928 F.2d at 1270.

71. *Id.* at 1270-71.

2) An analysis of punitive damages in American law and an examination of whether the Convention provides an exclusive cause of action or whether it permits separate state law actions claiming punitive damages.[72]

3) A conclusion that the Convention bars state wrongful death actions.[73]

4) An adoption of the federal common law of torts as the appropriate means (i.e., the governing law) to interpret the Convention, and a conclusion that federal common law does not contemplate a compensatory element in a punitive action.[74]

5) A decision that the Convention does not permit the sort of punitive damages available under federal law to be awarded, even when the liability limitations are lifted under Article 25 in cases of wilful misconduct.[75]

6) A declaration that the policy considerations that led the contracting parties to adhere to the Convention strongly militate against recognition of punitive damages.[76]

After examining the punitive damage issue in great depth, Judge Cardamone concluded that punitive damages are not recoverable under the Warsaw Convention.[77]

To date, then, a majority of district courts and appellate courts have denied punitive damages under the Warsaw Convention, while several district courts have allowed them. The courts' major split is on the appropriate interpretation of the Convention's liability and damage articles and the intent of the framers. In an attempt to reconcile the varying opinions, it may prove beneficial to explore the United States Supreme Court rulings on the Warsaw Convention in determining how the Supreme Court may decide on the punitive damage issue.

III. The United States Supreme Court's Decisions

Although the Warsaw Convention was signed into law in the United States in 1934, only four cases involving an interpretation of the Warsaw Convention have been decided by the United States Supreme Court. Each of the four cases has been decided in the previous eight years. A chronological examination of these four cases follows.

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72. *Id.* at 1271-73.
73. *Id.* at 1273-78.
74. *Id.* at 1278-80.
75. *Id.* at 1280-87.
76. *Id.* at 1287-88.
77. *Id.* at 1288.

A. Trans World Airlines, Inc. v. Franklin Mint Corp.

The Court's first look at the Warsaw Convention occurred in *Trans World Airlines, Inc. v. Franklin Mint Corp.*[78] in 1984. This case provided the Court an opportunity to construe the meaning of a portion of the Convention's liability limits.[79] Although the United States Supreme Court's holding focused primarily on the determination of the proper cargo liability limit, the Court made several important declarations regarding the Warsaw Convention itself.

Writing for the Court in a eight to one decision,[80] Justice O'Connor stated that the task of determining the appropriate liability limits was "made considerably easier by the 50 years of consistent international and domestic practices under the Convention."[81] The Court reasoned that any decision regarding the Convention interpretation should be consistent with: 1) the Convention framers' purpose, 2) well-established international practices, and 3) other decisions reached by the remaining signatories since 1929.[82] Justice O'Connor also acknowledged that the Convention framers did not intend the treaty to survive more than a few years.[83]

B. Air France v. Saks

The United States Supreme Court re-examined the Warsaw Convention one year later in *Air France v. Saks*.[84] This decision, also

78. 466 U.S. 243 (1984).

79. Franklin Mint Corporation had delivered four packages of numismatic materials (total weight was 714 pounds) to Trans World Airlines, Inc., for delivery from Philadelphia to London. The packages were subsequently lost. Franklin brought suit in United States District Court to recover the value of the packages in the amount of $250,000. Trans World Airlines, Inc., disputed the amount of liability, claiming that Article 22 limits an air carrier's liability regarding baggage transportation to $ 9.07 per pound. *Id.*

80. Justice Stevens was the lone dissenter. *Id.*

81. *Id.* at 255.

82. *Id.* at 255-56.

83. Justice O'Connor wrote:

> The Convention's framers viewed the treaty as one "drawn for a few years," not for "one or two centuries." That it has in fact been adhered to for over half a century is a tribute not only to the Framers' skills but to the signatories' manifest willingness to accept a flexible implementation of the Convention's terms.

Id. at 259 (footnote omitted).

84. 470 U.S. 392 (1985). All Justices joined in this opinion, except Justice Powell, who took no part in the consideration or decision of the case.

In *Air France v. Saks*, Respondent Saks had boarded an Air France aircraft in Paris for a flight to New York. During the aircraft's descent, Saks experienced severe pressure and pain in her left ear. Five days later, Saks consulted a doctor who concluded that Saks had become permanently deaf in her left ear.

written by Justice O'Connor, addressed the interpretation of the term "accident" under Article 17.[85] Justice O'Connor began the Court's analysis by reviewing the text of the treaty and the context in which the written words were used. The Court noted that because the governing text of the Convention is in the French language, any treaty term interpretation would require the Court to consider the term's French meaning.[86]

After determining the French meaning, the *Saks* Court once again noted that proper treaty interpretation should be consistent with the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts.[87] Justice O'Connor reviewed the Convention's drafting and negotiation records to aid in the Court's interpretative process.[88]

C. Chan v. Korean Air Lines, Ltd.

In *Chan v. Korean Airlines, Ltd.*,[89] the United States Supreme Court examined the issue of whether an international air carrier loses the benefit of the damages limitation pursuant to the Warsaw

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Saks brought suit, alleging that her injury was caused due to negligent maintenance and operation of the aircraft's pressurization system. Air France moved for summary judgment in federal district court, contending that Saks could not prove that her injury was caused by an 'accident' within the meaning of Article 17. The district court granted summary judgment for Air France; the court of appeals reversed. *Id.* at 394-95.

85. In interpreting the term "accident," Justice O'Connor noted that "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 396 (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943)).

86. The Court reviewed French cases and dictionaries in its analysis because:

> To determine the meaning of the term "accident" in Article 17 we must consider its French legal meaning. *See* Reed v. Wiser, 555 F.2d 1079 (CA2), *cert. denied*, 434 U.S. 922 (1977); Block v. Compagnie Nationale Air France, 386 F.2d 323 (CA5 1967), *cert. denied*, 392 U.S. 905 (1968). This is true not because "we are forever chained to French law" by the Convention, *see* Rosman v. Trans World Airlines, Inc., 34 N.Y. 2d 385, 394, 358 N.Y. S.2d 97, 102, 314 N.E.2d 848, 853 (1974), but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. Reed, *supra*, at 1090; Day v. Trans World Airlines, Inc., 528 F.2d 31 (CA2 1975), *cert. denied*, 429 U.S. 890 (1976). We look to the French legal meaning for guidance to these expectations because the Warsaw Convention was drafted in French by continental jurists. *See* Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-500 (1967).

Id. at 399.

87. *Id.* at 400.

88. *Id. See also* Choctaw Nation of Indians v. United States, 318 U.S. at 431.

89. 490 U.S. 122 (1989).

Convention if the required limitation notice is not given to passengers as provided in the Montreal Agreement.[90] Justice Scalia provided the opinion of the Court.

Justice Scalia refused to examine the Convention's drafting history, holding that it was appropriate to examine the drafting history of the Convention only to assist in interpreting an ambiguous provision; "[b]ut where the text is clear, as it is here, we have no power to insert an amendment."[91] Justice Scalia restated the role of the Court in interpreting a treaty by quoting approvingly from one of Justice Story's opinions in 1821:

> [T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind.[92]

The *Chan* Court also indicated that even if the treaty provision was ambiguous, it may only be contradicted by clear drafting history, which was not present.[93]

In a concurring opinion, Justice Brennan[94] stated that Justice Scalia's interpretation of the Convention's provisions was not the only plausible reading, and therefore the Court should properly review the drafting history.[95] The concurrence carefully reviewed the

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90. This case arose from the downing of a Korean Air Lines, Ltd. Boeing 747 by a Soviet fighter on September 1, 1983. All 269 persons on board the 747 were killed. *Id.* at 123. *See also In re* Korean Air Lines Disaster of September 1, 1983, M.D.L. 565 No. 83-0345 (D.D.C. August 3, 1989).

In 1969, Korean Air Lines had agreed to raise its liability limit for injuries to passengers to $75,000 per passenger, pursuant to the Montreal Agreement. The Agreement also required air carriers to give passengers written notice of this limit in print size no smaller than ten-point type. This notice was provided to Korean Air Lines' passengers on their airline tickets in smaller eight-point type. Passengers sought a declaration that this type size discrepancy deprived Korean Air Lines of the benefit of the damage limitation. 490 U.S. at 124.

91. *Id.* at 134.

92. *Id.* at 135 (quoting The Amiable Isabella, 6 Wheat. 1, 71 (1821)).

93. *Id.* at 134 n.5.

94. Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens.

95. "Certainly it is wrong to disregard the wealth of evidence to be found in the Convention's drafting history on the intent of the governments that drafted the document. It is altogether proper that we consider such extrinsic evidence of the treatymakers' intent." *Id.* at 136.

minutes of the Convention's drafting committee as well as subsequent case law before agreeing with Justice Scalia's holding that the air carrier did not lose the benefit of the Convention's liability limit because of the size of the type used in the notice.[96]

D. Eastern Airlines, Inc. v. Floyd

The United States Supreme Court's most recent ruling regarding the Warsaw Convention was decided on April 17, 1991.[97] The Court reversed the Eleventh Circuit Court of Appeals decision allowing recovery for emotional distress.[98] Writing for a unanimous Court, Justice Marshall once again outlined the Court's methodology in treaty interpretation[99] by stating that the Court should begin with the treaty's text and the context in which the written words were used; if the treaty's terms were ambiguous, the Court may examine the treaty's history, negotiations, and practical construction adopted by the parties.[100]

In order to properly interpret the Warsaw Convention, Justice Marshall reiterated the guideline established in *Air France v. Saks* to consider the French legal interpretation of any Warsaw treaty term to determine the shared expectations of the Convention's signatories.[101] The Court examined bilingual dictionaries,[102] official English treaty translations,[103] and French legal materials.[104] With

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96. *Id.* at 152.

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

98. *Id.* at 1493. *See also supra* notes 59, 60. Because the passengers did not allege any physical injury, the Court did not address the issue of whether emotional damages accompanied by physical injury would be recoverable. Also, the Court did not reach the question of whether the Convention provides the exclusive cause of action for the passengers, or whether a state cause of action may be maintained. Lastly, the passengers did not appeal the Eleventh Circuit's decision disallowing punitive damages, so the issue was not addressed by the United States Supreme Court.

99. The dispute herein centered on the proper interpretation of "*lesion corporelle*" in Article 17. Eastern Airlines argued that the term is properly translated to "bodily injury," thereby excluding passengers from recovering for purely emotional injuries. The passengers argued, and the Court of Appeals below agreed, that the term more properly encompassed purely emotional damages. *Id.* at 1492. The Court of Appeals analysis is reported in 872 F.2d 1462 (11th Cir. 1989). *See also supra* notes 59-68 and accompanying text.

100. 111 S. Ct. at 1492 (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988), quoting Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 534 (1987), quoting Air France v. Saks, 470 U.S. 392, 397 (1985)). *Accord* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989); Maximov v. United States, 373 U.S. 49, 53-54 (1963).

101. 111 S. Ct. at 1494. *See also* Air France v. Saks, 470 U.S. at 399.

102. 111 S. Ct. at 1494. The Court translated from JULES JERAUTE, VOCABULAIRE FRANCAIS-ANGLAIS ET ANGLAIS-FRANCAIS DE TERMES ET LOCUTIONS JURIDIQUES 205 (1953); 3 GRAND LAROUSSE DE LA LANGUE FRANCAISE 1833 (1987).

103. 111 S. Ct. at 1494, 1495. The Court relied on two major translations of the 1929 Convention into English, as well as the version which the United States Senate utilized when ratifying the treaty. *See* RENE H. MANKIEWICZ, THE LIABILITY REGIME

respect to French legal materials, the Court reviewed three principal sources of French law: legislation, judicial decisions, and scholarly writing.

After ruling that Article 17's term "*lesion corporelle*" was ambiguous, Justice Marshall turned to the treaty's drafting history and concluded that the Convention's drafters never specifically considered liability for emotional damages. The *Floyd* Court then noted two plausible explanations "why the subject of mental injuries never arose during the Convention proceedings: (1) many jurisdictions did not recognize recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury."[105] The Court was persuaded that because compensation for emotional distress was largely unavailable in 1929, the signatories had no intent to include such a remedy in the Convention.[106]

The *Floyd* Court again took note that the Convention's primary purpose was to limit the air carrier's liability so as to promote the growth of the fledgling industry. In that regard, the 1929 signatories were "more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers."[107] Justice Marshall also relied on the signatories' post-1929 conduct and signatory interpretation to further support the United States Supreme Court's interpretation as a uniform one.[108]

OF THE INTERNATIONAL AIR CARRIER 197 (1981). The same interpretation appears in the translation used in the United Kingdom Carriage by Air Act of 1932. *See* LEGAL HANDBOOK, *supra* note 9.

104. 111 S. Ct. at 1495. *See* Air France v. Saks, 470 U.S. at 400.

105. 111 S. Ct. at 1498.

106. *Id.* at 1498-99.

107. *Id.* at 1499.

108. *Id.* The *Floyd* Court found only one signatory opinion which addressed—and allowed—recovery for purely mental injuries under Article 17.

The Supreme Court of Israel allowed passengers to recover for emotional damages suffered during a 1976 hijacking of an Air France flight. *See* Cie Air France v. Teichner, 39 Revue Francaise de Droit Aerien, at 243, 23 Eur. Tr. L., at 102. (The only published version of this Israeli case found by Justice Marshall was reported in French). The Supreme Court of Israel emphasized the post-1929 development of the aviation industry and the law of torts and adopted an expansive view of treaty interpretation.

Although Justice Marshall noted the need for uniformity with other signatory decisions, the *Floyd* Court was not persuaded by the Supreme Court of Israel's reasoning and declined to follow the Israel decision. 111 S. Ct. at 1501, 1502.

IV. How the United States Supreme Court Should Decide

Although the United States Supreme Court has not addressed the issue of whether punitive damages are allowed under the Warsaw Convention, the conflict in the lower courts, as well as Circuit Judge Ginsburg's appeal for national resolution,[109] indicates that the Court may be required to grant certiorari on this issue in the near future. By employing the same methodology that the United States Supreme Court has previously applied in interpreting treaty provisions in the four Warsaw Convention cases above,[110] as well as examining the current Court's treatment of punitive damages, it is apparent that punitive damages may well be recoverable under the Warsaw Convention.

A. Interpreting the Text and Context

The Supreme Court has begun its interpretative process in every Warsaw case by examining the disputed text[111] and the context in which the words were used.[112] Further, the *Floyd* Court stated that "[b]ecause the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis."[113] The parties in several of the Warsaw punitive damage cases above have focused their dispute on the term "*dommage survenu*" in Article 17.[114]

1. French Interpretation

The term "*dommage survenu*" translates into "*damage sustained*" in the official English version of the Warsaw Convention ratified by the United States Senate.[115] The United States Supreme Court accepted this translation in *Air France v. Saks*.[116] Therefore, the English translation of Article 17 would begin: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . . ."[117] Several United States courts have agreed with

109. *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1176 (1987).

110. *See supra* Part III.

111. It is arguable that no express term regarding punitive damages is even in the treaty to interpret. This appears to be Judge Sprizzo's reasoning in *In re* Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986, 729 F. Supp. 17 (S.D.N.Y. 1990). However, as the United States Supreme Court has always looked at the French language first in its Warsaw Convention interpretative process, the examination here will be consistent with that approach.

112. *See supra* notes 84-86 and accompanying text.

113. Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489, 1493 (1991).

114. *See supra* note 15 and accompanying text.

115. *See supra* notes 1 and 15 and accompanying text.

116. 470 U.S. 392 (1985).

117. *See supra* note 15 and accompanying text.

the air carriers' argument that the term "damage sustained" is entirely compensatory in tone and have therefore concluded that an award for punitive damages would be inconsistent with Article 17's language.[118]

Interestingly, the French-English translation relied upon by the United States Senate — and subsequently adopted by the United States Supreme Court in *Air France v. Saks* — is not technically correct. The New Cassell's French Dictionary does indeed define "dommage" as "damage, injury, hurt, detriment, loss, harm."[119] This same reference, however, translates "survenir" as "to arrive or happen unexpectedly."[120] According to the Manual of Law French, the proper French translation for "sustain" is "sustenir."[121] The proper translation under Article 17, then, would provide that "[t]he carrier is liable for damage happening or arising unexpectedly in the event of the death or wounding of a passenger . . . ." The tone of this translation is arguably less compensatory than the translation relied upon by the Supreme Court in *Air France v. Saks*. At the minimum, the dispute in interpretation should be considered ambiguous and would require the United States Supreme Court to use additional methods to correctly interpret Article 17.[122]

Since this French-English translation by itself does not resolve the punitive damage issue, the U.S. Supreme Court will most likely attempt to clarify Article 17's proper construction by examining French legal materials. As outlined in *Floyd* above, the Court will follow the same procedure used by French jurists in 1929 by relying on three principal sources of French law: legislation, judicial decisions, and scholarly writing.[123] The optimum starting point for the Court, however, will be the same reference summary utilized by French jurists in 1929: the French Civil Code.

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118. *See In re* Air Crash Disaster at Gander, Newfoundland, on December 12, 1985, 684 F. Supp. 927, 931 (W.D. Ky. 1987); Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989).

119. THE NEW CASSELL'S FRENCH DICTIONARY 266 (Denis Girard ed. 1967).

120. *Id.* at 705.

121. JOHN H. BAKER, MANUAL OF LAW FRENCH 189 (1979).

122. The plaintiffs in *In re Air Crash at Gander, Newfoundland*, asserted this same type of argument. The court declined to accept plaintiffs' interpretation, however, after noting that the plaintiffs cited no authority for their assertion. 684 F. Supp. 927, 931 (W.D. Ky. 1987).

123. Eastern Airlines, Inc., 111 S. Ct. at 1495.

2. *French Civil Law*

The French legal system relies heavily on the French Civil Code, a compilation of articles imposing primarily contractual duties on parties.[124] The distinctions between a common law jurisdiction and a civil law system are important:

> [N]umerous rules differ if applied in the context of contractual or non-contractual rights and duties: the choice of law in conflicts cases, jurisdiction of courts, limitations of time to sue, the liability of co-defendants, legal presumptions, legal damages. Indeed, in French law a breach of contractual duty cannot be enforced by invoking the articles of the [French Civil] Code applicable to non-contractual liability. The common law may classify as torts many situations treated as contractual in civil law systems: professional malpractice, and carrier's liability for personal and property damage, are examples. In French law if the same act constitutes both a breach of contract and a tort, the courts follow the rule of *non-cumul*, not permitting option or waiver, but requiring that the action be exclusively in contract.[125]

Although the French civil law system is dominated by contract law, it does not follow that tort law has been ignored.[126] In fact, French civil law provides that certain types of punitive damage awards are recoverable in some cases.[127] Major difficulties in interpretation and application arise, however, because French law has not expanded or explored the various aspects of tort law as has the common law system.[128] Ninety percent of the judicial decisions regarding French Civil Code Article 1384,[129] for example, have been connected with motor vehicle accidents.[130] Because the French civil law system

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124. THE FRENCH CIVIL CODE (as amended July 1, 1976)(John H. Crabb trans. 1977). "The Civil Code is the most basic of the codes and the most fundamental and pervasive single element of all French law." *Id.* at 2. The French Civil Code contains over 600 articles pertaining to standard contracts; only five articles (articles 1382-1386) pertain to the French law of tort. HENRY P. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 309, 310 (1976).

125. DEVRIES, *supra* note 124, at 309 (citations omitted).

126. The French civil law system places the Anglo-American concepts of contract and tort under the law of obligations. The French Civil Code, however, does not have a distinct heading for "obligations." *Id.*

127. One such situation arises under French law when a judgment debtor refuses to comply with the terms of his civil punishment:

> The *astreinte* provided by French law is a coercive penalty which is imposed upon the judgment debtor in case of his non-compliance for the purpose of enforcing a civil judgment. For example, the debtor can be ordered to pay the creditor a certain sum for every infraction of a prohibitory judgment or for every day of non-compliance with a judgment decreeing performance of an act. The peculiarity of the sanction lies, above all, in the fact that the *astreinte* is not paid into the state treasury but to the judgment creditor.

XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 8, at 108 (1981).

128. The essence of French tort law is covered by only five articles in the French Civil Code under a chapter title of "Delicts and Quasi-Delicts." THE FRENCH CIVIL CODE 253, 254 (as amended July 1, 1976) (John H. Crabb trans. 1977).

129. Article 1384 states: "He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping." *Id.* at 253.

130. *Id.* at 311.

offers little guidance on tort issues, the Supreme Court will most properly explore other areas in order to interpret the treaty correctly.

B. Determining the Framers' Intent

1. Purposes of the Convention

The U.S. Supreme Court has emphasized in all four Warsaw decisions that the Court's interpretative process must be consistent with the Convention framers' purposes.[131] The Warsaw Convention's primary purpose was to uniformly regulate air carriers' liability to passengers and baggage, so as to encourage growth in a fledgling industry.[132] Further, the Court has declared that the "Convention was intended to reduce, not to increase, the economic uncertainties of air transportation."[133] Punitive damage awards would appear to be contrary to this purpose, because a large enough punitive award could have had a crippling effect on a new air carrier in 1929.[134]

131. *See supra* Part III. The United States Supreme Court has stated that proper Warsaw Convention treaty interpretations must conform with the treaty's purpose of establishing a "stable, predictable, and internationally uniform limit" that would encourage early industry growth. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. at 256.

132. *See supra* note 6. *See also* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. at 256.

133. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. at 260. Justice O'Connor outlined the Convention's purposes in this way: "The Convention's first and most obvious purpose was to set some limit on a carrier's liability for lost cargo . . . . The Convention's second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry." *Id.* at 255.

134. Justice Steven's dissenting opinion in Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984), cites a staff memorandum from the Chief, Policy Development Division, to the Civil Aeronautics Board on March 18, 1980. This memorandum reveals an interesting opinion on the background of the Convention's liability limits:

> The Warsaw Convention was negotiated during the late 1920's when the aviation industry was in its infancy. The minutes of the negotiations show that the primary concerns of the drafters are no longer of great importance to the industry. In addition, their assumptions about how the liability limitation mechanism would work were erroneous.
>
> In 1929, air travel was perceived by the public and, more importantly, by the insurance companies to be an extremely risky mode of transportation. A major justification for limiting liability was that, unless carriers could present potential insurers with some degree of predictability in estimating damages from aircraft accidents, they would have great difficulty in obtaining coverage. Furthermore, the delegates had little sympathy for anyone foolish enough to board an airplane without enough personal insurance to provide for his widow (or her widower) and children should the plane crash. Over the years, air travel has become one of the safest modes of transportation, and airlines, even those operating under circumstances where they cannot limit their liability for death or

Significantly, though, neither the Convention's minutes[135] nor text language[136] indicate that the framers ever purposely intended to shield an air carrier from punitive damage liability for an air carrier's wilful or reckless bad actions.[137] In fact, the passenger recovery limit for compensatory damages is lifted upon a finding of wilful misconduct by an air carrier.[138] Because the Convention signatories were willing to expressly compensate passengers more fully in cases of air carrier reckless behavior,[139] it would seem inconsistent for the Convention framers to silently imply that the naturally following punitive damages would not be recoverable. Therefore, since the signatories did not expressly prohibit punitive damage awards, a plain reading of the treaty would indicate that the framers did not intend to exclude punitive damages.

2. *Convention Limits*

The United States Supreme Court has not ruled on whether the Warsaw Convention prohibits state or federal causes of action based upon situations in which the Convention was not meant to govern.[140] In fact, the title of the Convention itself - "Certain Rules Relating to International Transportation by Air" - indicates that the Warsaw Convention was never intended by the framers to be an all encompassing agreement. The Minutes of the Convention indicate that the delegates specifically included the word "Certain" to show that the Convention would not cover all situations.[141] Therefore, the awarding

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personal injury, have no special difficulties finding insurers.

Id. at 274 n.4.

135. *See* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, *supra* note 8.

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

137. The terms "punitive" or "exemplary damages" do not even appear in the Minutes. *See* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, *supra* note 8.

138. *See supra* note 23.

139. By a plain reading of Article 25, it is reasonable to conclude that, in cases of carrier wilful misconduct, the framers intended that a requirement of full compensation to injured plaintiffs outweighed any need for a concrete measurable damage standard for the carrier. An award for punitive damages in cases of wilful misconduct would be consistent with this approach. *Id.*

140. *See* Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1481 (11th Cir. 1989). Plaintiffs contended that the Convention provided for state causes of action to be brought involving issues which the Convention did not address. The appellate court dismissed the state claim brought by the plaintiffs. When the case was brought to the United States Supreme Court, the dismissed state claim cause of action was not appealed by the plaintiffs, so the United States Supreme Court has not yet ruled on whether state claims are pre-empted by the Warsaw Convention. Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489 (1991).

141. Mr. Giannini, President of the drafting committee, stated:

> We have adopted the title: 'Convention for the Unification of Certain Rules Relating to International Carriage by Air.' This suffices to say that this Convention does not provide for the entire matter and gives satisfaction to certain

of punitive damages in separate state or federal causes of action would not appear to contradict the framers' explicit intention of providing signatories with only an initial guideline in the Warsaw Convention.

C. Practical Considerations

1. Consistent Interpretation with Other Signatory Countries

One justifiable concern of the United States Supreme Court in Warsaw Convention treaty interpretation cases is a desire to render judgments consistent with the other signatories.[142] Consistent judgments from the over 120 signatory countries would lend stability and predictability to Warsaw Convention decisions, as well as prevent party forum shopping. However, apparently no decisions have been reported by other signatories' courts either allowing or disallowing punitive damages under the Convention. Therefore, a United States decision authorizing punitive damage awards would not be disruptive to the United States Supreme Court's goal of rendering consistent judgments with the other signatories.

2. Punitive Damage Awards in Signatory Countries

It is beyond the scope of this Comment to explore the availability of punitive damages in the more than 120 signatory countries which adhere to the Warsaw Convention.[143] Generally, although punitive damage awards are an exception to established tort principles in most countries, the United States is not the sole jurisdiction[144] which will allow a plaintiff to recover punitive damages. Warsaw signatories England, France, Mexico, Norway, West Germany, Switzerland, and Turkey each will allow a plaintiff, in certain instances, to recover punitive damages or have the defendant's degree of fault be considered when assessing compensatory damages.[145]

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delegations such as the Czechoslovak Delegation, which asked that the word 'Certain' be added.

See SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES, *supra* note 8, at 188.

142. *See* Air France v. Saks, 470 U.S. at 404.

143. *See* LEGAL HANDBOOK, *supra* note 9.

144. *See* XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 10, at 82-87 (1981).

145. Memorandum of Points and Authorities in Opposition to the Motion of Korean Air Lines to Dismiss Plaintiffs' Claims for Punitive Damages, *In re* Korean Air Lines Disaster of September 1, 1983, M.D.L. 565 Misc. 83-0345 (D.D.C. Aug. 3, 1989).

3. *Punitive Damage Awards in the United States*

Notably, the awarding of punitive damages under the Convention by the United States Supreme Court would be consistent with United States federal common law. A recent United States Supreme Court decision involving the awarding of punitive damages illustrates the current Court's disposition towards punitive damages. In *Pacific Mutual Life Insurance Co. v. Haslip*,[146] the Court[147] held that allowing punitive damages did not necessarily violate the Fourteenth Amendment's Due Process Clause. The Court recognized the long common law history[148] of punitive damages in England by citing Blackstone's Commentaries[149] and the case of *Wilkes v. Wood*,[150] a 1763 England decision. The *Haslip* Court also cited American decisions allowing punitive damages from as far back as 1784[151] and 1791.[152] The Court determined that the reasonableness of the jury's punitive award could be measured on a case-by-case basis.[153]

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146. 111 S. Ct. 1032 (1991). This Alabama case involved an insurance agent who misappropriated health and life insurance premiums. When the insurance companies had stopped receiving premium payments, the insurance companies cancelled the respondents' policies; the insurance agent did not notify respondents that their policies had lapsed.

Respondent Haslip was hospitalized and incurred hospital and physician's charges. Because the insurance companies refused coverage, the physician billed Haslip directly. When Haslip was unable to pay, the physician placed Haslip's delinquent account with a collection agency, which obtained a judgment against Haslip. Haslip's credit was adversely affected. Respondents filed suit against the insurance companies on a theory of respondeat superior. The jury determined that fraud had occurred and awarded punitive damages. *Id.*

147. Justice Blackmun delivered the opinion of the Court, in which he was joined by Chief Justice Rehnquist and Justices White, Marshall, and Stevens. Justices Scalia and Kennedy filed concurring opinions. Justice O'Connor filed a dissenting opinion. Justice Souter took no part in the consideration or decision of this case. *Id.*

148. *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262-64 (1976).

149. 3 WILLIAM BLACKSTONE, COMMENTARIES 137-38.

150. 98 Eng. Rep. 489 (C.P. 1763). The Lord Chief Justice validated exemplary damages as compensation, punishment, and deterrence.

151. Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784).

152. Coryell v. Colbaugh, 1 N.J.L. 77 (1791).

153. Justice Blackmun explained that the Supreme Court had often approved of the traditional common-law approach to punitive damages, in which the amount of punitive damages is initially decided by a jury instructed to consider the gravity of the wrong and the need to deter others from engaging in similar conduct, and then a review of the jury's award is conducted by the trial and appellate courts for reasonableness. The Court then cited a 1852 opinion by Justice Grier:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party

Justice Scalia's concurring opinion was an even stronger endorsement of punitive damages, arguing that historical acceptance of punitive damages made those damages permissible regardless of a court's inquiry into "fairness" or "reasonableness."[154] In the lone dissenting opinion, Justice O'Connor contended that although punitive damage awards were legitimate, common law procedures for awarding punitive damages were indiscriminate and posed a devastating potential for harm.[155] In summary, then, although a minority of the Justices disagreed on the Court's specific review process in *Pacific Mutual Life insurance Co. v. Haslip*, all of the United States Supreme Court Justices affirmed the appropriateness and the long history of punitive damages in the United States.[156]

CONCLUSION

The United States Supreme Court has not yet addressed the issue of punitive damages under the Warsaw Convention, but the current split in the lower federal courts indicates that the Court may be forced to resolve this conflict soon. In previous interpretations of the Warsaw Convention, the Court has stressed the importance of maintaining the stated purpose and goals of the Warsaw Convention. The United States Supreme Court has demonstrated its methodology in determining the meaning of any disputed terms, as well as the importance of complying with the framers' intent.

By applying the United States Supreme Court's own methodology

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injured . . . . This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.

111 S. Ct at 1042 (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852)).

154. Justice Scalia objected to Justice Blackmun's case-by-case due process analysis:

> We have expended much ink upon the due-process implications of punitive damages, and the fact-specific nature of the Court's opinion guarantees that we and other courts will expend much more in the years to come. Since jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity.

Id. at 1054.

155. Justice O'Connor's main concern focused on the uncertainty of jury instructions on punitive damages, which

> are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results . . . . While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion . . . . The Constitution requires as much.

Id. at 1056.

156. *Id.* at 1032.

and rules of construction, it is apparent that punitive damages are not prohibited under the Warsaw Convention. The Convention drafters were certainly aware of the potential of punitive damages in cases of wilful misconduct, yet they did not expressly prohibit punitive damages from being awarded. By allowing plaintiffs to recover punitive damages, the United States Supreme Court will still abide by the intent of the Convention's drafters while more effectively deterring air carriers from wilful misconduct.

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