You'll Love the Way We Fly--But If You Don't, Too Bad: Does Zicherman v. Korean Air Lines Offer Hope of Subjecting Reckless International Airlines to Punitive Damages

Ian D. Midgley

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NOTES

You'll Love the Way We Fly—but If You Don't, Too Bad!: Does Zicherman v. Korean Air Lines Offer Hope of Subjecting Reckless International Airlines to Punitive Damages?†

If the Convention as drafted is unworkable in today's world, that should not be surprising . . . it was written for a few years, not for a half century of the most rapid and fundamental changes in the history of the planet.†

Introduction

For over sixty years the Warsaw Convention² has served to limit the liability of international airlines³ for death of or injury to their passengers arising from accidents. Although flying has be-

† Awarded the second annual Case Western Reserve Law Review Outstanding Student Note Award, as selected by the editors and faculty.
⁴ For purposes of this Note, an international airline is one engaged in international transportation as defined in Art. 1, § 2 of the Convention, that provides that international transportation is any transportation:

in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate, or authority of another power, even though that power is not a party to this convention.

Warsaw Convention, supra note 2, art. 1 § 2, 49 Stat. at 3014, 137 L.N.T.S. at 15.
come a far safer activity than when the Convention first took effect," aviation disasters continue to make international headlines, often highlighting the sentinel role the Convention plays in compensatory actions. While the Convention imposes virtually strict but limited liability on international airlines, and relieves a passenger, or his or her decedent, of the need to prove negligence on the part of the airline, it does not permit a recovery against airlines serving the United States to exceed $75,000.

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4 See Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497, 498 (1967) (comparing a fatality rate in domestic and international air travel between 1925 and 1929 of 45 per hundred million passenger miles with a figure of 0.55 per hundred million passenger miles in 1965); see also Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 273 (Stevens, J., dissenting) ("Conditions in the world of aviation are, of course, radically different than they were 50 years ago. The Spirit of St. Louis is a relic of the past. What was then a startling and daring feat for 'Lucky Lindy' is now a humdrum occurrence for millions of travelers."). The Convention came into effect in 1933. See Lowenfeld & Mendelsohn, supra, at 501-02. For an example of the adventure involved in 1920's air travel see RENÉ H. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 25 (1981) ("The passenger was individually weighed before embarking.").

5 A recent example is of course the destruction of TWA Flight 800 on July 17, 1996. See Byron Acohido, Suit Against Boeing, TWA In Works, SEATTLE TIMES, Oct. 11, 1996, at 16. Of particular interest for this disaster is whether the proposed International Air Transportation Association (IATA) Agreement, that waives limitations on liability, will apply. See infra note 52; see also Susan Carey & Leslie Scism, Airlines: Old Liability Limits May Not Apply In TWA Crash, WALL ST. J., Jul. 24, 1996, at 3. At least one prominent aviation lawyer believes that by its own terms, the IATA Agreement will not affect the crash. See Lee S. Kreindler, The End of Airline Liability Limits, N.Y.L.J., Aug. 30, 1996, at 3.

6 See Block v. Compagnie Nationale Air Fr., 386 F.2d 323, 327 (5th Cir. 1967). However liability for airlines that are party to the Montreal Agreement, see infra note 50, is not strict, in as much as airlines may still defend on the ground that a plaintiff's injuries were not caused by an "accident" within the meaning of Article 17 of the Warsaw Convention. See Air Fr. v. Saks, 470 U.S. 392, 407 (1985) (holding that airlines may defend where the definition of an "accident" is not met). See also infra note 36 (discussing Article 17 and the definition of "accident").

7 Warsaw Convention, supra note 2, art. 22 § (1), 49 Stat. at 3019, 137 L.N.T.S. at 25. Article 22 provides in part:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

. . . .

(4) The sum mentioned above shall be deemed to refer to the French franc consisting of 65-1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Id.
AIRLINE LIABILITY FOR PUNITIVE DAMAGES

Notwithstanding, the Convention does not allow international airlines to limit their liability if a court finds the accident in question has resulted from the airline's wilful misconduct. Consequently, plaintiffs often make great efforts to show recklessness or wilful misconduct on the part of airlines or their crew in order to recover beyond the $75,000 limit. While these efforts are rarely successful, in the few cases where wilful misconduct has been proven, plaintiffs have gained access to unlimited compensatory damages. Even so, most courts have ruled that punitive damages are not appropriate in any action under the Convention.

To date, no federal court of appeals has allowed the recovery of punitive damages in a Convention-based action. Although the recent United States Supreme Court decision in Zicherman v. Korean Air Lines, Co. offers a revised approach to deciding Warsaw Convention claims, the possibility that international airlines will be subject to punitive damages appears to be diminishing. An often repeated claim made by courts reaching this conclusion is that the Warsaw Convention seeks, above all, to provide a uniform system of recovery, and that punitive damages serve only to disrupt this goal.

In 1929, when the Warsaw Conference convened, 125,000 Poincare francs was equivalent to $4,898. See Lowenfeld & Mendelsohn, supra note 4, at 499 n.10. However, in 1934, prior to adhering to the Convention, President Roosevelt increased the official domestic price of gold to $35 per ounce. See Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 248 (1984). This had the effect of increasing the liability limitation to approximately $8,300. See Lowenfeld & Mendelsohn, supra note 4, at 499 n.10.

Originally, the task of converting the limit into United States currency was given to the Civil Aeronautics Board (CAB). See Franklin Mint, 466 U.S. at 247. However, with the elimination of CAB this task now falls to the Department of Transportation in consultation with the Department of State. See id.

8. See supra note 4, at 499 n.10.

9. See, e.g., Perry S. Bechky, Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation, 60 J. Air L. & COM. 455, 492 (1994-95) ("Plaintiffs, naturally enough, have consistently sought to escape the damage limitations imposed by the Warsaw Convention.").

10. See infra part II (discussing judicial decisions denying punitive damages).
12. See, e.g., the discussion of In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1476 (D.C. Cir. 1991), infra part II B.
Part I of this Note introduces the Warsaw Convention along with various governmental efforts that have attempted to modify its effect. Part II examines United States judicial decisions barring punitive damages in cases falling under the Convention, usually for one of two reasons: a perceived need to preserve uniformity, or a narrow reading of the text itself. In particular, this Part discusses the litigation arising from two specific aviation disasters: the bombing of Pan Am Flight 103 over Scotland, and the shooting down of Korean Air Lines Flight 007 over the Soviet Union.

Part III offers a discussion of *Zicherman v. Korean Air Lines,* a recent United States Supreme Court decision dealing with Convention claims, and analyzes its effect on Warsaw Convention litigation generally. Part IV turns to the concept of uniformity itself, both in terms of the degree of uniformity intended by the Convention's drafters, and the extent to which it has actually materialized. This Part contends not only that the drafters did not intend to achieve the degree of uniformity attributed to them by courts and commentators, but that, not surprisingly, substantial uniformity has failed to emerge.

Part V then argues that courts denying punitive damages based on a narrow reading of the text have had the logical cogency of their position undermined by some of the specific holdings in *Zicherman.* Accordingly, the analytical approach used by courts to deny punitive damages on this basis has been similarly eroded.

Finally, Part VI presents policy considerations used by courts to support the denial of punitive damages, and suggests that upon closer examination, these considerations just as readily support the recovery of punitive damages in factually appropriate cases.

This Note concludes that punitive damages are an appropriate recovery for plaintiffs proving willful misconduct on the part of international airlines. Courts should pay less attention to general claims of uniformity in deciding on the types of damages available under the Convention. Careful examination of the text and the drafting history reveals no intent to preclude punitive damages in meritorious cases. The admonition in *Zicherman,* that the Warsaw Convention offers no authority to seek uniformity in derogation of normally applicable local law, directs courts to pay less deference to uniformity in their punitive damages analyses. In particular, in cases of willful misconduct, none of the goals of the Convention

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are disrupted by subjecting international airlines to punitive damages if local law would otherwise permit their recovery.

I. BACKGROUND ON THE WARSAW CONVENTION

In hindsight, it was almost inevitable that 1929 would signal the introduction of the Convention for the Unification of Certain Rules Relating to International Transportation by Air. Only two years earlier, Charles Lindbergh had captured the world’s imagination flying the Spirit of St. Louis from New York to Paris. Amelia Earhart had just completed her own historic solo flight across the Atlantic, American aviator Richard E. Byrd had become the first man to fly over the South Pole, and the first international flight departing from the United States, a service from Key West, Florida, to Havana, Cuba, was initiated. So it was, with the United States standing on the verge of economic depression, that the representatives of some thirty-three nations converged on the historic city of Warsaw to flesh out a system of regulation for the newly hatched airline industry.

Inspired by the introductory remarks of the Belgian delegate—"[w]hat the engineers are doing for machines, we, lawyers, we must do the same for the law,"—the finished document became the most widely adhered to international treaty in history.

14. See Warsaw Convention, supra note 2.
18. See Block v. Compagnie Nationale Air Fr., 386 F.2d 323, 326 (5th Cir. 1967) (discussing aviation developments).
19. See KREINDLER, supra note 16, at § 11.01(2) (“The international air giants of today were literally in their swaddling clothes.”). As an indication of how the airline industry has developed in the years since the Convention was introduced, the most popular and advanced aircraft in use in the United States at that time was the Lockheed Vega, which carried six passengers and cruised at around 120 miles per hour. See Lowenfeld & Mendelsohn, supra note 4, at 498. The larger aircraft could carry 15 to 20 passengers. See id. at 498. If nothing else this makes implausible the claim of one commentator that the Convention was “designed to promote mass tort management.” Bechky, supra note 9, at 459.
20. SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW OCTOBER 12-14 1929, WARSAW MINUTES, 18 (Robert C. Homer & Didler Legrez trans., 1975) [hereinafter Minutes]. Mr. De Vos was also the Reporter for the Convention. See id.
21. Id. at 23.
22. See Warren L. Dean, Airline Liability in International Air Transportation: Time For a Change, 4 AIR & SPACE L. 1, 1 (1989). This would except, of course, the United Nations Charter. See H. L. Silets, Something Special in the Air and on the Ground: The Po-
Although the Conference itself lasted only eight days, work on the Convention had begun at an earlier Conference held in Paris in 1925. The first Conference produced a preliminary draft that was "polished and repolished" by a permanent committee of international legal experts called the CITEJA for presentation to the Warsaw Conference. By its own terms, the final document sought to achieve a degree of uniformity in the "conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. . . ."

The Convention became effective on February 13, 1933. Having declined to participate in its formation, the United States was nonetheless invited to become a party to it, and on October 29, 1934, by proclamation of President Roosevelt, the Convention became the supreme law of the land. Currently, the Convention

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23 See Minutes, supra note 20.
25 Id. at 19.
27 See Minutes, supra note 20, at 18 (discussing the draft of the Convention).
28 Warsaw Convention, supra note 2, preamble, 49 Stat. at 3000, 137 L.N.T.S. at 876. For further discussion of the uniformity intended by the drafters of the Convention see infra part IV B.
29 See Lowenfeld & Mendelsohn, supra note 4, at 501-02. Article 37(2) of the Convention provides: "As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after deposit of the fifth ratification." Warsaw Convention, supra note 2, art. 37, 49 Stat. at 3022, 137 L.N.T.S. at 876.
30 "The United States declined an invitation to attend the Conference, although it sent two observers, John Ide and McCeney Werlich." Block v. Compagnie Nationale Air Fr., 386 F.2d 323, 326 (5th Cir. 1967).
31 Article 38 of the Convention provides as follows:

(1) This convention shall, after it has come into force, remain open for adherence by any state.
(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.
(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Warsaw Convention, supra note 2, art. 38, 49 Stat. at 3022, 137 L.N.T.S. at 876. Although most courts have decided that an Article 38 signatory may be considered a High Contracting Party, at least one case has stated that a High Contracting Party is a country
boasts approximately 120 signatories.\textsuperscript{32} The Convention itself is comprised of forty-one articles divided into five chapters.\textsuperscript{33} In accordance with its preamble,\textsuperscript{34} the two largest chapters are entitled “Transportation Documents” and “Liability of the Carrier.”\textsuperscript{35} Within the latter, specific articles provide for liability in the event of death or injury to passengers,\textsuperscript{36} dam-

that has 

ratified the Convention and not merely signed it. See Lawrence B. Goldhirsh, The Warsaw Convention Annotated: A Legal Handbook 11 (citing Corcoran v. Pan Am, 1 All E.R. 82 (C.A. Eng. 1968)). Given that the Convention only applies to transportation to or from a High Contracting Party, see Warsaw Convention, supra note 2, art. 1, 49 Stat. at 3014, 137 L.N.T.S. at 15, it is of no little significance that the United States has not clearly ratified the Convention. See In re Air Crash in Bali, Indon., 462 F. Supp. 1114, 1118 (C.D. Cal. 1978) (stating that “the United States had nothing to do with formulation of the convention and did not ratify it but adhered to it shortly after it went into effect, pursuant to Article 38.”) (footnotes omitted) (emphasis added), rev’d on other grounds, \textit{In re Air Crash in Bali, Indon.}, 470 U.S. 392, 397 (1985) (stating that the Senate ratified the Convention in 1934); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 273 (1984) (Stevens, J., dissenting) (“The President submitted the Convention to the Senate in 1934, which gave its advice and consent by voice vote without committee hearings, committee reports, or floor debate.”). But see Air Fr. v. Saks, 470 U.S. 392, 397 (1985) (stating that the Senate ratified the Convention in 1934); In re Air Crash Disaster Near Honolulu, Haw., on Feb. 24, 1989, 783 F. Supp. 1261, 1263 (N.D. Cal. 1992) (“ratified by the United States Senate in 1934”); Siles, supra note 22, at 336 n.66 (“Senate approved resolution of ratification supporting adherence to Warsaw Convention by voice vote with no floor debate.”). At least one commentator finds it inconceivable that two-thirds of the Senate would ever consent to adhering to the Convention anew. See Bechky, supra note 9, at 466.

\textsuperscript{32} See Dean, supra note 22, at 1.

\textsuperscript{33} Chapter 1 (Articles 1-2) outlines the scope of the Convention; Chapter 2 (Articles 3-16) deals with the necessary documentation required for the transportation of people and goods; Chapter 3 (Articles 17-30) provides for the liability of the carrier; Chapter 4 (Article 31) governs the effect of the Convention when air transportation is combined with other forms of travel; and Chapter 5 (Articles 32-41) establishes the manner in which nations may participate in the Convention. See Warsaw Convention, supra note 2.

\textsuperscript{34} Warsaw Convention, supra note 2, preamble, 49 Stat. at 3014, 137 L.N.T.S. at 876.

\textsuperscript{35} See Warsaw Convention, supra note 2.

\textsuperscript{36} Article 17 provides:

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

Warsaw Convention, supra note 2, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23. The Supreme Court has defined an Article 17 accident to mean “an unexpected or unusual event or happening that is external to the passenger.” Air Fr. v. Saks, 470 U.S. 392, 405 (1985). For an analysis of the manner in which courts have defined the scope of the “embarking or disembarking” clause see M. Veronica Pastor, Absolute Liability Under Article 17 of the Warsaw Convention: Where Does It Stop?, 26 Geo. Wash. J. Int’l L. & Econ. 575 (1993).
age to goods,\textsuperscript{37} and damages caused by delay.\textsuperscript{38} Additional articles allow carriers to avoid liability by proving an absence of negligence on their part,\textsuperscript{39} or by showing contributory negligence on the part of the passenger.\textsuperscript{40} In addition, Article 22 imposes the original monetary limit on claims against airlines,\textsuperscript{41} while Article 25 divests the airline of its use in the event of wilful misconduct.\textsuperscript{42}

Despite the initial popularity of the Convention,\textsuperscript{43} its history has been rife with attempts to modify its effect.\textsuperscript{44} The first successful attempt at modifying the Convention occurred in 1955, less than thirty years after its creation.\textsuperscript{45} The major outcome of the so-called Hague Protocol was an increase of the liability limit of

\begin{itemize}
\item Article 18 provides in part:
\begin{quote}
(1) The 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 this damage so sustained took place during the transportation by air.
\end{quote}
Warsaw Convention, supra note 2, art. 18(1), 49 Stat. at 3019, 137 L.N.T.S. at 23.
\item Article 19 provides, "the carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." Id. art. 19, 49 Stat. at 3019, 137 L.N.T.S. at 25.
\item Article 20 provides in part "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Id. art. 20, 49 Stat. at 3019, 137 L.N.T.S. at 25. One prominent aviation lawyer believes Article 20 has only assumed practical importance with the recent possibility of aircraft being brought down by a missile attack where the airline has no control whatsoever. See Kreindler, supra note 5, at 3. Carriers that are signatories to the Montreal Agreement, see infra note 50, may not avail themselves of this defense.
\item Article 21 states that "if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Warsaw Convention, supra note 2, art. 21, 49 Stat. at 3019, 137 L.N.T.S. at 25.
\item See supra note 7 (discussing Article 22 and valuation methods).
\item See supra note 8 and accompanying text.
\item See Kimberlee S. Cagle, Comment, The Role of Choice of Law in Determining Damages for International Aviation Accidents, 51 J. AIR L. & COM. 953, 956 (1986) ("The signatory nations generally considered the Warsaw Convention satisfactory for the first twenty-five years of its existence.").
\item These efforts have been largely motivated by dissatisfaction with the low liability limitations, although other reasons have often been cited. See Lowenfeld & Mendelsohn, supra note 4, at 499 (stating that the original Convention limit was low even in 1929). For example, as recently as 1988, the United States Transportation Secretary, Jim Burnley, described the Warsaw system as "unpredictable, unfair, costly and confusing to the American traveling public." Dean, supra note 22, at 7-8.
\end{itemize}
Article 22 from $8,300 to $16,500. Although a significant percentage increase, in absolute terms the new limit was still unacceptably low, and the Senate declined to ratify it. Subsequent attempts to reformulate the Convention have met with similar failure, and the United States has failed to ratify any of the proposals developed.


\[^{47}\] See In re Air Crash in Bali, Indon., 462 F. Supp. 1114, 1118 (C.D. Cal. 1978) ("[L]ittle effort was made in the United States towards ratification of the Hague Protocol, which did not satisfy the opponents of the Warsaw Convention's liability provision."). Indeed, in June of 1983, almost thirty years after it was opened for signing, only 86 nations had ratified the Hague Protocol. See Silets, supra note 22, at 338 n.82.

\[^{48}\] The Guatemala City Protocol was one such attempt, made by the International Civil Aviation Organization (IACO). See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, as Amended by the Protocol Done at The Hague on Sept. 28, 1955, Mar. 8, 1971, ICAO Doc. No. 8932 (1971) [hereinafter Guatemala City Protocol], reprinted in NICOLES M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 732-38 (1981). The Guatemala City Protocol had the effect of raising the Article 22 liability limitation to 1,500,000 francs, or approximately $100,000. See Silets, supra note 22, at 344 n.121. In exchange for this increase, the Guatemala City Protocol also eliminated the wilful misconduct provision contained in the original Convention so that the new limit would be absolute, even if the airline engaged in intentional misconduct. See id. at 344-45. In addition, the Guatemala City Protocol contained a provision that would allow individual nations to develop national compensation plans to supplement a plaintiff’s recovery. See id. at 345. However, in addition to these provisions the Guatemala City Protocol also required that any nation ratifying it would also be bound to the Hague Protocol, and that in any event, the Guatemala City Protocol would not go into effect until it was ratified by thirty nations, including six whose airlines represented 40% of total scheduled international air travel. See Kelly Compton Grems, Comment, Punitive Damages Under the Warsaw Convention: Revisiting the Drafters’ Intent, 41 Am. U. L. Rev. 141, 154 n.66 (1991). This ensured that the Guatemala City Protocol would not go into effect without the ratification of the United States, and because of the elimination of the wilful misconduct provision the Senate has refused to ratify it. See id.

In 1975, the IACO met again to begin work on what would become the Montreal Protocols. See Additional Protocol Nos. 1-4, Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, ICAO Document Nos. 9145-9148 [hereinafter Montreal Protocols], reprinted in A. Lowenfeld, Aviation Law 985-1001 (2d ed. Supp. 1981). Consisting of four separate protocols, the major effect of them collectively was to increase the liability limitation and eliminate the wilful misconduct provision, as had the Guatemala City Protocol. See Grems, supra, at 154 n.66. In addition, the Montreal Protocols introduced a new unit of valuation called the Standard Drawing Right (SDR). See Silets, supra note 22, at 346. The SDR was adjustable for inflation, based as it was on the exchange rates of the British, German, Japanese, French, and United States currencies. See Naneen K. Baden, The Japanese Initiative on the Warsaw Convention, 61 J. Air L. & Com. 437, 446 (1995/1996). As such, the Montreal Protocols created an unbreakable liability limitation of 100,000 SDR’s, or at
The most significant alterations to the Convention's effect have come about by private contractual agreements, in particular the Montreal Agreement. Inspired by the United States' threat to denounce the Convention, the Montreal Agreement was, and continues to be, a contractual agreement between the United States and other nations.

That time, $117,000. See id. Although initially it appeared that the United States Senate would ratify the Montreal Protocols, having been endorsed by the Senate Foreign Relations Committee by 16 votes to one, the floor vote failed to secure the necessary two-thirds vote required. See Silets, supra note 22, at 346-47. Of particular note are the comments of Senator Ernest Hollings of South Carolina who stated:

To remove from potential discovery the carelessness—or even recklessness—of airlines, both foreign and domestic, is to thwart one of the two primary goals of the American tort system: Prevention. To limit the possible recovery of an American family... is to destroy the other goal of our tort system, namely, compensation. The Montreal Protocols are unique in that they would nullify both goals simultaneously.

Id. at 348 n.149. The Clinton Administration has recently endorsed the ratification of the Montreal Protocols. See David Field, Clinton Proposal to Ease Claims in Airline Disasters Draws Praise, WASH. TIMES, Jan. 10, 1994, at A19.

At the time of this writing the ICAO is at work formulating a new treaty to consolidate and modernize the Warsaw system. See ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air, Council Working Paper 10470 (1996) (on file with author). These efforts are in part a response to the Intercarrier Agreement, infra note 52. See Kreindler, supra note 5, at 1.

51 Article 22(1) permits contractual modifications that increase the liability of a carrier. See supra note 7.

52 Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, Agreement CAB 18900, adopted May 13, 1966, reprinted in 49 U.S.C. app. 1502 (1996) [hereinafter Montreal Agreement]. Delegates from 59 nations were involved in formulating the Montreal Agreement. See Lowenfeld & Mendelsohn, supra note 4, at 563. Indeed, Lowenfeld was Chairman of the United States delegation to the Conference. See id. at 497.

50 Article 39 of the Convention provides:

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Warsaw Convention, supra note 2, art. 39, 49 Stat. at 3022, 137 L.N.T.S. at 33. The Montreal Agreement, struck two days before the denunciation was to become effective, prompted the United States to withdraw the denunciation. See Pastor, supra note 36, at 577. At the time there was some question as to whether a signatory could withdraw a notice of denunciation prior to its becoming effective, see Lowenfeld & Mendelsohn, supra note 4, at 550 n.177 ("[I]t was felt that the notice of denunciation could be withdrawn at any time prior to the effective date."), and whether President Johnson could do so without the consent of the Senate. See Bechky, supra note 9, at 497 ("There is no constitutional basis, however, for such a limitation on Presidential control over foreign policy.").

However, at the time of this writing it seems more than likely that the Montreal
States Department of Transportation and international carriers flying to and from the United States. The Agreement provides for a liability limit of $75,000 in place of the $8,300 limit imposed by the Convention.\textsuperscript{53} In addition, liability is made strict by a clause prohibiting the use of certain defenses provided for in the original Convention.\textsuperscript{54} Although intended as an interim arrangement until a more permanent modification to the Convention limit could be reached,\textsuperscript{55} the Montreal Agreement continues to impose a $75,000 liability limit on over 149 airlines currently serving the United States.\textsuperscript{56}

Notwithstanding the effects of the Montreal Agreement, dissatisfaction with a system of limited recovery has continued to threaten the Convention's existence, particularly in the more industrialized nations of the world.\textsuperscript{57} This is aptly illustrated by a recent agreement entered into by ten Japanese airlines to voluntarily forgo any limitation of liability they would otherwise be entitled to under the Convention.\textsuperscript{58} The Japanese Initiative, as it is termed, requires that the airlines concerned, as part of the contract with their pas-

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\textsuperscript{53} See Montreal Agreement, supra note 50.
\textsuperscript{54} See id. at para. 1(ii). In particular, airlines are precluded from using the "all necessary measures" defense of Article 20. See id.
\textsuperscript{55} The United States was hopeful that an agreement could be reached setting liability in the area of $100,000 per passenger. See Lowenfeld & Mendelsohn, supra note 4, at 552.
\textsuperscript{56} But see supra note 52 (discussing the Intercarrier Agreement).
\textsuperscript{57} See In re Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463, 1470 (D.D.C. 1985) ("[T]he United States Senate has ratified no Convention, Protocol or Agreement since joining the original Convention. . . . Having rejected all proposals to date, it certainly seems that the United States is determined to accept no convention which imposes a limitation on the recovery available to citizens of this country."); see also Mankiewicz, supra note 45, at 242 (suggesting that economically under-developed nations were not interested in subsidizing higher indemnity levels for American and European travelers).
\textsuperscript{58} See Baden, supra note 48, at 453.
sengers, agree not to avail themselves of any liability limitation granted them by Article 22 or the Montreal Agreement.\textsuperscript{59}

Although subsequent modifications and agreements may have mitigated the harshness of the low liability limits, the Convention nonetheless exerts enormous influence on airline liability and passenger recovery. However, given its broad reach, the document is bereft of much of the detail normally provided in causes of action for wrongful death or injury.\textsuperscript{60} Specifically, the Convention does not mention the types of damages that may be recovered against airlines in a claim brought within its ambit.\textsuperscript{61} As a result, a good

\textsuperscript{59} The airlines accomplished this by adding two paragraphs to the contract of carriage. See id. at 455. The first stated that the airline would not apply the Article 22 liability limitation to any claim arising out of the Convention. See id. The second added that "each airline shall not use any defense for negligence as stated in Article 20(1) of the Warsaw Convention up to 100,000 SDRs, but will use those defenses thereafter." Id; see also supra note 52 (noting the similarity between the Intercarrier Agreement and the Japanese Initiative).

\textsuperscript{60} For example, compare Article 17 with the Ohio wrongful death statute that provides not only for who may bring suit but also lists the specific types of damages available. See OHIO REV. CODE ANN. § 2125.02 (Banks-Baldwin 1996). At least one circuit judge has stated that Article 17 lacks so much detail that it cannot constitute a cause of action for wrongful death. In his dissenting opinion in Benjamins v. British European Airways, 572 F.2d 913, 921 (2d Cir. 1978), Judge Van Graafeiland noted that at the time of the Convention's drafting there was no right in the United States to bring a wrongful death claim in the absence of a specific statute authorizing it. While all states now have such a statute they differ widely as to who may bring the suit and with respect to the measure, elements, and distributions of the damages recoverable. See id. However, Article 17 does not even address these issues, and in fact Article 24(2) specifically states that a claim under Article 17 is brought "without prejudice" to these very questions. See id. Thus, "Article 17 at best goes only half way towards creating a cause of action for wrongful death." Id. But see G. Nathan Calkins, Jr., The Cause of Action Under the Warsaw Convention, 26 J. AIR L. & COM. 217 (1959) (arguing that the Convention creates a cause of action sounding in contract).

For purposes of this Note, cause of action refers to the factual circumstances giving rise to a right to seek judicial redress, remedy refers to the means or avenue used to enforce the right, recovery means the specific substance of the right, normally the damages recoverable, and action refers to the actual formal demand of that right. This is important for two reasons. First, whether or not Article 17 is a cause of action, a remedy, an action, or a presumption of liability will in turn determine the substance of the right in question, i.e. the recovery, a part of which includes the types of damages available. Second, many of the opinions referenced herein appear to at least partially conflate the terms, which in turn leads to confusion, even within a single opinion.

A good example of this is Rhymes v. Arrow Air, Inc., 636 F. Supp. 737 (S.D. Fla. 1986). There, the court describes the Convention as the exclusive remedy even though it outlines four different avenues of recovery. See id. at 740-41. Clearly, from the context at least, the court means to say that the Convention provides for the exclusive recovery. See id. at 740 ("Any recovery, no matter how founded, will be subject to the limitations of the convention.") (emphasis added). Whether or not the Convention is the exclusive remedy is a different question altogether.

\textsuperscript{61} See Barbara J. Buono, The Recoverability of Punitive Damages Under the Warsaw
dealing with litigation has transpired to resolve this matter. One particular issue with which courts have wrangled, and which is the subject of this Note, is whether a finding of wilful misconduct on the part of the airline can form the basis for the recovery of punitive damages.

II. PREVIOUS DECISIONS DENYING PUNITIVE DAMAGES

The United States Supreme Court has decided only five cases involving the Warsaw Convention. In none of these cases was the Court called on to examine the availability of punitive damages. As such, whether, and under what circumstances, punitive damages may be recovered against an international airline is yet to be decided by the nation's highest court.

Lower federal courts have had several occasions to consider the issue, and while they have generally decided against such a recovery, the various rationales offered have been far from consistent.

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Convention in Cases of Wilful Misconduct: Is the Sky the Limit?, 13 FORDHAM INT'L L.J. 570, 571 (1989/1990) ("The Warsaw Convention, however, is silent as to the types of damages recoverable in actions arising under it."); see also Patricia Barlow, Punitive Damages Under the Warsaw Convention: Mixing Apples With Oranges, XVII-II ANNALS AIR & SPACE L. 71, 72 (1992) (suggesting that punitive damages were not mentioned in the Convention because they were unheard of in civil law jurisdictions).


In addition, all three of the federal appellate courts that have decided the issue have joined in refusing to allow punitive damages in claims governed by the Convention, for reasons that are difficult to reconcile.\textsuperscript{66}

Generally, federal courts have denied recovery of punitive damages based on one of two rationales. Some courts have rested their decision on their judicial interpretation of specific language in Article 17, in particular the language establishing liability for “damage sustained.”\textsuperscript{67} According to this argument, “damage sustained” refers only to the pecuniary amount necessary to compensate a plaintiff for the actual loss suffered. In so far as punitive damages are not \textit{caused} by an accident, the Convention envisions only compensatory damages, irrespective of the law governing the action. The most significant feature of this rationale, referred to herein as the textual argument, is that it purports to decide the issue based on an examination of the text itself.\textsuperscript{68}

The second rationale does not rely directly on a particular interpretation of the text. Instead, courts using this method have concluded more generally that punitive damages disrupt the uniformity sought to be achieved by the Convention. Based on evidence of the apparent purposes of the Convention, and of its drafters’ intent, these courts reject punitive damages because their enormous variety, both in amount and availability in different jurisdictions, disrupts the very uniformity the Convention was designed to create.\textsuperscript{69} Although referred to herein as the uniformity argument, this

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\textsuperscript{66} See Barlow, \textit{supra} note 61, at 73 (“The appellate courts which have held that punitive damages are not available under the Convention in the case of wilful misconduct have not all been uniform in their approach to the issue or in their rationale for denying punitive damages.”).

\textsuperscript{67} The French text of Article 17 reads in part “Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur. . . .” Warsaw Convention, \textit{supra} note 2, art. 17, 49 Stat. at 3018, 137 L.N.T.S. at 23 (emphasis added). While this Note makes reference to the State Department translation it should be noted that the French text is the official version of the treaty. \textit{See} Air Fr. v. Saks, 470 U.S. 392, 397 (1985) (“The governing text of the Convention is in the French language.”).

\textsuperscript{68} Although courts often invoke both rationales in arriving at their decision, perhaps the clearest example of a court using this type of rationale is \textit{Lockerbie I}. \textit{See infra} part II A.

\textsuperscript{69} \textit{Korean Air Lines}, \textit{see infra} part II B, is offered as being most representative of this method of denying punitive damages.
does not imply that courts adopting the textual argument do not also consider uniformity, which they surely do. However useful these designations may be, decisions rarely fit neatly into either category, but rather invoke elements of both. In addition, some courts have rejected both of these rationales and reasoned that the recovery of punitive damages is permissible in factually appropriate circumstances.70

Prior to 1991, a division existed among the lower federal courts as to whether punitive damages in excess of the $75,000 liability limitation could be recovered under the provisions of the Convention if an airline was found to have engaged in wilful misconduct.71 Since then, two events in particular have given rise to substantial litigation and analysis of the issue, resulting in a strong precedential basis for denying punitive damages: the destruction of Pan Am Flight 103 over Lockerbie, Scotland, and the shooting down of Korean Air Lines Flight 007 over Soviet airspace. Because these two events have generated the most comprehensive judicial opinions in Warsaw Convention jurisprudence, at least with reference to punitive damages, and to the extent that the resulting decisions are fairly representative of the two rationales discussed, a brief treatment of them is necessary.

A. The Lockerbie Disaster

The litigation surrounding the Lockerbie bombing is itself an enigma worthy of unraveling. On December 21, 1988, Pan Am Flight 103 was scheduled to fly from Frankfurt, West Germany to New York’s John F. Kennedy International Airport, via London, England.72 At 7:19 p.m., shortly after taking off on the second leg

70. The two courts to have done so are the Southern District of New York 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), and the Federal District Court of Kansas in Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).
71. See Grems, supra note 48, at 142. In as much as awards of punitive damages generally involve a finding of conduct arising at least to the level of gross negligence, any argument for punitive damages in this Note may be assumed to have as a predicate a finding of wilful misconduct or of an intentional illicit act. Generally speaking, punitive or exemplary damages are awarded to a plaintiff over and above the amount necessary to compensate for actual loss incurred to punish a wrongdoer for behavior that is wilful, wanton, oppressive, reckless, outrageous or malicious. See Barlow, supra note 61, at 73. They are also awarded to deter the wrongdoer from behaving similarly in the future. See id. For a list of specific state statutes authorizing punitive damages see Grems, supra, at 142 n.10.
of its journey, the aircraft exploded over Lockerbie, Scotland, killing all 259 passengers on board.\footnote{See id. at 548-49.} It was subsequently discovered that prior to taking off from London, a checked bag containing an explosive device had been placed in the cargo hold.\footnote{See Howard T. Edelman, *Punitive Damages Crash in the Second Circuit: In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 58 BROOK. L. REV. 497, 505-06 (1992).}

Following the tragedy, survivors brought claims in various federal courts against Pan Am\footnote{The actual defendants were Pan American World Airways, Inc. (Pan Am), two Pan Am subsidiary corporations, Alert Management Systems, Inc. and Pan Am World Services, responsible for providing security services, and Pan Am's parent corporation, Pan Am Corp. *See In re Air Disaster in Lockerbie, Scot.*, on Dec. 21, 1988, 733 F. Supp. at 548-49.} under Article 17 of the Warsaw Convention.\footnote{See id. at 548-49.} The claims were consolidated for trial in the Eastern District of New York\footnote{The claims were based on state and federal causes of action. *See Lockerbie I*, 928 F.2d 1267, 1272 (2d Cir. 1991) cert. denied sub nom. Rein v. Pan American World Airways, Inc., 502 U.S. 920 (1991).} and the trial was bifurcated between liability and damages. Prior to trial on the issue of liability, Pan Am was granted partial summary judgment dismissing plaintiffs' claims for punitive damages.\footnote{By order of the Judicial Panel on Multidistrict Litigation. *See id.* at 1269. The Multidistrict Litigation Act permits the Panel to consolidate separate claims involving similar questions of law or fact before a single district court. *See Bechky, supra* note 9, at 485-86. Nearly all major air crashes have been consolidated. In fact, nearly 20% of the Panel's cases have involved aircraft. *See id.* at 486.} The plaintiffs took an immediate appeal to the Second Circuit Court of Appeals where the trial court decision was affirmed in *Lockerbie I*.\footnote{See In re Air Disaster in Lockerbie, Scot., on Dec. 21, 1988, 733 F. Supp. 547 (E.D.N.Y. 1990). For purposes of deciding the motion, the court impliedly found the existence of wilful misconduct, and impliedly held that local law would allow recovery of punitive damages. *See id.*}

In *Lockerbie I*, the Second Circuit engaged in an extensive analysis of Warsaw Convention jurisprudence and concluded that

\footnote{928 F.2d 1267 (2d Cir. 1991). The opinion is referred to as *Lockerbie I* to distinguish it from *Lockerbie II*, a subsequent Second Circuit decision relating to the same set of events. Briefly, at the liability phase of the trial, Pan Am was found to have caused the deaths of the passengers and crew through its wilful misconduct. Upon remand for the damages phase, three of the damages trials returned verdicts allowing loss of society damages, and Pan Am was again granted leave to appeal to the Second Circuit. The resulting opinion, *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804 (2d Cir. 1994), upholding two of the loss of society rulings and vacating the other, is referred to as *Lockerbie II*, and is not pertinent to the issues discussed in this Note. For an account of the facts giving rise to the finding of wilful misconduct see Peter Watson, *In Pursuit Of Pan Am*, 2 ILSA J. INT'L & COMP. L. 203 (1995).}
punitive damages were not recoverable, notwithstanding Pan Am’s wilful misconduct. The court began by examining the purposes of the Convention and the context in which it was drafted. In doing so, the court noted that the two primary goals of the Convention were “first, to establish uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims,” and “second—clearly the overriding purpose—to limit air carriers’ potential liability in the event of accidents.” The court characterized the Convention as “a trade-off between carriers and their passengers.” Passengers would have the absolute right to compensation for injuries up to 125,000 Poincare francs while airlines could limit their liability to the same amount as long as they had refrained from wilful misconduct.4

The court then undertook an historical examination of punitive damages in American law, suggesting it was doing so “to identify clearly what kinds of damages the Warsaw Convention might bar.” Its rationale for doing so was that “punitive damages derive their meaning depending on whether federal law or a given state law, such as Massachusetts, New Hampshire or Connecticut, governs.” The court noted that in most jurisdictions, including federal jurisdictions, punitive damages are intended to deter and punish, and as such, are not considered compensatory, although in a minority of states punitive damages are viewed as “serving a compensatory function.”

Because Pan-Am had argued that Article 17 of the Convention was the sole cause of action available to plaintiffs, the court had next to decide whether state law causes of action could co-exist alongside the Convention cause of action. Clearly, if a cause of

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5 See Lockerbie I, 928 F.2d at 1270. Later, the court explained that normally it would have begun its analysis with the language of the text itself, but could not on this occasion because the Convention was silent as to the availability of punitive damages. See id. at 1280.
6 Id. at 1270. (citing Lowenfeld & Mendelsohn, supra note 4, at 498-99).
7 Id. at 1271.
8 Subject to Article 20 defenses. See id. at 1271; supra note 39 (noting Montreal Agreement limits use of Article 20). The method for converting the Poincare franc into U.S. dollars is discussed supra in note 7.
9 See Lockerbie I, 928 F.2d at 1271.
10 Id.
11 Id. at 1271-72.
12 Id. at 1272.
13 See id. at 1273.
action based on state law could be asserted, then for some plaintiffs the substantive law applicable to the action would view punitive damages as compensatory, while for other plaintiffs they would serve only deterrence and punishment purposes. Thus, because plaintiffs had asserted both federal and state law causes of action, the court was required to determine the availability of the latter.

Beginning with the established Second Circuit position that the Warsaw Convention creates a cause of action "enabling a plaintiff to sue directly under its terms," the court noted that whether state causes of action were still available, or whether the cause of action under the Convention was exclusive, had not previously been decided in the Second Circuit. The court carefully limited the question before it, stating the issue as whether "state causes of action are preempted when the state claim alleged falls within the scope of the Convention." See id. at 1271. Interestingly, if Article 17 expressly permitted the recovery of punitive damages it would seem to matter little what meaning federal or state law attached to them. Hence, the logical cogency of the court's position requires an assumption that Article 17 does not permit punitive damages, a point the court later purports to decide. See infra notes 101-02 and accompanying text (discussing whether Article 17 allows non-compensatory damages). This illustrates at least one of the dangers of opting, as the court did, not to begin with the text of the Convention in deciding upon its application.

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90. Lockerbie I, 928 F.2d at 1273 (citing Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978)). Benjamins was a Second Circuit opinion reversing two previous decisions that had held the Convention did not create a cause of action, but merely a presumption of liability. See Benjamins, 572 F.2d at 916-19. The Second Circuit had not been alone in adopting this position. See Wyman v. Pan American Airways, Inc., 43 N.Y.S.2d 420, 423 (N.Y. Sup. Ct. 1943) ("No new substantive rights were created by the Warsaw Convention."). But see Calkins, supra note 60 (arguing the Convention creates a cause of action sounding in contract).

91. See Lockerbie I, 928 F.2d at 1273. Nor had the Supreme Court decided the issue. See id. ("The Supreme Court has declined to address the question of exclusivity.").

92. Id. (emphasis added). The court made clear that state causes of action were not preempted when the claim alleged fell outside of the scope of the Convention, and that state causes of action were clearly preempted when they conflicted with the Convention, on account of the Supremacy Clause of the United States Constitution. See id. Specifically, the court stated:

The issue is not whether the Convention preempts state laws with which it is in direct conflict, as it obviously must under the Supremacy Clause of the United States Constitution. Nor is it whether a plaintiff may bring a state cause of action when the claim does not arise under the Warsaw Convention, which a plaintiff plainly may institute.

Id. (citations omitted). Presumably the court is deciding whether state causes of action are preempted when they fall within the scope of the Convention and do not conflict with it. Inexplicably, later in the opinion the court claims to have rejected the possibility of bring-
In deciding that state causes of action were not preserved by the Convention, the court gave its reasons as "the way the other parties have viewed the Convention, its emphasis on uniformity, and the need for a single, unified rule on such points as the recoverability of punitive damage..." Having determined that state causes of action were not preserved, the court then considered whether or not they had been preempted by Congress in adhering to the Convention. In concluding that they had, the court again mentioned the "desire for uniformity in the laws governing carrier liability" that had prompted adherence to the Convention, and noted that the existence of state causes of action would only frustrate these purposes. Although acknowledging that other courts had decided state law actions could be brought under the Convention, the court found "the more reasoned opinions conclude as we do."

Hence, because state law causes of action were preempted, and because the federal government had enacted the treaty, the court found the substantive law governing the treaty cause of action was federal law. In particular, the cause of action was to be governed by the federal common law of tort which, although permitting punitive damages in wrongful death claims, only did so to punish and deter a defendant. Because federal tort law did not "accord a right to recover for a compensatory element in a punitive damages claim," the court needed only to decide whether or not the Convention permitted a plaintiff to recover punitive damages intended to punish a defendant. For the first time, the court

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See id. at 1282 ("An argument for the availability of state causes of action under the Convention—as distinguished from the availability of state causes of action outside the Convention, a possibility we rejected earlier—is that the language of the Convention itself preserves them.") (emphasis added).

See Lockerbie I, 928 F.2d at 1274 (emphasis added). With regard to the first of these reasons the court noted that in particular Australia, England, and Canada had all passed domestic legislation to make Article 17 the exclusive remedy for claims governed by the Convention. See id. Yet if the court's conclusion is correct in that the Convention cause of action is exclusive as against state law causes of action, it is difficult to explain why the nations referred to would have had to have enacted legislation to reach the same result.

See id.

Id. at 1275.

Id. at 1276.

Id. at 1278.

See id. at 1279-80.

Id. at 1280.
The court explained that although it would normally have begun its analysis with the Convention text, it had not done so in this case because the text was silent on the availability of punitive damages. However, rather summarily, the court ruled that "damage sustained" excluded the possibility of non-compensatory damages, and that "Article 17 contemplates monetary or compensatory damages only."102

The court then considered plaintiff's argument that irrespective of the meaning of "dommage survenu," Article 24, which proscribes the conditions under which an action can be brought, should be interpreted as meaning the Convention had left the measure of damages to local law.103 That is, by its "however founded" language, Article 24 implies no single method for determining damages, and so the matter must have been left to the court of jurisdiction. The court made short work of this argument, finding instead that the provision left nothing more to local law than how to calculate compensatory damages and how to distribute the award among the various beneficiaries.104

The final issue left for the court was whether a finding of wilful misconduct would render Article 22 inoperative as a limitation of liability.105 Plaintiffs had argued that if Article 17 was

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100. See id. But if the Convention cause of action provides the right to seek judicial redress for the conduct involved, and the federal common law of tort is the substantive law proscribing its elements, then it is far from clear why the court needs to return to the cause of action and not the substantive law applicable to it in order to determine what damages may be recovered.

101. See id.

102. Id. at 1281. Although the court does not specifically say so, presumably the final step in the analysis is that because the substantive law governing the Convention cause of action, viz. the federal common law of tort, does not recognize a compensatory purpose to punitive damages, they are necessarily precluded. This is not insignificant given Zicherman's rejection of the application of federal common law to Convention causes of action. See infra note 191.

103. See Lockerbie I, 928 F.2d at 1282. Article 24 provides that:

(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 as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, supra note 2, art. 24, 49 Stat. at 3020, 137 L.N.T.S. at 27.

104. See Lockerbie I, 928 F.2d at 1283-84.

105. See id. at 1285. The court stated earlier that "[l]iability under Article 17 was obviously meant to be limited to 125,000 francs by Article 22(1)." Id. at 1280; see also id.
read to allow compensatory damages only, and also to preempt state law claims that would allow a recovery of punitive damages, then in both instances Article 17 was effectively limiting Pan-Am's liability.\textsuperscript{106} Because willful misconduct had been found, Pan Am should not be entitled to the liability limiting effects of Article 17. Unpersuaded, the court found that Article 17 was not an exclusion or limitation of liability because "to a civil lawyer unfamiliar with the concept of punitive damages, Article 17 does not appear to limit liability in any way.\text"\textsuperscript{107}

Finally, the court offered policy considerations to support its view that the Convention did not intend to permit punitive damages. Such a recovery, it ruled, would disrupt that which the Convention sought to accomplish, in particular, the ability of airlines to insure against losses,\textsuperscript{108} and to provide a uniform carrier liability regime. Uniformity would be "greatly defeated" if national law was to replace the Convention in cases of willful misconduct,\textsuperscript{109} and allowing punitive damages would "act as a magnet so that every airline injury claim would, if possible, be brought in the United States."\textsuperscript{110}

\textbf{B. Korean Air Lines Disaster}

The shooting down of Korean Air Lines Flight 007 (KAL 007) over Soviet airspace provided the D.C. Circuit Court of Appeals with an opportunity to review \textit{Lockerbie I} and to present its own rather different reasons for denying punitive damages in an action under the Convention.\textsuperscript{111} KAL 007 was a Korean Air Lines

\begin{footnotes}
\footnotetext[106]{For an elaboration of this point see infra notes 127-37 and accompanying text (dissenting opinion of Chief Judge Mikva in \textit{Korean Air Lines}).}
\footnotetext[107]{\textit{Lockerbie I}, 928 F.2d at 1286. Strangely, the court expressly declined to consider whether the federal common law of tort, i.e. the substantive law held to govern the cause of action, would view Article 17 as serving to limit liability, although it seems clear that it would. See id. ("For us to impose a common law view on the document, twisting the apple to appear to be an orange, would violate principles of Treaty interpretation."). Article 17, a source of liability, only becomes a limitation of liability when the court rules, as it does, that other sources of liability are precluded.}
\footnotetext[108]{For further discussion of airlines' ability to insure against losses, see \textit{infra} notes 307-18 and accompanying text.}
\footnotetext[109]{See id. at 1287. But see Minutes, \textit{supra} note 20, at 62 (suggesting it is appropriate not to allow the carrier to benefit from the Convention when it has committed willful misconduct).}
\footnotetext[110]{\textit{Lockerbie I}, 928 F.2d at 1287.}
\footnotetext[111]{This was so despite the fact that KAL Flight 007 had been shot down some five years prior to the bombing of Pan Am Flight 103. Cases in which plaintiffs attempt to}
\end{footnotes}
scheduled flight from New York's John F. Kennedy Airport to Seoul, South Korea, with a stop for refueling in Anchorage, Alaska. After leaving Anchorage, navigational errors caused the aircraft to deviate from its pre-planned course some 200 miles into Soviet airspace. It was later discovered that the aircraft had been shot down by a Soviet Union SU-15 interceptor, killing all 269 persons on board. At trial, a jury found Korean Air Lines guilty of wilful misconduct and awarded damages that included $50 million in punitive damages.

Although not as structured as the opinion in *Lockerbie I*, the D.C. Circuit began by stating its belief that the recovery of punitive damages must "turn on the nature of the liability contemplated by Article 17." Thus, recognizing the uniformity intended to result from the Convention, the court bound itself to give the language of Article 17 "a meaning consistent with the shared expectations of the contracting parties." Acknowledging that the Convention did not mention punitive damages, the court ruled that "the Article 17 phrase 'liable for damage sustained' strongly implies that the carrier's responsibility is compensatory and extends only to the reparation of loss resulting from the death or injury of passengers."
Not content with deciding the issue on the meaning of "damage sustained," the court then looked both to the negotiating history and to interpretations developed by other signatories in order to find additional support for its ruling. The court found its position similar to that of Great Britain, the only other common law contracting party, and that an award for non-compensatory damages would be "contrary to the expectations of the jurists who drafted Article 17." However, the court noted that in declaring punitive damages contrary to the Convention, it had "not take[n] sides in the exclusivity debate."

The court also claimed support in the drafting history, in particular, in a report from the CITEJA claiming that it had proved impossible to agree on a single rule on "what [constitute] the damages subject to reparation." Interestingly, while the court focused on the use of the word "reparation" in order to support its compensatory-only conclusion, it failed to acknowledge that the report in its entirety could just as adequately support a contrary position, in as much as the report recommended the question be "regulated independantly (sic) from the present Convention."

Having concluded that Article 17 limited recovery to compensatory damages, the court then held, as had the court in Lockerbie I, that Article 17 was not a limitation on liability of the sort that could be lifted in cases of wilful misconduct. Agreeing with Lockerbie I, the court concluded the drafters of the Convention would not have considered Article 17 a limitation of liability.

Finally, as in Lockerbie I, the court offered policy considerations to bolster its ruling, in particular suggesting that punitive damages in a Convention action would "increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation." As such, the court concluded that punitive dam-

119. Id. at 1487.
120. Id. at 1488. Recall that in Lockerbie I it was necessary to eliminate the availability of state causes of action because some states viewed punitive damages as compensatory recovery. See supra notes 85-96 and accompanying text.
121. Korean Air Lines, 932 F.2d at 1488 (citing Report Presented In the Name of the International Technical Committee of Aeronautical Legal Experts, reprinted in Minutes, supra note 20, at 255).
122. Minutes, supra note 20, at 255.
123. See Id. at 1488-89.
124. See Id. at 1489. But see Minutes, supra note 20, at 86-87 (discussing the possibility that for some countries, domestic law imposed greater liability upon airlines).
125. Korean Air Lines, 932 F.2d at 1490. For a discussion of these policy consider-
ages could not be recovered regardless of the substantive law used to assert the claim.126

*Korean Air Lines* also offers a vigorous dissenting opinion that merits discussion. Written by Chief Judge Mikva, the dissent declined to accept the majority position that the Convention barred the recovery of punitive damages.127 The dissent agreed with the majority that a cause of action based on Article 17 limited recovery to compensatory damages.128 However, most of the plaintiffs had claimed damages under a combination of state and federal causes of action, both statutory and at common law.129 Hence, in denying punitive damages in claims not brought under the Convention cause of action, the majority had done one of two things: it had either implicitly made Article 17 the exclusive cause of action, despite its claim not to have addressed this issue, thereby preempting other causes of action that might allow for punitive damages, or it had construed Article 17 as a “partial preemption” of non-Convention causes of action.130 That is, where non-Convention causes of action were brought, Article 17 acted to limit the recovery available to the amount allowed by the Convention. Thus, the dissent claimed, “the majority appears to employ the latter rationale, but then dismisses the force of Article 25 in part on the strength of decisions premised on the exclusivity rationale.”131

Turning first to the exclusivity issue, the dissent pointed to the variety of courts and commentators that had rejected the notion that Article 17 was the exclusive cause of action.132 Hence, Judge

\[\text{ations see infra part VI.}\]

126. *See Korean Air Lines*, 932 F.2d at 1490. Hence, there was no need to determine the applicable substantive law, as had done the court in *Lockerbie I*.

127. *See id.*

128. *See id.* at 1491.

129. *See id.* Accordingly, Judge Mikva stated that if any of the plaintiffs had based their complaints solely on the Article 17 cause of action he would concur in holding that they could not recover punitive damages. *See id.*

130. *See id.* The majority had considered only “the nature of the liability contemplated by Article 17,” without reference to other sources of liability. *Id.* at 1485.

131. *Id.* at 1491. In other words, the majority could only conclude that Article 17 was not a limitation of liability by first assuming it was the exclusive source of liability. While claiming not to have “take[n] sides in the exclusivity debate,” the court, as support for limiting the effect of Article 25, cites primarily to *Lockerbie I*. *See id.* at 1488-89. But *Lockerbie I* was only able to adopt its position by “taking sides” and deciding to preclude state law causes of action. *See supra* notes 88-96, and accompanying text.

132. *See Korean Air Lines*, 932 F.2d at 1492. In so doing Judge Mikva noted that the *Lockerbie I* position on exclusivity was “astonishing in light of the Second Circuit’s own precedents.” *Id.* In particular, the dissent pointed to *Tokio Marine and Fire Insurance Co.*
Mikva concluded, "[t]he Convention is not the exclusive remedy for passengers injured on international flights."\textsuperscript{133} In fact, the "however founded" language of Article 24 "clearly contemplates actions arising under separate sources of law but places some limits on recovery."\textsuperscript{134} By refusing to decide the exclusivity issue, the majority must have construed Article 17 as a \textit{limitation} on the liability a carrier would otherwise face from a state or other federal law cause of action.\textsuperscript{135}

However, if this were so, Article 25 would waive any such limitation in the event of wilful misconduct.\textsuperscript{136} In ruling otherwise,—i.e. that Article 17 was not a limitation—the majority relied almost exclusively on \textit{Lockerbie I}. However, the court in \textit{Lockerbie I} only concluded that Article 17 was not a limitation because the court had first decided that Article 17 was the exclusive source of liability for international airlines.\textsuperscript{137} Hence, in refusing to allow punitive damages, the majority relied on a position it had specifically declined to decide.

Nor could the majority rely on \textit{Floyd v. Eastern Airlines, Inc.},\textsuperscript{138} an Eleventh Circuit case denying punitive damages without deciding the exclusivity issue. In \textit{Floyd}, the court stated only that "state law was preempted to the extent that it was inconsistent with the compensatory scheme of Article 17."\textsuperscript{139} Hence, plaintiff's state law tort action was preempted as inconsistent with the Convention. In this case however, some claims were in federal maritime law, and the Warsaw Convention, as a federal treaty, did not preempt other federal law.\textsuperscript{140} The dissent concluded "the language of Article 25 supports the conclusion that punitive damages are not

\textit{v. McDonnell Douglas Corp.}, 617 F.2d 936 (2d Cir. 1979). \textit{See Korean Air Lines}, 932 F.2d at 1492. \textit{Tokio Marine} had held that the Convention cause of action was not exclusive. \textit{See Tokio Marine}, 617 F.2d at 942 ("[I]f the Convention draftsmen intended to create a contract cause of action, the 'however founded' language of Article 24 indicates that they did not intend that cause of action to be exclusive.").

\textit{Korean Air Lines}, 932 F.2d at 1492. Nor presumably is Article 17 the exclusive cause of action. \textit{See supra} note 60 (distinguishing cause of action from remedy).

\textit{Korean Air Lines}, 932 F.2d at 1492.

\textit{See id.} at 1493.

\textit{See id.}

\textit{See supra} notes 90-96 and accompanying text.

\textit{872 F.2d} 1462 (11th Cir. 1989). For further discussion of \textit{Floyd}, \textit{see infra} notes 148-53 and accompanying text.

\textit{Floyd}, 872 F.2d at 1462.

\textit{See Korean Air Lines}, 932 F.2d at 1492. ("[W]e are confronted with two legal schemes that stand in rough equipoise under the Supremacy Clause.").
prohibited by the Warsaw Convention in cases of willful misconduct even if a cause of action based solely on the Convention would not authorize such damages."\textsuperscript{141}

By way of support, the dissent offered an analogy between the Convention and workmen's compensation laws that impose strict liability for work-related accidents.\textsuperscript{142} Notably, these laws did not limit the availability of non-compensatory damages in cases of intentional misconduct by the employer.\textsuperscript{143} Similarly, the exception created by Article 25 "does not undermine the basic purpose of limiting carrier liability; it simply recognizes that in cases of serious misconduct carriers should not enjoy the benefits of these limitations."\textsuperscript{144}

Finally, Judge Mikva created a hypothetical "diabolical carrier" that sought to deliberately sabotage one of its own flights in the hopes of collecting the insurance payout.\textsuperscript{145} Even if plaintiffs could successfully prove intent to destroy the aircraft, "the majority's decision would completely foreclose the availability of punitive damages."\textsuperscript{146} Judge Mikva concluded that if wilful misconduct were proved, "[t]he limitations of the Convention (and the goals those limitations serve) should have no application."\textsuperscript{147}

\textsuperscript{141} Id. at 1494. The dissent also commented on the reliance placed by Floyd on the understandings of subsequent drafters, particularly those of the Hague Protocol, that a showing of wilful misconduct would only waive the monetary limits of Article 22. See Floyd, 872 F.2d at 1483 ("[M]inutes of the negotiations on the Hague Protocol, an amendment to the Convention, indicate that the delegates understood article 25 as referring only to article 22."). In particular, Judge Mikva found this method of interpretation of little merit. See Korean Air Lines, 932 F.2d at 1493-94 (citing McKelvey v. Turnage, 792 F.2d 194, 200 (D.C. Cir. 1986), affd, 485 U.S. 535 (1988)) ("T]he views of later Congresses as to the meaning of enactments by their predecessors are of little, if any, significance.").

\textsuperscript{142} See Korean Air Lines, 932 F.2d at 1494.

\textsuperscript{143} See id. Judge Mikva did not discuss the availability of separate actions in the event of wilful or reckless misconduct.

\textsuperscript{144} Id.; see also Minutes, supra note 20, at 62 (suggesting it is appropriate not to allow the carrier to benefit from the Convention when it has committed willful misconduct).

\textsuperscript{145} See Korean Air Lines, 932 F.2d at 1494.

\textsuperscript{146} Id. By way of response, the majority had suggested that criminal sanctions would act to deter this type of conduct. See id. at 1490. Nonetheless, in terms of compensation to injured plaintiffs, the majority claimed that "because of the 'accident' requirement in Article 17, it is by no means certain that the protections of the Convention would be available to a carrier that destroyed its own aircraft." Id. The majority did not explain why it was more certain that an act of wilful misconduct would be considered an accident.

\textsuperscript{147} Id. at 1494.
C. Other Significant Decisions

In addition to Lockerbie I and Korean Air Lines, several other courts have made significant contributions to the issue of punitive damages under the Convention. One, previously referred to in discussing Korean Air Lines, is Floyd v. Eastern Airlines, Inc.,\(^{148}\) in which the Eleventh Circuit Court of Appeals became the first circuit court to deny punitive damages in an action under the Convention. The court in Floyd held that state law causes of action were preempted in so far as they conflicted with the scheme of recovery established by the Convention.\(^{149}\) The court rejected plaintiffs’ claims for punitive damages under the Convention cause of action by ruling that the liability created by the Convention was “entirely compensatory in tone and structure” and that Article 25 merely lifted the liability limitation on compensatory damages.\(^{150}\)

The Floyd court then considered plaintiffs’ argument that a state cause of action allowing the recovery of punitive damages was not inconsistent with a Convention cause of action for the same harm that was silent as to punitive damages, and so should not be preempted.\(^{151}\) The court rejected this argument, instead finding that such a recovery would not fall within the “conditions and limits set out in this convention” for actions not brought under the Convention.\(^{152}\) As noted above, Floyd decided the case without reaching any conclusions as to the exclusivity of the Convention cause of action against a non-conflicting state cause of action.\(^{153}\)

\(^{148}\) 872 F.2d 1462 (11th Cir. 1989). The plaintiffs in Floyd brought claims for intentional infliction of emotional distress under both state law and the Convention. Although the court ruled that the Convention provided a cause of action for such harm, this was reversed by the United States Supreme Court. See Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991) (holding that Article 17 does not allow recovery for mental injury unaccompanied by physical injury).

\(^{149}\) See Floyd, 872 F.2d at 1482.

\(^{150}\) Id. at 1483. Unlike Lockerbie I and Korean Air Lines, the plaintiffs in Floyd had argued that Article 25 created an independent cause of action authorizing punitive damages, a notion rejected by the court. See id.

\(^{151}\) See id. at 1485.

\(^{152}\) That is, it would not fall under the limits of Article 24. See id. Rather than attempting to discover the meaning behind punitive damages under the particular state cause of action in issue, as was the case in Lockerbie I, see supra notes 85-87 and accompanying text, the court instead chose to treat punitive damages generally, as damages “not intended to compensate victims, but . . . to punish a defendant for his conduct and to deter others from engaging in similar conduct in the future.” Floyd, 872 F.2d at 1487.

\(^{153}\) At least one commentator has suggested that because it did not adhere to the
Although no circuit court has ruled that punitive damages may be recovered against an international airline, at least one district court has found so. The first case to parse on the availability of punitive damages in a state action against an international airline was *Hill v. United Airlines.* The plaintiff in *Hill* brought a common law tort action for intentional misrepresentation seeking, *inter alia,* punitive damages. The defendant airline invoked the Warsaw Convention arguing that its liability, if any, was governed thereunder.

Judge Saffels ruled that notwithstanding the uniform system of liability established by the Convention, “it does not exclusively regulate the relationship between passenger and carrier on an international flight.” Where a matter is treated by the Convention, the latter served to limit liability, but where the Convention did not apply, liability is “to be established [by] traditional common law rules.” Having determined that the tort of misrepresentation did not fall within Articles 17, 18, or 19 establishing liability under the Convention, the court found “nothing in the Warsaw Convention to bar a lawsuit for damages as a result of the alleged intentional tort.”

Having established the availability of a state claim for conduct beyond that articulated by the Convention, the court then examined whether Hill was entitled to punitive damages. The court stated

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*550 F. Supp. 1048 (D. Kan. 1982).*

*See id. at 1051. Hill had been booked to fly on United Airlines to Japan on a business trip. Having failed to arrange an aircraft for the first stage of the flight, United representatives falsely announced that the airport in Seattle had been closed due to inclement weather, and that the flight had been canceled. In actual fact, the airport had been open all morning and other carriers had been flying there, some of which could have gotten Hill there in time to make his connecting flight had United rerouted him. As a result, Hill missed the international stage of his journey and his business meeting. See id. at 1050.*

*156 Id. at 1054.*

*157 Id.*

*158 Id.*

*159 Hill had argued that misrepresentation was the equivalent of wilful misconduct as used in Article 25. Yet, if the tort claim is, as the court found, “completely outside of the Warsaw Convention,” it is difficult to see why the Convention would limit Hill’s recovery. After all, Article 24 only limits to the conditions of the Convention those “cases covered by” Articles 17, 18, and 19, none of which deal with the tort of misrepresentation. See *Warsaw Convention, supra* note 2, art. 24, 49 Stat. at 3020, 137 L.N.T.S. at 27.*
that if Hill could prove wilful misconduct, a term "broad enough to encompass . . . allegations of intentional misrepresentation," then he could recover actual and punitive damages beyond the limits of Article 22 by invoking Article 25.160

Another decision of particular interest is In re Highjacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986,161 in which Judge Sprizzo of the Southern District of New York denied a summary judgment motion to dismiss punitive damages. Beginning with the proposition that the Warsaw Convention created a cause of action for wrongful death, the court held such an action was "independent of the various actions created by the internal law of the signatory nations."162 Because punitive damages were an element of the common law remedy, they were not expressly preempted by the Convention, although subject to Article 22, they could not exceed $75,000.163 Nor would the court imply the preemption of punitive damages "in the absence of some clear indication in the text itself or its legislative history that supports that conclusion."164

Finally, the court suggested that even if Article 17 precluded punitive damages, the Convention would bar Pan Am's reliance on Article 17 if they had engaged in wilful misconduct.165 The court stated, "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 as such not available to the airline.166 Significantly, the court rejected the rea-

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This inconsistency may, in part at least, explain the reluctance of subsequent courts to follow Hill in allowing punitive damages. See Floyd, 872 F.2d at 1488 n.43 ("[T]o the extent that Hill authorizes recovery of punitive damages under the Warsaw Convention, we decline to accept its holding.").

160. Hill, 550 F. Supp. at 1055. At least one commentator has characterized Hill's ruling on punitive damages as dicta. See Buono, supra note 61, at 571 n.8.


162. Karachi, 729 F. Supp. at 19. The court was "constrained" to follow the Second Circuit's ruling in Tokio Marine, 617 F.2d 936 (2d Cir. 1980), that the remedy provided by the Convention was not exclusive.

163. See Karachi, 729 F. Supp. at 19.

164. Id. Indeed, the court found the language of Article 24 strongly suggested "the Convention contemplates state causes of action, including those for punitive damages, not found in or created by the Convention." Id.

165. See id.

166. Id. at 20. This is essentially the point made by Chief Judge Mikva in Korean Air
soning in *Floyd* which, by limiting the provisions waived by a triggering of Article 25, had judicially amended the plain language of the text to "effectuate what it believes the Contracting Parties intended."\(^{167}\)

It was against this backdrop of decisions and rationales that the Supreme Court decided *Zicherman v. Korean Air Lines*.\(^{168}\)

### III. THE ZICHERMAN DECISION

*Zicherman*, only the fifth Warsaw Convention case to reach the Supreme Court,\(^ {169}\) did not directly involve punitive damages.\(^ {170}\) Instead, *Zicherman* decided the related issue of whether a plaintiff in a Convention case could recover damages for loss of society.\(^ {171}\) However, in the course of so doing, Justice Scalia, writing for a unanimous court, offered a renewed approach to deciding damages issues under the Convention.

The case itself stemmed from the same set of facts involved in *Korean Air Lines*.\(^ {172}\) The Court began its analysis by examining

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*Lines. See supra* notes 127-37 and accompanying text.


\(^ {169}\) See supra note 62.

\(^ {170}\) Indeed, the punitive damages issue had already been resolved by *Korean Air Lines*. See supra part II B.

\(^ {171}\) Related in that both punitive and loss of society damages are non-pecuniary. Generally, loss of society damages are awarded for nonpecuniary benefits that a family is deprived of by the loss of the decedent. The benefits compensated for can include love, affection, care, attention, companionship, comfort, and protection. See Stephen J. Fearon, *Recoverable Damages in Wrongful Death Actions Governed by the Warsaw Convention*, 62 DEF. COUNS. J. 367, 368 (1995).

\(^ {172}\) See supra notes 111-15 and accompanying text. The plaintiffs, Marjorie Zicherman and Muriel Mahalek, respectively the sister and mother of the decedent, sued Korean Air Lines in the U.S. District Court for the Southern District of New York under the Warsaw Convention. See *Zicherman*, 116 S. Ct. at 631. At a consolidated trial the jury found that the flight crew had engaged in willful misconduct and that, as such, the $75,000 liability cap would not apply. See *id*. The jury then awarded $50 million in punitive damages which was subsequently vacated in *Korean Air Lines*. See *id*. The Judicial Panel on Multidistrict Litigation then remanded the cases to their transferor courts for trial of damages issues. See *id*. At the trial for damages in the Southern District of New York the jury awarded Zicherman, *inter alia*, $70,000 in loss of society damages and $28,000 to Mahalek. See *id*. On appeal, the Second Circuit, relying on its decision in *Lockerbie II*, stated that although general maritime law provided the substantive law of damages, and allowed for loss of society damages, it was necessary for a plaintiff to prove that he or she was a dependent of the decedent, which plaintiffs in this case had not done. See *id*. at 631-32. Hence Mahalek’s award was vacated and Zicherman’s remanded. See *id*. at 632. The Supreme Court subsequently granted certiorari. See *id*. 
Article 17 to see if it permitted recovery for loss of society.\textsuperscript{173} Recognizing that "dommage"\textsuperscript{174} could refer to an extremely wide range of phenomena,\textsuperscript{175} the Court concluded that the term meant "legally cognizable harm."\textsuperscript{176} Having decided on the meaning of "dommage," the next task for the Court was to determine the content of the term.

Plaintiffs had argued the concept should be construed to mean any harm that French civil law had recognized in 1929.\textsuperscript{177} In rejecting this, the Court found it "particularly implausible" that the mere use of the French language could have a dispositive effect.\textsuperscript{178} Because the drafters must have known "dommage" would vary widely "from jurisdiction to jurisdiction, and even from statute to statute within a single jurisdiction," the Court found it unlikely that use of the French term would require compensation for harms recognized in France but not in other nations, or to forbid compensation for harms not recognized in France but acknowledged elsewhere.\textsuperscript{179} The only realistic alternative, the Court concluded, was that Article 17 left to adjudicating courts the determination of what harm was legally cognizable.\textsuperscript{180}

For additional support, the Court turned to Article 24, which it claimed was an express limitation of Article 17.\textsuperscript{181} Plaintiffs had contended that Article 24 left only procedural matters to local law, such as standing and division of awards among eligible claimants. Rejecting this, the Court held that if an action was brought under Article 17, the Convention did not affect "the substantive questions of who may bring suit and what they may be compensated for."\textsuperscript{182} These questions were for determination by whatever local

\textsuperscript{173} See id.
\textsuperscript{174} The court equated "dommage" with "damage" or "harm." See id.
\textsuperscript{175} See id. (stating that such phenomena ranged "from the medical expenses incurred as a result of [plaintiff's] injuries (for which every legal system would provide tort compensation), to the mental distress of some stranger who reads about [plaintiff's] death in the paper (for which no legal system would provide tort compensation).")
\textsuperscript{176} Id.
\textsuperscript{177} See id. Plaintiffs argued this would include "dommage materiel" (pecuniary harm of various sorts) as well as "dommage moral" (non-pecuniary harm of various sorts including loss of society).
\textsuperscript{178} See id. at 633.
\textsuperscript{179} Id.
\textsuperscript{180} See id. As support for this, the court cited several domestic statutes that provided for "damages" or for reimbursement of "injury" but which left it to adjudicating courts "to decide what sorts of harms are compensable." Id.
\textsuperscript{181} See id.
\textsuperscript{182} Id. at 634.
law the court hearing the case selected to apply, as “the convention left to domestic law the questions of who may recover and what compensatory damages are available to them.”

The Court then looked to “the negotiating and drafting history... and the post-ratification understanding of the contracting parties” for further support. The drafting history confirmed that the CITEJA had discussed the possibility of determining “the categories of damage subject to reparation,” but had decided that a solution to this problem was beyond the scope of the Convention and so it was left to “private international law” or “the area of jurisprudence we call conflict of laws.”

Likewise, the post-ratification conduct of other signatories offered further support for the position that “damages recoverable—so long as they consist of compensation for harm incurred—are to be determined by domestic law.” The Court noted that several countries had passed domestic legislation to specifically govern the types of damages available in a Warsaw Convention case.

The Court turned next to the question of which nation’s domestic law would determine the legally cognizable harm in the instant case: the choice of law question alluded to in the CITEJA report. However, such an analysis was unnecessary as both parties had stipulated to the law of the United States.

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183. Id. Already, the court, by its choice of wording, has decided that Article 17 allows only compensatory damages. Rather than examining Article 17 with a view towards the types of damages it permits—whether pecuniary, non-pecuniary, compensatory, punitive, or other—the court has assumed without elaboration that Article 17 is entirely compensatory. However, as Lockerbie I emphasized, some state causes of action permit punitive damages under the guise of compensation, and Zicherman makes no attempt to preempt state causes of action.

184. Id. at 634.

185. See id. This language in the CITEJA Report had been used by Korean Air Lines to support its position that Article 17 allowed compensatory damages only. See supra notes 121-22 and accompanying text.

186. Zicherman, 116 S. Ct. at 635. But see Bechly, supra note 9, at 468 (arguing that the Convention sought to avoid conflicts of laws questions).

187. Zicherman, 116 S. Ct. at 635. Presumably, so long as the local law allows punitive damages to compensate a plaintiff for harm incurred, such damages are not precluded by the Convention. Nor, assuming a finding of wilful misconduct, will they be limited.

188. See id. The inference being that in the absence of such legislation a variety of damages would exist. This is contrary to the inference made from this fact by the court in Lockerbie I. See supra note 93.

189. See Zicherman, 116 S. Ct. at 635. The fact that in a typical case the forum jurisdiction must engage in a choice of law analysis to determine the type of damages available is not without import for the uniformity apparently sought to be achieved by the
This raised the final question of which particular United States law would apply. "The Second Circuit, moved by the need to 'maintain a uniform law under the Warsaw Convention,'" had ruled that causes of action under the Convention were to be governed, regardless of where the accident occurred, by general maritime law.\(^{190}\) Rejecting this approach, the Court affirmed that the Convention did not authorize any departure from the normal federal disposition.\(^{191}\) Although Congress could have passed legislation to ensure that a particular law applied in Convention cases, as other countries had done, in the absence of such a law, "Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention."\(^{192}\) In this case there was "little doubt" that the applicable law was the Death on the High Seas Act (DOHSA).\(^{193}\)

Because DOHSA allowed only for recovery of "compensation for the pecuniary loss sustained," plaintiffs could not recover loss of society damages.\(^{194}\) In addition, where DOHSA applied, plain-

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\(^{190}\) Zicherman, 116 S. Ct. at 636.

\(^{191}\) See id.

\(^{192}\) Id. At least one circuit court has subsequently interpreted this language to mean that Article 17 is not a cause of action. See Saavedra v. Korean Air Lines, Ltd., 93 F.3d 547, 549 (9th Cir. 1996) ("As the Supreme Court explained, no cause of action directly under the Warsaw Convention exists; the Convention merely provides 'pass through' provisions, which allow the courts to use only domestic causes of action."). This may be a rather sweeping assessment of Justice Scalia's choice of wording. After all, it is still possible that Article 17 creates a cause of action but that the substantive elements not provided for are to be determined by reference to the normally applicable domestic cause of action.

\(^{193}\) 46 U.S.C. § 761 et seq. [hereinafter DOHSA]. Section 761 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Id.

\(^{194}\) Zicherman, 116 S. Ct. at 636. Section 762 of DOHSA provides that in a suit under § 761 the recovery "shall be a fair and just compensation for the pecuniary loss..."
tiffs could not resort to state law or general maritime law for a loss of society remedy.  

Finally, the Court reiterated its lack of concern with the uniformity that had moved the Second Circuit to apply federal maritime law. The Court acknowledged that "undoubtedly, it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel . . . [but] this is not an area where the imposition of uniformity was found feasible." Rejecting an implied authorization on the part of the Convention to pursue uniformity, the Court stated "the Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law."  

Almost as a footnote, the Court discarded plaintiffs’ claim that application of DOHSA which allows for only pecuniary damages, in conjunction with the Warsaw Convention liability limit of $75,000, acted as an unintended double cap that would not sufficiently deter airlines from engaging in wilful misconduct. The Court, stating that the Convention "unquestionably envisions the application of domestic law," declared itself unpersuaded, remarking that it was the "function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence." The Court then repeated its decision that Articles 17 and 24 permitted compensation only for legally cognizable harm, but left "the specification of what harm is legally cognizable to the domestic law applicable under the forum’s choice-of-law rules."  

IV. THE MYTH OF UNIFORMITY  

The remainder of this Note examines the impact of Zicherman’s reassessment of the role uniformity should play in determining the damages available in an action under the Warsaw 
Convention. While recognizing that *Zicherman* did not arise in a punitive damages context, this Note nonetheless contends that, given the extent to which uniformity arises as an obstacle to recovery, the spirit of *Zicherman* requires a court to give careful and thorough treatment of uniformity as a general principle before allowing it to preclude punitive damages that would otherwise be permissible under the local law governing a claim. Judicial estimations of the scope of uniformity intended by the Convention's drafters have been inadvertently expanded beyond that evidenced by the drafting history.

Indeed, the sweeping uniformity discussed in much of the caselaw has never in fact resulted. Despite what courts have alleged on behalf of the Convention's purposes, the only meaningful sense in which uniformity has emerged is in providing a variable liability limitation that is recognizable to airlines that refrain from willful misconduct. Allowing plaintiffs to recover punitive damages in factually appropriate circumstances does not disrupt this limited uniformity.

### A. Contexts in which Uniformity Arises

Courts denying punitive damages in Warsaw Convention cases have arrived at their decisions in a variety of manners. Some have looked generally at the Convention and concluded that punitive damages would disrupt whatever the drafters intended to achieve. Others have examined the text of Article 17 and reasoned that the language itself cannot be construed to permit non-compensatory recovery. Regardless of the approach, however, nearly every case denying punitive damages makes reference to uniformity, either as a primary reason for denying a recovery, or as support for a decision reached on other grounds.

Even in cases where the textual argument is strongly articulated, uniformity still plays a substantial role in the ultimate decision. In *Lockerbie I*, the court ruled that the Convention cause of action was exclusive, which in turn required a finding that state law causes of action were not preserved by the Convention in the absence

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201. See Baden, *supra* note 48, at 439 ("[T]he uniformity goal of the Warsaw Convention has not been met.").

202. For example, while *Lockerbie I* purports to rest its decision on a construction of the text and the preemption of alternative sources of liability, it offers uniformity considerations as additional support. *Korean Air Lines*, on the other hand, declares *ab initio* that it will construe the text to correspond with the uniformity it believes the Convention was intended to achieve.
of an indication in the document itself. In ruling so, the court relied on other decisions which had come to similar conclusions based on uniformity.\textsuperscript{204} In particular, the court cited \textit{Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.},\textsuperscript{205} in which the Fifth Circuit had preempted a state law cause of action, proposing that "[a]n obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers."\textsuperscript{206} Likewise, the Ninth Circuit, in \textit{In re Mexico City Aircrash of October 31, 1979},\textsuperscript{207} had preempted non-Convention claims in order to avoid "varying measures of damages or varying specifications of persons entitled to recover,"\textsuperscript{208} another clear reference to uniformity.

As noted above, the court in \textit{Lockerbie I} gave its reasons for finding exclusivity as "the way the other parties have viewed the Convention, its emphasis on uniformity, and the need for a single, unified rule on such points as the recoverability of punitive damages...."\textsuperscript{209} The court's rationale for preempting state causes of action was that the "subject matter demand[ed] uniformity vital to national interests."\textsuperscript{210} Having postulated that the Convention emerged from a desire for uniformity "in the laws governing carrier liability," the court asked whether the goals of uniformity were frustrated by allowing state law claims, such as the ones presented to the court.\textsuperscript{211}

By way of contrast, \textit{Korean Air Lines}, rather than examining the interaction of the various causes of action, asked whether punitive damages were "consistent with the shared expectations of the contracting parties."\textsuperscript{212} Concluding they were not, the court proceeded to honor the uniformity intended for the liability scheme set forth in the Convention.\textsuperscript{213} Without engaging in textual interpreta-

\textsuperscript{205} 737 F.2d 456 (5th Cir. 1984).
\textsuperscript{206} Id. at 459.
\textsuperscript{207} 708 F.2d 400 (9th Cir. 1983).
\textsuperscript{208} Id. at 414 n.25.
\textsuperscript{209} \textit{Lockerbie I}, 928 F.2d at 1274; see also text accompanying note 93.
\textsuperscript{211} See id. The court also invoked uniformity when determining whether to adopt state law as the governing law for the Convention cause of action. See \textit{id}. at 1278-79.
\textsuperscript{212} \textit{Korean Air Lines}, 932 F.2d at 1485. The court did not concern itself with the different meanings underlying punitive damages in the various jurisdictions.
\textsuperscript{213} See \textit{id}. at 1485-86.
tion, the court rested its decision on an “obligation to construe the Convention in a manner that [would] promote uniformity.”\textsuperscript{214} Hence, if the United States was the only signatory to permit punitive damages the uniform application of the treaty would be threatened.\textsuperscript{215}

Given the contexts in which courts defer to the goal of uniformity, and its seemingly dispositive effect on the outcome, uniformity itself merits closer examination. Not only have courts invoked uniformity in a variety of ways, but they have also offered somewhat different meanings for the term, suggesting less than full agreement with respect to the extent of uniformity the Convention was designed to establish. Indeed, much of the content courts have given to the concept of uniformity is not supported by the drafting history.

\textbf{B. Limited Uniformity Intended by the Drafters}

Undoubtedly the source most often referred to by courts and commentators alike as evidence of the Convention’s drafters’ intent, is the Minutes to the Warsaw Conference.\textsuperscript{216} The Conference was comprised of eight separate sessions in which the delegates, armed with the preliminary draft presented by CITIJA,\textsuperscript{217} fleshed out their differences with the substance and wording of the various specific provisions. The transcripts of the ensuing discussions were eventually published as the Minutes, although not all of the discussions engaged in over the eight day period are revealed therein.\textsuperscript{218} Nonetheless, the Minutes present arguably the clearest indication of the delegates’ concerns with respect to how the Convention would eventually function.

The most striking sentiment appearing throughout the Minutes, particularly in light of subsequent judicial statements, is the repeated efforts of numerous delegates to make clear that the resulting Convention was not intended to constitute a comprehensive solution to the problems it undertook. In welcoming delegates to the opening session, the Polish Foreign Minister expressed his belief that the document, once signed, would “inaugurate a series of major

\textsuperscript{214} Id. at 1487.
\textsuperscript{215} See id.
\textsuperscript{216} See Minutes, supra note 20.
\textsuperscript{217} See supra notes 24-27 and accompanying text.
\textsuperscript{218} For example, Mr. De Vos spent four hours in discussions with several delegates before the Conference was even under way. See Minutes, supra note 20, at 28.
collective agreements in the realm of private aeronautical law.\textsuperscript{219} The President of the Conference\textsuperscript{220} reinforced this, declaring that in presiding over the ensuing debates he would be guided by the idea that the Warsaw Conference would be inaugurating a series of future conferences.\textsuperscript{221} He opined that the questions before them were only the beginning, and suggested future conferences would be needed to deal with subsequent questions.\textsuperscript{222} The Reporter went further still, suggesting the resulting document would be the beginning of “the Code of the Air.”\textsuperscript{223}

To give content to the idea of the Conference being a first step in a general direction, the Polish delegation\textsuperscript{224} at the behest of the IATA, introduced a proposal for an additional article specifying “that, in sum, that which we are going to do here is nothing but a first try at codification, a first effort to codify aeronautical law.”\textsuperscript{225} The proposed article called for a mechanism to convene future conferences for revision of the work of the first conference, and was eventually included as Article 41.\textsuperscript{226} The Reporter believed the proposed article would “establish right from today the principle that this first effort we make today is not definitive.”\textsuperscript{227} Indeed, before the Conference was over, the French delegation made a formal request for future conferences to “pursue this work of unification.”\textsuperscript{228}

Given that the Conference did not purport to deal with every aspect of the passenger-carrier relationship, it is not surprising that

\textsuperscript{219} Id. at 12 (remarks of Minister Zaleski).

\textsuperscript{220} Mr. Lutostanski was also Dean of the Faculty of Law at the University of Warsaw. See id. at 12-13.

\textsuperscript{221} “Your President, Sirs, will be happy if the efforts of this Warsaw Conference inaugurate a series of conventions on private aeronautical law—this idea will serve as my guide in the days during which I will have the great honor of directing your debates.” Id. at 14.

\textsuperscript{222} Other specific questions to be dealt with included liability to third parties on the ground, compulsory insurance, combined carriage, and the legal status of the captain of the aircraft. See id.

\textsuperscript{223} See Minutes, supra note 20, at 23.

\textsuperscript{224} Supported by the delegations from Switzerland and the USSR. See id. at 32.

\textsuperscript{225} Id.

\textsuperscript{226} See id. Article 41 reads: “Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention.” Warsaw Convention, supra note 2, art. 41, 49 Stat. at 3023, 137 L.N.T.S. at 876.

\textsuperscript{227} Minutes, supra note 20, at 32.

\textsuperscript{228} Id. at 182.
delegates did not discuss the types of damages available to aggrieved passengers or their survivors, nor the availability of non-compensatory damages. However, the Minutes do suggest, in accord with Zicherman, that rather than seeking to establish a single uniform law on the subject, the drafters left the issue for determination by national law.

Support for this comes in the form of a proposal made by the Czechoslovak delegation for the addition of a separate article stating that in the event that the Convention did not provide for the resolution of a difficulty, national law would apply.229 The Reporter, in announcing the proposal, stated his opinion that the article was unnecessary surplusage, because when a matter arose which "was not provided for in the Convention, it's the common law which is applicable."230

However, because the German delegation had proposed the use of the word "Certain" in the title of the Convention, the Czech delegation was satisfied that the title itself, rather than their proposed article, would sufficiently indicate "the special character of the Convention."231 When the title was finally agreed upon, the President of the Drafting Committee, in announcing it, stated that it sufficed "to say that this Convention does not provide for the entire matter...."232

Nor were damages the only area in which a single uniform law was unattainable. The Minutes present a number of instances where delegates struggled with problems that simply did not permit a uniform solution. The Reporter, noting "a convention would be absolutely useless, if all national systems were equivalent," acknowledged that national laws were disparate on a number of matters.233 Nonetheless, Mr. Vos believed that a suitable docu-

229. The proposal read: "In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply." Id. at 176.

230. Id. The Polish delegation had proposed that if the Convention did not provide for a particular case, then the governing law should be the Bern Convention on Railway Transportation. See id.

231. Id.

232. Id. at 188. But see Mankiewicz, supra note 45, at 239:

The word "certain" was chosen because the Convention cannot and would not deal with general principles of the private laws of contract which are different in civil law and in common law and differ from country to country and no State would change its law on that matter for the sole purpose of accommodating contracts for carriage by air.

233. Minutes, supra note 20, at 19.
ment could be produced "without forcing the acceptance of one legal system or another."\textsuperscript{234} One particular example concerned the problem of which law would be used to determine whether a carrier was liable for the acts of its agents.\textsuperscript{235} The British delegate, Sir Alfred Dennis, had proposed adding the phrase, "according to the law of the country where the contract was concluded," to the original Article 24, as this was the law that the parties would be most familiar with.\textsuperscript{236} Although Sir Alfred did not insist on the particular provision if an alternative formula for deciding liability could be found, he nonetheless stressed that "the Convention must fix the law by which the liability or the non-liability of the carrier will be determined."\textsuperscript{237} The French delegation proposed to find a formula to satisfy the question, stressing their opposition "to a formula that would lead to the application of national law."\textsuperscript{238} Sir Alfred accepted the French proposal but stated his opinion: "[I]f you want to find a law that all countries will accept, this will be very difficult."\textsuperscript{239} The final document reveals Sir Alfred’s pessimism was well founded, as Article 25(2) gives no indication as to which law will determine vicarious liability.\textsuperscript{240} Airlines must refer to national law when attempting to establish that an employee was acting beyond the scope of his or her employment.

\textsuperscript{234} Id.
\textsuperscript{235} In the original draft, Article 24 stated, "if the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants." Id. at 265-66.
\textsuperscript{236} Id. at 63.
\textsuperscript{237} Id. at 65. Mr. Clarke of the British delegation clarified this issue further:

What we are saying, furthermore, is that if the master must be liable in certain cases for the acts of his employees, it must be decided what is the law which will regulate this question. For example, English law can decide that, in such case, the master is liable, while French law would say the contrary, and vice versa. It must be said, then, in the Convention, which law will apply.

Id.

\textsuperscript{238} Minutes, supra note 20, at 66. The Italian delegation also opposed the proposal, stating that out of "the necessity of arriving at uniform rules, we are opposed to the referral thereof to national law." Id.
\textsuperscript{239} Id. at 65.
\textsuperscript{240} Article 25(2) provides that the wilful misconduct provisions of Article 25(1) will apply to damage caused "by any agent of the carrier acting within the scope of his employment." Warsaw Convention, supra note 2, art. 25(2), 49 Stat. at 3020, 137 L.N.T.S. at 27 (emphasis added).
AIRLINE LIABILITY FOR PUNITIVE DAMAGES

At other times delegates fully accepted the application of national law to specific provisions in the Convention. In his discussion of an article to address the specifics of when a passenger fell within the coverage of the Convention, the Italian delegate suggested such a determination be made "by the common law of each country." Even Mr. Ripert of the French delegation, previously so opposed to the application of national law, conceded that it was "practically impossible to find in the convention a precise text indicating at what moment the passenger finds himself to have already commenced the contract of carriage," and that local courts would have to decide whether or not carriage had commenced.

Elsewhere in the Minutes, delegates appear to have urged the application of national law. During a discussion of the provision relating to contributory negligence, the President of the Drafting Committee defended the application of national law, pointing out the difficulty involved in "finding a formula which could satisfy both peoples under English or Anglo-Saxon law and peoples under Continental laws." Deferring to national law would avoid difficulties in countries where the concept of contributory negligence did not exist. Thus, Article 21 would only apply in countries where national law recognized fault based mitigation of liability. When asked whether it might be possible to actually

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241. The preliminary draft of Article 20 stated in part:

The period of carriage, for the application of the provisions of the present chapter (Chapter III), shall extend from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination; it shall cover no such carriage outside the boundaries of an aerodrome other than by aircraft.

Minutes, supra note 20, at 264. The final draft contains no equivalent provision. For an insightful discussion of how American courts have determined when coverage takes effect, see Pastor, supra note 36.

242. Minutes, supra note 20, at 74. The Italian delegate had previously been opposed to the application of national law. See supra note 238 and accompanying text.

243. See supra note 238 and accompanying text.

244. Minutes, supra note 20, at 78.

245. Article 21 in the preliminary draft provided: "In the case where the carrier proves that the fault of the injured person caused or contributed to the damage, the court may, in accordance with the provisions of its own law, rule out or attenuate the liability of the carrier." Id. at 208. See also supra note 40 (confirming tendency toward application of national law in final version of Article 21).

246. Minutes, supra note 20, at 208.

247. See id. at 208-09. For example, Sir Alfred Dennis remarked, "English law has no system to reduce the shared liability." Id. at 208.

248. See id. at 208-09. In response to Mr. Dennis' opposition to the Article based on the fact that his home country had no system to reduce shared liability, Mr. Giannini re-
require mitigation, the Swiss delegate responded "if the national law does not allow attenuation, we can do nothing about it... We cannot dispute national law."249

Certainly, the Minutes offer no evidence of a desire to create a uniform rule on the types of damages available under the Convention. As Zicherman noted, the CITEJA, in presenting the preliminary draft to the Conference, announced that it had not been possible to come up with a solution to the issue of "what are the damages subject to reparation," and had recommended the issue be treated "independently from the present Convention."250 Hence, the delegates made no mention of it during the Conference.

Although not all the drafters approved of deferring to national law, the Minutes reveal that in certain circumstances resort to national law was the only feasible alternative.251 In such instances, the drafters were concerned only that the Convention should have uniform application regardless of the various national laws then in existence. Attempts to create uniform international laws would have been the concern of the ensuing conferences the drafters undoubtedly had in mind.

C. Limited Uniformity as a Result

Whatever the uniformity intended by the Convention’s drafters, the resulting system of recovery created by the application of the Convention has been anything but uniform.252 Despite their claims that the Convention requires and establishes uniformity, courts and commentators have provided a variety of examples of just how far from uniform the Warsaw system is, offering additional support for Zicherman’s claim that in certain areas uniformity was found to be unrealizable.253

One of the claims often made by courts and commentators is that the Warsaw Convention was intended to create uniformity in

marked: "If there is nothing in your national law, it is not my fault." Id. at 209.

249. Id. at 209-10.
251. But see Baden, supra note 48, at 438-39 ("The drafting history of the Warsaw Convention clearly demonstrates that the Convention's primary goal was to provide industry-wide uniform liability for death or personal injury caused by an airline accident.").
252. See id. at 439 ("[T]he uniformity goal of the Warsaw Convention has not been met.").
253. See, e.g., Bechky, supra note 9, at 467-68 ("[I]t can be argued that the 'Warsaw system' (consisting of the Warsaw Convention, the subsequent protocols, and the Montreal Agreement) defeats the very purpose of the original Convention: uniformity.").
terms of the substantive law applicable to claims arising from international flights.\textsuperscript{254} One of the problems facing carriers in 1929 was the inability to accurately predict which substantive law would govern an action brought against them.\textsuperscript{255} Indeed, one court has stated that one of the major benefits of the Convention was that it created "a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved."\textsuperscript{256}

In actual fact, such reliance on the part of the carrier has never been available. In the first instance, the Convention does not answer, or even address, the question of which substantive law is to apply to a cause of action under it. Although the document does refer to the court of jurisdiction for determination of procedural matters,\textsuperscript{257} the natural negative inference to be drawn from such a

\textsuperscript{254} See Lockerbie I, 928 F.2d 1267, 1270 (2d Cir. 1991) (suggesting one of the Convention's purposes was "to establish uniformity in the aviation industry with regard to 'the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims'") (emphasis added) (quoting Lowenfeld & Mendelsohn, supra note 4, at 498-99), cert. denied sub nom. Rein v. Pan American World Airways, Inc., 502 U.S. 920 (1991); Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 458 (5th Cir. 1984) ("[W]e find the delegates were concerned with creating a uniform law to govern air crashes, dehors national law...""); Cagle, supra note 43, at 955 ("[T]he signatories desired to establish uniform liability rules governing international aviation which would supersede the various domestic laws... "). But see Zicherman, 116 S. Ct. at 636 ("Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention."); supra part IV B (arguing that the drafters anticipated extensive resort to local law).

\textsuperscript{255} See Reed v. Wiser, 555 F.2d 1079, 1090-91 (2d Cir. 1977):

The problem of finding one's way through this thicket of foreign laws would be extremely difficult for the individual, passenger, or shipper, an even greater problem for the large manufacturing company with many air shipments to different parts of the world, and an almost insuperable task for the airline which has to operate in or over great numbers of countries whose laws are foreign to that of its flag. The Warsaw Convention, by providing a uniform rule of law which governs the relationship of the airline operator and his passenger or shipper in all of these different situations has for almost 40 years provided a degree of certainty making it possible for the individual passenger or shipper and the airline operator to be reasonably certain what their legal relationship with each other is, and to act accordingly.

(citing comments of Administrator Halaby of the FAA before the Senate Foreign Relations Committee) (emphasis added).

\textsuperscript{256} Id. at 1090 (citations omitted).

\textsuperscript{257} Article 28(2) provides that "questions of procedure shall be governed by the law of the court to which the case is submitted." Warsaw Convention, supra note 2, art. 28(2),
provision is that the law of the local court does not decide the elements of the claim. The substantive law applicable to a claim necessarily involves a choice of law analysis, taking into account the location of the crash, the interests of the parties, the jurisdiction where the suit is filed, and a plethora of other factors related to subject matter and personal jurisdiction. Given these variables, it is hard to imagine how airlines can be assured ahead of time of the substantive law applicable to claims brought against them, or even of the particular choice of law analysis that will be applied.

The recent tragedy of TWA Flight 800 illustrates this point. Unless TWA had conducted extensive research based on information from all passengers aboard the aircraft, it could not possibly have known beforehand, and indeed may not even yet know, the substantive law that will govern actions brought against it. Every nationality represented by passengers is a potential forum for suit. Even if every passenger was a United States citizen filing suit in the United States, the applicable national law is decided in part by the location of the accident, whether over the territory of a state, over the ocean, or within United States territorial limits.

49 Stat. at 3021, 137 L.N.T.S. at 29.

258 See Zicherman, 116 S. Ct. at 635 (discussing the choice of law analysis required to determine issues of compensatory damages).

259 For an interesting illustration of the processes by which plaintiffs' lawyers decide where to file suit see Watson, supra note 79. Watson, the Head of Litigation for a Scottish law firm involved in the Lockerbie disaster, suggests that plaintiffs' lawyers must consider all possible forums and jurisdictions applicable to a case, especially "when the wrongdoer is an international corporation operating throughout the world, seeking to take cover behind conventions, jurisdictions, or the weaknesses of a particular local legal system." Id. at 203. With particular reference to the Lockerbie disaster, Watson recalls that the Lockerbie Air Disaster Group, a coordinating body for individual plaintiff's lawyers, decided to exhaust discovery and investigatory procedures available in Scotland, whilst removing any litigation to the United States where more realistic damages could be expected. See id. at 206.

260 Article 28(1) provides:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Warsaw Convention, supra note 2, art. 28(1), 49 Stat. at 3020, 137 L.N.T.S. at 29. The domicile of the passenger is not an independent forum. See Kreindler, supra note 5, at 3 ("The passenger, or his estate, has the right to sue in his or her place of domicile only if it coincides with one of the other specified places of venue.").

261 That is, the issue concerns whether the applicable law is state law, federal mari-
This host of factors makes it implausible that the Convention permits TWA to predict the substantive law governing the claims it will face.

Nor can airlines be assured of the types of damages they will be subject to in the actions they counter.\footnote{As distinct from the amount of damages.} This follows naturally given that damages are a substantive element of a claim, and the substantive law applicable to Convention claims is indeterminate.\footnote{See Zicherman, 116 S. Ct. at 634 ("[T]he Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.") (emphasis added).} Indeed, this is made clear in Zicherman, which holds that the types of damages available to a plaintiff are to be determined by local law.\footnote{See id. at 635. For example, in Canada the types of damages available under Article 17 are left to provincial law. See id. Although, as Zicherman points out, some signatories have enacted legislation to specifically define the types of damages available. See id.} If airlines cannot be assured of the substantive law governing claims against them, it is inconceivable that they can foresee with accuracy the types of damages to which they will be subject. The enormous variety of damages available in the various jurisdictions of the numerous signatory nations is not modified by the Convention.

Perhaps the closest the Warsaw Convention comes to establishing uniformity is in the amount of liability a carrier will face. Initially, it seems a carrier can be assured of a certain amount of liability in the event of an accident, regardless of the substantive law used to decide the elements of the action, and the types of damages available. However, even in this limited sense, uniformity remains elusive.

From the point of view of the passenger, and to a limited degree the airline, it is no simple task to determine the amount recoverable without knowing a variety of information in addition to the fact that damage has resulted from an international flight.\footnote{Clearly, this knowledge is important to the extent that supporters of the Convention offer, as one justification for it, the fact that passengers can make suitable insurance arrangements to supplement the recovery available to them. See Lisi v. Alitalia-Linee Aeree Italiane, 370 F.2d 508, 512-13 (2d Cir. 1966) (suggesting the trade off for limited liability was the opportunity for passengers to make their own alternative arrangements for financial security).} Presently, there are at least five potential damage amounts available

\textit{time law}, or DOHSA. The location of the accident in Zicherman left “little doubt” which law was applicable. See Zicherman, 116 S. Ct. at 636 (applying DOHSA to determine issue of compensatory damages).
to a passenger or her decedents, depending on which particular version of the Convention, if any, is applicable, and whether the airline involved is party to any particular Article 22 agreement. The liability limit for an airline governed by the original Convention is approximately $8,300. If a particular flight is scheduled between signatories of the Hague Convention, the limit is twice this, approximately $16,600. Alternatively, the flight in question may not be subject to any version of the Convention, in which case the amount recoverable is unaffected by it.

Having determined which version, if any, of the Convention is in effect, the parties must determine whether the airline is party to any supplemental agreements made in accordance with Article 22. If the carrier is a signatory to the Montreal Agreement the applicable limit increases to $75,000. Similarly, if the airline is a party to the Japanese Initiative, the potential recovery is unlimited. Although airlines are in a better position than passengers to know the applicable liability limit for any given flight, it is clearly a stretch to view the Convention as a scheme imposing a uniform liability amount on the airlines governed by it.

Rather than guaranteeing a uniform and fixed liability limitation for airlines, the Warsaw system instead allows airlines to predict in a limited sense the amount of liability they will be subject to in any given accident. While airlines have some self-determination in entering Article 22 agreements, and can discover which version

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266. This would be the case if a plaintiff brought an action in Cuba, a nation that has not adhered to any version of the Convention. However, the nationality of the airline does not affect the applicability of the Convention in nations adhering to it. For an example of this see Glenn v. Compania Cubana de Aviacion, S.A., 102 F. Supp. 631, 633-34 (S.D. Fla. 1952), where plaintiff's decedent had a return ticket from Miami to Havana. The court applied the Convention, even though a court hearing the same action in Cuba would not be required to; see also Cagle, supra note 43, at 962-63.

267. Other jurisdictions may also have their own limits on liability. For an examination of foreign laws limiting the liability of airlines see Cagle, supra note 43, at 967-73.

268. This is true, assuming the flight in question is to or from the United States. See Montreal Agreement, supra note 50.

269. See supra notes 58-59 and accompanying text (discussing the Japanese Initiative). In as much as unlimited recovery is itself another factor to be considered, uniformity is further disrupted. See Cagle, supra note 43, at 990 ("By creating another liability limit, the goal of uniformity would become more illusory.").

270. For a comprehensive illustration of the variety of possibilities for recovery under the Warsaw System see Cagle, supra note 43, at 961-65.

271. Airlines can choose whether to enter into such agreements, but the Montreal Agreement is mandatory for airlines wishing to service the United States. See Montreal Agreement, supra note 50. At least one commentator believes the Montreal Agreement disrupts uniformity by permitting private parties and a single government to set a new
AIRLINE LIABILITY FOR PUNITIVE DAMAGES

of the Convention is adhered to by any nation it chooses to fly to, it is more realistic to speak of the liability limitation created by the Convention as knowable, to a greater or lesser degree, rather than uniform.

Because airlines serving the United States are parties to the Montreal Agreement, it is conceivable that courts denying punitive damages in factually appropriate cases have in fact sought only to preserve national uniformity in the amount recoverable against international airlines. However, even national uniformity in the amount of damages recoverable is subject to a further consideration: the conduct of the airline.

The Warsaw Convention provides a knowable liability limitation only when airlines have refrained from wilful misconduct. Hence, Article 25 does not permit airlines to use any provision limiting or excluding liability if wilful misconduct is found to have caused the harm. The Convention does not provide, nor did it intend or ever attempt to provide, a uniform liability limitation for reckless airlines. If found reckless, airlines are liable in full for all available damages, just as if the Convention did not exist. As such, reckless airlines have absolutely no capacity to predict with any accuracy what their liability will amount to.

Rather than establishing a uniform system of recovery, the Warsaw Convention has created what it was intended to: a beginning. No substantive uniform liability law for aviation has evolved, but instead a system for determining which law will apply under particular circumstances, however far from uniform that might be. Rather than imposing uniform amounts of recovery, the


272. See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 459 (5th Cir. 1984) ("[U]niformity has both an international and intranational application.").

273. National uniformity is also subject to the understanding that plaintiffs bringing actions against domestic airlines recover considerably greater damages than plaintiffs whose actions are governed by the Convention, although the only factual difference in their respective complaints may be the destination cities. See Lowenfeld & Mendelsohn, supra note 4, at 554 tbl.1 (charting differences in passenger recoveries between Warsaw and non-Warsaw cases between 1950 and 1964).

274. See Warsaw Convention, supra note 2, art. 25, 49 Stat. at 3020, 137 L.N.T.S. at 27.

275. This would have been the effect of the Montreal Protocols, had the Senate ratified them. See supra note 48 (discussing subsequent attempts to modify the Convention).

276. See Cagle, supra note 43, at 966 ("[T]he Warsaw system is not fully attaining one of its primary goals of a uniform system of liability rules to govern international aviation. Choices between various liability limits destroy any semblance of uniformity.").
Convention has established a liability scheme that airlines can use to predict within certain boundaries which liability limitation, if any, will apply to a particular scheduled flight, conditioned on the airline itself refraining from wilful misconduct. Whatever may have been the drafters' intent, the practical application of the Convention has produced nothing like the degree of uniformity courts in the United States have attributed to it.277

V. THE ARGUMENT FROM THE TEXT

While the drafting history offers support for the admonition in Zicherman not to seek uniformity in derogation of the normally applicable law,278 it does not directly respond to those courts denying punitive damages on the basis of a textual interpretation.279 However, courts reasoning in this manner may have cause to reconsider their approach in light of Zicherman. While Zicherman does not directly address punitive damages analysis, a number of the logical supports underlying the textual argument are significantly weakened by Zicherman's approach to Convention claims generally.

Lockerbie I, offered as perhaps the clearest illustration of the textual argument, required the acceptance of five separate logical premises in order to conclude that punitive damages were barred under the Convention.280 First was the notion that punitive damages derive their meaning from the substantive law governing them. Thus, under certain state laws, punitive damages serve a compensatory function.281

The second step in reaching the conclusion was a finding that the Convention provided the exclusive cause of action available to plaintiffs. This was necessary to avoid the situation where similarly situated plaintiffs brought similar actions but due to differences in the state laws, as outlined in the first premise, some could recover

277. At least one commentator has suggested the intent of the drafters was to achieve uniform application of the Convention rather than uniform results. See Buono, supra note 61, at 600.
279. See supra notes 67-68 and accompanying text (describing the textual argument).
280. See Lockerbie I, 928 F.2d 1267, 1270, 1287 (2d Cir. 1991), cert. denied sub nom. Rein v. Pan American World Airways, Inc., 502 U.S. 920 (1991). The ensuing outline corresponds closely with the analytical framework offered by the court, except that the item marked "IF" by the court is here divided into two distinct premises.
281. See id. at 1272-73.
punitive damages while others could not. The solution required all plaintiffs to proceed under the same cause of action.282

Having restricted recovery to a single cause of action, the court's third step was to declare that the substantive law applicable to the action was federal law, as opposed to state law.283 Adopting state law would only result in the very problems preemption was supposed to dispel.

This was followed closely by the fourth premise, that the particular federal law to apply in actions under the Convention was the federal common law of tort.284 Unfortunately for the Lockerbie I plaintiffs, federal common law only allowed punitive damages if they were used to punish a defendant.285 Finally, the court's fifth premise was that the language of the Convention made it clear that only compensatory damages could be recovered.286 Therefore, because the Convention permitted "compensatory" punitive damages but federal common law only allowed "punitive" punitive damages, plaintiffs could not recover.

A conclusion is only as sound as the premises upon which it is based. Because Zicherman rejects the validity of two, and casts serious doubt on a third of the premises supporting the decision in Lockerbie I, it would seem that the latter no longer retains precedential value for the argument rejecting punitive damages based on the text of the Convention.287

A. Article 17 is Not the Exclusive Cause of Action

Zicherman presents several strong indications that Article 17 is not necessarily the exclusive cause of action available to plaintiffs bringing actions against international airlines. To the contrary, Zicherman states that the Warsaw Convention is "nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention."288 Under the particular facts of Zicherman, state law causes of action were not preempted by the existence of the Convention, as Lockerbie I had

282. See id. at 1273-78.
283. See id. at 1278.
284. See id. at 1279-80.
285. See id. at 1270, 1279-80.
286. See id. at 1280-87.
287. Perhaps an even more obvious reason for doubting the continued validity of Lockerbie I is the radically different analytical structure offered by Zicherman for dealing with Warsaw Convention claims.
posited, but rather because the factual circumstances of the case invoked the application of a particular federal statute, viz. DOHSA. Because DOHSA had previously been found to preempt all state law in the area of wrongful death more than a marine league (approximately 3 miles) from the shore, plaintiffs’ state wrongful death claims could not survive. However, had KAL 007 crashed over the mainland United States where no federal statute existed to preempt all state causes of action, the “local law that would govern” would, presumably, have been a state wrongful death statute.

If the Warsaw Convention is merely a pass-through, as Zicherman claims, then the effect of preempting all state law causes of action, as did Lockerbie I, is to leave only a federal common law wrongful death action available whenever maritime and DOHSA causes of action are not applicable. Yet this is precisely the resolution Zicherman rejects, requiring instead the application of the domestic law that would normally govern. Zicherman seems to envision, implicitly at least, that on occasions, the substantive law governing an action brought under the Warsaw Convention will be state wrongful death statutes of the kind preempted by the court in Lockerbie I.

B. Federal Common Law is Not the Usual Federal Disposition

Closely related to the exclusivity of Article 17 is the third premise relied on by Lockerbie I that the governing law of an action brought under the Convention is the federal common law of tort. Zicherman’s rejection of this premise is more apparent than its rejection of exclusivity. In Korean Airlines, the case under review in Zicherman, the D.C. Circuit had posited that a Convention claim was governed by general maritime law. Zicherman expressly rejects this. In doing so, Zicherman states that the Convention

- See Lockerbie I, 928 F.2d at 1275 ("[W]e deduce the Convention preempts state law causes of action.").
- See Zicherman, 116 S. Ct. at 636.
- See id.
- That is, when the site of the accident does not invoke maritime jurisdiction.
- See Zicherman, 116 S. Ct. at 636. It can hardly be argued that the normal resolution of a wrongful death claim is to bring a federal common law action in tort. But see Daniel F. Wilhelm, International Decision, 90 Am. J. Int’l L. 655 (1996) (stating that after Zicherman the federal common law of torts still applies to accidents over land).
- See id. ("We think not.").
"[c]ontains no rule of law governing the present question; nor does it empower us to develop some common law rule—under cover of general maritime law or otherwise—that will supersede the normal federal disposition."296

Similarly, it was out of concern for uniformity that Lockerbie I settled on federal common law rather than applying state law which it acknowledged was often the normal federal disposition,297 a concern for uniformity that Zicherman warns against. Where Lockerbie I finds it "would make little sense to adopt state law when uniform interpretation of the federal law is more consistent with the convention's purposes," Zicherman finds a lack of authorization to do so.298 Hence, even where plaintiffs elect not to proceed under a state law cause of action for wrongful death in factually appropriate circumstances, the usual federal disposition would entail the application of the same state law as the substantive law governing the claim. It follows that in certain cases, punitive damages would be a substantive element of the claim.

C. The Text Does Not Limit Article 17 to Compensatory Damages

Perhaps the cornerstone of the textual argument for denying punitive damages in claims brought under the Convention is that the language used in Article 17 necessarily precludes non-compensatory damages. The argument itself rests on a conceptual interpretation of the term "dommage survenu" found in the original French text of Article 17. In particular, Lockerbie I determined that "dommage survenu" was best translated as "damage sustained" rather than "damages occurred" or "damages happened" or "damages arrived."299 However, perhaps to minimize reliance on its ability to translate French terms, the court stated that irrespective of the exact meaning, the term referred to "actual harm caused by an accident rather than generalized legal damages."300 From this, the

296. Id. (emphasis added).
298. See Zicherman, 116 S. Ct. at 636 ("The Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law.").
299. Lockerbie I, 928 F.2d at 1280-81 ("The translation of 'du dommage survenu' as 'damage sustained' is the one made by the State Department and found in the United States Code.").
300. Id. at 1281.
court deduced, without much by way of elaboration, that only compensatory damages could be recovered. In part, the conclusion seemed based on the court’s inability to conceptually conceive of an accident ever causing punitive damages.301

If this interpretation of “dommage survenu” is read back into the remainder of Article 17, the resulting cause of action reads “the carrier shall be liable for actual harm, as distinguished from legal damages, in the event of death or wounding.”302 However, Zicherman offers a somewhat different meaning, albeit subtle, for “dommage.” According to Zicherman, “dommage,” or “damage” as it was translated, meant “legally cognizable harm” and subsequently left the content of the term to local law.303 As such, a redrafting of Article 17 according to this interpretation reads, “the carrier shall be liable for whatever harm the court of jurisdiction recognizes and permits a recovery for in the event of death or wounding.” Although “harm” is still arguably indicative of actual loss,304 if a state wrongful death statute permits recovery of punitive damages for loss of dignity, or if the state law allowed punitive damages as a compensatory remedy for actual loss suffered, such a recovery would be within the definition of “legally cognizable harm” but clearly beyond that of “actual harm.” At least under particular circumstances it is difficult to reconcile the different interpretations of “dommage” rendered by the courts in Lockerbie I and Zicherman. It hardly needs mention that any conflict is resolved in favor of the latter.

In addition, the practical effect of Zicherman’s definition of “dommage” is that the Convention does not establish a fixed category of damages for claims brought under Article 17. The need for flexibility in the types of damages available runs parallel to the respect for national law shown by the Convention’s drafters.305 In any event, while it is conceivable that “actual harm” precludes awards for punitive damages, it is not at all clear that “legally cognizable harm” requires the same result.306

301. See id. ("[A]n accident does not ‘cause’ punitive damages.").
303. See supra notes 173-80 and accompanying text.
305. See supra note 250 and accompanying text.
306. Moreover, as one commentator has pointed out, allowing the particular wording of
Aside from its admonitions against overplaying the role of uniformity, Zicherman also challenges the logical underpinning of cases denying punitive damages on more structured grounds. Zicherman offers hope that courts will turn away from specious arguments based on curlicues of the French language, and from sweeping assessments of world airline uniformity, and instead treat reckless airlines like all other reckless defendants. Safeguards against punitive damages exist in the factual basis underlying them. In urging this result, it pays to examine the extrinsic policy considerations offered by Lockerbie I and Korean Air Lines as support for their decisions, some of which do not offer as much support as their authors suggest.

VI. POLICY CONSIDERATIONS

In denying punitive damages, courts have offered policy considerations as ostensible support for their decisions, one of which suggests that if international airlines are subjected to punitive damages they will be unable to afford the premiums charged by insurance underwriters to secure adequate insurance coverage in case of disasters. While at first gloss there appears to be at least some connection between insurance premiums and exposure to liability, closer examination suggests that liability insurance would be unaffected by subjecting reckless airlines to punitive damages.

Several sources suggest that one of the anticipated benefits of the Warsaw Convention, at least for airlines, was that it would enable them to acquire adequate insurance for their operations.  

3 “[Damages sustained] was, therefore, a term of inclusion rather than of exclusion and was never intended to limit the types of damages recoverable.” Id. at 601-02 & n.162 (citing Minutes, supra note 20, at 166-67).

See Bechky, supra note 9, at 463 (“The negotiators considered an exclusive damage cap necessary to allow airlines the certainty in liability needed to obtain insurance at a cost low enough to make aviation economically viable.”). Indeed, in transmitting the Convention to the Senate in 1934, Secretary of State Cordell Hull wrote:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the
Although some courts have noted a general policy need for airlines to insure against their potential losses, no court has ever suggested that a reckless airline should be able to insure against its reckless acts. Indeed, the word "accident" used in Article 17 would be just as inappropriate a description of reckless conduct as the majority in Korean Air Lines suggests it would be for Judge Mikva's "diabolical airline."\(^{308}\)

In addition, it is far from settled that airlines could indemnify themselves from punitive damages through their insurers. In American jurisprudence, the idea of insuring against acts of recklessness is strongly disfavored, and attempts to do so contractually are often voided on policy grounds.\(^{309}\) Assuming the insurer would not be required to pay elements of a claim that were punitive in nature, the actual loss suffered by the insurer would remain unchanged.\(^{310}\)

Wilful misconduct entitles plaintiffs to full compensatory damages in excess of whatever limit is applicable, an amount the insurer would be required to pay irrespective of the airline being further subject to punitive damages.\(^{311}\) If reckless airlines are undeserving of the protection offered by the Convention, then the purposes

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carrier a more definite basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934) (emphasis added).

\(^{308}\) See supra note 146 and accompanying text (discussing majority's response to Mikva's diabolical airline).

\(^{309}\) However, in over twenty states, punitive damages are covered under liability policies. See Stephen C. Kenney, Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma, 48 J. AIR L. & COM. 753, 753-54 (1983) ("As of this writing, twenty-two states have held that punitive damages rendered directly against an insured are insurable, while twenty states prohibit such insurance."). Even in 1983 Kenney recognized a trend towards the pro-coverage position. See id. at 765. See also Edelman, supra note 74, at 540 n.166 (listing states that permit airlines to insure against punitive damages).

\(^{310}\) Kenney suggests the use of a punitive damages exclusion clause to best achieve this result. See Kenney, supra note 309, at 773-77. Some states have enacted specific legislation dealing with this matter. See Alan I. Widiss, Liability Insurance Coverage For Punitive Damages? Discerning Answers To The Conundrum Created By Disputes Involving Conflicting Public Policies, Pragmatic Considerations And Political Actions, 39 Vt. L. REV. 455, 459 (1994).

\(^{311}\) Under the proposed Intercarrier Agreement, where liability would be unlimited without a finding of wilful misconduct, there is a much stronger argument that insurers would need to increase premiums. Although all damages must still be compensatory according to the local applicable law. See supra note 52 (discussing the effects of the Intercarrier Agreement).
underlying punitive damages are not fully served if their burden falls on insurance carriers.312

Even if insurance premiums were to increase as a result of subjecting reckless airlines to punitive damages, it does not follow that adequate insurance coverage would be unavailable.313 According to one industry expert, liability insurance premiums for the airline industry in 1989 were $150 million.314 If premiums had increased by 25% at that time, airlines would have paid only $37.5 million in additional premiums.315

When compared alongside the one billion airline passengers for the year, this increase would have amounted to approximately four cents per passenger.316 Although a rise in aviation disasters since then, not to mention inflation, may have increased these figures, the fact that liability insurance costs are less than 0.5% of the total operating costs of international airlines makes it difficult to see how even a doubling of premiums would result in airlines being unable to secure adequate coverage.317 Certainly domestic airlines, often the same corporate entities, appear to have no difficulty securing adequate insurance coverage, though receiving no special protection from punitive damages.318

312. An often cited case for this position is Northwestern National Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). Specifically, the court stated:

[If a] person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong.

Id. at 440. Of course, this Note argues for allowing punitive damages precisely because in some jurisdictions they do serve to further compensate the victim.

313. See Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 275 (1984) (Stevens, J., dissenting) (“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 personal injury, have no special difficulties finding insurers.”) (citing a staff memo addressed to the Civil Aeronautics Board (CAB)).


315. See id.

316. Compare this with Pan Am’s $5.00 per ticket surcharge described infra at note 327.

317. See Peter Martin & Trevor French, Blown Cover: Japanese Airlines Have Unilaterally Opted for Unlimited Passenger Liability, AIRLINE BUS., Feb. 1993, at 44 (arguing that cost is not likely to be an issue for major airlines). See also Bechky, supra note 9, at 464 (“It is understood that the low damage awards were justified in 1929 to protect a ‘fledgling industry,’ but the industry has subsequently matured and now could buy insurance to pay higher damage awards.”).

Some courts, particularly the Korean Air Lines court, have suggested that allowing punitive damages increases litigation claims brought under the Convention by creating an incentive to prove willful misconduct in order to recover beyond the liability limits. This argument is not restricted in its scope to the issue of punitive damages. Claimants have incentives to show willful misconduct regardless of the availability of punitive damages, because the liability limit, whichever one is applicable, is lifted, allowing full recovery. Hence, refusing to allow punitive damages does very little to reduce the incentive to litigate claims rather than to settle on the amount provided for by the Convention.

In addition, at least one commentator has argued that airline disasters are an area where litigation should not be discouraged. Even with modern technological developments, the causes of airline disasters often remain unknown or uncertain. A great deal of the information subsequently used to improve the safety and quality of air travel comes from zealous inquiries by advocates seeking to show fault on the part of airlines. As a result, the purposes underlying a general preference for settlement may not apply to airline disasters, where discovering the cause of the accident has significant ramifications for the safety of the public. This is particularly so given the increased technological structure of aircraft themselves and the increasing ingenuity of international terrorists.

(D.C. 1985) ("[I]t has been noted that domestic airlines managed to flourish without a similar limitation placed on liability.") (citations omitted).

319. See Korean Air Lines, 932 F.2d at 1489-90.

320. But see Bechky, supra note 9, at 458 ("The Convention's formula—strict liability coupled with a low damage cap—is particularly designed to promote settlement. . . ."). Bechky does concede, however, that in actual practice the Convention has "not promoted settlement or other forms of rapid resolution." Id.; see also supra note 307 (quoting Secretary of State Hull).

321. See Watson, supra note 79, at 207 ("Large damage settlements are not only a proper reflection of damages for those bereaved or seriously injured, but the settlements also provide an economic imperative to promote and encourage change and the improvement of safety standards.").

322. The crash of TWA Flight 800 is an excellent example. More than twelve months after the accident, investigators have still not determined the cause of the crash. Indeed, some employees of the National Transportation Safety Board concede that the exact cause of the crash may never be known. See Workers Call TWA Crash Theory 'Premature,' LOS ANGELES TIMES, Dec. 17, 1996, at A20. Four times as many people believe the U.S. government is involved in covering up information about the TWA crash than believe Elvis Presley is still alive. See Conspiracy a Belief to 74%, Poll Finds, LOS ANGELES TIMES, Nov. 13, 1996, at A15.

323. Aside from seeking compensation, plaintiffs often use courts as a public forum through which to hold airlines responsible for the tragedy, and to demand corrective mea-
Perhaps the most obvious purpose served by punitive damages is that of deterring and punishing international airlines that engage in reckless conduct. Although Zicherman suggests deterrence is a matter best left to legislatures, if the Convention is understood not to protect reckless airlines, then courts are presumably able to treat international airlines much like their domestic counterparts. Although various state statutes provide specifically for punitive damages, the latter are also a judicially created mechanism for deterring inappropriate conduct.

Nothing suggests international airlines are less likely to be deterred from reckless conduct than other business entities, especially those engaged in the transportation industry. Although at least one commentator has suggested the negative publicity generated by a disaster is enough to deter the behavior in question, evidence of gross lapses in security check-in procedures and routine maintenance tasks suggest otherwise.

Denying punitive damages can no longer be based on the special nature of the international airline industry. Courts and commentators that have viewed the Convention as a means of protecting the airline industry based on its unique risks ignore the

sures. The families of the Lockerbie victims, for example, succeeded in pushing through the Aviation Security Act of 1990, established a memorial at Arlington National Cemetery, and procured United Nations sanctions against Libya. See Bechky, supra note 9, at 459 n.14. But see Panel Discussion, The Japanese Initiative: Absolute Unlimited Liability in International Air Travel, 60 J. AIR L. & COM. 819, 834 (1995) (“[T]he tort law’s function is not to find out exactly what happened; its function is to provide for recovery.”) (remarks of Warren L. Dean). For a discussion of the liability of international airlines for injuries resulting from acts of terrorism, see Roberta L. Wilensky, Comment, Flying the Unfriendly Skies: The Liability of Airlines Under the Warsaw Convention for Injuries Due to Terrorism, 8 NW. J. INT’L L. & BUS. 249 (1987) (arguing that victims of terrorism are inadequately compensated under the Convention).

See Grems, supra note 48, at 142 n.10.

See Widiss, supra note 310, at 457 n.4 (discussing the type of conduct for which courts can award punitive damages).

See Edelman, supra note 74, at 521-22 (“[T]he marketplace severely punishes airlines that fail to maintain high safety standards through negative publicity and, in turn, decreased ridership.”).

See, e.g., Watson, supra note 79, at 208. Watson describes a massive public relations campaign instituted by Pan Am in 1986 to restore the confidence of American travelers in the airline’s ability to protect against terrorist threats. Part of this scheme involved the introduction of a new security system, called ALERT, for which Pan Am charged a $5.00 per ticket surcharge. As part of the campaign, Pan Am staged a demonstration of guard dogs, adorned in coats with “ALERT” emblazoned on them, sniffing suitcases at New York’s Kennedy Airport. Unfortunately, the dogs were on hire from a cat and dog home and were untrained in detecting explosives. “The dogs were bewildered, rented for the day, and accomplished nothing more than to urinate over the suitcases.” Id.

See Onyeanusi v. Pan Am, 952 F.2d 788, 792 (3d Cir. 1992) (“The negotiators
enormous transformation the industry has undergone, from the infant enterprise struggling to find capital in 1929 into the multi-billion dollar industry that exists today. Airlines no longer have difficulty attracting capital, nor do they face bankruptcy in the event of a single crash, as is evidenced by the number of domestic

who met in Warsaw feared that the fledgling [airline] industry would never develop and prosper if it could be liable for catastrophic judgments.

329 See Bechky, supra note 9, at 464 ("It is understood that the low damage awards were justified in 1929 to protect a 'fledgling industry,' but the industry has subsequently matured and now could buy insurance to pay higher damage awards."); see also Silets, supra note 22, at 374 ("Since the airline industry is no longer a fledgling, and since airlines are routinely subjected to unlimited liability in United States domestic air crash litigation, there is no longer any need to protect airlines from potentially debilitating lawsuits."). As long ago as 1978, at least one District Court recognized this point in the following manner:

In re Air Crash in Bali, Indon., 462 F. Supp. 1114, 1125-26 (C.D. Cal. 1978), rev'd, 684 F.2d 1301 (9th Cir. 1982) (citations omitted). One of the District Courts involved in the Korean Air Lines litigation had the following to say:

In re Korean Air Lines Disaster of Sept. 1, 1983, 664 F. Supp. 1463, 1470-71 (D.D.C. 1985) (citations omitted). But see Oonyanusi v. Pan Am, 952 F.2d at 792. ("Although the airline industry has "taken off" to a degree never envisioned by the Wright Brothers, much less the Convention's signatories in 1929, courts must remain faithful to the Convention's original purposes.").
airlines active in the United States, despite being subject to punitive damages.

CONCLUSION

Subjecting international airlines to punitive damages in factually appropriate circumstances disrupts neither the uniformity intended by the drafters of the Warsaw Convention nor the uniformity that can be said to exist as a result of its application. Assuming a finding of wilful misconduct as a prerequisite to any award of punitive damages, such a recovery is warranted because airlines cannot in good faith claim to deserve special protection not available to other businesses engaged in transportation. As noted above, airlines have never been assured of the types of damages they will face, nor have reckless airlines ever been able to limit the amount of their liability. As such, punitive damages have no effect on the limited uniformity currently available under the Convention.

This Note has suggested that arguments based on the uniformity sought to be achieved by the Convention ought not to prevent a recovery of punitive damages in an otherwise factually appropriate case. Courts should instead pay closer attention to the text, in particular its silence on punitive damages, and render decisions that more accurately take into account the conduct alleged and proven. Punitive damages are always appropriate where wilful misconduct has caused harm. In situations where a single act of recklessness has resulted in mass fatalities, they are even more so.

This challenge to the courts will doubtless be easier if and when the Supreme Court provides a definitive solution to the numerous unresolved issues, in particular the exclusivity of the Warsaw Convention cause of action. But in the meantime, Zicherman directs courts to apply the law that would normally govern. Refusing to allow punitive damages against reckless defendants is anything but normal. Broad statements of general uniformity are both mythical and obscure, and do not help to bring about the normal disposition. The crutches that courts have for so long clung to in granting special protection to international airline companies no
longer support denying punitive damages to the families of those lost through acts of wilful misconduct.

IAN D. MIDGLEY

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