AIR DISASTERS; CAUSE OF ACTIONS IN INTERNATIONAL AVIATION UNDER THE WARSAW CONVENTION; BURYING THE GHOST OF KOMLOS

by Larry Moore, J.D.'

I. INTRODUCTION

As global business and economics become ever more a part of the daily life of the United States, so too will international treaties become a greater part of American law. The knowledge of how international treaties affect domestic business law will be as necessary to the next generation of lawyers as is the knowledge of the commonlaw to the current generation.

The problems in adjusting to such treaties, especially for a common law nation such as the United States, can be seen in the difficulty the courts in this country have had in determining the basis from where a cause of action is derived in accidents occurring during international air flights. This area of private law is governed by the 1929 International Convention for the Unification of Certain Rules Relating to International Carriage by Air, its modifications and additions, or as it is more commonly known, the Warsaw Convention.[1] This Convention is a multinational treaty which governs all liability in the airline industry with regards to losses or injuries to persons, baggage, or goods which result from a delay or accident while the aircraft is involved in an international flight, or while the aircraft serves as a leg of any other international flight.[2] In regulating tort matters, it is one of the oldest and most successful international laws which govern in an area of private economic-legal matters once considered to be solely the subject of local

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1. Warsaw Convention , Oct. 12, 1929, 49 Stat 3000, T.S.No. 876 (1934), reprinted in note following 49 U.S.C App. Sec. 1502 note, 137 LN.T.S. 11.

[2] Andreas Lowenfeld and Allan Mendelsohn, *The U.S. and the Warsaw Convention*, 80 Harvard L Rev 497,498-501 (1967).

law.[3] The problems faced by the courts in dealing with this treaty is a good indication of what lies ahead as more international agreements of this nature increasingly become a part of our legal system.

Beginning in 1989 with *Chan* v. *Korean Air Line** the United States Supreme Court and the Appellate courts have issued a series of rulings which have sharply limited the ability of lower courts to look for rights and remedies outside the Warsaw Convention in adjudicating cases which arise under it.[5] In *Chan,* the Supreme Court eliminated the American Rule in its interpretation of the Warsaw Convention.[6] In addition to the *Chan* decision, the Supreme Court in *Eastern Airlines* v. *Floyd* also rejected mental or psychic injury as an independent grounds for recovering damages under the Warsaw Convention.[7] At the same time in a ruling which made the Court of Appeals uniform, the Second Circuit in *In Re Air Disaster in Lockerbie Scotland,* held that punitive damages would not be allowed under the treaty* These rulings taken as a unit have eliminated a number of deviations in interpreting the treaty which were peculiar only to the United States. In doing so the court has resolved almost sixty years of controversy surrounding this treaty in the courts of the United States.[9]

In order to reach its conclusions as to the application of the treaty, the courts had to work through forty years of confusion created by *Komlos* v. *Compagnie Nationale Air France*[10] as to whether the Warsaw Convention created an independent cause of action, or whether it merely created a presumption of liability which was to be determined by local law.

3.Georgette Miller, *LIABILITY IN INTERNATIONAL AIR TRANSPORT,* at 2 (1977).

[4]109 S. Ct. 1676 (1989) (hereinafter *Chan).*

5.Lawrence Goldhirsch, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK (1988).*

[6] Lu dec Ice v. Canadian Pacific Airlines Ltd, 98 D.LR. 3rd 52 (Can. 1979).
Larry Moore, *Chan* v. *Korean Air Lines: The United States Supreme Court Eliminates the American Rule to the Warsaw Convention,* 13 HASTINGS INTL & Comp.L Rev. 229 (1990). The American rule as it is called in other countries is based upon a provision of the Montreal agreement which required that international airline tickets print the liability limits in ten point type. *Infra* note 30. Many American courts held that any deviation from this rule by the use of smaller type would result in these limits being removed and unlimited liability allowed. The Supreme Court found here that the Montreal Agreement, while it set out ticket guidelines, set no penalties for their violation. Hence the Warsaw Convention could not be set aside and the lower courts could not provided remedies outside the Convention as they had no power to modify a treaty otherwise constitutional.

[7.]111 S. Ct 1489 (1991).

8.928 F.2d 1267 (2nd Or. 1991),(hereinafter *Lockerbie* II to differentiate it from the crucial district court *ease). Also see* Floyd v. Eastern Airlines. 857 F.2d 1462 (11th Or. 1989). *Rev'd* on other grounds.

9.Moore, *supra* note 6.

[10]lll F.Supp 393 (1952) (hereinafter Komlos). *Also see* 200 F.2d 436 (2d Or 1953).

This article looks at the resolution of the problem in finding the cause of action under the Warsaw Convention, with emphasis on the kinds of problems these types of treaties can create for common law countries as reflected in *Komlos* and related rulings until corrected by *Lockerbie.*[11]

II. BACKGROUND

A. The Warsaw Convention and Related International Conferences.

The Warsaw Convention grew out of a proposal, the *Avant-Project,* which would fix liability and provide for uniformity in regulating international aviation.[12] This proposal was submitted by France to the 1925 Paris Conference on Private International Air Law.[13] Out of this conference, a commission was formed and a panel of experts was appointed who were charged to study the problems of aviation and then to present a draft solution to an international convention specifically called to ratify such a proposal.[14] The commission was called the Comite International Technique d'Experts Juridiques Aeriens.[15] The committee worked on this problem for four years and their final report was presented to a second conference held in Warsaw Poland in 1929.[16] The treaty was ratified by the member nations in October, 1929[17] and went into effect on February 13, 1933.[18]

Forty-four nations were invited to attend the conference in addition to the League of Nations.[19] Thirty-two nations officially attended this latter conference as well as representatives of the League of Nations and the International Commission of Air Navigation.[20] The United States unofficially attended the Conference and became a signatoxy to it in 1934.[21]

The Convention, as enacted, was to protect the fledgling aviation industry from the enormous judgments which could result from an air accident. It sets the limits of recovery for which a passenger or shipper can

[11] *Id.*

[12] Miller, *supra* note 3, at 13.

[13] *Id.*

[14] Nathan Calkins, *The Cause of Action Under The Warsaw Convention, 26* J AIR L & COM. 271 at 218-19 (1959). *Also set SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, MINUTES,October* 4-12,1929 (Robert Horner and Didier Legrez tran. 1975) at 159 of French Text, (hereinafter MINUTES).

[15] Calkins, *supra* note 14, at 281 n. 7. Hereinafter the committee will be referred to as Gteja.

16.Id. at 227.

[17] *Id.*

[18] Lowenfield, *supra* note 2, at 501.

[19] 9MlNUTES, *supra* note 14, at 3.

20.Barbara Buono, *The Recoverability of Punitive Damages Under the Warsaw Convention in Casts of Wilful Misconduct; Is the Sky the Limit?,* 13 FORD INT. I—I- 570 (1990).

21.Lowenfeld, *supra* note 2, at 504.

recover as a result of personal injury, death,[22] or property loss which may result from an international flight. In addition, it sets up uniform rules for the form of airline tickets,[23] baggage checks,[24] and waybills[25] used in international transportation as well as the procedure for making routine claims for lost or damaged goods shipped in international commerce.[26]

The treaty has been the subject of a number of latter conferences and meetings,[27] but few have led to any major changes in the operation of the Convention.[28] The exceptions and most important treaty modifications to American law are the Hague Protocol[29] and the Montreal Agreement.[30]

B. The Montreal Compromise

From the beginning, the United States did not like the treaty because of what it considered to be an inadequately low liability limit in cases of personal injury or death.[31] Under Article 22(1) of the Warsaw Convention, the total damages allowed was 125,000 Poincare francs[32] or S8300.00.[33] Criticism of this treaty and this amount was intense in America,[34] and reached its climax in the case of *Ross v. Pan American Airways.*[35] The protest surrounding this case lead to an attempt by other nations who were High

[22] *Id. Also* Warsaw Convention, *supra* note 1. Article 22. (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

23.Warsaw Convention, *supra* note 1, art. 3.

24.Id. supra note 1, art. 4.

25.Id. supra note 1, arts. 5-16.

26.Id. *supra* note 1, arts. 26 & 30(3).

[27.] Eastern Airlines v. Floyd, at 1497-1501.

[28.] Miller, *supra* note 3 at 38 & 258.

29. The 1955 Hague Protocol, Hague Proceedings, 478 U.N.T.SJ71. *Note* This agreement, ratified by the other member nations in 1955, was so unpopular in the U.S. that it was not submitted to the Senate for confirmation until 1961 and was still the subject of bitter debate in 1966 when the Montreal Agreement was placed into effect. It was never formally ratified in this country.

30. The Conference Agreement Relating to Liability Limitations to the Warsaw Convention and the Hague Protocol, May 16, (1966), (hereinafter referred to as the Montreal Agreement), CAB Agreement 18900, *note* following 49 U.S.CA. Sec. 1502 (approved by CAB Order E-23680, 31 Fed Reg. 7302).

31. Lowenfeid, *supra* note 2 at 504.

32. Warsaw Convention, *supra* note 1. For text of article 22(1) see *supra* note 22

33. Lowenfeid, *supra* note 2 at 499.

34. Id. at 502-4.

35. 299 N. Y. 88, 85 N.E-2d 880 (N.Y. 1949) (hereinafter Ross). Here a young American entertainer was critically injured while on a USO tour during World War II. She was awarded $8300.00 for her serious injuries.

Contracting Parties to the treaty to seek a compromise of the treaty amount so as to satisfy the United States without offending other nations.[36] This lead to the 1955 Hague Protocol which raised the treaty limits to 250,000 Poincare francs or $16,600.00.[37] The United States rejected this compromise because it was still lower than the increase to $25,000.00 which was demanded.[34] Congress never ratified this Protocol, even though the debate over its ratification within the Office of the President, and within Congress lasted for ten years.[39]

In 1965 those opposing the treaty, and the compromise of the Hague Protocol prevailed, and the United States officially filed a Notice of Denunciation of the treaty which was the first step in withdrawing from the Warsaw Convention."[0] This lead to further negotiations among the member nations and among the airlines in an attempt to keep the United States under the Warsaw Convention.[41] In a special meeting of the major air carriers of the member nations, which was held in Montreal, Canada in February of 1966, a private agreement with the United States was reached in which the liability limit for personal injuries or death was raised to $75,000.00.[42] In addition, the individual airlines waived the normal negligence defenses and accepted strict liability for claims arising in international air transportation.[43]

This agreement mollified, but did not eliminate criticism of the Convention within the United States as evidenced through its courts.[44]

II. CAUSE OF ACTIONS UNDER THE WARSAW CONVENTION.

A. Cause of Actions and Damage Limitations

As the United States has always been unhappy with the levels of liability in Warsaw Convention cases, it has consistently sought ways of avoiding those limits. One of the more popular means was through punitive damage claims which some United States courts held were proper if it could be shown that the injury was caused by willful misconduct. That is under the

36. Lowenfeid, *supra* note 2, at 507.

37. Id at 504-9.

38. Id at 506.

39. !d at 510, 515, 545-552.

[40]*Id* The United States was fully prepared to denounce the treaty unless the limits of liability were raised to at least $100,000.00 *Also see, Notice Of Denunciation,* 53 DEPT St. BULL 923, at 924-25.

[41]Id. at 549-51.

[42]*Id* at 595-96.

43.Montreal Agreement, *supra* note 30. *Note* that all further discussion hereinafter of damage limitations under the Warsaw Convention will refer to the $75,000 limit of the Montreal Agreement.

44.Moore, *supra* note 6.

Warsaw Convention, the only means to escape its liability limits was through the willful misconduct exception found in article 25(1) of the Convention. This article removed the limit when the carrier was found guilty of willful misconduct.[43] However as the Warsaw Convention contains no section which specially gave a cause of action for wrongful death or for punitive damages, early court decisions erroneously believed that this meant that these claims would have to be brought under state law.[44] They further held that there was no preemption of these state provisions within the treaty.[47]

It is this erroneous reading of the treaty which has lead to a long and costly detour in the wrong direction in resolving cases under the Warsaw Convention. Errors which reflect the types of problems which can arise out of an international treaty. That is, while the goals are clear, because of some underlying but unstated assumption contained within different legal systems, different results occur. Results that sometimes are opposite to the goals of the treaty.

B. Common Law Nations and the Problem of the Cause of Action

In trying to determine exactly what claims were or were not being protected by the treaty, the United States courts have had to struggle with two issues. That is, did article 17 of the Warsaw Convention create a separate cause of action,[44] or did it merely create a presumption of liability?[49] If it created a cause of action, did it preempt any applicable state law?[50]

It should be noted that this quest for the nature of the cause of action under the Warsaw Convention, as a matter of comparative law is a phenomenon peculiar only to common law nations and especially in the area of wrongful death. [51] This is in comparison to civil law countries such as France, from which the model for the Convention was derived, where it was common for redress for personal injury or death to be provided by the con

45.Warsaw convention, *supra* note 1. Article 25. (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful(sic) misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful(sic) misconduct.

46. *Jn re* Aircrash in Bali, Indonesia on April 22, 1974 684 F.2d 1301 (1982).

47.Buono, *supra* note 20 at 593-96.

48. Komlos, 209 2d 436 (2d 1953).

49.Warsaw Convention, *supra* note 1. Article 17. 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.

50. Id. at 1275-76.

51. Miller, *supra* note 3, at 224.

tract of carriage.[35] Also, in those civil law nations, where a contract was not in effect, a remedy was always present in tort under their various codes.[53]

In common law countries, such matters were not so simple. The early English rule was that there was no remedy for wrongful death.[54] Therefore, such cases could be brought only where there had been enacted a wrongful death statute which specifically provided such a right.[55] England corrected this oversight with the passage of the *Fatal Accuients Act of 1846* * This case also set the pattern for future analysis regarding the right to bring a wrongful death act in a common law court. That is the first question to be determined was by what statute was the cause of action allowed. If there was none, then the holding had to be that the right did not exist.

Most civil law nations however, presumed this right, a fact which seems to reverse the usual notion of the differences between common law and civil nations. As the Warsaw Convention contained no specific section equal to the common law countries' wrongful death statute, the path to confusion was evident. That is, a common law court in a Warsaw Convention case, seeing no statute would assume that there could be no suit for wrongful death and that in order to provide relief, it would have to find a cause of action somewhere else, which was usually the state law. But as the Convention did not allow referral to local law in this area, the courts were stymied unless they could come up with a creative solutions. This, the courts in the United States frequently did.

The problem was not as severe in other common law nations. Countries such as Canada and Australia each had enacted statutes which ruled that all causes of actions as a result of an injury under the Warsaw Convention will be founded on that Convention.[57] Section 2(5) of the *Carriage by Air Act,* Revised Statutes of Canada, section C-14 substitutes the Warsaw Convention for other national law as the basis for liability for any death or injury under the treaty.[58]

Section 12(2) of the Australia *Civil Aviation (Carriers' Liability) Act* contained a similar provision. [59] Both of these statutes were based on the United Kingdom's *Carriage by Air Act of 1932* which also provided for the Convention to be the cause of action in a death case.® Oddly enough, this law

[52]Callrins, *supra* note 14, at 219-20 In France, early death case* were covered by tort statutes. However, after 1911, injuries arising out of transport were made matters of contract.

53.Id

[54]Lord EUenborough's ruling in Baker v. Bolton. 1 Camp. 493,170 E.R. 1033 (Nisi Prius 1808).

55.Miller, *supra* note 3, at 226.

***56.* Id**

57.Id, at 228-9.

58.ld.

59.*Id.*

60.*Id. Also see* MINUTES, *supra* note 14 at 3. At the time of the passage of this act, it also applied to India, Ireland, and the Union of South Africa as parts of the British Empire.

was repealed in England in 1961.[61] This act in effect reversed the 1932 law and reinstated the *Fatal Accidents Act of 1846* as the basis of liability. [62] This, however, did not create the uncertainty that arose in the United States because the statute had left the belief in the United Kingdom that the Convention provided the cause of action in cases arising under it.®

The United States did not enact a specific carriage by act as did England, Canada, or Australia. Instead, the act was considered to be a selfexecuting treaty under the constitution.[64] This meant that the treaty's effect had to be discovered by the courts, rather than have its effects spelled out by statute.

C. The United States and the Komlos Case

The first case to look at the Warsaw Convention and whether it created a cause of action was the New York case of *Wyman* v. *Pan American Airways.*[M] In this case, the court was faced with determining from where the plaintiffs cause of action arose in an air crash which occurred at sea.[66] The state's wrongful death statute did not apply at sea, and there was no local law which could be applied.[67] In looking at the Warsaw Convention, the court noted that the treaty covered all areas of the accident, but then held that there was no wrongful death statute present in the treaty.[6]® It solved the problem using the federal *Death on the High Seas Act*[6]. However, after using this statute as the basis for suit, the court then rejected any efforts to provided damages going beyond those allowed by the Convention.[70] Indeed, the results reached were precisely those envisioned by the Convention even though the court misread the treaty.[71] However, the court stated in dictum that the Convention created no new substantive rights.[72]

The next case to consider the problem was the *Ross* case.[73] This case arose out of the injuries incurred by an entertainer in the crash of an airplane carrying a U.S.O. troupe during World War II. The court here properly ruled that the Convention provided an independent cause of action in that it

61.Carriage by Air Act of 1961, section 3.
62. *Id.*
63.Miller, *supra note* 3, at 229.
64.Id at 28.
65.43 N.Y.S.2d 420 (1943).
66. Id at 423.
67. Id at 422-3.
68. Id
69. Id
70. Id
71. Id
72. Id at 423.
73. Ross, 85 N.E~2d 880.

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defined the terms upon which liability would be allowed, and set the limits on the amount of damages which could be collected, and that it preempted any local cause of action.[74] This decision comported with most interpretations of the treaty and gave no hint of the confusion that was to follow.

The problem began in a peculiar federal district court case, *Komlos*™ In this case, the treaty problem was merely a preliminary question in determining who could sue the airline for the wrongful death of the plaintiffs son who had been killed as a result of an air crash in Portugal.[76] That is, did the estate have a right to sue under Portuguese law upon the principle of lex loci, or did this right pass to the insurance company which was the worker's compensation carrier who had paid the death benefits per contract, and who was then seeking under their subrogation right to sue the airline so as to recover the amount paid to the estate?[77] The first issue that the court had to address was whether the rights in question were governed by the state workers compensation laws, Portuguese law, or by the articles of the Warsaw Convention.[78]

The airlines, which were the target of both suits, defended by arguing that in this case, the cause of action was created by the treaty.[79] In rejecting this argument, the court began by reaffirming the common law rule that a death action could only be brought with statutory authorization.[80] It then looked to the Convention to see if such a provision could be found and held that it was not. It then held that the controlling law was the state workers compensation act which in this case gave the right to sue to the insurer and not to the estate.[81]

In working through these issue, the court in *Komlos* typifies both the confusion that courts have had in applying the treaty, and the extent to which they have sometimes gone in order to provide relief to parties over and above that prescribed by the Warsaw Convention. Though a federal district court case, it looked to the local case law of New York as authority, as the state courts had heard several cases under the Convention prior to its presentation to the federal courts of that district. However, the court acknowledges, but rejects the longer, well reasoned opinions of the New York Appellate court in *Ross,* and in *Garcia,* both of which ruled that the treaty was the sole cause

74. Id. at 884-5. This rule was also followed in Garcia v. Pan American Airways 269 App.Div, 287, 55 N.Y.S.2d 317(1945)(hereinafter Garcia) and Salamon v. Koninldijke Luchtvaart Maatschappij 107 N.YA2d 768 (1951).

[75]111 F. Supp 393 (S.D.N.Y. 1952).

[76]*Id.* at 396-7.

[77]*Id.*

[78].*Id.* at 398-99.

[79]*Id* at 399.

80.Id. at 399.

81.Id

of action for international air accidents involving member nations of the treaty.[82]

Komlos also ignored the manner in which the law was applied in *Wyman* but instead used its conclusionary finding that the Convention created no cause of action.[83] It went on to reject the contractual nature of the treaty, ruling instead that the entire matter was one of torts.[84] It used as further proof of this matter, a letter from Cordell Hull, who was the Secretary of State at the time of the acceptance of the treaty, to President Roosevelt in which he stated that the Convention merely created a a presumption of liability.[83]

On appeal, the Second Circuit did not address the cause of action question at all.[86] In fact, the court did not mention the Warsaw Convention anywhere in its ruling which reversed the lower court decision.*[7] However, the lower court's analysis of the treaty seems to be an unstated premise in this ruling which substituted the law of Portugal for the law of New York and which had the further effect of changing the power to sue from the insurer to the estate.[8]* Oddly enough, though this case does not discuss the Warsaw Convention, it, and not the district court opinion, is cited as the authority that there is no cause of action under the Warsaw Convention. The phantom rule established by this case lasted for twenty-one years.®[9]

[82] *Id* at 400.

83.Komlos, 111 F. Supp. at 399.

[84] *Id* at 401.

[85] *Id* at 402-3. Secretary Hull writes: The effect of article 17 (ch.HI) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seem to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation."

86.209 F.2d 436 (2d Or. 1953).

[87] *Id.*

88.Id at 438-9.

89.The question was considered again in Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Or 1957). Here a corporate jet en route from New York to Venezuela crashed over the Atlantic ocean. The Plaintiffs attempted to establish jurisdiction in federal district court under the Warsaw Convention. The trial court dismissed their suit holding that the Convention created no independent cause of action and that the case should have been brought in admiralty.

Also see Husserl v. Swiss Air Transport, 388 F.Supp. 1238 (S.D.N.Y 1975).

Much of the problem in understanding the statute comes from a misunderstanding of the meaning of article 24 of the convention[90]. As drafted, this article can be read to mean that the Convention merely serves as a limit on damages under whatever cause of action is used to sue the carrier. That the treaty was meant to be the source of any right to sue can be determined from its history. In looking at the predecessor drafts to the current article 24, we find that it was originally two sections, articles 26 and 27.[91] Of note is the first sentence in the draft of article 26 which states in no uncertain terms that"... the liability action may not be brought against the carrier except on the basis of this convention..."[92] However, in order to clear up some duplications of language and to more tightly organize the language of the treaty some changes were made. One of the changes eliminated this clause which would have been invaluable to a common law nation such as the United States in providing it with what it could view as the equivalent of a wrongful death statute. Further, a reading of the complete history of the development of the treaty shows that its major goal was to establish unification of international air law.[93]

90.Warsaw convention, *supra* note 1: Article 24. (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.

91.Calkins, *supra* note 14, at 222 (translation); Draft submitted to the third session of Gteja, meeting in May of 1928. Article 26. In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this Convention, unless the damage arises through an intentional unlawful act as to which he bears the liability, in such case, he shall not have the right to avail himself of the provisions of this convention which exclude in whole or in part his direct liability or that derived from the errors or omissions of his servants or agents. Article 27. In case of death of the person holding the cause of action, every liability action, however founded may be exercised, within the terms and limits provided by this convention, by those persons to whom such action belongs in accordance with the national law of the deceased or, in default of such law, in accordance with the law of place of his last permanent residence.

92. Id

93. *Id.* at 226. The reporter of the Madrid meeting explains the changes as follows; "...Former Article 26 contained two ideas - first, every liability action must be brought on the basis of the convention; the second idea covered the intentional unlawful acts as to which the carrier had assumed liability. It appeared absolutely necessary to separate these two ideas. There were thus two new paragraphs. In addition, since there had been eliminated from Article 27 the part relating to the person who would be entitled to bring suit on the death of the holder of the right, the article no longer contained more than a declaration that all action must be brought on the basis of the convention. This was a repetition of the same idea contained in Article 26. The drafting subcommittee had therefore combined the two articles in a new Article 24..."

D. Post Komlos Cases

The erroneous reading of the Convention was not overruled until *Benjamin* v. *British European Airways*.[9]* This case arose out of the crash of a Trident Jet, killing 112 people. The court here, after properly reviewing the history of the Warsaw Convention, decided that the purpose of the treaty was to establish uniformity in international air law in addition to placing limits on liability. The court further found that this could only be achieved if the Warsaw Convention was an exclusive cause of action for claims arising out of international air travel.[95] Based upon this, the court overruled *Komlos*.[96] The other federal circuits soon abandoned *Komlos* and adopted the new rule.[97]

Most cases after *Benjamin* accepted the Warsaw Convention as a cause of action which preempted the use of local law and it appeared that controversy over its application were over* In *Floyd* v *Eastern Airlines*," an airplane bound from Miami to Nassau, Bahamas, had all three engines shut down at the same time. However, the pilot was able to restart the plane and was able to return safely to Miami.[100] Though no one was killed or injured, numerous lawsuits were filed for emotional injuries and punitive damages under Article 25(1) of the Convention.[101] The plaintiffs argued here that this article created a cause of action which allowed punitive damages under the Convention , and allowed them to claim punitive damages under state law.[102]

Relying on the language of the Convention, the court found that Article 25(1) in removing liability limits only referred to the monetary limits of Article 22 and did not effect Article 17 which limited claims only to damages sustained.[103] Therefore the court held that the Warsaw Convention did not permit punitive damages and preempted any state cause of action.

This rule was followed and expanded in *In Re Air Disaster in Lockerbie Scotland*.[104] This case arose out of a terrorist bombing which blew apart a Pan Am flight from London to New York over Lockerbie, Scotland.[105] Ilie plaintiffs here argued that under Article 25 the liability limits were removed for willful misconduct, this meant all limits, and therefore allowed a

94. *Id.* at 221.227.
95. 572 F.2d 913 (2d Or 1978)(hereinafter Benjamins).
96. Id.
97.Id.
98. Id
99.872 F.2d 1462 (11th Or 1989), *rev'd on other grounds.* 111 S.Ct. 1489 (1991).
100.Id. at 1466.
102.Floyd, 872 F.2d at 1483.
103. *Id.* at 1484.
104 .Id . at 1485.
[105]736 F. Supp. 18 (ED.N.Y. 1990), (hereinafter Lockerbie 1).

[110] *Id* at 1483.

claim for punitive damages.[106] However, the court found that nowhere in the Convention text was there a cause of action for punitive damages, and that the removal of the limitations on damages under Article 25(1) did not create such a cause of action.[107] The Court held that recovery was only for "damages sustained" and denied the plaintiffs claim.[108]

The cause of action issue seemed settled until the decision of *In Re Hijacking of Pan American World Airways Aircraft at Karachi International Airport.*[109] This case arose out of a Pan Am flight from Bombay, India, to New York City which was hijacked at Karachi, Pakistan.[110] Twenty people were killed, and a number were injured.[111] While the Court held that the Warsaw Convention did create a cause of action for wrongful death and personal injury, it went on to rule that the treaty did not expressly preempt any other cause of actions which the victim may have under state law.[112] The court then allowed the plaintiff to sue for punitive damages under the state law.[113] The court here specifically rejected *Floyd* and created a conflict with the decision in *Lockerbie* 7.[114] This matter was resolved in *In Re Air Disaster At Lockerbie, Scotland.*[1U]

The Second Circuit combined *Lockerbie I* and *Karachi* for purposes of appeal.[116] It looked to the purpose of the Convention and found that it was to place specific limits on the nature and amount of damages which could be recovered in air accidents except in cases of willful misconduct.[117] The Court further found that the purpose of the treaty was to provide a single cause of action for injuries and thereby uniformity in compensation.[118] The court ruled that this required that state laws which conflicted with the principle of uniform compensation be preempted.[119] The court also reviewed the text of the treaty and found it to be a complete regulatory scheme that was intended to serve as a uniform international law.[120] Then after a detailed analysis of articles 17, 24(2), & 25 ,[m] and the policy considerations behind the

106. See Lockerbie II, 928 F.2d 1267, 1269 (2nd 1991).
107. Id at 19.
108. Id. at 20.
109. Id. at 20-21.
110. 729 F.Supp. 17 (S.D.N.Y. 1990)(hereinafter Karachi).
111.*Id* at 18.
112. Id.
113.Id at 19.
114. Id at 19-20.
[115.]736 F. Supp. 18 (ED.N.Y. 1990)(hereinafter Lockerbie I).
116. Id
117. Lockerbie, 928 F2d 1270-71.
118. Id. at 1273-76.
119. Id.
120. Id at 1280.
121. Id at 1281-87.

convention,[122] the court decided that punitive damages, as they conflicted with the compensatory scheme desired by the framers, could not be recovered under the Warsaw Convention.[123] This ruling effectively prohibited plaintiffs from seeking any cause of action outside of the convention.

IV. CONCLUSIONS

With the rulings in the *Lockerbie* cases and in other recent cases, it is now apparent that the United States' courts have finally learned and accepted both the meaning and the purpose of the treaty. In the past, the courts have either misunderstood the Convention as a result of their common law interpretation, or they have seen it as an obstacle to fair compensation of victims and have sought means to circumvent it. In either case, the United States allowed wide variations in case outcomes which violated the principle of uniformity which was the governing concept of the Convention.

The United States, which became a signatory nation of this treaty in 1934, did not finally understand or accept its meaning until 1991. In reviewing the Convention's history in America, two problems in treaty application become apparent which could lead to similar problems in the future as other conventions of this type become more common in the area of international law.

The first is one of law. As a common law nation, the United States must first accept the fact that most other nations in the world operate under a civil law system or one close to it. From the Roman law heritage spread through much of the west, to the book of rules by Confucius or Mao spread through the east, much of the world's law is based upon a written code. Hence treaties, unless they have been developed specifically on models from English speaking nations, may have applications totally foreign to common law nations. Hence it will be of major importance for the United States to do more than bring back a written document. It must also understand what this document means to the rest of the signing partners. It took almost sixty years for the United States to understand and accept the fact that one of the major benefits sought by the Warsaw Convention was uniformity in the law in its application among the member states. In an international society, taking sixty years to grasp the meaning of an agreement is far too long, and to do so in the future could well doom a worthy agreement.

The second problem is a social-political one. During the years of the Warsaw Convention’s existence in this country, some courts have acted as though they did not care what the purpose of the convention was as they sought every means possible to circumvent it on the grounds that the awards

122. *Id.* at 1287-88.

123. *Id.*

under American standards were too low. However, most nations in the world are far poorer than the United States, while others do not share the same litigation fervor as this country. Therefore, agreements which set limits, especially where the limits are based upon finances, should not be entered into if the United States has no intentions of abiding by the limits. The many attempts at circumvention of the Warsaw Convention, though honest and proper by American standards, when viewed by an outsider may well appear to be either outright dishonesty or cheating on a treaty. This is not an image that any American wants. With the lessons of the Warsaw Convention properly learned, it is an image we can well avoid in the application of future treaties.