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Howard T. Edelman

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PUNITIVE DAMAGES CRASH IN THE SECOND CIRCUIT: *IN RE* AIR DISASTER AT LOCKERBIE, SCOTLAND ON DECEMBER 21, 1988*

INTRODUCTION

Passengers on international flights are keenly aware of the dangers associated with flying overseas.¹ However, passengers on international flights seldom consider the potential ramifications of the mere purchase of an international airline ticket.² Under

* 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991). This case arises from the consolidation of two district court cases: *In re* Air Disaster at Lockerbie, Scotland on December 21, 1988, 733 F. Supp. 547 (E.D.N.Y. 1990) and *In re* Hijacking of Pan American Airways, Inc. Aircraft at Karachi Int'l Airport, Pakistan on September 5, 1986, 729 F. Supp. 17 (S.D.N.Y. 1990). This Comment is in no way intended to desensitize the tragedy of Pan Am Flight 103 or any airline accident.

¹ Dangers most frequently encountered include crashes due to mechanical failures, bombings and hijackings. See, e.g., *In re* Mexico City Aircrash of October 31, 1979, 703 F.2d 400, 403 (9th Cir. 1983) (Western Airlines Flight 2605 crashes and kills 74 people attempting to land at Mexico City); *In re* Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1304 (9th Cir. 1982) (in Pan American jet crash, 106 passengers were killed); *In re* Air Crash Disaster at Sioux City, Iowa on July 19, 1989, No. MDL-817, 89 C 8082, 1991 WL 279005 (N.D. Ill. Dec. 26, 1991) (on United Airlines flight, 112 passengers were killed when hydraulic system failed); *In re* Air Disaster at Lockerbie, Scotland on December 21, 1988, 733 F. Supp. at 549 (when a bomb exploded in the cargo hull of Pan Am Flight 103 en route from London to New York, 259 persons were killed); *In re* Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Int'l Airport, Pakistan on Sept. 5, 1986, 729 F. Supp. at 18 n.1 (when Pan Am Flight 73 hijacked en route from Bombay to New York, 20 passengers were killed).

² For a discussion of the liability limits imposed on international travel, see *infra* note 4 and accompanying text. Under the Montreal Agreement, see *infra* note 21, the Convention requires that passengers be advised of the liability limitations on international travel in 10-point type print. The limitations are required to be presented to passengers upon receipt of the ticket and are to spell out the potential liability limitations. See *In re* Air Crash Disaster at Warsaw, Poland on March 14, 1980, 705 F.2d 85 (2d Cir.) (holding that 8.5-point type print size did not meet the 10-point notice requirement and thus prevented the airline from imposing the liability limitations of the Warsaw Convention), *cert. denied*, 464 U.S. 845 (1983), *rev'd in* Chan v. Korean Airlines, Ltd., 490 U.S. 122 (1989). The notice requirement was instituted to provide passengers with the opportunity to seek additional monetary protection by purchasing travel insurance. This additional coverage is considered independent of the \$75,000 limitation imposed by the Convention. *In re* Air Crash Disaster at Warsaw Poland, 705 F.2d at 86 n.3. While the Convention does not require that passengers have actual notice of the limitations, the 10-point print size establishes constructive notice. A strong argument could be made that passengers should be required to have actual notice, the probable result being that more passengers would seek more adequate liability protection before traveling. However, it

the Convention for the Unification of Certain Rules Relating to International Transportation by Air (the "Warsaw Convention"),³ international air travelers are limited to a \$75,000 recovery against an airline for damages resulting in personal injury or death.⁴ There has been much debate about the inadequacies of this limit and its inherent injustices,⁵ especially considering that

would be very difficult both to implement and enforce an actual notice requirement considering the millions of people who travel internationally each year and the evidentiary problems that would arise in determining whether passengers had actual notice of the limitations.

Recently, the Supreme Court has taken a more pro-airline view of the notice requirement, holding that failure to supply notice in the 10-point print size did not waive the Convention's liability limitations. Only in situations where passengers did not receive a ticket or received a ticket where the shortcomings were so severe that the document could not be considered a ticket would the Convention's liability limitations be waived. See *Chan*, 490 U.S. at 129 n.3. This approach severely undermines the constructive notice that passengers were to receive from the 10-point print size and increases the likelihood that passengers will not obtain liability insurance.

³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted at 49 U.S.C. § 1502 n.1, Warsaw Convention (1988). Approximately 110 nations are signatories of the Warsaw Convention. For a compilation of the member nations, see Kimberlee S. Cagle, *The Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 1000-01 (1986).

⁴ While the Convention affects travel between almost every nation in the world, the Convention's \$75,000 liability limitation applies only to international flights originating or terminating in the United States. The \$75,000 limit reflects a special compromise among members to ensure that the United States remained a signatory to the Convention. Cagle, *supra* note 3, at 958-59. Most nations do not subscribe to this limit, but instead adhere to lower limits ranging from \$8300 to \$16,000 when the United States is not a departure or termination point. *Id.* at 957-59.

⁵ See Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967). This article presents a historical analysis of the various attempts to raise the liability limits under the Warsaw Convention and recounts the United States' threat to withdraw from the Convention in 1965 if the liability limits were not raised. It was such pressure that eventually led to the Montreal Agreement, which raised the limit to \$75,000 for flights originating or arriving in the United States. The article however does not attempt to criticize the liability limits. Instead it brings out the fierce disagreement among member nations about raising liability limits. See *infra* note 21 and accompanying text. For a critique of the Warsaw Convention's liability limits, see Cagle, *supra* note 3, at 988 (contrasting the varying degrees of liability awards available under the Convention with awards available when the Convention is not applicable, thereby concluding that the Convention is not fulfilling one of its main goals of establishing a uniform liability system). While Cagle's criticism has validity, since different nations do adhere to different monetary limits under the Convention, there is a difference between nations applying different liability levels, which they currently do, and having varying liability levels within the jurisdiction of a single nation, which would occur if plaintiffs were allowed to bring independent state claims. For a discussion of the possible confusion that varying liability awards would add to the Con-

there is no comparable limitation in domestic air travel.⁶

vention if independent state claims were available, see *infra* notes 139-79 and accompanying text. See also P. Jacobs & B.F. Kiker, *Accident Compensation for Airline Passengers: An Economic Analysis of Liability Rules Under the Warsaw Convention*, 51 J. AIR L. & COM. 589, 608 (1986) (arguing that the Convention's compensation scheme should bear some relationship to the economic losses actually suffered by passengers); David L. Sheinfeld, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653, 691 (1980) (criticizing the Convention for inadequately compensating passengers in airline accidents and noting that United States courts have failed to address the issue of extending liability limits and have subsequently prevented passengers from being sufficiently compensated).

In a rather startling development, several Japanese airlines, including Japan Air Lines, have announced they will withdraw from the liability limits imposed by the Warsaw Convention. This decision will allow claimants to seek unlimited liability against these airlines. The Warsaw Convention specifically permits airlines to contract privately for higher liability awards. The decision is undoubtedly a reflection of the embarrassment most airlines and insurers feel when faced with inadequately compensating victims of air disasters. Japan Air Lines believes this move will force the aviation industry to revamp the Warsaw Convention and raise the liability risks of airlines. See Robert Rice, *Japanese Airlines to Scrap Limit on Liability for Victims*, FIN. TIMES (London), Nov. 19, 1992, at 1; Robert Rice, *An Airline Decision Born of Embarrassment*, FIN. TIMES (London), Nov. 19, 1992, at 5.

⁶ The Warsaw Convention does not apply to domestic air travel. See Cagle, *supra* note 3, at 955. Therefore, the only limitations imposed on domestic aviation disaster litigation are those imposed by state or federal law regulating wrongful death and personal injury actions. *Id.* Domestic aviation liability awards can potentially be in the hundreds of millions of dollars. See, e.g., *Court Absolves Government in Delta L-1011 Crash*, AVIATION DAILY, Sept. 5, 1989, at 436 (estimating that potential liability from the crash of a Delta flight in Dallas on August 2, 1985 could exceed \$150-200 million); *Settlement*, AVIATION DAILY, Mar. 20, 1989 ("Settlement amounts from air transport crashes are growing, with the average award in the 1987 Northwest crash in Detroit projected to be \$1 million, far above the \$362,943 reported in a 1988 Rand Corp. study . . ."); Jim Doyle, *Jury Awards \$600,000 to Couple in Air Accident*, S.F. CHRON., Apr. 18, 1991, at A2 (couple traveling aboard a United Airlines flight that split open in midair near Oahu, Hawaii in 1989 were awarded \$600,000); *\$2.7 Million Awarded in Aeromexico Crash*, N.Y. TIMES, Apr. 13, 1990, at 12 (federal court awards \$2.7 million in damages to the family of a father and son who died in a 1986 Aeromexico jet crash in California). The Warsaw Convention was drafted specifically to prevent damage awards from reaching such high levels in international air travel. See *infra* notes 14-29 and accompanying text.

Besides the high liability awards, domestic aviation litigation has been plagued by severe complexities, mainly involving the difficult determination of which state wrongful death or personal injury standards to apply when passengers from multiple states are represented on a given flight. See Scott R. Paulsen, *Choice of the Punitive Damage Law in Airline Accidents: The Chicago Rule Comes Crashing Down*, Summer 1990 J. CORP. L. 803, 847 (arguing that the choice of law analysis in determining whether punitive damages may be awarded is often the most critical issue in airline disaster litigation). For an example of the confusing state of domestic airline litigation, see *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colorado*, on Nov. 15, 1987, 720 F. Supp. 1445 (D. Colo. 1988) (holding that Texas law applied to punitive damage claims even though the crash occurred in Colorado, the litigation was pending in Colorado and most of the pas-

The recent decision by the United States Court of Appeals for the Second Circuit in *In re Air Disaster at Lockerbie, Scotland* on December 21, 1988⁷ has once again fueled debate over the Warsaw Convention.⁸ The *Lockerbie* court made two controversial findings on the award of damages in actions governed by the Convention. First, the Second Circuit held that punitive damages were not recoverable under the Warsaw Convention and that plaintiffs may seek only compensatory damages when an action is governed by the Convention.⁹ The court reasoned that to allow punitive damages would prevent the Convention from achieving its main goal: to limit an air carrier's potential liability in the event of an accident.¹⁰ In addition, the Second Circuit pointed out that to award punitive damages would hinder the creation of a uniform liability scheme.¹¹ Second, the court held that the Warsaw Convention preempted independent state claims against an airline, making the Convention the exclusive means by which plaintiffs could seek recovery for personal injuries or wrongful deaths stemming from an international flight.¹² The *Lockerbie* court reasoned that if independent state

sengers purchased tickets in Idaho). The Convention was also intended to avoid such complex and arbitrary judicial determinations. See *infra* notes 14-29 and accompanying text.

⁷ 928 F.2d 1267 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991).

⁸ See *In re Korean Air Lines Disaster* of Sept. 1, 1983, 932 F.2d 1475, 1490-94 (D.C. Cir. 1991) (Mikva, J., dissenting) (criticizing the *Lockerbie* decision for unnecessarily concluding that the Convention must be the exclusive cause of action and arguing that punitive damages should be available under the Convention when the applicable state law permits); Kelly Compton Grems, *Punitive Damages Under the Warsaw Convention: Revisiting the Drafters' Intent*, 41 AM. U. L. REV. 141 (1991) (arguing that the *Lockerbie* court erred in looking at the drafters' intent to determine that the Convention was exclusive when the plain language of the Convention permits independent state causes of action). For a critique of the *Korean Air Lines* dissent and a discussion of why the Convention must be the exclusive cause of action, see *infra* note 210 and accompanying text. See also Christopher Reynolds, *Travel Insiders, What Value Life? Issue Unsettled For Air Travel*, L.A. TIMES, Aug. 2, 1992, at L2 (the "[Warsaw Convention] does not serve anyone, whether that be the families of victims, the airlines, or even the trial lawyers who represent the families.").

⁹ 928 F.2d at 1270.

¹⁰ *Id.* For a discussion of the background of the Warsaw Convention and the intentions of the drafting parties, see *infra* notes 14-29.

¹¹ 928 F.2d at 1269-70.

¹² *Id.* The Second Circuit's decision prevents airline disaster claimants from pursuing punitive damages or wrongful death actions under state law. This Comment views the Second Circuit's dual holdings as essentially interchangeable, even though other commentators have criticized the court for deciding both issues. See *supra* note 8. The

causes of action were available, the Convention would be unable to function as a uniform guide to airline liability.¹³

This Comment begins with a discussion of the underlying policies and goals of the Warsaw Convention. This Comment then discusses the procedural history of the two conflicting district court decisions that led to the Second Circuit's review of the punitive damage issue. Finally, this Comment examines the *Lockerbie* court's decision.

This Comment contends that the Second Circuit was justified in holding that punitive damages are not available under the Warsaw Convention. After examining the general rationale for punitive damages and then contrasting this with the role of damages under the Convention, this Comment concludes that the penal nature of punitive damage awards in the United States conflicts with the Convention's purely compensatory structure. Furthermore, the Comment submits that punitive damages are both duplicative and unnecessary since the Warsaw Convention provides for unlimited compensatory awards when willful misconduct can be proved. By the Convention's own terms, victims in international aviation accidents are adequately compensated without the imposition of punitive awards. Additionally, the marketplace, to a certain extent, imposes punitive damages upon airlines; negative publicity leads to decreased ridership.

Next, this Comment argues that it was necessary for the Second Circuit in *Lockerbie* to hold that the Warsaw Convention preempts independent state claims. Were state claims allowed, consistent application of the Convention would be impossible. Airlines and potential claimants would be faced with a myriad of potentially conflicting state rules since there is no state uniformity on such issues as whether punitive damages can

court's holding that punitive damages are unavailable under the Convention is directly related to its holding that state wrongful death actions are barred by the Convention. A primary reason for finding that punitive damages are not permitted is the division among states concerning punitive damage awards in wrongful death actions and the resulting effect on uniform and limited liability judgments. See *infra* notes 152-74 and accompanying text. Whether this Comment refers to punitive damages or independent state causes of action, the surrounding analysis is relevant to both. Independent state wrongful death claims and punitive damages would both prevent the uniform application of the Convention. Thus both are barred by the Warsaw Convention. However, this Comment will also examine the two holdings separately since commentators and courts have criticized the Second Circuit for unnecessarily preempting all state claims.

¹³ 928 F.2d at 1270.

be awarded in a wrongful death action or whether punitive damages can be insured against. To promote uniformity and to effectuate the Convention's goal of limiting potential liability, the Second Circuit had no recourse but to preempt the application of independent state claims seeking punitive damages.

This Comment concludes by examining how the Second Circuit's opinion squares with those of other jurisdictions which support the position that independent state claims are preempted by the Warsaw Convention. Ultimately, it is this Comment's position that the Second Circuit's analysis was both thoughtful and principled and that the *Lockerbie* court acted in accordance with the objectives established by the Warsaw Convention.

I. BACKGROUND OF THE WARSAW CONVENTION

The 1929 Warsaw Convention was the culmination of two international conferences that sought to lend guidance and assistance to the then infant aviation industry.¹⁴ The resulting document reflected two primary goals envisioned by the drafters. The first was the creation of uniform liability principles for the international airline industry.¹⁵ Uniformity was deemed necessary because the airline industry involved many nations with different languages, customs and legal practices. The Convention's drafters wanted one set of rules to apply no matter which nation or airline was involved in a legal action.¹⁶ In addition, the Convention established almost complete uniform procedures for dealing with claims arising out of international transportation and for determining the substantive law that was to be applied to such claims.¹⁷ The Convention's drafters believed that this uniform

¹⁴ See Lowenfeld & Mendelsohn, *supra* note 5, at 498. The first conference was held in Paris in 1925 and the second in Warsaw in 1929. *Id.*

¹⁵ See Barbara J. Buono, *The Recoverability of Punitive Damages Under the Warsaw Convention In Cases of Willful Misconduct: Is the Sky the Limit?*, 13 *FORDHAM INT'L L.J.* 570, 573 (1989-1990) (detailing the drafting history and the resulting text of the Warsaw Convention).

¹⁶ See *Reed v. Wiser*, 555 F.2d 1079, 1090-91 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

¹⁷ [T]he framers of the Convention . . . [drafted] a treaty which laid down uniform rules as to venue (Article 28), burden of proof (Article 20), standards of negligence (Articles 20 & 25), presumptions (Article 18(3) & 26), contractual liability limitations (Article 23), suits against the estate of the tortfeasor (Article 27), statute of limitations (Article 29), liability in the event of carriage by

procedure would simplify and lessen litigation.¹⁸

The second goal of the Convention was to limit the potential liability of air carriers.¹⁹ Limiting potential liability was considered the more important of the two goals and the overriding purpose of the Warsaw Convention.²⁰ Liability was initially limited to \$8300 but was subsequently raised to \$75,000.²¹ The Convention members imposed a liability limit to enable airlines to spend needed capital on expanding their operations instead of paying large liability awards.²² The limit also provided a definite basis upon which insurance rates could be calculated.²³ Addi-

more than one carrier (Article 30), and damage awards (Article 22 & 25). *Id.* at 1092. The Convention was also successful in achieving uniformity in the areas of ticket documentation, baggage checks and air waybills. See Lowenfeld & Mendelsohn, *supra* note 5, at 498.

¹⁸ "It is believed that the principle of limitations of liability will . . . be beneficial to passengers . . . as affording a more definite basis of recovery and as tending to lessen litigation." *President of the United States Transmitting a Convention for the Unification of Certain Rules*, Senate Comm. on Foreign Relations, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934) (Secretary of State Cordell Hull), cited in Lowenfeld & Mendelsohn, *supra* note 5, at 499.

¹⁹ Lowenfeld & Mendelsohn, *supra* note 5, at 499.

²⁰ *Id.*

²¹ The rise in liability resulted from the Montreal Agreement of 1966. The United States was dissatisfied with the low level of compensation previously available under the Warsaw Convention and negotiated an increase to \$75,000 after it threatened to withdraw from the Warsaw Convention. The Montreal Agreement is not a treaty, but rather is an application of Article 22 of the Convention, which allows air carriers and passengers to agree upon a higher level of liability. It has been argued that the reason other member nations agreed to the increase in liability was to keep the United States from withdrawing from the Convention. Without the United States as a member—a major player in international aviation—it would have been impossible for the Convention to achieve its goal of uniformity in international travel. See Buono, *supra* note 15, at 579-80. The Montreal Agreement is peculiar in that it is not accepted by all members of the Convention and is therefore not on equal standing with the Warsaw Convention. "The agreement only applies where the place of departure, the place of destination, or an agreed stopping place is the United States." See Cagle, *supra* note 3, at 957-59.

²² Nations often engage in restrictive measures such as tariffs or enter into treaties restricting trade to protect new and developing industries. See JOHN H. JACKSON & WILLIAM J. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* 19 (1986). Often governments will subsidize industries in an attempt to protect them from competition abroad. *Id.* at 725-26. In a sense, the liability limitation of the Warsaw Convention was nothing more than a communal attempt by various governments to protect the aviation industry. See Lowenfeld & Mendelsohn, *supra* note 5, at 499. Although the success of governmental intrusion into the free market has been debated, the fact remains that it is nonetheless an accepted practice for nations to attempt to protect domestic industries. JACKSON & DAVEY, *supra*, at 17-19.

²³ "[S]uch limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates. . . ." *President of the United States Transmitting a*

tionally, the drafters believed that limiting liability would decrease the volume of litigation since parties would know the extent of potential liability before the commencement of a lawsuit.²⁴

The Convention established a basic trade off between potential claimants and airlines.²⁵ Initially, the Convention placed a presumption of liability against the airline in the event of an accident unless the carrier could prove that it was free from negligence.²⁶ However, airlines can no longer free themselves from a

Convention for the Unification of Certain Rule, Senate Comm. on Foreign Relations, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 3-4 (1934) (Secretary of State Cordell Hull), cited in Lowenfeld & Mendelsohn, *supra* note 5, at 500.

²⁴ See *supra* note 18 and accompanying text. Whether the Convention has indeed decreased litigation is another question for which there appears to be no empirical data. However, it is already clear that the *Lockerbie* decision is beginning to add some uniformity and simplicity to actions governed by the Convention at least insofar as punitive damages are concerned. In *Korean Air Lines* the United States District Court of Appeals for the District of Columbia vacated a \$50 million punitive damages award based on the reasoning of *Lockerbie*. 932 F.2d 1475 (D.C. Cir. 1991). Had *Lockerbie* been decided before the *Korean Air Lines* jury award, it is most likely that the award would have been vacated sooner or never awarded at all. Likewise Judge Cannella of the Southern District of New York recently denied a plaintiff's motion to amend its complaint to add punitive damages in an action governed by the Convention, noting the recent *Lockerbie* decision. See *Priestley v. American Airlines, Inc.*, No. Civ. 89-8265, 1991 LEXIS 4804 (S.D.N.Y. April 12, 1991). As the Second Circuit is faced with issues of punitive awards and whether the Convention affords an exclusive cause of action in international airline disaster suits, *Lockerbie* will be its lodestar. In time, it is quite likely that the issue will not be litigated at all.

²⁵ The *Lockerbie* court focused much of its attention on the influence of civil law in the drafting of the Convention's provisions. According to the court, the Warsaw Convention was influenced by the civil law of contracts. In French and German law contractual liability concerning domestic carriers provides for a trade-off between limitations on liability and a plaintiff's guaranteed recovery. 928 F.2d at 1271. "Article 25 of the Convention, which lifts the liability limit . . . [for] willful misconduct . . . [is] also derive[d] from the . . . civil law principle that 'one cannot escape the consequences of one's intentional fault.'" *Id.* Based on these civil law doctrines, the court opined that the Convention must be read as both a method to establish uniform liability and as a means to limit such liability.

²⁶ Article 17 of the Convention stated that the carrier would be liable for damages sustained. Article 20(1) of the Convention established that liability could only be rebutted if the carrier could prove it was free from negligence. Courts had interpreted Articles 17 and 20(1) to create a presumption of airline liability unless the carrier could prove otherwise. See *Benjamins v. British European Airways*, 572 F.2d 913, 922 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). This presumption of liability made establishing liability easier and less expensive for claimants seeking recovery under the Convention. "The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a [claimant] has in establishing the cause of an accident in air transporta-

Convention claim by arguing that all necessary steps were taken to avoid the accident or damage.²⁷ Rather, there now exists a strict liability standard for accidents, limiting air carrier liability to \$75,000 while claimants benefit from a guaranteed recovery.²⁸ Despite these liability limits, Article 25 of the Convention provides that unlimited damages beyond the \$75,000 limit can be awarded if a claimant can prove that the airline engaged in willful misconduct.²⁹

II. FACTS AND PROCEDURAL HISTORY OF *LOCKERBIE*³⁰

A. *Facts and Procedural History of Pan Am Flight 103*

On December 21, 1988 Pan Am Flight 103 crashed near Lockerbie, Scotland. Flight 103 had originated in Frankfurt, West Germany and had flown nonstop to Heathrow Airport in London, England.³¹ The flight then departed Heathrow for New York's John F. Kennedy International Airport.³² At 7:19 p.m. Greenwich mean time, Flight 103 exploded in midair and crashed near Lockerbie, Scotland.³³ The explosion was caused by a terrorist bomb placed inside a checked bag in the cargo hold of

tion." Lowenfeld & Mendelsohn, *supra* note 5, at 500, quoting *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, Senate Comm. on Foreign Relations, S. EXEC. DOC. NO. G, 73d Cong., 2d Sess. 4 (1934).

²⁷ Before the Montreal Agreement, airlines could escape liability by proving that all necessary steps were taken to avoid the accident or damages sustained. See *supra* note 26 and accompanying text. The parties to the Montreal Agreement, however, waived the liability defense available under Article 20(1) of the Convention. See Cagle, *supra* note 3, at 959. As such, airlines are now strictly liable for damages under the Convention.

²⁸ For a justification of the strict liability standard, see Lowenfeld & Mendelsohn, *supra* note 5, at 599-601 (arguing that the standard is justified since strict liability standards tend to prevent the delay of liability awards and noting that delays seriously devalue the compensation eventually awarded to claimants). One of the major goals of the Convention is to decrease litigation and establish predictable awards. Strict liability promotes such goals. See *supra* notes 14-27 and accompanying text.

²⁹ 928 F.2d at 1271. For a discussion of what constitutes willful misconduct, see *supra* notes 129-31 and accompanying text.

³⁰ The facts of *Lockerbie* stem from two separate airline incidents. The first case involved the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. The second case involved the hijacking of Pan Am Flight 73 at Karachi International Airport, Pakistan.

³¹ *In re Lockerbie*, 733 F. Supp. 547, 548 (E.D.N.Y. 1990).

³² *Id.* at 548-49.

³³ *Id.* at 549.

the airplane.³⁴ All 259 passengers on board died in the explosion.³⁵

Representatives of the victims filed suits in various federal courts against Pan American World Airways, Inc. ("Pan Am"), two Pan Am subsidiary corporations that provided security services and Pan Am's parent corporation.³⁶ The plaintiffs asserted that federal courts had jurisdiction over Pan Am based on federal subject matter jurisdiction and the Warsaw Convention.³⁷ The plaintiffs asserted claims against Pan Am seeking compensatory damages for the airline's willful misconduct and breach of contract. The plaintiffs also sought punitive damages for the defendant's willful misconduct.³⁸ If willful misconduct could be established, such claims would entitle the plaintiffs to unlimited liability awards. All actions were subsequently consolidated and transferred for pretrial hearings by order of the Judicial Panel on Multidistrict Litigation to the Eastern District of New York.³⁹

Defendant Pan Am moved for partial summary judgment

³⁴ Brief for Appellant at 2, *In re Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388).

³⁵ 733 F. Supp. at 549.

³⁶ Specifically, the suit was filed against Pan Am, Pan Am Corp. (Pan Am's parent corporation) and two companies that provided security services for Pan Am (Alert Management, Inc. and Pan Am World Services, Inc.). *Id.* Pan Am moved to dismiss the punitive damage claims. 928 F.2d at 1269. When this Comment refers to Pan Am, it refers to Pan American World Airways, Inc.

³⁷ 28 U.S.C. § 1331 grants original jurisdiction to federal courts in all civil actions arising under the Constitution, laws or treaties of the United States. Since the Warsaw Convention is a treaty to which the United States is a signatory, district courts had jurisdiction over the *Lockerbie* claims.

³⁸ 733 F. Supp. at 549. The plaintiffs asserted that the Warsaw Convention provided that the punitive damage issue should be determined according to the law of the forum state. *Id.* Therefore punitive damages could be barred only if local law prohibited the awarding of such damages. *Id.* The plaintiffs also claimed that Article 25 of the Convention, which allows for the lifting of the \$75,000 liability limit, authorized punitive damage awards if willful misconduct is established. *Id.* While it is not clear which of Pan Am's acts were alleged to constitute willful misconduct, the plaintiffs' claim undoubtedly stemmed from Pan Am's violations of established security standards. See Brief for Appellant at 4 n.7, *In re Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388).

³⁹ *In re Air Disaster at Lockerbie, Scotland* on December 21, 1988, 709 F. Supp. 231 (J.P.M.L. 1989). The Judicial Panel on Multidistrict Litigation was created to consolidate and assign to a single judge common litigation that is ongoing in multiple jurisdictions. 28 U.S.C. § 1407 (1992). Initially, the Panel must determine whether various cases pending throughout the country have enough in common to justify their consolidation. The end goal is to reduce expenses and expedite dispositions. See *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

on the plaintiffs' punitive damage claims by arguing that such damages were barred under the Warsaw Convention.⁴⁰ Chief Judge Platt for the Eastern District of New York granted the defendants' partial summary judgment motion and dismissed the punitive damage claims.⁴¹ The court rejected the plaintiffs' assertion that local law governed whether punitive damages could be awarded under the Warsaw Convention and reasoned that to allow punitive damages would be inconsistent with the primary goals of the Convention.⁴² Although the Warsaw Convention was silent on whether punitive damages could be awarded, the court concluded that "in order for a court to find that a provision inconsistent with the entire scheme of the Warsaw Convention exists, the provision would have to be express and explicit."⁴³ While the court acknowledged that the liability limits set by the Convention were low, it nevertheless reasoned that it was bound not to alter, amend or add to the Convention's text because such an act would be a usurpation of legislative power.⁴⁴

On February 26, 1990 Chief Judge Platt entered an additional memorandum and order denying the plaintiffs' motion for reargument.⁴⁵ The court found, however, that the punitive dam-

⁴⁰ *In re Lockerbie*, 733 F. Supp. 547, 548 (E.D.N.Y. 1990).

⁴¹ *Id.*

⁴² *Id.* at 549-50.

⁴³ *Id.* at 550. See also *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989) (holding that punitive damages are inconsistent with the intent and language of the Warsaw Convention), *rev'd on other grounds*, 111 S. Ct. 1489 (1991). The district court did not believe that the drafters of the Convention intended for punitive damages to be recoverable. "The primary shared expectation of the contracting parties was to set some uniform limit on an airline carrier's liability in order to promote the civil aviation industry which at the time of the Warsaw Convention was in its infancy." *Lockerbie*, 733 F. Supp. at 550. "[A] State cause of action for punitive damages would directly contravene the liability limits set out in the treaty." *Id.* at 551 (citing *Floyd*, 872 F.2d at 1480-81). At the time the Convention was signed, laws governing punitive damages varied from nation to nation. If the drafters of the Convention intended to create a uniform liability scheme, they would not have allowed for the application of inconsistent local rules. *Id.* at 552. For a discussion of commentators who have criticized examining the goals of the Convention as a basis for interpreting the Convention's text, see *infra* note 85 and accompanying text.

⁴⁴ 733 F. Supp. at 553-54, citing *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (discussing the standards for interpreting the Convention in the context of whether air carriers lost the protection of the Warsaw Convention's limitation on damages if the airline failed to provide notice of the limitation in 10-point type print size).

⁴⁵ Brief for Appellant at 6, *In re Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388).

age issue involved a controlling question of law and subsequently granted the plaintiffs' motion to take an interlocutory appeal of the issue to the Second Circuit.⁴⁶ The Second Circuit agreed to hear the appeal on April 27, 1990.⁴⁷

B. *Facts and Procedural History of Pan Am Flight 73*

The *In re Hijacking of Pan Am World Airways at Karachi International Airport, Pakistan* on Sept. 5, 1986⁴⁸ case arose from a terrorist hijacking of Pan Am Flight 73 traveling from Bombay, India to New York on September 5, 1986. At a scheduled stop in Karachi, Pakistan, four armed terrorists seized the aircraft. Twenty passengers were killed and a number of other

⁴⁶ 928 F.2d at 1269. The interlocutory appeal was made under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1982). The Act governs interlocutory appeals that may be heard upon judicial discretion. The section applies where: (1) the district judge who authorized the interlocutory appeal is "of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion . . ." and also believes that "an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." and (2) the court of appeals then agrees to hear the case. The determination of whether to certify the issue for appeal is at the complete discretion of the district court judge. RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 898-902 (1989).

⁴⁷ Brief for Appellant at 5, *In re Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388). The remaining liability issues continued to be tried in the Eastern District of New York. Recently, after an 11-week trial, the jury found that Pan Am had acted willfully in failing to maintain proper security measures. This decision cleared the way for plaintiffs to collect unlimited damages from Pan Am. Arnold H. Lubasch, *Pan Am Is Held Liable By Jury in '88 Explosion*, N.Y. TIMES, July 11, 1992, at A1. Plaintiffs are seeking a total of \$350 million in damages. *Pan Am Guilty of Misconduct in Lockerbie Disaster, Jury Rules*, CRAIN BUS. INS., July 13, 1992, at 1. The trials to determine damages began in July 1992 and verdicts have been issued including one in excess of \$9 million. Edward Frost, *First Lockerbie Damage Award—\$9.23 Million*, REUTERS, LTD., July 22, 1992. Since Pan Am is now bankrupt and liquidated, Pan Am's insurers will cover the jury awards. *USAIG Expected Warsaw Limit to Apply to Pan Am*, CRAIN BUS. INS., July 22, 1992, at 14. However, it is not entirely clear what effect Pan Am's bankruptcy will have on the insurance companies ability to pay claims. To ensure payment of damage awards, the plaintiffs have motioned Judge Platt to order the insurers to post a \$750 million bond. See Sara J. Harty, *Pan Am Plaintiffs Seek Bond From Insurers*, CRAIN BUS. INS., Oct. 26, 1992, at 82. Nevertheless, these awards greatly surpass the \$75,000 Warsaw Convention liability limit. The argument that the Warsaw Convention does not adequately compensate victims is severely weakened when juries award these large compensatory awards. See *infra* notes 87-88 and accompanying text. Additionally, whether intended or not, a jury award in excess of \$9 million undoubtedly sends a message to airlines to maintain adequate safety standards or face excessive potential liability. In fact, the liability award for over \$9 million is the largest award in aviation disaster history. See *Pan Am Award is Largest in Disaster History*, NAT'L L. J., Aug. 3, 1992, at 6.

⁴⁸ 729 F. Supp. 17, 18 n.1 (S.D.N.Y. 1990).

passengers were injured during the course of the hijacking.⁴⁹

Survivors and representatives of the Karachi hijacking victims sued Pan Am in various federal district courts. The actions were consolidated in the Southern District of New York by order of the Judicial Panel on Multidistrict Litigation.⁵⁰ The plaintiffs asserted that Pan Am had engaged in willful misconduct and they sought both compensatory and punitive damages.⁵¹ Pan Am responded with a summary judgment motion seeking the dismissal of all claims relating to punitive damages.⁵² Judge Sprizzo denied Pan Am's motion for partial summary judgment.⁵³

The court reasoned that there was no express language in the Convention that preempted or precluded punitive damages.⁵⁴ The court found that the only limitation on damages was Article 22 of the Convention under which damage awards could not exceed \$75,000 unless willful misconduct was established.⁵⁵ The court also reasoned that preemption of state punitive damage claims could not be inferred in the absence of some clear indication in the text itself that the Convention prohibited punitive damage awards.⁵⁶ The court interpreted the language of the Convention to provide expressly for the award of punitive damages.⁵⁷ The court understood Article 25's lifting of liability to

⁴⁹ *Id.*

⁵⁰ The actions were consolidated and transferred under 28 U.S.C. § 1407 (1992). See *supra* note 39.

⁵¹ *In re Lockerbie*, 928 F.2d 1267, 1269 (2d Cir. 1991).

⁵² 729 F. Supp. at 18.

⁵³ *Id.*

⁵⁴ *Id.* at 19.

⁵⁵ *Id.*

⁵⁶ *Id.* Both parties agreed that the Convention's text is silent on whether punitive damages are available and that the legislative history sheds little light on the question. *Lockerbie*, 928 F.2d at 1280.

⁵⁷ 729 F. Supp. at 19-20. The district court found that both Articles 24 and 25 of the Convention envisioned the awarding of punitive damages. Article 24(1) provides that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." The court reasoned that this language strongly suggested that the Convention provided for state causes of action, including those for punitive damages. *Id.* at 19. To buttress this analysis, the court put forward Article 25, which provides that "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 willful misconduct . . ." The court opined that to the extent that the Convention limits liability, Article 25 removes all limitations on the amount or type of damages to be awarded in the case of willful misconduct. *Id.* at 20.

This holding is in sharp contrast to the manner in which the *Lockerbie* district court read Article 25. There, the court determined that "Article 25 [could] not be interpreted

include all types of damage awards, including punitive damages.⁵⁸ Since the language of the Convention clearly indicated to the court that punitive damages could be awarded, the court did not find it necessary to analyze the implied unwritten intentions of the original contracting members.⁵⁹ Judge Sprizzo, like Chief

as authorizing an independent cause of action for punitive damage claims and be consistent with the shared expectations of the parties" to the Convention. *In re Lockerbie*, 733 F. Supp. 547, 551-52 (E.D.N.Y. 1990). See *infra* note 85 and accompanying text (discussing the Second Circuit's statutory analysis of the Convention's text). See *supra* notes 14-29 and accompanying text (discussing the drafters' intent).

⁵⁸ 729 F. Supp. at 20.

⁵⁹ *Id.* In fact, the *Karachi* court believed that the courts in *In re Lockerbie*, 733 F. Supp. at 547, and *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483-89 (11th Cir. 1989), were incorrect when they examined the intentions of the parties in formulating the Convention. *Id.* Its principal disagreement with these decisions was the method of statutory interpretation adopted by the *Lockerbie* and *Floyd* courts. In *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989), the Supreme Court enunciated basic rules by which to interpret the Convention.

We must . . . be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history The latter may of course be consulted to elucidate a text that is ambiguous . . . [b]ut where the text is clear . . . [courts] have no power to insert an amendment.

Id. at 134 (citations omitted). The *Karachi* court believed that the language of Articles 24 and 25 was clear in permitting punitive damage awards. See *infra* notes 110-27 and accompanying text (discussing Articles 24 and 25 and criticizing the analysis adopted by the *Karachi* court). To the *Karachi* court, Article 24 clearly provided that local law could determine whether punitive awards were available and Article 25 provided for the lifting of all liability limitations, including the prohibition on punitive damages. Therefore there was no need to examine the drafters' intent under the analysis formulated in the *Chan* decision.

The *Lockerbie* district court, the Eleventh Circuit in *Floyd* and the Second Circuit in *Lockerbie* did not view the text as reading as clearly as the *Karachi* district court. Initially, these courts noted that the Convention was silent on the issue of punitive damages. 733 F. Supp. at 549 ("the Warsaw Convention does not expressly refer to punitive damage claims"); 872 F.2d at 1486 ("[T]he text of the Convention does not explicitly address the issue of punitive damages [W]e do not think plaintiffs can take much comfort in this 'silence.'"); 928 F.2d at 1270 ("[T]he Convention is silent on this subject [of punitive damages]."). Therefore, with ambiguous text to interpret, the courts understood that they had no choice but to determine the drafters' intent in resolving the punitive damage issue. Additionally, as the Second Circuit itself noted, the literal meaning of Article 24 is not clear. 928 F.2d at 1282 (stating that Article 24 is subject to two interpretations).

However, it is harder to justify these courts' interpretations of Article 25. The *Lockerbie* courts and the *Floyd* court do not appear to argue that Article 25 is ambiguous and thus subject to a legislative intent inquiry. Instead they reasoned that Article 25 was intended to apply to the lifting of limitations on compensatory awards only, even though a literal reading might yield a different conclusion. See 733 F. Supp. at 552 ("It seems more likely that if the . . . [drafters] intended that carriers . . . would be subject to punitive damage claims, Article 25 would have provided that the entire Warsaw Conven-

Judge Platt in Pan Am Flight 103, certified his decision for appeal.⁶⁰

C. *The Second Circuit's Review of Lockerbie*

The court of appeals examined the conflicting lower court decisions as raising a single question of law.⁶¹ The issue was whether a plaintiff may assert a claim for punitive damages in a wrongful death action governed by the Warsaw Convention.⁶² The Second Circuit found the Convention to be silent on the issue.⁶³ Nonetheless, the court was persuaded that the Convention's purposes were not consistent with an award of punitive damages.⁶⁴ The Second Circuit therefore affirmed the Eastern District's dismissal of the plaintiffs' punitive damage claims arising from the crash of Pan Am Flight 103 and reversed the Southern District's denial of the defendants' summary judgment motion to strike the punitive damage claims arising from the hijacking of Pan Am Flight 73.⁶⁵

tion, rather than just certain provisions [namely, compensatory damage provisions], were inapplicable. . . ."); 928 F.2d at 1286 ("[W]hen the Convention refers to the terms that limit or exclude liability, it refers solely to terms within the Convention itself, as conceived by the contracting parties."); 872 F.2d at 1483 ("The structure of the Convention . . . [and] the subsequent interpretation by the parties . . . persuade us that Article 25 operates only to remove liability limitations" for compensatory damages.). Since these decisions did not conclude that Article 25 was ambiguous, then under the Supreme Court's instructions in *Chan* it is questionable whether these courts should have examined the legislative intent behind Article 25. However, these courts cannot be criticized for refusing to adopt a reading of the Convention that would severely undermine the universally accepted goals of limited liability and uniformity. For a discussion of why the Second Circuit was justified in examining the drafters' intent, see *infra* note 85.

⁶⁰ *In re Karachi*, No. MDL-724 (S.D.N.Y. May 23, 1990) (order certifying punitive damage issue for immediate appeal to the Second Circuit). Judge Sprizzo determined that his *Karachi* decision to allow punitive damage claims to proceed involved a controlling question of law for which there existed a substantial difference of opinion. In fact, Judge Sprizzo's decision directly conflicted with the decision of Judge Platt.

⁶¹ *In re Lockerbie*, 928 F.2d 1267, 1269 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

⁶² *Id.* at 1269-70.

⁶³ The Second Circuit also noted that there was little legislative history discussing the types of damages that could be awarded under the Convention. *Id.* at 1270. In fact, both Pan Am and the various plaintiff-appellants agreed that the notes and minutes of the Warsaw Convention provided little guidance in determining whether the Convention provides for punitive damages. *Id.* at 1280. With little else to analyze other than the text itself, the *Lockerbie* court had no real option but to examine the issue in light of how punitive damage awards would affect the Convention's goals. For a discussion of other methods the court might have adopted in examining the Convention, see *supra* note 85.

⁶⁴ 928 F.2d at 1270.

⁶⁵ *Id.* at 1288.

The Second Circuit undertook a lengthy, if not exactly sequential, analysis to support its position that punitive damages were not available under the Warsaw Convention.⁶⁶ It focused on the role of punitive damages in American law, noting that under state law, punitive damages are generally imposed to punish a defendant. The court acknowledged that punitive damages are sometimes awarded to compensate a plaintiff for injuries that would not otherwise be compensated through traditional tort awards.⁶⁷ Under federal law, however, punitive damages are

⁶⁶ Initially the court discussed the Convention's history and the objectives the drafters desired to achieve. See *supra* notes 14-29 and accompanying text (discussing the goals of the Warsaw Convention). The Second Circuit acknowledged the drafters' concerns that uniformity in procedure and limited liability were "necessary to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which . . . insurance rates could be calculated." 928 F.2d at 1270-71. It also recognized that the drafters hoped to bring about a decrease in the length, complexity and cost of airline litigation. *Id.* However, the Second Circuit addressed these concerns as an afterthought in its section on policy considerations. See 928 F.2d at 1287-88. Nonetheless, the *Lockerbie* court was correct in determining that these goals would be promoted by the preemption of punitive damage claims. See *infra* notes 139-79 and accompanying text (discussing the effects of permitting independent state claims); see *infra* notes 77 & 85 (examining the organizational quirks of the *Lockerbie* decision).

This Comment's approach differs from the analysis undertaken by the Second Circuit. This Comment justifies preempting all state claims by determining that the Convention does not provide for punitive awards. The Comment then notes that if state law claims are permitted under the Convention, punitive damages could be asserted under state laws and uniform application of the Convention would be impossible. Finally, it concludes that to prevent this back door disruption to the Convention, all state law claims must be preempted. The Second Circuit, however, determines that state law claims are preempted by the Convention apart from considering the effect punitive damages would have on the Convention. The Second Circuit examines the two issues as if they were separate. Perhaps the *Lockerbie* decision would unfold more logically if the court had engaged in a detailed analysis of the effect that state law claims would have on the Convention.

⁶⁷ 928 F.2d at 1272. The Second Circuit noted that the role of punitive damages in state law continues to be divided and that a minority of states still interpret punitive damages to serve a compensatory function. See *Peisner v. Detroit Free Press*, 242 N.W. 2d 775, 780 (Mich. Ct. App. 1976) (stating that the purpose of punitive damages is not to punish but to fully compensate plaintiffs for injuries sustained); *Kelsey v. Connecticut State Employees Ass'n*, 427 A.2d 420, 425 (Conn. 1980) (permitting punitive damages to be awarded to cover litigation costs because of the defendant's reckless behavior). To add to this inconsistency, there are even states that take the position that punitive damages serve both a compensatory and penal role. See *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989) (recognizing that "New York courts view punitive damages as having a purpose beyond punishment, affording the injured party a personal monetary recovery over and above compensatory loss"). Therefore, if New York State law applied under the Warsaw Convention, the plaintiffs in *Lockerbie* and *Karachi* might have been able to proceed with a punitive damage claim even if such claims were preempted be-

generally awarded only to punish a defendant and deter future conduct.⁶⁸ Therefore, if state law claims were preempted by the Convention, punitive damages could only be awarded if the Convention was designed to punish airlines in addition to compensating victims.⁶⁹

The court next analyzed the potential problems that would be created by allowing independent state claims seeking punitive damages.⁷⁰ The Second Circuit concluded that the Convention did not provide for independent state causes of action, even though no Second Circuit decision had directly held that the Convention created an exclusive cause of action.⁷¹ The court

cause New York law views punitive awards as both compensatory and penal in nature. Since Article 25 lifts liability limits on compensatory damages, arguably unlimited punitive awards could be sanctioned under New York law because of the award's dual role. See *Racich*, 887 F.2d at 393. The Second Circuit, seeing that merely preempting punitive damage claims might not prevent them from being awarded under state law in the guise of compensatory damage claims, determined that it had to preempt all state claims.

⁶⁸ 928 F.2d at 1272. See *infra* notes 92-99 and accompanying text (discussing the proper role of punitive damages).

⁶⁹ 928 F.2d at 1273.

⁷⁰ *Id.*

⁷¹ *Id.* The court cited *In re Air Crash Disaster at Warsaw, Poland* on March 14, 1980, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) and *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980) as Second Circuit cases addressing the issue of exclusivity. In *Air Crash Disaster at Warsaw, Poland* the Second Circuit affirmed on other grounds the district court's holding that the Warsaw Convention was the exclusive cause of action. The appellate decision however did not address the issue of exclusivity itself but instead examined whether an airline lost the protection of the Convention's liability limitations if it did not adhere to the 10-point type size in warning passengers of the limitations. See *supra* note 2.

In the *Poland* district court holding, the court clearly stated that the Warsaw Convention creates an exclusive cause of action. 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982). "[T]he Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs can not maintain a separate wrongful death action for damages under California law." *Id.* The opinion went on to state that the "limitation of liability of a carrier would have no meaning if this exclusivity argument were rejected and plaintiffs were permitted to assert independent causes of action under [state] law." *Id.* While this district court opinion is not binding on the Second Circuit, it is difficult to understand why the *Lockerbie* court examined the appellate opinion in *Poland*, which does not address the issue of exclusivity, but ignored the district court opinion which does examine the question.

A Second Circuit case with a conflicting view on exclusivity is *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936 (2d Cir. 1980). The *Tokio* decision revolved around the crash of a McDonnell Douglas aircraft owned by Japan Air Lines in Moscow. The issues presented involved contribution and indemnification. The Warsaw Convention was not directly implicated. However, in *dicta*, the *Tokio* court stated that the Convention might not be the exclusive cause of action:

buttressed its position by citing to cases in the Fifth and Ninth Circuits which held that the Convention was the exclusive cause of action for international aviation accidents.⁷² The court

Article 24 of the Convention provides that any action for damages, however founded, can only be brought subject to the conditions and limits of the Convention. If . . . the Convention draftsmen intended to create a contract cause of action, the above [language] indicates that they did not intend that cause of action to be exclusive.

Id. at 942 (citations omitted). However, *Tokio* stated that the issue remained open whether the Convention was grounded in the common law of contract or tort. *Id.* The Second Circuit in *Lockerbie* directly addressed the issue and determined that although the Convention was drafted against the civil law of contracts, the Convention's structure was much more similar to common law tort than to the common law of contracts. 928 F.2d at 1279-80; see *infra* note 76. Consequently, it is not clear whether the *Tokio* court would still state that the Convention was not intended to be the exclusive cause of action in light of the *Lockerbie* court's determination that the Convention is based on common tort law.

Additionally, the *Tokio* court did not undertake an examination of the potential ramifications if the Convention was not the exclusive cause of action. For a discussion of the ramifications of independent state claims, see *infra* notes 139-79 and accompanying text. The *Tokio* court did not interpret the Convention, but was instead faced with determining whether a contract provision prevented an insurance company from recovering from the airline for settled claims arising from a plane crash. Subsequently, the *Lockerbie* holding is both better reasoned and substantiated since it directly addresses the issue of exclusivity and engages in a detailed analysis of the Convention's text.

Interestingly, it was not until 1978 that the Second Circuit recognized that the Warsaw Convention created an independent cause of action at all. See *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Before *Benjamins* the Convention was viewed as a standard by which to impose liability but was not seen as creating a cause of action to commence a lawsuit. 572 F.2d at 916. The *Lockerbie* court concluded that *Benjamins* left open the question of whether state causes of action were available under the Convention. For a further discussion of the *Benjamins* decision and an analysis of the Second Circuit's treatment of the exclusivity issue, see *infra* note 186.

⁷² See *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984) (Warsaw Convention creates a cause of action and is the exclusive remedy for loss of or damage to cargo), *cert. denied*, 469 U.S. 1186 (1985); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983) (Warsaw Convention creates a cause of action but not necessarily the exclusive cause of action). For further discussion of the Second Circuit's interpretation of the Fifth and Ninth Circuits' decisions, see *infra* notes 186-200 and accompanying text. The Second Circuit also found persuasive the manner in which other members of the Convention have treated the issue of exclusivity. 928 F.2d at 1274. The *Lockerbie* court found that France, England, Canada and Australia all have held the Convention to be the exclusive remedy for claims governed by the Warsaw Convention. *Id.* Holding that the Warsaw Convention is the exclusive remedy has the same effect as determining that the Convention is the exclusive cause of action. See *infra* note 187. The court noted that the manner in which other nations have interpreted the Warsaw Convention was entitled to considerable weight. *Id.* See Carriage by Air Act, 1932, 22 & 23 Geo. 5, ch. 36, § 1(4) (Eng.) (Article 17 is the exclusive remedy in actions governed by the Convention); Civil Aviation Act, 1959-

adopted the posture that allowing separate causes of action would lead to varying degrees of recovery and therefore would not serve the Convention's uniform liability objective.⁷³ Specifically, the court indicated that permitting state claims could lead to the inconsistent application of state law to the same accident. Since different state laws might apply to different plaintiffs, inconsistent outcomes would occur.⁷⁴ Therefore, the Second Circuit determined that the Warsaw Convention preempted all state claims since their application would contravene the Convention's uniform liability scheme.⁷⁵

The court then focused its attention on whether state or federal law should determine whether punitive damages were available under the Convention. Considering its previous analysis of the drawbacks of allowing state law to apply, the court concluded that federal common law should determine the question. The Second Circuit concluded that federal common law would not permit an award of punitive damages if the Warsaw Convention was designed specifically to compensate passengers.⁷⁶

1973, § 12(2), 2 AUSTL. ACTS P. 643, 645 (1974)(Austl.); Carriage By Air Act. § 2(5), Can. Rev. Stat., ch. C-26 (1979) (Can.). See also *Benjamins*, 572 F.2d at 919 (acknowledging that other nations' interpretations of the Convention's provisions should be given considerable weight in analyzing the Convention).

One judge has postulated that the fact that other nations have needed to enact legislation requiring the Convention to be the exclusive remedy is proof that the Convention itself was not intended to be exclusive. See *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1492 (D.C. Cir. 1991) (Mikva, J., dissenting). While this argument has some appeal, it fails to realize that these nations would not have enacted such legislation if they believed it was in such contradiction to the Convention's language. To have done so would have violated the Convention's terms and misconstrued accepted principles of interpreting international agreements. Under the Vienna Convention on the Law of Treaties, May 22, 1969, § 3, Art. 31(1), reprinted in JOSEPH SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 247 (1988) (documentary supplement), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose." Therefore, in legislatively adopting the issue of exclusivity, these nations must have been doing so in the good faith belief that the Convention had so permitted.

⁷³ *In re Air Disaster at Lockerbie*, 928 F.2d 1267, 1275-78.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1278.

⁷⁶ Although courts often craft federal common law by borrowing relevant state law, the Second Circuit chose to establish a uniform federal law anew. A primary consideration in determining whether federal courts should create federal law or adopt preexisting state law is the degree of need for national uniformity. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (federal common law adopted instead of state law be-

The Second Circuit therefore turned its attention to the text of the Warsaw Convention.⁷⁷ Since the Convention is silent on the issue of what damages might be recovered, the court recognized that it had to "examine the purposes for which the Convention came into being, its history, the negotiations leading to its adoption, and how the contracting parties have construed the Convention."⁷⁸ Other courts have interpreted provisions of the Convention to effectuate the Convention's goals of creating a uniform liability scheme and limiting an air carrier's potential liability.⁷⁹ Therefore, in interpreting the question of whether pu-

cause of the need to establish a uniform standard for parties dealing in commercial paper issued by the federal government). The Second Circuit concluded that only a uniform federal standard on punitive damages would allow the Convention to maintain a uniform liability scheme. The court declined to adopt state law since it already concluded that applying state law in determining whether punitive damages were available would thwart the Convention's goals. 928 F.2d at 1278-80.

The *Lockerbie* court examined what type of federal common law should be applied. Although it recognized that the Convention was drafted under the civil law of contract, the court concluded that the federal common law of tort would determine which elements of a cause of action were available under the Convention. The court understood the common and civil laws of contract to fulfill different roles, while the common law of tort and the civil law of contract of carriage were comparable. Common tort and civil contract carriage laws were designed to compensate the victim whereas the common law of contract was designed to give the plaintiff the benefit of its bargain. *Id.* at 1279-80. Under the federal common law of tort, punitive damages can be awarded only to punish a defendant and deter certain types of conduct. It does not allow for punitive damages to be compensatory in nature. See *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306 & n.9 (1986) ("Damages in tort cases are designed to provide compensation for the injury caused to the plaintiff by the defendant . . . Congress adopted this common-law system of recovery when it established liability for constitutional torts."). Since the Convention paralleled the federal common law of tort, the Second Circuit concluded that the Convention would permit the recovery of punitive damages only if the Convention were drafted with the intent to punish international carriers and deter future types of behavior. By contrast, if the Convention was designed to be purely compensatory in nature, punitive damages would not be available. In the end, the Second Circuit found the Convention to be compensatory in nature only and therefore held that the federal common law of tort would not permit punitive damages to be awarded under the Convention.

⁷⁷ Interestingly, as the court itself notes, a judicial examination of a treaty would normally begin with the text of the treaty itself and then turn to an examination of the Convention's goals. 928 F.2d at 1280. Here, however, the court first examined the underlying goals of the Convention. It was only after the court had determined the Convention's goals that it determined whether the Convention's text supported a finding preempting punitive damages. 928 F.2d at 1280-87. However, since the Second Circuit's approach enlightens courts in analyzing the Convention, the court should not be chastised for misordering the traditional interpretative framework.

⁷⁸ *Id.* at 1280.

⁷⁹ See *Air France v. Saks*, 470 U.S. 392, 399 (1985) (in interpreting the Convention's

nitive damages are available under the Convention, the Second Circuit asked itself whether awarding punitive damages would effectuate the Convention's goals. Under such a framework the *Lockerbie* court concluded that punitive damages were not available under the Warsaw Convention.⁸⁰

The court separately examined Convention Article 17 (establishing an air carrier's liability), Article 24 (leaving certain issues to be determined by local law) and Article 25 (providing for the lifting of liability limits in the case of willful misconduct). In each instance the *Lockerbie* court determined that the Warsaw Convention served a compensatory function only.⁸¹ The Second

text, words should be given a meaning consistent with the shared expectations of the contracting parties); *In re Korean Air Lines Disaster* of Sept. 1, 1983, 932 F.2d 1475, 1487 (D.C. Cir.) (holding that Article 17 of the Convention is purely compensatory in function, a reading that comports with the court's obligation to construe the Convention in a manner that will promote uniformity), *cert. denied*, 112 S. Ct. 616 (1991); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1487 (11th Cir. 1989) (holding that punitive damages serve a very different role than compensatory awards and that such a conclusion is supported by the Convention's goals to limit airline liability and to provide a uniform scheme of liability), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *Reed v. Wiser*, 555 F.2d 1079, 1088 (2d Cir.) (interpreting the Convention should begin by examining the purposes of the provision that requires interpretation), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 336 (5th Cir. 1967) (a judicial examination is "hardly possible without considering the conception, parturition, and growth of the [C]onvention."), *cert. denied*, 392 U.S. 905 (1968).

⁸⁰ 928 F.2d at 1281.

⁸¹ The court examined Articles 24 and 25 of the Convention to determine whether they provided for punitive awards even though the court had concluded that Article 17 established liability for compensatory damages only. See *infra* notes 82 & 100-109 (discussing Article 17). For the text of Articles 24 and 25, see *infra* notes 110 & 119. The plaintiffs had argued that Article 24 specifically leaves questions on damages to be determined by local law since the language of Article 24 directs courts to turn to local law. 928 F.2d at 1282. However, the Second Circuit understood Article 24 to leave only certain issues to local law such as the amount of damages available—subject to the \$75,000 limit—and issues of standing to sue. *Id.* at 1283-84. The *Lockerbie* court admitted that Article 24 could be interpreted to provide for independent causes of action, but noted that it could also be interpreted as establishing Article 17 as the exclusive liability theory for actions within the Convention's scope. *Id.* at 1282. Since the language was ambiguous, the Second Circuit was able to delve into the legislative history in accordance with the Supreme Court's directive in *Chan*. See *supra* note 59 & *infra* note 85 (discussing *Chan*). Upon an examination of legislative history, the Second Circuit determined that Article 24 did not provide for alternative causes of action, but instead established Article 17 as the exclusive cause of action, with only certain issues left to local law determination. *Id.* at 1282-85; see *infra* notes 110-18 and accompanying text (discussing why the drafters of Article 24 could not have intended the Convention to provide for independent causes of action).

The Second Circuit also examined whether Article 25 permitted punitive damages when it lifted the \$75,000 liability limit upon a finding of willful misconduct. The plain-

Circuit reached this conclusion because the treaty was drafted in language which suggests that the Convention was designed solely to compensate passengers and not to punish airlines.⁸²

In addition to the Convention's text, the court examined various policy considerations to determine that punitive damages were not available under the Convention. The court examined the effect punitive damages would have on other Convention members, on air carriers' ability to insure against damages, on the cost of obtaining such insurance and on the desire to decrease and quicken the flow of litigation.⁸³ In each category the Second Circuit believed that to allow punitive damages would weaken and undermine the Convention's goals of establishing a uniform liability scheme and limiting airline liability.⁸⁴ These

tiffs argued that Article 25 lifts all liability limits, including Article 17's prohibition of punitive awards. 928 F.2d at 1285. The *Lockerbie* court concluded that Article 25 referred to the lifting of compensatory limits only. *Id.* This conclusion was premised on the court's prior determination that the Convention was designed as a vehicle to compensate and not to punish. *Id.*; see *infra* notes 119-27 and accompanying text (analyzing Article 25).

⁸² The Convention was originally drafted in French. The Second Circuit's determination that the Warsaw Convention serves only a compensatory function revolved around the translation of various French terms embodied in the treaty. Article 17 establishes the scope of an airline's liability. Specifically, the court's examination focused on Article 17's use of the term "*dommage survenu*." 928 F.2d at 1280-82; see *infra* note 100 (for the text of Article 17). The court adopted the term "damages sustained" as a translation for "*dommage survenu*". *Id.* at 1281. "Damages sustained" suggests that the Convention was designed to compensate only those damages actually sustained by a passenger. *Id.* By definition, punitive damages are not sustained by a passenger, but are awarded to punish a defendant. 928 F.2d at 1280-81. The plaintiff-appellants argued that the term should be translated as "damages occurred" or "arrived" or "happened." Even had the court adopted such a translation, it would still not justify an award of punitive damages since such damages are external to the accident itself and have no relation to the damages incurred, arrived or happened by passengers. *Id.* at 1280-82.

In support of this analysis, the *Lockerbie* court noted that in the two other cases in which courts have interpreted the term, "*dommage survenu*" was determined to mean "damages sustained" and was interpreted as compensatory in tone. See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1486 (11th Cir. 1989) (the term "*dommage survenu*" or "damages sustained" is entirely compensatory in tone), *rev'd on other grounds*, 111 S. Ct. 1489 (1991); *In re Air Crash Disaster at Gander, Newfoundland*, 684 F. Supp. 927, 931 (W.D. Ky. 1987) (the proper translation of "*dommage survenu*" is damages sustained). See *infra* notes 100-09 and accompanying text (discussing Article 17).

⁸³ 928 F.2d at 1287-88.

⁸⁴ *Id.* For instance, the Second Court worried that if punitive damages were available under the Convention, the United States would become "a magnet so that every airline injury claim would, if possible, be brought in the United States." *Id.* at 1287. The court noted the enormous differences between the recoveries available in the United States compared to those abroad. If all claims were filed in the United States in hopes of

considerations reinforced, the court concluded that the Warsaw Convention precluded punitive damages.

III. ANALYSIS

This Comment initially investigates the function of punitive damages in American law and contrasts the role of punitive damages with the intended purposes of the Convention. It becomes apparent that the drafters of the Convention did not intend punitive damages to be awarded. To support this conclusion, this Comment looks at the various problems that would arise if punitive damage claims were permitted. Finally, this Comment examines whether the Second Circuit was in line with other jurisdictions and thus advanced the goal of uniformity or whether it unnecessarily complicated future judicial interpretations of the Warsaw Convention. In the end, this Comment concludes that preempting state punitive damage claims will promote the Convention's function as a uniform liability scheme of air carrier liability. Only by giving the drafters' goals short shrift could the Second Circuit have concluded otherwise.⁶⁵

winning a substantial punitive award and a percentage of such claims were successful, the Convention would no longer operate as a limiting factor on airline liability. *Id.* For a further discussion of the policy issues addressed by the court, including issues of insurance and complexity of litigation, see *infra* notes 152-74 and accompanying text.

⁶⁵ The Second Circuit has been criticized for relying so heavily on the drafters' intent. See *supra* note 8. Some commentators argue that courts should never endeavor to ascertain legislative intent and should only focus on the text before them.

In general, little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed. Most if not all of it is of questionable practical availability Besides, little or none of it is relied on by typical members of the legislative audience as conditioning the language of the statute.

Reed Dickerson, *The Legislative Process: Statutory Interpretation: Dipping Into Legislative Intent*, 11 HOFSTRA L. REV. 1125, 1130 (1983). In fact, this theory of statutory interpretation was adopted by the Supreme Court in *Chan*: "We must thus be governed by the text . . . whatever conclusions might be drawn from the intricate drafting history . . ." 490 U.S. 122, 134 (1989).

Yet the Convention's scant legislative history is nonetheless clear and has been a fertile source for courts that have examined the Warsaw Convention. See *supra* notes 14-29 & 79. To ignore and forego a judicial analysis of legislative intent is to jeopardize unnecessarily the goals for which the treaty was drafted. In this instance to ignore the drafters' intent and to hold punitive damages available under the Convention would be to open the treaty to inconsistent application and to create a surge in the level of international liability awards. See *infra* notes 139-79 and accompanying text. These are exactly the problems the Convention was designed to prevent.

Additionally, in analyzing an international treaty, principles of statutory interpretation have developed that urge nations to interpret an international agreement in light of

A. *Punitive Damages Should Not Be Available Under the Warsaw Convention*

The *Lockerbie* court correctly acknowledged that the Warsaw Convention is silent on whether a plaintiff may state a claim for punitive damages.⁸⁶ Under the Warsaw Convention claimants are limited to \$75,000 in damages unless willful misconduct is established. Commentators have argued that this liability

its object and purpose. See Vienna Convention on the Law of Treaties, May 22, 1969, § 3, Art. 31(1), reprinted in SWEENEY ET AL., *supra* note 72, at 247. Although not yet officially adopted by the United States, "the Department of State has stated since 1973 that it considers the convention as a codification of customary international law and thus . . . authoritative . . ." See SWEENEY, *supra* note 72, at 993-94. Commentators such as Dickerson, *supra*, and cases like *Chan*, 490 U.S. at 122, fail to take into account these international principles of statutory interpretation. As such the holding of *Chan* is questionable and Dickerson's formalistic approach to statutory interpretation may have no place in the international context.

Other commentators argue that statutes should be analyzed under an evolving approach, giving new meanings to words as new situations and new problems arise. These commentators believe that "statutory interpretation as a practical exercise . . . may consider the evolution of a statute as well as its historical origins." William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1009 (1989). These commentators believe that a statute is not an isolated structure to be interpreted according to its strict and limited terms, but should be read against changed legal and social circumstances. *Id.* at 1018. See also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 24-27 (1988).

Under such an analysis, the Second Circuit should have endeavored to discover whether circumstances have changed since the Convention's drafting that might warrant an acceptance of punitive awards. The Second Circuit might have examined whether punitive awards would have served a therapeutic goal such as increasing safety standards, or whether modern airlines are still in need of liability limitations. While the Second Circuit itself did not acknowledge that it was investigating whether to expand the scope of the Convention, it could be argued that the *Lockerbie* court did implicitly engage in such an inquiry. After all, the Second Circuit did examine the effect that punitive damages would have if available under the Convention. The court concluded that punitive damages would thwart the Convention's uniform liability scheme and would increase the volume and complexity of litigation and airline liability. 928 F.2d at 1287-88. It is understandable then why the court would not be willing to give birth to such disarray absent some directive from the legislative branch.

[Courts] do not sit to decide whether laws are no longer necessary or to assess the diplomatic consequences of their abandonment. The Warsaw Convention is not a treaty that has moldered on the books. On the contrary it has had agonized reappraisal by the Executive and Legislative branches. [The court's] duty is to enforce the Constitution, laws, and treaties of the United States, whatever they might be, and until one of the . . . branches [of government] declares otherwise, the Warsaw Convention remains the supreme law of the land.

Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977) (citations omitted).

⁸⁶ 928 F.2d at 1269-70.

limit is both unfair and inadequate for a number of reasons.⁸⁷ First, the airline industry is no longer a struggling or burgeoning industry in need of protection, but instead is a developed and established one.⁸⁸ Second, punitive damages are necessary to force air carriers to maintain high safety standards.⁸⁹ These criticisms notwithstanding, the Warsaw Convention does provide for unlimited compensatory liability when willful misconduct is established. Generally, willful misconduct is an essential element to an award of punitive damages.⁹⁰ Plaintiffs are therefore already adequately compensated under the Convention when an airline has engaged in willful misconduct. Additionally, the marketplace severely punishes airlines that fail to maintain high safety standards through negative publicity and, in turn, de-

⁸⁷ Nancy J. Strantz, *Aviation Security and Pan Am Flight 103: What Have We Learned?*, 56 J. AIR L. & COM. 413, 422-31 (1990); see also Sheinfeld, *supra* note 5, at 681-83.

⁸⁸ See Strantz, *supra* note 87, at 429; Thomas J. Dolan, *Warsaw Convention Liability Limitations*, 6 NW. J. INT'L L. & BUS. 896, 914 (1984). The thrust of these arguments is that the airline industry no longer needs special protection and the \$75,000 limit is arbitrarily low and inadequate to compensate victims fully. However, the fact that one of the treaty's intended goals has become obsolete is not an excuse for the judiciary to ignore the treaty altogether.

While it is true that the airline industry is both developed and established, these are not grounds to ignore the damage limitations imposed by the treaty. A uniform application of rules is essential to an industry that involves so many different nations and legal systems. Additionally, it is not altogether clear how established and stable the airline industry presently is. The recent demise of Pan Am, Eastern, Midway and Braniff airlines and the constant financial difficulties of Continental, Northwest and TWA all point out that the airline industry is not so secure. Abnormally large liability awards could potentially prevent these surviving companies from maintaining financial stability. Furthermore, in many nations, the airline industry is hardly well developed. For instance, with the breakup of the Soviet Union, new airlines are being established in many of the Republics. See *Aeroflot Takes Aim at the Post-Communist World*, N.Y. TIMES, Jan. 12, 1992, at C7. These airlines could potentially look to the Convention to help stabilize their liability costs in the initial stages of development. So while the United States' airline industry might be developed, that is not necessarily the case for all members of the Convention or for potential future members.

⁸⁹ Concerns about the safety of international flight have heightened in recent years. Terrorist activity has no boundaries, and passenger aircraft more than twenty years old continue to fly despite their known wear and tear. Although the Warsaw Convention did not expressly provide for a recovery of punitive damages in cases of willful misconduct . . . perhaps the threat and the economic reality of punitive damages will force air carriers to increase safety measures aboard passenger aircraft.

Buono, *supra* note 15, at 603. For a criticism of this theory, see *infra* notes 133-38 and accompanying text.

⁹⁰ See *infra* notes 128-32 and accompanying text.

creased ridership. Since the Convention is silent on the issue of punitive damages and such awards are inconsistent with the Convention's goals, the Second Circuit was justified in concluding that punitive damages are not available under the Warsaw Convention.⁹¹

1. Punitive Damages Generally

Punitive damages are private fines awarded to punish reprehensible conduct and to deter its future occurrence.⁹² Generally, punitive damages are not imposed to compensate for a plaintiff's injury.⁹³ The United States Supreme Court has consistently recognized the penal nature of punitive damage awards.⁹⁴ The Court has also criticized excessive punitive damage awards and the resulting threat to potential technological innovations.⁹⁵

⁹¹ For a detailed discussion of why the *Lockerbie* court cannot be faulted for examining the goals of the Convention instead of merely relying on the Convention's text, see *supra* note 85.

⁹² See *International Bd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (punitive damages designed to punish certain conduct and deter future similar behavior but are not intended to compensate for injury). See also *RESTATEMENT (SECOND) OF TORTS* § 908(1) (1979) ("[P]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.').

⁹³ *International Bd. of Elec. Workers*, 442 U.S. at 48; see also *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 (1989) (O'Connor, J. concurring in part and dissenting in part) (punitive damages are not awarded to compensate for injury, but to further the aims of the criminal law and deter future similar conduct). However, there are some states that do view punitive awards as having a compensatory element. For instance, in New York, "courts view punitive damages as having a purpose beyond punishment, affording the injured party a personal monetary recovery over and above compensatory loss." *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989); see *supra* note 67.

⁹⁴ *Browning Ferris*, 492 U.S. at 280 (O'Connor, J., concurring in part and dissenting in part) (citing Supreme Court cases from 1893-1987 in which the Court has articulated that punitive damages are intended to punish the defendant). See, e.g., *Tull v. United States*, 481 U.S. 412, 422, n.7 (1987) (punitive damages intended to punish and are therefore legal and not equitable in nature); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306, n.9 (1986) (federal common law of tort views punitive damages as designed to punish a defendant); *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 350 (1974) (punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101, 107 (1893) (punitive damages are not awarded to compensate the sufferer but to punish the offender and warn others).

⁹⁵ In *Browning-Ferris* Justice O'Connor articulated the fear that skyrocketing punitive damage awards might prevent manufacturers from placing needed products in the market (i.e. new pills or vaccines). 492 U.S. at 272 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor pointed to recent punitive awards ranging from \$6-

"[P]unitive damages are generally seen as a windfall to plaintiffs, who are usually entitled to receive full compensation for their injuries, but not more."⁹⁶

Punitive and compensatory damages have different goals. "Whereas compensatory damages are designed to 'have the wrongdoer make the victim whole,' commensurate with the loss or injury actually sustained, punitive damages are intended to 'punish the tort-feasor for [its] conduct and to deter . . . similar action in the future.'"⁹⁷ While there has been some debate as to the appropriate type of conduct warranting an award of punitive damages, it is generally agreed that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or . . . reckless indifference to the rights of others."⁹⁸

The *Lockerbie* court clearly recognized the difference be-

\$10 million. *Id.* Often the punitive damage award has little relation to the compensatory damages. In *Browning-Ferris* the jury awarded \$51,000 in compensatory damages for an antitrust violation, but \$6 million in punitive damages. This was 117 times the actual damages suffered by the plaintiff. *Id.*

An analogy to other industries will help elucidate some of the problems of punitive awards. It is probable that excessive punitive damage awards prevent companies from spending money on other areas of business. Some manufacturers of prescription drugs have decided that it is better to avoid uncertain liability than to introduce a new drug to the market. See Brief for Pharmaceutical Mfrs. Assoc. et al. as Amici Curiae at 5-23, cited in *Browning-Ferris Indus.*, 492 U.S. at 282. "Similarly designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to punitive damages." *Id.*; see generally P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 152-71 (1988), cited in *Browning-Ferris Indus.*, 492 U.S. at 282. Specifically, punitive damages could prevent airlines from being financially able to purchase security devices that would better detect bombs or spend money on increased security personnel. Admittedly, there is no guarantee the money will be spent on such security items by preempting punitive claims.

⁹⁶ *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J. dissenting). Recently the Supreme Court has even expressed doubts about the constitutionality of certain punitive damage awards. See *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1038 (1991) (punitive damage award of \$800,000, although large in proportion to damages, did not violate the 14th Amendment's Due Process Clause).

⁹⁷ *Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989) (under New York law and public policy, punitive damages could be awarded in product liability actions involving exposure to asbestos in order to punish the manufacturer).

⁹⁸ *Smith*, 461 U.S. at 46-47, quoting RESTATEMENT (SECOND) OF TORTS § 903(2) (1979); see *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986) (punitive damages will encourage plaintiffs to pursue a manufacturer that has engaged in a deliberate act or omission with a high degree of probability of harm to others); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981) (to warrant an award of punitive damages, it must be shown that the acts or conduct were willful, intentional and done in conscious disregard of the results).

tween punitive and compensatory damages in analyzing whether punitive damages are available under the Convention. While the Second Circuit noted that a minority of states viewed punitive damages as serving both a penal and compensatory role, the court understood punitive damages to have primarily a penal function.⁹⁹ Therefore, the *Lockerbie* court examined whether the Convention was intended to punish and deter future misconduct by international airlines.

2. Convention Designed to Award Compensatory Damages Only

The Second Circuit first examined Article 17 of the Convention, which governs the right to seek damages in actions controlled by the Convention.¹⁰⁰ The Second Circuit determined that Article 17 was only compensatory in nature.¹⁰¹ To reach this conclusion, the Second Circuit paid particular attention to the civil law background of the Convention. The *Lockerbie* court noted that punitive damages are not usually awarded in civil law nations.¹⁰² The court reasoned that civil law nations view puni-

⁹⁹ 928 F.2d at 1271-73; see *supra* note 67 and accompanying text.

¹⁰⁰ Article 17 reads as follows:

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.

928 F.2d at 1280.

¹⁰¹ The sum of the context in which the Article was written, the law of the contracting parties, subsequent interpretations, and the historical translation argue persuasively that Article 17 establishes liability for compensatory damages only, and that it would be inconsistent with the purposes of the Warsaw Convention to read Article 17 as permitting the recovery of punitive damages.

Id. at 1281-82. For a discussion of why the original French version of the Convention supports a finding that Article 17 is designed only to compensate, see *supra* note 82.

¹⁰² The Warsaw Convention was drafted under the predominant influence of civil law. See GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 78 (1977); 928 F.2d at 1281 ("Under civil law . . . an action under the Warsaw Convention sounds in contract. Punitive damages are generally not available in civil law contract actions. In fact, under the civil law they do not appear to be available at all."); see also *In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F. Supp. 79, 85 (D.P.R. 1990) ("Punitive damages is a foreign concept to . . . civil law tradition."); *Cooperativa de Seguros Multiples de Puerto Rico v. San Juan*, 289 F. Supp. 858, 859-60 (D.P.R. 1968) ("It may be validly asserted that in Puerto Rico, which is a Civil Law country, the doctrine of punitive damages does not prevail."); Richard J. Mahoney, *Punitive Damages: It's Time to Curb the Courts*, N.Y. TIMES, Dec. 11, 1988, at 3 ("Punitive damages are an anomaly peculiar to the United States and are virtually unknown in the world's remaining civil-law coun-

tive damages as both excessive and redundant when unlimited compensatory damages are available.¹⁰³ Like some courts in the United States, civil law nations view punitive damages as a windfall.¹⁰⁴ In the end, the Second Circuit found that these civil law concepts supported the court's position that punitive damage awards were not available under the Convention.¹⁰⁵

While the Convention is silent on punitive damages, the court viewed this silence as favoring the award of compensatory damages only. The Convention's drafters probably never considered the question of whether punitive damages should be awarded, for if they had, the overwhelming civil law presumption against punitive damages would have led to printed debate.¹⁰⁶ Instead, the drafting history is silent on the subject.¹⁰⁷ Indeed, in the one instance where adding a penal element to the treaty was considered, the drafters rejected the provision.¹⁰⁸ In the absence of any indication by the drafters that they intended to include punitive damages in the Convention, the court reasoned that it was not the role of courts to carve out new rights

tries."). As a symptom of the division between the civil and common law doctrine on punitive damages, United States courts attempting to gain jurisdiction over foreign defendants have sometimes had difficulty getting civil law nations to accept service of process when the complaint seeks punitive awards. See Brief for the United States as Amicus Curiae, Volkswagenwerk, A.G. v. Schlunk, 486 U.S. 694 (1988), cited in GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 139 n.79 (1991) (describing the difficulties that have arisen in convincing West German authorities to accept service of process of United States complaints that seek punitive damages). Additionally, international law has not permitted punitive damages in cases seeking damages for personal injury or death. See *Chile-United States Comm. Convened under the 1914 Treaty For the Settlement of Disputes: Decision With Regard to the Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt*, 31 ILM 1 (1992).

¹⁰³ 928 F.2d at 1285-86.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* note 102.

¹⁰⁷ See Brief of Defendant-Appellee at 17-20, *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388).

¹⁰⁸ Pan Am argued that in the one instance where punitive measures were suggested, they were rejected. The drafters considered a proposal that would impose punitive measures on carriers that did not satisfy the Warsaw Convention's requirements on passenger tickets, baggage tickets and airway bills. The proposal for punitive sanctions was objected to by the British delegation. A compromise was reached where the proposed punitive measures were not included. *Id.* at 19-20. Therefore, the scant legislative history involving punitive measures shows that the drafters were not inclined to consider proposals that were intended to punish airlines for not complying with the Convention's requirements.

for litigants.¹⁰⁹ The *Lockerbie* court acted appropriately by declining to read meanings into the Convention's language that were neither present nor intended.

The court then turned its attention to the language of Article 24.¹¹⁰ Article 24 states that certain procedural rules under the Convention are to be determined by local law.¹¹¹ The *Lockerbie* court concluded that Article 24 was intended solely to regulate the question of who had standing to sue under the Convention and how much in damages could be awarded. The court, however, did not believe that the Convention allowed local law to determine the *types* of damages available under the Convention.¹¹² The Second Circuit concluded that the drafting history of Article 24, together with the civil law background of the Convention described above, made it extremely unlikely that Article 24 was intended by the drafters to preserve a right to punitive damages under the Convention.¹¹³

This interpretation of Article 24 is open to serious criticism. The Second Circuit itself admitted that commentators and case law agree that the Convention leaves the amount of damages to be determined by the local laws of member nations, but subject to the \$75,000 cap expressly provided for in the Convention.¹¹⁴

¹⁰⁹ See *supra* note 85 and accompanying text.

¹¹⁰ Article 24 reads as follows:

(1) In the cases governed by articles 18 and 19 [baggage claims] 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.

928 F.2d at 1282.

¹¹¹ In the five instances where the law of the forum is to apply, the rules state so explicitly; Article 21 (contributory negligence); Article 24(2)(standing of and allocation among survivors); Article 25 (standards for willful misconduct); Article 28 (rules for determining venue); and Article 29 (running of the statute of limitations). *Reed v. Wisner*, 555 F.2d 1079, 1092 (2d Cir. 1977).

¹¹² 928 F.2d at 1282-84. Plaintiffs specifically argued that Article 24 permitted local law to determine the type of damages awarded under the Convention. See Brief of plaintiffs-appellants at 17, *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388). Plaintiffs submitted that the Second Circuit had previously held that the Convention was not intended to be exclusive and therefore provided for the application of local law. *Id.*, citing *Tokio Marine & Fire Ins. v. McDonnell Douglas*, 617 F.2d at 942. However, this argument is specious since the *Tokio* decision did not specifically hold that the Convention provided for state claims. See *supra* note 71.

¹¹³ 928 F.2d at 1284.

¹¹⁴ *Id.*, citing *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002-03 (9th Cir.

Therefore, the drafters could have also intended local law to determine the types of damages available within the Convention's \$75,000 limitation.

Yet the conclusion that the drafters might have left the types of damages question to local law is refuted by the Convention's history and logic. The drafters' primary concern when writing Article 24 was how to regulate who had standing to sue under the Convention.¹¹⁵ The signatories of the Convention realized that establishing a uniform rule on who could sue would be impossible to achieve. Each nation's laws on which party has the right to sue in wrongful death actions varied widely. Therefore, in an effort to promote acceptance of the Convention's overall goals, the drafters decided to allow the specific issue of standing to be resolved by local law.

That the drafters would have left the question of the types of awards available to local law is unlikely. First, Article 17 only establishes liability for injuries sustained by passengers. The drafters exhibited no intent to provide punitive awards.¹¹⁶ Second, leaving to local law the issue of the types of damages available would lead to much uncertainty regarding the scope of air carrier liability, thereby undermining the Convention's goal of establishing a uniform liability scheme. This problem would be compounded when a finding of willful misconduct permits an

1987) ("damages are to be measured according to the internal laws of a party to the Convention"); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (Convention left certain issues such as the proper beneficiaries of an award to local law). However, according to the Second Circuit, no case has ever addressed the issue of whether the type of damages left to be determined by local law could include punitive damages. 928 F.2d at 1283. The above authorities do support that local law will determine the amount or level of damages awarded, subject to the \$75,000 cap, but do not support the proposition that local law will determine the composition of the award (i.e. compensatory or punitive). In short, local United States law could determine how much to award as long as the award is under the \$75,000 Convention limit. Additionally, these authorities point out that Article 24 was designed to regulate the question of who had standing to sue under the Warsaw Convention.

¹¹⁵ In case of decease of a passenger carried, the lawsuit regarding responsibility may be taken by the persons who have a right to take such action according to the law of the land of the deceased person but under the reserve of the limitation of responsibility provided for in the [Convention.]

928 F.2d at 1283 (citing Initial Draft of Article 24, International Conference on Private Aviation Law (Paris 1926)(State Department Translation)(Addendum at 12a). This language clearly evidences an intent of the drafters to limit Article 24's use of local law to determine questions of standing.

¹¹⁶ See *supra* notes 100-08 and accompanying text.

unlimited liability award.¹¹⁷ While leaving to local law the issue of who has standing also creates some uncertainty, there is a significant difference between who has the right to divide a wrongful death action reward and how much of the reward there is to divide. The Convention was intended only to limit this latter concern.¹¹⁸

The Second Circuit also considered the ramifications of Article 25,¹¹⁹ which provides that the \$75,000 liability limit can be lifted if willful misconduct on the part of the airlines can be proved. In such a scenario, the level of damages awarded can be unlimited. Therefore, the question remained whether the drafters of Article 25 envisioned the award of punitive damages when willful misconduct is established. The Second Circuit held that Article 25 referred only to the lifting of the \$75,000 cap on compensatory limitations.¹²⁰ The court reasoned that under the civil law unlimited damages are available only to prevent a willful tortfeasor from escaping full responsibility from the damages it causes by hiding behind the shield of the Convention's liability

¹¹⁷ See *infra* notes 139-79 and accompanying text. This problem manifests itself where the \$75,000 liability limit has been lifted because of a finding of willful misconduct. While there will be a certain amount of unpredictability when unlimited compensatory awards can be awarded, such wrongful death awards can be determined by examining the scope of the appropriate wrongful death statute. In such cases an airline will be able to predict, for insurance purposes, the amount of damages that could be awarded. With the prospect of punitive damages, predictability would be much more difficult given that there are no set judicial limits on permissible levels of punitive damage awards and juries are allowed wide discretion in awarding punitive awards. See *supra* notes 92-99 and accompanying text. See also RICHARD A. EPSTEIN, *CASES AND MATERIAL ON TORTS* 793 (1990). The Convention would be a useless tool in controlling an airline's exposure to liability if airlines could not adequately predict and therefore protect against damage awards.

¹¹⁸ The Convention was concerned with how high liability awards would be and not who was going to receive those awards. Therefore, reading Article 24 as allowing local law to determine who had standing to sue is not inconsistent with prohibiting local law to determine the issue of punitive awards. If local law determines that 10 different parties have standing to sue for one death, then those 10 claimants would split one liability award. The award, however, cannot exceed a total of \$75,000 unless willful misconduct can be established.

¹¹⁹ Article 25 reads as follows:

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 willful 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 willful misconduct.

928 F.2d at 1285.

¹²⁰ *Id.*

limitations.¹²¹ Moreover, civil law nations tend not to allow or provide for punitive damage awards.¹²² The *Lockerbie* court reasoned that Article 25 was not to be viewed as a back door attempt to punish carriers for their intentional acts.¹²³

Like the Second Circuit's understanding of Article 24, this interpretation of Article 25 is also open to criticism. Nothing in the language of the Convention would prohibit interpreting Article 25 as lifting all limits on liability, thereby providing for punitive damages in the case of willful misconduct. In fact the elements necessary to prove willful misconduct and to establish grounds for punitive damages are quite similar.¹²⁴ Additionally, it would only seem logical that airlines should be exposed to greater liability when they have engaged in intentional misconduct.

However, these interpretations are inconsistent with the context in which the Convention was drafted. A group of nations, primarily grounded in civil law, would not have permitted Article 25 to provide for punitive damage awards without any debate.¹²⁵ When the text of the Convention does not readily supply an answer, "the words used should be given a meaning consistent with the shared expectations of the contracting par-

¹²¹ *Id.* at 1285-86.

¹²² See *supra* note 102.

¹²³ 928 F.2d at 1285.

¹²⁴ See *infra* notes 128-31 and accompanying text.

¹²⁵ While it is true that the United States has a long history of awarding punitive damages in tort-related accidents, it must be remembered that the United States was not officially present at the Warsaw Convention. The United States was only present to observe the proceedings. See Lowenfeld & Mendelsohn, *supra* note 5, at 502. Therefore, it is unlikely that the United States had significant influence in drafting the Convention. Consequently, the drafters' intentions were most likely guided by their civil law mindsets. One commentator has argued that since punitive damages are unique to common law, the failure of the Convention's drafters to discuss the issue should not be dispositive in determining whether punitive damages are available under the Convention. See Buono, *supra* note 15, at 603. Yet this argument fails to address the reality that civil law nations do not normally provide for punitive awards and that the drafting history's silence on the issue is most likely an indication that punitive damages were never seriously considered. Additionally, once one examines the potential results of allowing punitive damages, it becomes clear that punitive damages would hinder the achievement of the Convention's goals. For a discussion of the effect punitive damages would have if available under the Warsaw Convention, see *infra* notes 139-79 and accompanying text. For a discussion of why the Second Circuit did not err in examining the drafters' intent as part of its analysis of the punitive damage issue and an examination of why other methods of statutory interpretation would not have been proper or any more effective, see *supra* note 85.

ties."¹²⁶ Since Article 25 is not clear on exactly what liability limits it lifts, it was necessary for the Second Circuit to determine what the drafters would have intended. The drafters, especially those from civil law countries, would most likely have been antagonistic toward the concept of punitive awards. Therefore, the *Lockerbie* court correctly concluded that Article 25 refers to the lifting of liability limits on compensatory awards only.¹²⁷

3. Article 25 Obviates the Need for Punitive Damages

While the Convention's \$75,000 liability limit may currently be inadequate to compensate victims, Article 25 provides for the awarding of unlimited liability when willful misconduct can be shown.¹²⁸ The Convention provides that "[w]illful misconduct requires either 'the intentional performance of an act with knowledge that the performance of that act will probably result in injury' or 'the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences.'"¹²⁹ This definition is quite similar to the standard ap-

¹²⁶ *Lockerbie*, 928 F.2d at 1280, citing *Air France v. Saks*, 470 U.S. 392, 399 (1985).

¹²⁷ 928 F.2d at 1285.

¹²⁸ See *supra* note 119.

¹²⁹ *Republic Nat'l Bank of New York v. Eastern Airlines, Inc.*, 815 F.2d 232, 238-39 (2d Cir. 1987) (an air carrier's omissions from a release form resulting in the loss of plaintiff's currency did not constitute willful misconduct under the Convention). Judge Platt in the Eastern District of New York—instructing the *Lockerbie* jury on the standard to determine whether Pan Am was willfully liable for the *Lockerbie* disaster—defined willful misconduct as "the intentional performance of an act with knowledge that performance of the act will probably result in injury or damage or it may be the intentional performance of an act in such a manner as to imply disregard of the probable consequences of the performance of the act." Arnold H. Lubasch, *Pan Am Is Held Liable By Jury In '88 Explosion*, N.Y. TIMES, July 11, 1992, at A1. However, it is not necessarily clear that the jury's willful misconduct determination will be upheld. Recently the Second Circuit overturned a finding of willful misconduct in *Ospina v. Trans World Airlines, Inc.*, 1992 WL 212001 (2d Cir. Sept. 3, 1992). In *Ospina* a bomb exploded on a TWA flight approaching Athens, Greece. The Second Circuit held that TWA had not engaged in willful misconduct since all regular safety procedures had been followed and no Federal Aviation Administration ("FAA") rules or regulations had been violated. *Id.* The court concluded that no reasonable jury could have determined that TWA had engaged in willful misconduct. *Id.* However, the court did not establish a clear standard of what types of violations would warrant a finding of willful misconduct. Therefore, it is feasible that the Second Circuit could also overturn the finding of willful misconduct in the bombing of Pan Am Flight 103. However, since the *Lockerbie* disaster did involve breaches of FAA regulations, the willful misconduct holding should not be overturned. Plaintiffs have argued that Pan Am violated section XV (1)(a) of the FAA's Air Carrier Standard Security Program, which requires airlines to match baggage with passengers.

plied in determining whether punitive damages should be awarded: "[P]unitive damages may be awarded [when] conduct . . . is outrageous, because of the defendant's evil motive or . . . reckless indifference to the rights of others."¹³⁰ Consequently, conduct that would qualify for the lifting of liability limits under Article 25 would seemingly justify an award of punitive damages.¹³¹

However, the *Lockerbie* court rightfully cautioned against courts using Article 25 to award both unlimited liability and punitive damages. The Second Circuit stressed the civil law's tendency to denounce punitive damage awards: "The civil law appears to [conclude] that the award of full compensatory damages alone is sufficient to deter willful misconduct, [therefore] punitive damages would be both excessive and redundant."¹³² This analysis is consistent with interpreting the Convention in a manner that promotes the Convention's primary goal of limiting airline liability. Excessive and redundant liability awards would prevent airlines from reducing their exposure to exorbitant liability judgments.

Nonetheless, some argue that punitive damages are necessary to insure that airlines maintain high safety standards.¹³³ Undeniably, airline safety is of the utmost importance. Yet the

See *TWA Ruling Overturned*, WORLD INS. REPORT, Oct. 9, 1992.

¹³⁰ *Smith v. Wade*, 461 U.S. 30, 47 (1983) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).

¹³¹ The *Lockerbie* court clearly recognized the similarity between punitive damages and the willful misconduct clause of Article 25. However, the court found that their purposes served different roles. The court noted that deterrence is a goal of both punitive damages and Article 25. Nevertheless, the court concluded that punitive damages are intended merely to punish defendants while Article 25 is designed to insure that no airline escapes its financial responsibility when acting egregiously. 928 F.2d at 1285-86. The difference is highlighted by the civil law belief that unlimited compensatory damages, in and of themselves, will deter future misconduct, leaving punitive measures unnecessary. H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 211 (1954).

¹³² 928 F.2d at 1285-86. At first glance it is not clear how punitive and compensatory damages can be deemed excessive and redundant if they are intended to serve different purposes. However, they are arguably redundant and excessive when examined in the context of the Convention. The Convention was structured to provide for compensatory damages only. Further, the Convention was designed to compensate passengers adequately while establishing some limits on an airline's potential liability. See *supra* notes 14-29 & 100-27 and accompanying text. Therefore an award designed to punish would be excessive in a liability scheme designed to provide compensatory damages only. The award would also be redundant since Article 25 already fully compensates claimants by providing unlimited liability.

¹³³ See Buono, *supra* note 15, at 603.

Warsaw Convention was not intended to regulate airline safety.¹³⁴ Rather, the Convention was designed to standardize airline liability.¹³⁵ Thus, allowing punitive damages cannot be justified under an airline safety rationale: the Convention was designed only to provide passengers with compensatory awards.

Moreover, the inability of courts to award punitive damages under the Convention will not lead to decreased airline safety standards.¹³⁶ The marketplace exacts a high price for lapses in safety precautions. Pan Am's reputation, financial stability and its ultimate existence suffered greatly as a result of the Lockerbie disaster.¹³⁷ For example, the sale of Pan Am's London

¹³⁴ For a discussion of why courts should not be involved in legislating new, although arguably worthy, objectives into the Convention, see *supra* note 85 and accompanying text. If the Warsaw Convention were intended to act as a regulatory force on airline safety, its text or legislative history would evidence as much. However, as of now, the Convention is designed to regulate only certain rules and procedures concerning the airline industry, such as ticketing, baggage claims and liability standards. Regulations involving airline safety must come from other areas of the law. For instance, the Chicago Convention of 1944 ("Chicago Convention") is an international treaty regulating aviation safety. The Chicago Convention leaves issues of deterrence and punishment to regulatory agencies of member nations. See *Convention on International Civil Aviation*, Dec. 7, 1944, 612 Stat. 1180, T.I.A.S. 1591 (1947); see also Brief for the Air Transport Association of America as Amicus Curiae at 6, *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388) (Warsaw Convention is concerned with compensating claimants, not with aviation safety or deterrence and punishment of airlines).

¹³⁵ See Brief of the Air Transport Association of America as Amicus Curiae at 6, *In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991) (No. 90-7388).

¹³⁶ *Id.* at 16-18. Additionally, it seems more appropriate for punitive-type measures to come from treaties or regulatory agencies designed to monitor airline safety standards. Whether or not organizations, such as the FAA, actively and effectively enforce regulatory guidelines is an issue for the executive and legislative branches to determine. Courts should not engage in legislative decisionmaking merely because they fear that administrative agencies are not fulfilling their congressionally mandated roles. For a discussion of why courts should not engage in judicial legislating, see *supra* note 85.

¹³⁷ See *Pan Am's 1990 Loss Nearly Doubles 1989's*, AVIATION WEEKLY & SPACE TECH., May 27, 1991, at 31 ("Pan Am Corp. lost \$662.9 million in 1990, a net loss nearly double that incurred in the year after a terrorist's bomb destroyed a Pan American World Airways Boeing 747 over Scotland."); Philip Robinson, *Britain Holds Key to Pan Am's Fate*, THE TIMES (London), Jan. 9, 1991, at 4 (estimating that the Lockerbie disaster cost Pan Am \$350 million); Keith Bradsher, *A Year of Tribulation for Pan Am*, N.Y. TIMES, Nov. 9, 1989, at D1 ("More than 10 months after a terrorist bomb destroyed a Pan American World Airways jetliner over Lockerbie, Scotland, many travelers, particularly business people, continue to avoid the carrier. The Scottish tragedy . . . will have cost the airline up to \$250 million in foregone ticket sales . . ."). Cf. *Court Absolves Government in Delta L-1011 Crash*, AVIATION DAILY, Sept. 5, 1989, at 436 (Delta foresees \$150 to \$200 million in claims from 1985 crash in Dallas); *Boeing, JAL to Compensate Crash Victims*, AVIATION WEEKLY & SPACE TECH., Oct. 14, 1985, at 30 (losses to JAL, including loss of business, could exceed \$280 million as a result of a JAL jet disaster,

routes to United Airlines can be traced, in part, to the Lockerbie disaster.¹³⁸ Arguably, Pan Am's bankruptcy can also be viewed, in part, as a marketplace adjustment in light of the Lockerbie crash.

B. *Independent State Claims Would Not Promote the Convention's Goals*

In support of its position that punitive damages are not available under the Convention, the Second Circuit examined the possible ramifications of allowing independent state claims in actions governed by the Convention.¹³⁹ The court correctly held that the Warsaw Convention was the exclusive cause of action by which claimants could seek recovery for wrongful death or personal injuries.¹⁴⁰ The court found that state claims were preempted by the Convention; future plaintiffs are barred from invoking state law to determine whether punitive damages are available under the Convention.¹⁴¹ In so holding, the court opined that state law claims would prevent the Convention from achieving its goal of creating a uniform liability scheme. For the court to have concluded otherwise would have presented international carriers with varying degrees of liability under each

which killed crew members and 520 passengers).

¹³⁸ See Philip Robinson, *Flight of Cash Brings Pan Am Full Circle*, THE TIMES (London), Jan. 9, 1991, at 2.

¹³⁹ *In re Lockerbie*, 928 F.2d 1267, 1275-78 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991).

¹⁴⁰ *Id.* This part of the Second Circuit's decision has generated more controversy than its holding on punitive damages. See *supra* note 8. Holding that the Convention does not provide for punitive awards is a much more limited holding than concluding that the Convention is the exclusive cause of action. To make the first decision effective, however, the Second Circuit had no choice but to make the second determination. If a claimant had the choice between suing under the Convention, which prohibits punitive damage awards, or pursuing a claim under an alternative wrongful death action, which permits a punitive award, a claimant would fight to litigate under the independent state law claim. On the other side, the airline would fight tooth and nail to ensure that the Convention controlled the litigation. Predictability and uniformity would never be achieved as long as these various avenues of recourse were open to plaintiffs. Were plaintiffs to succeed in bringing state law claims, the Convention would become dead letter law. Therefore, to lend support to its initial holding prohibiting punitive awards under the Convention, the Second Circuit had to preempt all independent state claims. For a further discussion of why preempting punitive claims and preempting all state claims invokes the same analysis, see *supra* note 12.

¹⁴¹ 928 F.2d at 1278.

state's different rules on punitive damages.¹⁴²

1. Preemption Doctrine

The Supreme Court has set forth when state law may be preempted by federal law.¹⁴³ Federal legislation may expressly

¹⁴² One commentator has argued that the Warsaw Convention has never achieved its goal of creating a uniform system of liability to govern international air travel. *See* Cagle, *supra* note 3, at 953-54 (criticizing the Convention for its differing degrees of liability award limitations). Different nations subscribe to one of the following: the original Warsaw Convention (liability limitation of \$8300), the Hague Protocol of 1955 (lifting liability to \$16,600) or the Montreal Agreement of 1965 (lifting liability to \$75,000 for flights departing or arriving in the United States). *Id.* at 955-59. The United States currently adheres to the Montreal Agreement. Cagle points out that "similarly situated passengers suffering identical injuries on the same flight can recover different damage amounts Some passengers may recover only \$8300 under the original Warsaw Convention while others may recover \$75,000" under the Convention as modified by the Montreal Agreement. *Id.* at 998. For example, while the United States adheres to the \$75,000 limit of the Montreal Agreement, Mexico continues to follow the \$16,600 limit of the Hague Protocol. However, Cagle's argument glosses over the significance of the generally low maximum recovery limits set by the Convention. While there is some variability among nations, the variability is not exceptional and the maximum total payments will be within the airline's means. After all, foreign nations are adhering to self-interest in keeping liability limits low; many airlines that belong to the Convention are state owned. *Id.* at 959, 964. The result is an assurance that all claimants will be paid.

There is, however, a difference between an airline knowing that it will be subject to varying levels of liability depending upon which liability limit a nation endorses, *see* Cagle, *supra* note 3, and an airline having to predict which applicable state punitive damage laws will apply to a specific case. *See infra* notes 152-74 and accompanying text. In the former case, an airline can guard against or react to a known liability standard by obtaining insurance or reserving a set amount of money for potential liability awards. In the latter situation, an airline must wait for a court determination on which liability standard will be applied, making it virtually impossible to guard against and difficult to react to potential liability. The cost in terms of money and time as the court determines the rules to be applied on punitive awards would cut against the Convention's plan of limiting liability and promoting certainty.

¹⁴³ The Warsaw Convention as a treaty is the supreme law of the land. U.S. CONST. art. VI, cl. 2. The question therefore is whether the Convention is meant to be the exclusive law of the land on the issue of liability or whether state law is also applicable to international airline suits.

The answer as to whether to preempt state law turns on an examination of the congressional intent in enacting the statute. *See* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (state law regulating natural gas transportation is preempted by federal law because of evidence of congressional intent to preempt state regulation of interstate natural gas transportation). Congress may expressly preempt state law. *See* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (Congress expressly preempted state regulation on labeling of packaged food). When Congress is not explicit, preemption may be justified when Congress implicitly indicates an intent to occupy a given field. "Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is suffi-

preempt state law, or it may enact a scheme so pervasive that a court may infer Congress left no room for the states to legislate in that area.¹⁴⁴ State law may also be preempted when the subject matter involved demands uniformity and independent state regulation would potentially jeopardize the purposes behind the federal action.¹⁴⁵ There is, however, a general presumption against finding preemption of state law.¹⁴⁶

The Convention does not expressly forbid state intrusion into international air carrier liability. Therefore state law claims might be permissible under the Convention, especially considering that the Convention expressly leaves certain issues to be resolved by local law.¹⁴⁷ Accordingly, the Second Circuit properly examined the possible ramifications of applying state law. Since the Convention does not expressly preempt state claims, the *Lockerbie* court could only justify preemption if it determined that state wrongful death actions would prevent the Convention

ciently dominant." *Schneidewind*, 485 U.S. at 300.

Finally, state law may be preempted where federal and state law conflict. Such a conflict may be evidenced by the inability of parties to comply with both the state and federal law. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (state regulation of avocados upheld because it was not impossible to comply with state and federal law regulating the marketing of avocados). A conflict between state and federal law may also exist where the state law stands as an obstacle to accomplishing the purposes and objectives behind the congressional act. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law regulating alien registration preempted because it prevented the federal Alien Registration Act from acting as a comprehensive regulatory scheme).

¹⁴⁴ See *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ See *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990) (New York Lemon Law was not preempted by the Magnuson-Moss Warranty Act and Regulations promulgated by the Federal Trade Commission).

The Supreme Court has cautioned . . . that courts must, when considering a preemption claim, give careful attention to the subject matter When Congress legislates in a field traditionally occupied by the States, [the court should] start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Thus a litigant challenging a state statute on preemption grounds must overcome a presumption against finding pre-emption of state law.

Id. (citations omitted).

¹⁴⁷ The Convention clearly leaves some issues to be determined by examining local law. "Commentators and case law are in accord that the Convention leaves the measure of damages to [local law]." *Lockerbie*, 928 F.2d at 1283; see *supra* note 114 and accompanying text. Nations are free to set the level of damages as long as the damage award does not exceed the \$75,000 liability limit. Additionally, the Convention leaves the question of "who are the proper beneficiaries of a damage award" to local law. 928 F.2d at 1282-83.

from acting as a uniform standard for international airline liability and a limiting force on such potential liability.¹⁴⁸

The *Lockerbie* court analyzed the conflicts that would arise if plaintiffs could plead state punitive damage claims.¹⁴⁹ The court focused its attention on the complexity involved in ascertaining which state punitive damage laws would apply.¹⁵⁰ The Second Circuit recognized that the existence of different state laws on punitive awards would confront passengers and airlines with inconsistent judicial determinations from one court to the next. The court determined that state claims would indeed prevent the Convention from creating a uniform standard on airline liability and held these state claims preempted. Otherwise, state law claims concerning the proper state punitive damage law to apply to actions governed by the Convention might clog the courts with litigation.¹⁵¹

2. Choice of Law Analysis

Choice of law analysis determines which state laws are to be applied in a lawsuit.¹⁵² The law of the state where an action is pending will not necessarily be the state law applied. If the parties involved are from multiple states, or the action is pending where the airline accident occurred, a court might conclude that

¹⁴⁸ Interestingly, the Convention's international grounding never directly entered the Second Circuit's determination of whether punitive damages and independent state claims were preempted by the Convention. The Supreme Court has emphasized that states have only the most limited roles in international relations. See BORN & WESTIN, *supra* note 102, at 10-13. "These general principles are most obviously reflected in the frequent preemption of state laws in the areas of foreign relations and foreign commerce by inconsistent federal statutes, treaties and other international agreements." *Id.* at 10. Since the Warsaw Convention is the express intent of many nations to cooperate on international airline liability, the general presumption against preemption of state law is significantly weakened.

¹⁴⁹ 928 F.2d at 1275-76.

¹⁵⁰ *Id.*

¹⁵¹ The Second Circuit noted that the fear of an increase in the volume of litigation is realistic. Potential claimants, especially foreigners, would seek to have their cases adjudicated in the United States because of the enormous windfall punitive awards might bring if willful misconduct were established and Article 25's liability limitation lifted. Foreign claimants could potentially receive much higher awards than are available in other foreign jurisdictions. 928 F.2d at 1287. "[A]s a moth is drawn to the light, so [would] a litigant [be] drawn to the United States . . ." *Smith Kline & French Labs. v. Block*, [1983] 2 All E.R. 72, 74 (opinion of Lord Denning, M.R.), cited in BORN & WESTIN, *supra* note 102, at 218.

¹⁵² See Paulsen, *supra* note 6, at 818-19.

it is more appropriate to apply another state's law.¹⁵³ At least seven different theories have developed—each adopted in some form by every state—to determine how a court should choose which substantive state law to apply.¹⁵⁴ Regardless of the method employed, however, the results are often arbitrary, unpredictable and inconsistent from state to state.¹⁵⁵ Therefore, depending upon the substantive law imposed by the choice of law rule, the same case could be decided differently from one

¹⁵³ Under the *Erie* doctrine, if a plaintiff were to bring a state claim, "a federal court [sitting in diversity] must apply the choice of law rules of the district in which the court sits, and then the substantive law of the applicable state." 928 F.2d at 1275. See also *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Under New York law a court must apply the substantive tort law of the state that has the most significant relationship with the occurrence and with the parties. See *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 194-99, 480 N.E.2d 679, 682-85, 419 N.Y.S.2d 90, 93-96 (1985); *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 288, 240 N.Y.S.2d 743, 752 (1963). The most significant contacts are the parties' domiciles and the location of the tort. *Schultz* at 197, 480 N.E.2d at 684, 419 N.Y.S.2d at 95; *In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F. Supp. 79, 83-84 (D.P.R. 1990).

Therefore, if a federal court in the Eastern District of New York was adjudicating a wrongful death action stemming from an airline crash that occurred in New York and the parties involved were from Delaware, Massachusetts and Pennsylvania, the court would be faced with the prospect of applying either Delaware, Massachusetts, New York or Pennsylvania law on the substantive issues. It is not entirely clear which state would have the closest relationship to the plaintiffs in such a scenario. These laws might well conflict with one another and a claimant's ability to recover may well depend on which state law the court adopts.

¹⁵⁴ The seven major rules that courts have employed when determining the applicable state law are: (1) *lex loci delicti* (law of the state where the accident occurred applies); (2) most significant relationship (law of the state that has the most significant relationship to the occurrence and the parties involved applies); (3) government interest analysis (law of the state with the greatest interest in the issues before the court applies); (4) choice-influencing considerations (state law determined by balancing such policy considerations as predictability, maintenance of order, advancing forum state's interests, etc.); (5) center of gravity (apply state law based on a review of the importance of each contact in relation to the facts of the case); (6) *lex fori* (law of the forum state will always be applied); and (7) combined modern approaches (combining two or more of the above analyses). See Paulsen, *supra* note 6, at 819-25.

¹⁵⁵ *Id.*; see, e.g., *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 734 F. Supp. 1425 (N.D. Ill. 1990) (in claims resulting from a 1989 crash by United Airlines in Sioux City, Iowa, punitive damage claims against the airline governed by Illinois law; punitive damage claims against the manufacturer determined by California law; and punitive damage claims against the engine manufacturer determined by Ohio law); *In re Aircrash Disaster at Stapleton Int'l Airport, Denver, Colorado, on Nov. 15, 1987*, 720 F. Supp. 1445, 1454-55 (D. Colo. 1988) (Texas law on punitive damages applied to an air crash that took place in Colorado even though most of the tickets were purchased in Idaho). Although these cases were not governed by the Warsaw Convention, they exemplify the arbitrary results of choice of law analysis in airline accidents.

state to the next.¹⁵⁶

According to Article 28 of the Convention, "a suit may be brought in a court where the carrier is domiciled or has a principal place of business, or where the carrier has a place of business through which the contract was made [i.e. where the ticket was purchased] or . . . at the place of destination."¹⁵⁷ While this places some limitations on where a lawsuit can be filed, it is no great stretch to imagine an accident on a crowded international flight that would leave an airline subject to suit in all fifty states and a myriad of foreign nations.¹⁵⁸ In a consolidated action such as *Lockerbie*,¹⁵⁹ a trial court could be faced with determining which of the fifty state laws, and perhaps foreign laws, to apply. A trial court might also be faced with the prospect of applying different state laws to different parties within the same lawsuit.¹⁶⁰ Allowing state law claims under the Convention would inescapably lead to choice of law chaos and would entirely thwart the Convention's goal of uniformity.

Choice of law issues might muddy the waters on the limits of airline liability as well. States are almost equally divided on the issue of whether punitive damages are available in wrongful death actions.¹⁶¹ A plaintiff's ability to collect punitive damages might well be determined by the state law in which the plane crash occurred.¹⁶² Therefore, punitive damages could be awarded

¹⁵⁶ Paulsen, *supra* note 6, at 819-25.

¹⁵⁷ 928 F.2d at 1275.

¹⁵⁸ Since Article 28 provides as a proper venue the place where the ticket was purchased, an airline with an international flight filled with hundreds of passengers would likely be amenable to suit in many states and foreign lands.

¹⁵⁹ 733 F. Supp. 547 (E.D.N.Y. 1990).

¹⁶⁰ 928 F.2d at 1275.

¹⁶¹ For example, Massachusetts state law provides for the awarding of punitive damages in a wrongful death action, while Rhode Island does not. Compare MASS. ANN. LAWS ch. 229, § 2 (Law. Co-op. Supp. 1982) with R.I. GEN. LAWS § 10-7-1 (1985). If state law determined whether punitive damages were to be applied under the Convention, plaintiffs could be denied equal availability of recovery. An airline flying from Providence, Rhode Island to London, England could as easily crash in Massachusetts as Rhode Island since both are neighboring states. However, the location of the crash could adversely affect a claimant's right to recovery.

¹⁶² Under the *lex loci delicti* doctrine in choice of law analysis, a court is to choose the applicable state law based upon where the accident occurred. Paulsen, *supra* note 6, at 819. If the plane crashed in Massachusetts, the *lex loci delicti* doctrine would require Massachusetts law to be applied. Therefore, punitive damages would be available under the Convention. However, if the plane crashed in the neighboring state of Rhode Island, the same plaintiff could not seek a punitive award. See *supra* note 161. The distinction

through the back door via the appropriate choice of state law, even though the Convention itself does not permit punitive damage claims. This back door approach would devastate the Convention's limited liability goal.

Moreover, if the Warsaw Convention allowed state law to determine the issue of punitive damages, litigation costs would surely increase. Parties would be inclined to litigate the issue of which state's law to apply when different state laws might be more favorable to their respective positions.¹⁰³ Potential litigants would spend unnecessary time, money and effort on debating issues of procedure instead of issues of substance.¹⁰⁴ Increased costs would further thwart the Convention's main goal of limiting airline liability.¹⁰⁵ Overall, the havoc the choice of law problem would have wreaked on the Convention's twin goals of uniformity and limited liability further supports the Second Circuit's holding that state law claims are preempted under the Convention.

between allowing for punitive damages in wrongful death actions in Massachusetts and prohibiting them in Rhode Island would likely encourage an airline to seek the application of Rhode Island law. Alternatively, claimants would seek to have Massachusetts law applied to allow for the award of punitive damages. The Convention's goals of decreasing and simplifying litigation would be lost. See *supra* notes 14-29 and accompanying text. Additionally, such arbitrary results would seem unfair to both plaintiffs and defendants. Why should either party's rights be drastically affected by the unpredictable event of where a plane may crash?

¹⁰³ 928 F.2d at 1276.

¹⁰⁴ See *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colorado* on Nov. 15, 1987, 720 F. Supp. 1445 (D. Colo. 1988). This case was not governed by the Warsaw Convention but exemplifies the difficulties that could arise if the Convention provided for independent state causes of action. The court described the choice of law dilemma as:

The burden [choice of law issues] place on judicial resources frustrates the early and orderly resolution of issues which should demand greater attention—compensating the victims or vindicating accused commercial entities. Specifically, state laws on the issue of punitive damages are not harmonious. Uncertainty on the choice of law question requires a considerable expenditure of time, money and other resources by . . . the litigants and counsel.

Id. at 1454-55 (citations omitted) (Texas law on punitive damages applied to an air crash that took place in Colorado even though most of the tickets were purchased in Idaho).

¹⁰⁵ The Second Circuit clearly recognized this problem when it noted "[t]he existence of differing laws in various states—particularly respecting punitive damages—would frustrate the Convention's aims of uniformity and certainty . . ." 928 F.2d at 1278. The court therefore concluded that state law claims must be preempted by the Convention to allow the Convention to act as a uniform and limited liability scheme. *Id.* at 1276. Had they ruled otherwise, the court would have been ignoring its obligation to interpret the Convention in a manner that would promote the Convention's goals.

3. Airlines' Ability to Insure Against Punitive Damage Awards

To further illustrate the potential problems associated with applying state law is the question of whether a state allows liability insurance to be obtained for punitive damage awards.¹⁶⁶ Some states prohibit insurance against punitive damages based on public policy grounds.¹⁶⁷ Since punitive damages are usually imposed to punish a wrongdoer and to deter future similar conduct, courts have held that these goals cannot be achieved if punitive damage awards are reimbursed by insurance companies.¹⁶⁸ Alternatively, some courts reason that the freedom to contract should leave the issue of whether punitive damages are insurable

¹⁶⁶ For example, while Arizona, Georgia, Maryland, Virginia and Wisconsin permit parties to insure against punitive awards, California, Florida, Illinois, New Jersey and New York do not. *Compare* Price v. Hartford Accident & Indem. Co., 502 P.2d 522 (Ariz. 1972) (public policy favors enforcement of insurance policies that cover punitive damages); Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910 (Ga. 1977) (Georgia statute authorizing insurance of legal liability includes punitive awards); First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 389 A.2d 359 (Md. 1978) (public policy does not preclude liability coverage of punitive awards); Lipscombe v. Security Ins. Co., 189 S.E.2d 320 (Va. 1971) (automobile insurance coverage includes punitive damage awards); Cieslewicz v. Mutual Serv. Casualty Ins. Co., 267 N.W.2d 595 (Wis. 1978) (homeowner's liability insurance covers punitive awards) with City Prod. Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494 (Cal. Ct. App. 1979) (state law voids any insurance contract that indemnifies awards based on willful misconduct); Nicholson v. American Fire & Casualty Ins. Co., 177 So.2d 52 (Fla. Dist. Ct. App. 1965) (insuring punitive awards is inconsistent with the public policy goal of deterring willful misconduct); Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058 (Ill. App. Ct. 1981) (better view of punitive awards is to promote their penal attributes and to prohibit their coverage in insurance policies); Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co., 410 A.2d 696 (N.J. Super. Ct. App. Div. 1980) (public policy does not permit a tortfeasor to shift the burden of punitive damages to its insurer); Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979) (insurance of punitive damage awards is against public policy). See generally Stephen C. Kenney, *Punitive Damages In Aviation Cases: Solving The Insurance Coverage Dilemma*, 48 J. AIR L. & COM. 753, 753-54 nn.2-3 (1983).

¹⁶⁷ *Northwestern National Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), has been cited by one commentator as the leading example of courts refusing to permit punitive damages to be insured on public policy grounds. *McNulty* involved the trial of an intoxicated driver who crashed into another vehicle, resulting in a punitive award against the driver. On appeal the Fifth Circuit held that since punitive awards were designed to punish the defendant for his actions, this purpose could not be achieved if a defendant was permitted to shift the financial burden imposed by punitive awards to another party. 307 F.2d 432, 440 (5th Cir. 1962). See also Kenney, *supra* note 166, at 761-62 (noting that most courts, which have held that punitive awards are not insurable, have followed the reasoning of *McNulty*).

¹⁶⁸ *Id.*

to the insurer and the insured. Additionally, these courts find that prohibiting the insurance of punitive damages has no effect on deterring future conduct and therefore question whether the public good is harmed by these private contracts.¹⁶⁹

Air carriers would likely seek to be tried under that state law which allows punitive damages to be insured. Insurance companies, on the other hand, would seek to have cases tried in forums that do not permit punitive awards to be insured.¹⁷⁰ As insurance companies often pay for defense work, conflicts of interest might arise between the airline and insurance agency.¹⁷¹ "The insured's pecuniary interests are potentially susceptible of being sacrificed for those of the insurer because the insurer's duty to defend generally includes the right to conduct and to control the defense."¹⁷² If an insurer attempts to prevent a case from being tried in a jurisdiction that allows punitive damages to be insured, an airline will likely seek independent counsel.¹⁷³ This conflict will undoubtedly increase airlines' litigation costs, in direct contravention of the Convention's goal of limiting liability awards to enable carriers to insure against such losses.¹⁷⁴ Depending upon the choice of law rule applied, air carriers will be faced with uncertain and arbitrary decisions relating to their ability to insure against liability awards that include punitive damages.

To permit state law claims seeking punitive awards would undo both the uniformity and limited liability goals of the Con-

¹⁶⁹ *Lazenby v. Universal Underwriters Ins. Co.* has been cited as the leading decision to justify the holding that punitive awards may be insured. 383 S.W.2d 1 (Tenn. 1964). As in *McNulty*, 307 F.2d at 432, see *supra* note 167, *Lazenby* involved an accident caused by an intoxicated driver. However, in *Lazenby* the court held that punitive damages were insurable because it did not believe that prohibiting such reimbursements would deter future similar conduct. The court determined that the public good was not harmed by private contracts shifting the financial burden imposed by punitive awards. 383 S.W.2d at 5. See also *Kenney*, *supra* note 166, at 763-65.

¹⁷⁰ Logically, it would seem that plaintiffs would not care whether punitive damages are insurable and would probably not fight the airline on the appropriate state choice of law on this issue. However, given the volatility of the airline industry, plaintiffs may indeed desire to have punitive damages insured. Generally, an insurance company would be in a better position to pay a punitive award than an airline that was facing potential bankruptcy. Alternatively, if the airline was more financially secure than the insurer, a plaintiff would prefer to make sure that state law required the airline to pay the award.

¹⁷¹ *Kenney*, *supra* note 166, at 770-71.

¹⁷² *Id.* at 771.

¹⁷³ *Id.*

¹⁷⁴ 928 F.2d at 1276. See *Lowenfeld & Mendelsohn*, *supra* note 5, at 499-500.

vention. Airlines would be faced with inconsistent liability from one jurisdiction to the next and would be forced to spend considerable energy litigating the insurability of punitive damages. For the Convention to achieve any of its purposes, the *Lockerbie* court had no alternative but to hold that state law claims are preempted by the Convention.

4. Presumption Against Preemption Overcome

Although the *Lockerbie* court recognized the general presumption against preempting state law,¹⁷⁵ the Second Circuit nevertheless concluded that to protect the Convention's uniform liability scheme and its liability limitations, it had no choice but to preempt the application of state law claims.¹⁷⁶ Three reasons support this conclusion. First, state law on punitive damages directly conflicts with the goals of the Convention. Consequently, under well-grounded principles of federalism, state law must give way to the application of federal law.¹⁷⁷ Second, preemption of independent state claims is a positive step toward the uniform application of the Convention because it prevents the application of different liability standards.¹⁷⁸ Finally, international treaties should be governed by federal law since state law has traditionally remained outside the scope of international af-

¹⁷⁵ 928 F.2d at 1278. See *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990) (New York Lemon Law was not preempted by the Magnuson-Moss Warranty Act and regulations promulgated by the Federal Trade Commission because of the state interest in regulating car sales); see *supra* note 146.

¹⁷⁶ 928 F.2d at 1278.

¹⁷⁷ For a discussion of the preemption doctrine, see *supra* notes 143-46 and accompanying text.

¹⁷⁸ The *Lockerbie* decision does not create a uniform liability limit for all Warsaw Convention members: its holding is only binding in the Second Circuit. But considering that the Second Circuit houses major international airports, such as John F. Kennedy and LaGuardia Airports, the court's holding that punitive damages are not available under the Convention potentially apply to tens of thousands of air flights and millions of passengers. See Sarah Bartlett, *New York Feels Pinch of Slump in U.S. Tourists*, N.Y. TIMES, June 5, 1991, at 1 (international arrivals at Kennedy, LaGuardia and Newark increased to 11.3 million in 1990 compared to 10.8 million in 1989); Joseph W. Queen, *Study Finds Kennedy Airport May Be Long Gateway Status*, NEWSDAY, Nov. 21, 1991, at 39 (sixteen million international passengers passed through Kennedy, LaGuardia and Newark Airports in 1989). Lawsuits litigated in the Second Circuit will enjoy the predictability of the Convention's liability scheme. However, it must be noted that future claimants might now seek to avoid litigating claims governed by the Convention in the Second Circuit.

fairs.¹⁷⁹ In the end, the preemption of state claims was the only alternative for the *Lockerbie* court to adopt.

C. *The Building Blocks of the Second Circuit's Analysis*

1. Direct Support for Preemption in the Eleventh Circuit

The Second Circuit is not the first court of appeals to hold that punitive damages are unavailable under the Convention. Moreover, its analysis closely parallels those of other courts. The Eleventh Circuit in *Floyd v. Eastern Airlines, Inc.*¹⁸⁰ held that claims seeking punitive damages under Florida state law were preempted by the Warsaw Convention and further asserted that any state claim which conflicted with the Convention's goals was preempted.¹⁸¹

The Eleventh Circuit examined the manner in which state punitive damage claims would affect the Convention's goals. The *Floyd* court stated that the objectives of the Convention were "to limit strictly the liability of the airlines and to provide a uniform and comprehensive scheme of liability."¹⁸² The court noted that "[t]he Convention was intended to place strict limits on air carrier liability for accidents Holding that punitive damages are unavailable in an action governed by the Warsaw Convention furthers the goal of certainty of liability."¹⁸³ The *Floyd* court noted that there was a significant difference between the cost to compensate a victim and the additional monetary liability in awarding punitive damages to punish an airline. The court opined that if punitive damage claims were available, liability limitations would be impossible to achieve.¹⁸⁴

The *Lockerbie* and *Floyd* courts looked to the Convention's goals to justify their preemption of state punitive damage

¹⁷⁹ See *supra* note 148.

¹⁸⁰ 872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 1489 (1991). While preempting state punitive damage claims, the Eleventh Circuit held that claims for the intentional infliction of emotional distress were available under the Convention. On appeal the Supreme Court reversed and held that claims for intentional infliction of emotional distress were not available under the Convention. 111 S. Ct. at 1489. The Supreme Court, however, did not address the Eleventh Circuit's holding on punitive damages.

¹⁸¹ *Id.* at 1486-89.

¹⁸² *Id.* at 1487.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

claims. These courts therefore remained faithful to the Convention's ideals.¹⁸⁵

2. The Issue of Exclusivity in the Fifth and Ninth Circuits

The *Lockerbie* court determined that the question of whether the Convention provides the exclusive cause of action had not previously been answered by the Second Circuit.¹⁸⁶

¹⁸⁵ The *Lockerbie* court's analysis was not confined to an examination of court of appeals' decisions. In *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797 (N.D. Ill. 1986), the Northern District of Illinois held that punitive damages were not available under the Convention. The *Harpalani* court reasoned that the

purpose of the [Convention] was to establish strict limits on liability that would adequately compensate passengers for most losses, [but] would also be sufficiently low to permit carriers to insure against losses at reasonable rates Allowing punitive damage awards would be inconsistent with this scheme, both because carriers cannot insure against such awards, and because the purpose of punitive damages—to punish and deter—is unrelated to the signatories' goal of ensuring minimally adequate compensation.

Id. at 799. As did the *Lockerbie* court, the *Harpalani* court placed great emphasis on advancing the Convention's goals.

The Second Circuit also examined another district court case which held that state punitive damage claims were preempted. In *In re Air Crash Disaster at Gander, Newfoundland*, on Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987), the court held that "state law claims for punitive damages are pre-empted to the extent that they would prevent the application of the Convention's limitations." *Id.* at 933.

¹⁸⁶ Before 1978 the Second Circuit had consistently held that the Warsaw Convention did not create a cause of action to sue but only created a presumption of liability. For example, the Convention could be used as a basis to measure airline liability but could not be used as the legal basis upon which to bring suit. In wrongful death actions plaintiffs would have to look to the applicable state statutes or to other legally recognized causes of action. See *Komlos v. Compagnie Nationale Aere France*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). Both *Komlos* and *Noel* have been cited for the proposition that the Convention does not itself establish a cause of action under which to sue. "The Second Circuit has spoken twice, the Supreme Court has denied certiorari, and in all subsequent American Warsaw cases it was either assumed or certified that the claim must be founded on some law other than the Convention itself." Lowenfeld & Mendelsohn, *supra* note 5, at 519.

It was not until *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), that a cause of action was recognized under the Convention itself. In *Benjamins* the Second Circuit, overruling established precedents, held that the Warsaw Convention created a cause of action for wrongful death. 572 F.2d at 919. The *Benjamins* court reasoned "that the desirability of uniformity in international air law can best be recognized by holding that the Convention . . . is . . . the universal source of a right of action." *Id.* The question then arises as to how the *Lockerbie* court believed the question of exclusivity remained open. The court's language in *Benjamins* seems clear: the Convention is the exclusive cause of action in cases governed by the Warsaw Convention.

Perhaps one explanation for the *Lockerbie* court's tentative reading of *Benjamins* is

Thus, the court examined the manner in which other jurisdictions handled the issue.¹⁸⁷ The court placed considerable significance on those cases that construed the Convention's provisions as promoting the Convention's goals. Specifically, in addition to focusing on the Eleventh Circuit, the *Lockerbie* court looked to the Fifth and Ninth Circuits' analysis of the issue of exclusivity.¹⁸⁸ The Second Circuit concluded that both circuits viewed the Convention as the sole cause of action for cases arising under the Warsaw Convention.

In *Boehringer-Manhaim Diagnostics, Inc. v. Pan Am World Airways, Inc.*¹⁸⁹ the Fifth Circuit held that the Warsaw Convention was the exclusive remedy against an international carrier for loss or damage to cargo.¹⁹⁰ While this holding is not the

that the *Lockerbie* court viewed the *Benjamins* court's treatment of the exclusivity issue as mere *dicta*. Essentially, the *Lockerbie* court interpreted *Benjamins* as creating a cause of action under the Convention but not necessarily creating the only cause of action. Additionally, the *Lockerbie* court might have believed that reading the *Benjamins* decision as holding that the Convention was the exclusive cause of action was too far reaching, considering that *Benjamins* had overturned a series of cases which held that the Warsaw Convention created no cause of action at all. Thus, the Second Circuit felt the need to examine the case law of other circuits to determine whether the Warsaw Convention should preempt state law causes of action. For a further discussion of why the *Lockerbie* court believed the question of exclusivity remained unanswered, see *supra* note 71 and accompanying text.

¹⁸⁷ 928 F.2d at 1276-77. In the cases examined by the *Lockerbie* court there appears to be much confusion between the issue of whether the Convention is the exclusive remedy or the exclusive cause of action. See *infra* notes 189-200 and accompanying text. If the Convention is the exclusive remedy, then state claims seeking punitive awards may be brought subject to the \$75,000 limitation. On the other hand, if the Convention is the exclusive cause of action, no lawsuit may be brought under the guise of state law claims. The distinction, however, blurs when one compares the similarities between preempting only punitive claims and preempting all state claims to a holding that the Convention is just the exclusive remedy or the exclusive cause of action. If plaintiffs could initiate suit under state law, then confusion would continue over whether punitive awards could be provided under the state claims. To avoid addressing a complicated issue completely and to permit the Convention to act as a uniform guide on international airline liability, all avenues of state action must be closed. Similarly, to avoid the confusion inherent in permitting state law claims, the Convention must not only supply the exclusive remedy, it must also provide the exclusive cause of action. Otherwise, the Convention could not function as a uniform guide to airline liability and effectively limit such liability.

¹⁸⁸ 928 F.2d at 1273-74.

¹⁸⁹ 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985).

¹⁹⁰

The essential inquiry is whether the convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law. We

equivalent of stating that the Convention is the exclusive cause of action, the court went on to state that the Warsaw Convention preempted Texas law in all areas the Convention covered.¹⁹¹ The Fifth Circuit noted that "an obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers."¹⁹² The *Lockerbie* court's reading of *Boehringer* is thus not off the mark.

The *Lockerbie* court seems, however, to have missed the mark in its analysis of a Ninth Circuit case. *In re Mexico City Aircrash* of October 31, 1979¹⁹³ the Ninth Circuit held that the Warsaw Convention created a cause of action to sue for wrongful death,¹⁹⁴ without holding that the Convention was the exclusive cause of action to sue under the Convention. In fact, the Ninth Circuit expressly stated that "the delegates [of the Convention] did not intend that the cause of action created by the Convention be exclusive."¹⁹⁵ Undaunted, the Second Circuit in *Lockerbie* cited *Mexico City* for the proposition that the "Ninth Cir-

have not previously addressed this question We hold today that the Warsaw Convention creates the cause of action and is the exclusive remedy. Our colleagues of the Second and Ninth Circuits previously have so concluded.

Id. at 458.

¹⁹¹ *Id.* at 459. Interestingly, *Boehringer* cites *Benjamins* for the proposition that the Warsaw Convention creates a cause of action, although not necessarily the exclusive cause of action. *Id.* On the other hand, *Lockerbie* cites *Boehringer* for the holding that the Convention is the exclusive cause of action. 928 F.2d at 1273-74. The question then is whether these two statements are consistent. If *Boehringer* is stating that the Convention creates a cause of action, but that the exclusive remedy for such a breach or a breach based on some other legal theory is the Convention's liability limits, then *Lockerbie* is incorrect when it cites *Boehringer* for the proposition that the Convention created an exclusive cause of action. *Id.* However, *Boehringer* also concluded that any state law in conflict with the Convention is invalid under the preemption doctrine since the Convention is equivalent to federal law. 737 F.2d at 459. While this is slightly different from stating that the Convention creates the exclusive cause of action, when one examines the ramifications of allowing independent state claims under the Convention, it becomes clear that all state claims could potentially conflict with the Convention's goals. See *supra* notes 139-79. In the end, the two holdings are therefore consistent because independent state claims do conflict with the Convention; the Convention must therefore be the exclusive cause of action.

¹⁹² 737 F.2d at 459.

¹⁹³ 708 F.2d 400 (9th Cir. 1983).

¹⁹⁴ *Id.* at 416. Much like the Second Circuit's decision in *Benjamins*, the court in *Mexico City* overruled a line of cases which held that the Convention did not create a cause of action. Unlike *Benjamins* however, the *Mexico City* decision did not state that the Convention was the exclusive cause of action to sue under the Convention. See *supra* note 186.

¹⁹⁵ 708 F.2d at 414 n.25.

cuit has rebutted the idea that a cause of action may be founded on some law other than the Convention"¹⁹⁶ Here, the *Lock-
erbie* court clearly erred.¹⁹⁷

Nevertheless, another Ninth Circuit decision cited by the *Lockerbie* court does support the Second Circuit's exclusivity holding. In *In re Aircrash in Bali, Indonesia* on April 22, 1974¹⁹⁸ survivors of passengers killed in a plane crash in Indonesia brought wrongful death actions against Pan Am. The United States District Court for the Central District of California permitted a jury award of damages above the \$75,000 Convention limit. The Ninth Circuit held that the district court erred by applying California law, which prevented a decedent from compromising a survivor's right to a wrongful death recovery, instead of applying the liability limits imposed by the Convention.¹⁹⁹ In essence, the court held that to the extent that California law would override the application of the Convention's \$75,000 cap, California law was preempted by the Convention.²⁰⁰ While the court never directly stated that the Convention was the exclusive cause of action, its holding would have no meaning if state claims continued to be available under the Convention. Since the application of state law would prevent the Convention from acting as a limitation on liability, by the language of the *Bali* court all state claims must be preempted.

Nevertheless, like the Fifth Circuit, the Ninth Circuit's reasoning supports the Second Circuit's position that state punitive damage claims contravene the Convention's goals. Therefore the conclusion that the Convention should provide the exclusive

¹⁹⁶ 928 F.2d at 1274.

¹⁹⁷ In addition to creating a cause of action under the Convention, the *Mexico City* court seems to have reasoned that any application of state law that resulted in an award over the \$75,000 Convention limitation would be inconsistent with and therefore preempted by the Convention. Nevertheless, this reasoning can be read to lend support to the *Lockerbie* decision to preempt all state law claims. The Ninth Circuit reasoned that the Warsaw Convention preempted state law to the extent that state law would affect the recovery allowed by the Convention: to the extent that the application of state law increased an airline's liability beyond the limitations envisioned by the Convention, state law would be preempted. 708 F.2d at 414 n.25, 418. Assuming that litigation costs would increase if state law claims seeking punitive damages were applicable under the Convention, the *Mexico City* decision could be used to justify the preemption of all state claims. *Mexico City*, 708 F.2d at 414 n.25, 415-16, 418; *Lockerbie*, 928 F.2d at 1274-76.

¹⁹⁸ 462 F. Supp. 1114 (C.D. Cal. 1978).

¹⁹⁹ 684 F.2d 1301, 1306-08 (9th Cir. 1982).

²⁰⁰ *Id.* at 1308.

cause of action logically flows from the decisions of the Fifth and Ninth Circuits, even though neither Circuit directly held that the Convention creates an exclusive cause of action.

3. Cases in Opposition to *Lockerbie*

The Second Circuit acknowledged that courts disagree on whether state punitive damage claims are preempted by the Convention. The court cited two cases where punitive damages were not found to be preempted by the Warsaw Convention.²⁰¹ However, neither case cited by the court engaged in any substantive exclusivity inquiry. Moreover, one of the cited decisions was recently overturned.²⁰² The dearth of judicial authority in support of awarding punitive damages only lends credence to the Second Circuit's conclusion that state punitive damage claims are preempted by the Warsaw Convention.²⁰³

In *Hill v. United Airlines*²⁰⁴ the United States District Court of Kansas held that passengers seeking recovery against United Airlines for intentional misrepresentation of flight delays could proceed with claims seeking punitive damages. The court stated that "the provisions of Article 25(1), which makes an exception to defendant's limited liability . . . *might* entitle plain-

²⁰¹ *Hill v. United Airlines*, 550 F. Supp. 1048 (D. Kan. 1982); *In re Korean Air Lines Disaster* of Sept. 1, 1983, 932 F.2d 1475, 1490 (D.C. Cir.) (vacating \$50 million punitive jury award as a result of the shooting down of a Korean Airliner over the Sea of Japan because the Convention is compensatory in nature only), *cert. denied*, 112 S. Ct. 616 (1991).

²⁰² *Korean Air Lines Disaster* at 1490; see *infra* notes 207-10 and accompanying text.

²⁰³ *Hill*, 550 F. Supp. at 1048 (defendant's summary judgment motion denied, permitting plaintiffs to seek \$10,000 punitive award for alleged intentional misrepresentation on the part of the airline); *Korean Air Lines Disaster*, 932 F.2d at 1479 (jury awards \$50 million in punitive damages in a wrongful death action governed by the Convention and appellate court vacates punitive damage award), *cert. denied*, 112 S. Ct. 616 (1991); *In re Karachi*, 729 F. Supp. 17 (S.D.N.Y. 1990) (summary judgment motion denied which sought dismissal of punitive damage claims), *rev'd in In re Lockerbie*, 928 F.2d 1267 (2d Cir.) (denial of summary judgment reversed and punitive damage claims dismissed), *cert. denied*, 112 S. Ct. 331 (1991). The result: *Hill* is the only current decision that has not dismissed punitive claims or awards.

²⁰⁴ 550 F. Supp. at 1048. *Hill* involved the issue of whether the Warsaw Convention precluded recovery by passengers who alleged that United Airlines intentionally misrepresented to them certain information concerning connecting flights. The court held that an action based on intentional misrepresentation was within the scope of the Warsaw Convention. *Id.* at 1054.

tiffs to recover actual punitive damages"²⁰⁵ The court, however, was not directly faced with the issue of whether punitive damages could be awarded under the Convention. Additionally, courts that have directly examined the punitive damage issue have not accepted the *Hill* decision as persuasive.²⁰⁶

The Second Circuit also cited *In re Korean Air Lines Disaster of September 1, 1983*²⁰⁷ for the proposition that punitive damage claims are available under the Convention. In *Korean Air Lines Disaster* the United States District Court of the District of Columbia, without opinion, affirmed a jury award of \$50 million in punitive damages for the wrongful deaths resulting from the downing of a Korean Airline jet by a Soviet plane. After the Second Circuit decided *Lockerbie*, however, the Court of Appeals for the District of Columbia Circuit vacated that lower court's affirmation of the punitive damage award, thereby strengthening the *Lockerbie* court's holding that punitive dam-

²⁰⁵ *Id.* at 1056 (emphasis added). In denying defendant's motion to dismiss the intentional misrepresentation claims, the court stated that plaintiffs might be entitled to their punitive damage award claims if the plaintiffs could prove the required elements of the intentional misrepresentation claims. This conclusion was based on the court's determination that plaintiffs properly included Article 25, which lifts liability limits under Convention, in their complaint. *Id.* However, it is difficult to ascertain what the *Hill* court meant by this statement. Did it mean that Article 25 provides for the inclusion of punitive damage claims or that if the plaintiffs had not pleaded claims based on Article 25, a court could not consider whether to award the punitive damage claims beyond the Convention's liability limits? Since the *Hill* decision does not address the issue of punitive damages in any in depth manner, many courts have refused to follow it. Courts have been unsure exactly what the *Hill* decision stands for in relation to punitive damage awards. See *infra* note 206.

²⁰⁶ *Lockerbie*, 928 F.2d at 1277 (2d Cir. 1991) ("*Hill* stated only that the plaintiffs in that case had properly invoked the willful misconduct provision, which if proved might entitle plaintiffs to recover actual damages, but this holding was not supported by any detailed reasoning."); *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1488-89, n.43 (11th Cir. 1989) ("It is not clear whether the court in *Hill* held that punitive damages are recoverable in an action governed by the Convention . . . [but i]n any event, to the extent that *Hill* authorized recovery of punitive damages under the Warsaw Convention, we decline to accept its holding."); *In re Air Crash Disaster at Gander, Newfoundland on December 12, 1985*, 684 F. Supp. 927, 933 (W.D. Ky. 1987) ("The reasoning in *Hill* is not logically consistent and the court's holding is of dubious precedential value in this case. Consequently, this court declines to follow the rule or decision in *Hill*."); *Harpalani v. Air-India, Inc.*, 634 F. Supp. 797, 799 (N.D. Ill. 1986) ("Only . . . [*Hill*] has suggested that the Warsaw Convention does permit punitive damage awards. That court did so in dicta without carefully examining the authority for punitive awards, and this court declines to adopt its conclusion.").

²⁰⁷ 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991).

age awards are barred under the Convention.²⁰⁸

The District of Columbia Circuit in *Korean Air Lines Disaster* construed the Convention in a manner that would promote uniformity. The court noted that "[t]he uniform application of the treaty would be threatened if the United States, alone among contracting states, imposed a liability [standard] wholly outside the compensatory scheme Undoubtedly, punitive liability for international carriers would be controversial . . . and we should construe the Convention to avoid such a potential source of divergence."²⁰⁹ This analysis mirrors the Second Circuit's focus on uniformity and liability limitations.²¹⁰ Therefore,

²⁰⁸ As in the *Lockerbie* decision, the Supreme Court has declined to review the Court of Appeals for the District of Columbia Circuit's decision to dismiss the punitive damage award. 112 S. Ct. 616 (1991).

²⁰⁹ 932 F.2d at 1487.

²¹⁰ *Id.* The court in *Korean Air Lines Disaster* clearly stated that its holding did not reach the issue of whether the Convention preempts all state causes of action because the vacated punitive claim was based on federal maritime law and not the Convention. *Id.* at 1486. The court, however, did find that the Convention was purely compensatory in nature.

This conclusion comports with our obligation to construe the Convention in a manner that will promote uniformity. The uniform application of the treaty would be threatened if the United States, alone among contracting parties, imposed a form of liability wholly outside the compensatory scheme of [the Convention.] Undoubtedly, punitive liability for international carriers "would be controversial for most signatories," and we should construe the Convention to avoid such a "potential source of divergence."

Id. at 1487 (citations omitted). The inference is that had the *Korean Air Lines Disaster* court addressed the issue, it would have followed *Lockerbie* and found state claims preempted by the Convention. *Id.*

The *Korean Air Lines Disaster* decision, however, was not without dissent. Judge Mikva vigorously disagreed with the court's determination that punitive damages were preempted under the Convention. 932 F.2d at 1490 (Mikva, J., dissenting). First, the dissent did not believe that the Convention preempted punitive damage claims and argued instead that the court should have engaged in a choice of law analysis to determine the applicable state law on the punitive damage issued. *Id.* Second, the dissent criticized the majority for relying too heavily on the *Lockerbie* decision. *Id.* at 1491-92. Judge Mikva believed that the *Lockerbie* court reached too far in holding that the Convention provided the exclusive cause of action. *Id.* The dissent reasoned that there was a significant difference between preempting punitive damage claims and preempting all state law. To support this proposition, the dissent examined the text of the Convention and concluded that Article 24 expressly preserved independent state actions. *Id.* at 1492. "The Convention is not the exclusive remedy for passengers injured on international flights, in fact, Article 24's reference to 'any action for damages, however founded' clearly contemplates actions arising under separate sources of law. . . ." *Id.* The dissent focused on the Supreme Court's instructions in *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122 (1989), see *supra* notes 59 & 85, and determined that Article 24's plain meaning preserved independent state claims. 932 F.2d at 1493.

with the exception of *Hill*,²¹¹ no court has held that punitive damages are available in an action governed by the Warsaw Convention.

CONCLUSION

By adopting the position that punitive damages are barred under the Convention, the Second Circuit construed the Convention in a manner consistent with the intended goals of the Convention's drafters. The Second Circuit supported this conclusion by examining the potential chaos that might result if independent state claims seeking punitive awards were permitted under the Convention. This potential confusion prompted the court to preempt all state law claims, thus making the Convention the exclusive cause of action for claims within the Convention's scope.

While commentators and courts might criticize the Second Circuit for paying too much heed to legislative intent or for unnecessarily preempting all state claims, the decision was both sound and necessary to insure uniform liability standards for the international airline industry. As long as hundreds of airlines and nations remain intertwined in international travel, set rules are necessary to insure predictability in determining potential liability. While preempting punitive claims and declaring the Convention to be the exclusive cause of action is controversial, *Lockerbie* will nevertheless help insure that international airlines receive needed guidance.

Since the Warsaw Convention continues to be the governing law on liability standards for international air travel, courts are obligated to enforce the current provisions of Convention. As the supreme law of the land, any change in the structure of the Convention must come from either changing the Convention itself or from the United States withdrawing its membership. Until that

Having determined that the Convention's text was clear, the dissent did not examine the drafters' intent. Instead, Judge Mikva reasoned that the issue of punitive damages should have been relegated to a choice of law determination. *Id.* at 1495-99. The dissent's analysis, however, completely fails to examine the confusion and expense that would arise in applying state law. The dissent fails to comprehend the effect a literal interpretation would have upon the Convention's ultimate goals. Therefore the Second Circuit's decision to preempt all state claims is more faithful to the true spirit of the Convention than is Judge Mikva's formalistic reading of the Convention's text.

²¹¹ 550 F. Supp. 1048 (D. Kan. 1982).

time it is the duty of courts to enforce the Convention's text and goals. The *Lockerbie* court should be commended for fulfilling this obligation by prohibiting the award of punitive damages under the Warsaw Convention.

Howard T. Edelman