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International Aviation Law Anarchy: Zicherman v. Korean Air Lines Dismantles the Warsaw System

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NOTES AND COMMENTS

INTERNATIONAL AVIATION LAW ANARCHY: *ZICHERMAN V. KOREAN AIR LINES* DISMANTLES THE WARSAW SYSTEM

I. INTRODUCTION

On September 1, 1983, Korean Air Lines (KAL) Flight 007, en route from the United States to South Korea, accidentally strayed into Soviet airspace.[1] The flight crew recognized the danger but, fearing discipline by KAL, refused to return to Anchorage.[2] A short time later, a Soviet aircraft intercepted and shot down the jet.[3] Two hundred and sixty-nine passengers and crew members died in the disaster.[4] There were no survivors.

The families of the victims filed multiple suits against KAL. The plaintiffs' claims were governed by the Warsaw Convention,[5] which provides a remedy for accidents such as the KAL disaster, occurring on flights between signatory nations.[6] Article 17 of the Treaty provides for airline liability 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.[7]

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1. *See* Zicherman v. Korean Air Lines, 116 S. Ct. 629, 631 (1996).

2. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1478 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 991 (1991) [hereinafter *In re KAL*].

3. *See Zicherman*, 116 S. Ct. at 631.

4. *See id.*

5. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 12 (1933) [hereinafter Warsaw Convention]. The terms "Treaty" and "Convention" will also be used to refer to the Warsaw Convention throughout this Note.

6. *See id.* For a list of signatories to the Warsaw Convention see U.S.C.S. INTERNATIONAL AGREEMENTS 341-42 (Law. Co-op. 1995).

7. Warsaw Convention, *supra* note 5, art. 17, 49 Stat. at 3018, (unofficial English translation). The official French text reads:

Le transporteur est responsable du dommage survenu en cas de mort, de bles-

After a trial and a verdict for the plaintiffs, the federal district court considered the type and amount of damages to award.[8] In addition to financial loss, the surviving family members claimed and received nonpecuniary damages, including survivors' grief, emotional distress, and loss of society.[9] The federal court of appeals reversed and set aside some of the nonpecuniary damages.[10] Marjorie Zicherman and Muriel Mahalek, the mother and sister, respectively, of Flight 007 victim Muriel Kole, appealed the denial of loss of society damage to the U.S. Supreme Court claiming that the Warsaw Convention permits such damages. The validity of their claim rested on the meaning of the term *dommage survenu* (damage sustained) found in Article 17.

In January of 1996, the Supreme Court rendered its decision

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sure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

Id. art. 17, 49 Stat. at 3005, 137 L.N.T.S. at 22.

8. In the absence of willful misconduct by the airline, the Warsaw Convention limits a plaintiff's liability to $75,000. *See* Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, *reprinted in* 49 U.S.C. § 40105 (1994) [hereinafter Montreal Agreement]. In the Flight 007 cases, a jury found that KAL acted with willful misconduct. *See In re KAL*, 932 F.2d at 1477; *see also* Warsaw Convention, *supra* note 5, art. 25(1), 49 Stat. at 3006, 137 L.N.T.S at 26.

On January 8, 1997, the U.S. Department of Transportation approved the International Air Transport Association (IATA) Intercarrier Agreement (IIA), the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), and the Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs (IPA). *See* D.O.T. Order No. 97-1-2 (January 8, 1997). These agreements, negotiated between the United States, the IATA and the Air Transport Association of America (ATA), provide for unlimited international air carrier liability and liability without fault for damages up to 100,000 SDRs (Special Drawing Rights), the equivalent of approximately $146,000. *See* Desmond T. Barry, Jr. & Thomas J. Whalen, *Unlimited Liability: The New Ball Game in International Transportation by Air*, 64 DEF. COUNS. J. 381, 382-83 (1997). These recent agreement are inapplicable to the KAL 007 cases.

9. The U.S. Supreme Court defines loss of society as encompassing "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection." Sea-Land Svcs. v. Gaudet, 414 U.S. 573, 585 (1974). Courts award monetary damages as an attempt to compensate victims for this kind of injury. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 952-53 (5th ed. 1984) (commenting on the intangibility of loss of society and the absurdity of equating it with pecuniary loss). Although a person who has suffered a loss from an intentional or negligent tort cannot be "made whole"—that is, rendered as physically or emotionally fit as if the accident had not happened at all—the law endeavors to make these victims as "whole" as is possible with money damages. *See* JOHN T. BLANCHARD, CALIFORNIA REMEDIES 420 (1995).

10. *See* Zicherman v. Korean Air Lines, 43 F.3d 18, 21-23 (2d Cir. 1994).

in *Zicherman v. Korean Air Lines*.[11] Writing for a unanimous Court, Justice Antonin Scalia refused to find that the words *dommage survenu*, had their own independent meaning in the Treaty. The Court found that the words provided "nothing more than a pass-through, authorizing [the Court] to apply the law that would govern in the absence of the Warsaw Convention."[12] In reaching its decision, the Court held that the governing domestic law was the Death on the High Seas Act (DOHSA).[13] The Court applied DOHSA because the Flight 007 disaster occurred "beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States."[14] Under DOHSA, however, plaintiffs may not recover nonpecuniary damages.[15] Thus, the Court eliminated the loss of society damages from Zicherman's and Mahalek's recovery.

The implications of the *Zicherman* decision, however, extend beyond the narrow issue of loss of society damages. The application of DOHSA eliminates *all* types of nonpecuniary damages.[16] DOHSA however, does not exclusively define damages because not all international aviation accidents occur on the high seas. Depending upon the circumstances of the accident, *Zicherman* potentially imposes various state and federal laws to define the damages recoverable under the Warsaw Convention. This application defeats the relevant objectives of the Warsaw Convention, including uniformity, deterrence of willful misconduct, and the attainment of equity between passengers and airlines.

This Note analyzes the effect of the *Zicherman* decision on the Warsaw system. Part II reviews the facts of *Zicherman*, and Part III presents a brief overview of the Warsaw Convention. Part IV examines the *Zicherman* decision, followed by its ramifications in Part V. Part VI analyzes *Zicherman v. Korean Air Lines*, examining Article 17 with the method of treaty interpretation dictated by customary international law. This method requires fulfillment of the Treaty's purposes, which this Note identifies. Because the

11. 116 S. Ct. at 629.

12. *Id.* at 636.

13. Death on the High Seas by Wrongful Act, 46 U.S.C. app. § 761-67 (1994).

14. *Id.* § 761. The Court has held that DOHSA applies to airplane crashes. *See* Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 263-64 (1972).

15. *See* 46 U.S.C. app. § 762; *see also* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978).

16. In *Zicherman*, KAL only challenged the loss of society damages. *Zicherman*, 116 S. Ct. at 636 n.4.

Zicherman Court's interpretation runs contrary to the purposes of the Warsaw Convention, Part VI provides an alternative interpretation. Part VII argues that Congress should enact legislation to implement a uniform and fair interpretation of the Treaty. Such legislation would result in more consistent rulings, ensure fairness among litigants, mitigate the anarchy, and shorten the protracted legal process that currently exists.

II. THE FACTS OF *ZICHERMAN V. KOREAN AIR LINES*

KAL Flight 007 never arrived in Seoul, South Korea as scheduled.[17] Early reports stated that Soviet Air Force planes had forced the Boeing 747 to land on Sakhalin Island and that the passengers were safe.[18] Eighteen hours later,[19] however, U.S. Secretary of State, George Schultz, announced that a Soviet military jet had shot down Flight 007,[20] killing all 269 passengers and crew members aboard.[21] In subsequent lawsuits filed by the victims' families, both KAL and the plaintiffs presented their version of the facts to a jury.[22] Although the facts are still disputed,[23] the jury accepted the following facts as recounted by the appellate court.[24]

A. The Disaster

Flight 007 originated in New York and briefly stopped in Anchorage, Alaska before setting a course for Seoul, South Korea.[25] Before leaving Anchorage, the 007 flight crew incorrectly programmed the aircraft's Inertial Navigation System (INS).[26] The

17. *See* Clyde Haberman, *Korean Jetliner with 269 Aboard Missing Near Soviet Pacific Island*, N.Y. TIMES, Sept. 1, 1983, at A1.

18. *See id.*

19. *See* William R. Doerner et al., *Atrocity in the Skies*, TIME, Sept. 12, 1983, at 18.

20. *See* Robert D. McFadden, *U.S. Says Soviets Down Korean Airliner*, N.Y. TIMES, Sept. 2, 1983, at A1.

21. *See* Steven Strasser et al., *A Ruthless Ambush in the Sky*, NEWSWEEK, Sept. 12, 1983, at 16. The victims of the disaster included 60 Americans. *See id.* at 17.

22. *See In re KAL*, 932 F.2d at 1475.

23. *See, e.g.*, MICHEL BRUN, INCIDENT AT SAKHALIN (1995); *see also* David Pearson, *K.A.L. 007: What the U.S. Knew and When We Knew It*, THE NATION, Aug. 18-25, 1984, at 105; Perry S. Bechky, *Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation*, 60 J. AIR L. & COM. 455, 503 n.228 (1995).

24. *See In re KAL*, 932 F.2d at 1475.

25. *See id.* at 1477.

26. *See id.* at 1478. The INS is a gyroscopic navigational device for calculating flight position which the crew must properly program before takeoff by inputting the latitude

crew noticed this error en route but, fearing suspension by KAL, did not return to Anchorage.[27] Flight 007 flew progressively further off course as it traveled from Anchorage towards Seoul.[28] The jet crossed over the Kamchatka Peninsula, the Sea of Okhotsk, and then over sensitive Soviet military facilities on the island of Sakhalin.[29] A Soviet Sukhoi–15 intercepted the 747 and fired at least two missiles.[30] The 747 was struck and plummeted into the Sea of Japan.[31]

The crew of Flight 007 knew the danger of flying into Soviet airspace.[32] They were aware that, in a 1978 incident, KAL Flight 902 flew into Soviet airspace because of a navigational equipment malfunction.[33] Soviet military aircraft intercepted KAL 902 and blasted a hole in its fuselage, killing two passengers, injuring thirteen, and forcing the plane to crash–land on an ice–covered lake.[34]

B. The Lawsuit

Marjorie Zicherman and Muriel Mahalek, as well as other surviving family members, filed individual suits against KAL in various federal courts. The courts subsequently transferred these cases to a Judicial Panel of Multi–district Litigation court for consolidated proceedings on the common issue of liability.[35] The jury concluded that the crew's actions, in conjunction with their knowledge of Flight 902, constituted willful misconduct under Article 25 of the Warsaw Convention.[36] Consequently, KAL's liability for damages could exceed the $75,000 liability cap of the Warsaw

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and longitude of the gate where the aircraft is parked. *See id.*

27. *See id.*

28. *See id.* at 1477-78.

29. *See* Doerner, *supra* note 19, at 14.

30. *See* Strasser, *supra* note 21, at 16.

31. *See* Doerner, *supra* note 19, at 18.

32. *See id.*

33. *See The Worst, But Not the First*, TIME, Sept. 12, 1983, at 17.

34. *See id.*

35. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 575 F. Supp. 342 (J.P.M.L. 1983).

36. *See In re KAL*, 932 F.2d. at 1478. The unofficial English translation of article 25(1) reads:

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

Warsaw Convention, *supra* note 5, art. 25(1), 49 Stat. at 3020 (emphasis added).

Convention.[37] The jury awarded the plaintiffs $50 million in punitive damages.[38] The court held that, because of the wide disparity in the plaintiffs' circumstances, the individual district courts must determine all other damages on a case by case basis.[39] On appeal, the District of Columbia Circuit Court of Appeals reversed the punitive damages award and remanded the cases to the district courts for determination of compensatory damages.[40] After hearing the issue of damages in Zicherman and Mahalek's suit, a New York jury found KAL liable for $375,000.[41]

KAL appealed the New York judgment.[42] The court of appeals reversed the judgment awarding the survivors' grief damages (mental injury) and set aside the loss of society awards.[43] The court held that general maritime law, not DOHSA, controlled the allowable damages.[44] Citing general maritime law principles, the court held that a plaintiff must be the decedent's dependent to recover loss of society damages.[45] The court found that because Kole's sister, Mahalek, was not a dependent, she could not recover loss of society damages. The court then remanded the case to determine Zicherman's dependency status as the decedent's mother.[46]

Zicherman and Mahalek petitioned the U.S. Supreme Court for clarification and removal of the dependency requirement.

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37. *See* Montreal Agreement, *supra* note 8.

38. *See In re KAL*, 932 F.2d at 1479.

39. *See* Zicherman v. Korean Air Lines, 43 F.3d 18, 20 (2d Cir. 1994).

40. *See In re KAL*, 932 F.2d at 1485-87. The appellate court based this decision on the Lockerbie air disaster case that held the Warsaw Convention does not contemplate punitive damages. *See In re* Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 502 U.S. 920 (1991) [hereinafter *Lockerbie I*].

41. The jury awarded Zicherman and Mahalek the following damages:

Loss of Society — Zicherman	$ 70,000
Loss of Society — Mahalek	28,000
Mental Injury — Zicherman	65,000
Mental Injury — Mahalek	96,000
Loss of Support and Inheritance — Zicherman	16,000
Decedent's Pain and Suffering — Kole's Estate	100,000
Total Compensatory Damages	$375,000

See Zicherman, 43 F.3d at 21.

42. *See id.* at 18.

43. *See id.* at 21-23.

44. *See id.* at 21.

45. *See id.* at 22 (citing Wahlstom v. Kawasaki Heavy Indus., 4 F.3d 1084, 1092 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994)).

46. *See id.*

KAL cross-petitioned, contending that the Warsaw Convention does not permit loss of society damages whatsoever.[47] The U.S. Supreme Court granted certiorari, to decide the question of whether the Warsaw Convention provides for loss of society damages for deaths on the high seas.[48] The Court then eliminated all loss of society damages from the plaintiffs' recovery, holding that the domestic law, otherwise applicable to the case, defines the types of recoverable damages under the Warsaw Convention.[49]

III. LEGAL BACKGROUND: THE WARSAW CONVENTION

The development of international air transportation in the early part of this century created many new legal problems.[50] To address these issues, two international conferences held in 1925 and 1929, established the *Comité International Technique d'Experts Juridique Aériens* (CITEJA).[51] CITEJA drafted the Warsaw Convention[52] to unify the rules regarding the liability of the airlines for damages sustained during international flights and to supplant each signatory nation's differing domestic laws covering these issues.[53] The Convention also sought to limit the potential liability of the airlines for accidents in order to protect an industry that was it its infancy at the time.[54] With the latter goal in mind, CITEJA capped liability at $8300.[55] If, however, a court finds that a defendant airline engaged in willful misconduct, then the liability cap disappears.[56]

The $8300 liability limit was extremely low, even in 1929.[57] Numerous legal commentators, particularly those in the United

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47. *See Zicherman*, 116 S. Ct. at 632.

48. *See* Zicherman v. Korean Air Lines, 115 S. Ct. 1689 (1995).

49. *See Zicherman*, 116 S. Ct. at 637.

50. *See* Andreas E. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967).

51. *See id.*

52. *See* Warsaw Convention, *supra* note 5, 49 Stat. at 3000, 137 L.N.T.S. at 12.

53. *See* LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED 5 (1988).

54. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 499.

55. *See* Warsaw Convention, *supra* note 5, art. 22, 49 Stat. at 3006, 137 L.N.T.S. at 24. The Convention itself sets the limit at 125,000 Poincaré francs. *See id.* The United States established the dollar equivalent at $8,300 in 1933. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 499 n.10.

56. *See* Warsaw Convention, *supra* note 5, art. 25, 49 Stat. at 3006, 137 L.N.T.S. at 26.

57. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 499.

States, criticized the limit.[58] To address these complaints, the member nations drafted and debated amendments to the Convention.[59] The Hague Protocol, enacted in 1955, raised the liability limit to the equivalent of $16,300.[60] The United States, however, still considered this limit too low and refused to ratify the Protocol.[61]

The most significant change in the Warsaw system occurred in 1966, with the signing of the Montreal Agreement.[62] This agreement constituted neither a new treaty nor an amendment to the Warsaw Convention.[63] The Montreal Agreement was actually a special contract, enacted pursuant to Article 22 of the Warsaw Convention, between the United States government and the international air carriers operating within the United States.[64] This agreement raised the liability limit of the carrier for each passenger to $75,000.[65] In addition, the carriers agreed that they would not raise as a defense that they or their agents had taken all necessary measures to avoid the damage, or that taking such measures was impossible.[66] Thus, the Montreal Agreement substantially redefined the U.S. objectives of the Warsaw Convention and should alter the U.S. interpretation of the Convention.[67]

The U.S. federal courts have interpreted the provisions of Warsaw Convention on several occasions. Prior to *Zicherman*, the

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58. *See* GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS 37 (1977).

59. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 551.

60. *See* MILLER, *supra* note 58, at 37. The Hague Protocol established the liability limit at 250,000 francs. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371, 381.

61. *See* MILLER, *supra* note 58, at 37.

62. Montreal Agreement, *supra* note 8. The combination of the Warsaw Convention and the subsequent protocols and agreements is often referred to as the Warsaw system. *See* Bechky, *supra* note 23, at 468. This Note adopts this practice.

63. *See* STUART M. SPEISER & CHARLES F. KRAUSE, 1 AVIATION TORT LAW § 11:19, at 679 (1978).

64. *See id.* Article 22 of the Warsaw Convention authorizes carriers and passengers to agree, by special contract, to a higher limit of liability. *See* Warsaw Convention, *supra* note 5, art. 22(1), 49 Stat. at 3006, 137 L.N.T.S. at 24. For a list of the original signatories to the Montreal Agreement see SPEISER & KRAUSE, *supra* note 63, § 11:19, at 676-79 n.27. Today, all carriers operating to and from the United States are deemed to be parties to the Montreal Agreement. *See* 14 C.F.R. § 203 (1997).

65. *See* Montreal Agreement, *supra* note 8.

66. *See id.* (citing Warsaw Convention, *supra* note 5, art. 20(1), 49 Stat. at 3005, 137 L.N.T.S. at 24).

67. *See* discussion *infra* Part VI.C.

U.S. Supreme Court had addressed the damages provisions contained in the Warsaw Convention in *Eastern Airlines v. Floyd*.[68] The *Floyd* case concerned an incident in which three engines on an Eastern Airlines jet failed. The crew, however, managed to restart one engine and narrowly avoid a crash-landing in the ocean.[69] Subsequently, several passengers filed suit against Eastern Airlines for mental anguish.[70] The Court construed the Warsaw Convention's meaning of the term *lésion corporelle* (bodily injury) and concluded that an air carrier is not liable under the Warsaw Convention for a purely mental injury that is not accompanied by any physical injury.[71] The holding in this case is significant because of the construction method the Court employed. In *Floyd*, the Court looked to the French legal meaning for guidance to ascertain the signatories' intentions.[72]

The Second Circuit Court of Appeals interpreted the provisions of the Warsaw Convention regarding the availability of punitive damages. In *Lockerbie*, the case concerning a terrorist bombing of a jet over Scotland, the court held that the federal definition of punitive damages does not include a compensatory element.[73] The court thus perceived punitive damages as incompatible with the Warsaw Convention's goal of compensation without punishment.[74] Because the *Lockerbie* decision relied on the federal definition of punitive damages,[75] the introduction by *Zicherman* of state law into the Warsaw system could make punitive damages now available in some cases.

IV. THE FLIGHT 007 DECISION

In *Zicherman v. Korean Air Lines*, the Supreme Court interpreted Article 17 of the Warsaw Convention. The Court construed the words *dommage survenu*, which define the scope of the carrier's liability. It addressed whether these words encompass loss of society damages and, if they do, whether only dependents

68. 499 U.S. 530.
69. *See id.* at 533.
70. *See id.*
71. *See id.* at 552.
72. *See id.* at 536-42.
73. *See Lockerbie I*, 928 F.2d at 1280.
74. *See id.* at 1288.
75. *See id.* at 1280.

can recover those damages.[76]

A. Domestic Law Determines Damages

The Court first considered the plain meaning of the English words "damage" or "harm" to define *dommage survenu*.[77] It rejected this definition as too inclusive, stating "[i]t cannot seriously be maintained that Article 17 uses the term [*dommage*] in this broadest sense, thus exploding tort liability beyond what any legal system in the world allows, to the farthest reaches of what could be denominated 'harm.'"[78] The two alternative definitions the Court considered were the French legal meaning as existed in 1929, which the plaintiffs championed, and an empty meaning that domestic law would fill.[79]

The Court quickly dismissed the French legal definition.[80] It acknowledged that although it had looked to French law in *Eastern Airlines v. Floyd*[81] to interpret the term *lésion corporelle*, and in *Air France v. Saks*[82] to interpret the term *accident*, those cases relied upon French law only for a general meaning.[83] The Court provided the detailed meaning.[84]

The Court reasoned that the only realistic interpretation of Article 17 would be to allow domestic law to determine the damages a plaintiff could recover.[85] The Court supported this conclusion by examining Article 24 of the Convention, which refers the parties' "respective rights" to domestic law.[86] It argued that these

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76. *See* Brief for Petitioners/Cross-Respondents, *Zicherman* (Nos. 94-1361, 94-1477), *available in* 1995 WL 330611, at *i [hereinafter Petitioners' Brief].

77. *See Zicherman*, 116 S. Ct. at 632.

78. *Id.*

79. *See id.* at 632-33.

80. *See id.* at 633.

81. 499 U.S. 530 (1991).

82. 470 U.S. 392 (1985).

83. *See Zicherman*, 116 S. Ct. at 632-33.

84. *See id.*

85. *See id.* at 634.

86. Article 24 states:

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

Warsaw Convention, *supra* note 5, art. 24, 49 Stat. at 3020, (unofficial English translation).

include substantive as well as procedural rights.[87] The Court based this conclusion on, among other things, an evaluation of the *travaux préparatoires* (drafting papers) as recorded by CITEJA.[88] Citing two CITEJA reports, the Court found that the Warsaw Convention drafters wholly deferred the issue of available damages to the forum jurisdiction.[89]

The first CITEJA report stated that the type of damages subject to reparations "would be studied later on, when the issue of knowing which are the persons, who according to the various national laws, have the right to take action against the carrier, will have been elucidated."[90] The Court's opinion then cited a later CITEJA report, which proposed that damages should be regulated by private international law.[91]

Before concluding its analysis of Article 17, the Court briefly surveyed the other signatory nations' interpretations.[92] The Court noted that England, Germany and the Netherlands had adopted domestic legislation to govern Warsaw Convention damages.[93] Likewise, the Court noted that Canadian courts deny damages other than those permitted by provincial law.[94] The Court concluded that "expert commentators are virtually unanimous that the type of harm compensable is to be determined by domestic law."[95]

B. DOHSA is the Domestic Law that Guides this Case

Both parties agreed that U.S. law would govern the lawsuit's damage inquiry if the Convention did not.[96] Because the Court determined that the Convention did not have its own definition of damages, it considered how to define the term for the U.S.

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87. *See Zicherman*, 116 S. Ct. at 634.

88. *See id.* at 634-35.

89. *See id.*

90. *Id.* at 634 (quoting Henry de Vos, *Report of the Third Session*, CITEJA REPORTER, May 15, 1928, *reprinted in* INTERNATIONAL TECHNICAL COMMITTEE OF LEGAL EXPERTS ON AIR QUESTIONS 106 (1928)).

91. *See id.* at 634-35 (citing Henry de Vos, *Report of the Third Session*, CITEJA REPORTER, Sept. 25, 1928, *reprinted in* SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, WARSAW 1929, at 255 (R. Horner & D. Legrez trans. 1975)).

92. *See id.* at 635.

93. *See id.*

94. *See id.*

95. *Id.*

96. *See id.*

courts.[97] The Second Circuit had held that principles of general maritime law should determine the types of damages available.[98] This would guarantee a uniform rule regardless of whether an accident occurred over land, territorial waters, or the high seas.[99] The Supreme Court disagreed, stating that the U.S. courts have no authority to apply a common law rule to this type of case.[100] The Court noted that although Congress has the authority to legislate such a law, it has not done so.[101] The Court determined that, in the absence of a governing rule, it must address the damages question as if the Warsaw Convention did not exist.[102]

The Court found that because the Flight 007 disaster occurred on the high seas, DOHSA properly defined damages.[103] It also noted that, where DOHSA applies, neither state law nor general maritime law can supplement the damages because DOHSA is a federal statute preempting all other law.[104] Furthermore, under DOHSA, loss of society damages are not available.[105]

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97. *See id.* at 635-37.

98. *See Zicherman*, 43 F.3d at 21. Loss of society damages are a remedy available under general maritime law. *See* Sea-Land Svcs., Inc. v. Gaudet, 414 U.S. 573, 585-88 (1974).

99. *See Zicherman*, 43 F.3d at 21-22.

100. *See Zicherman*, 116 S. Ct. at 636.

101. *See id.*

102. *See id.*

103. *See id.* The relevant provision of DOHSA reads as follows:

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

46 U.S.C. app. § 761.

104. *See Zicherman*, 166 S. Ct. at 636 (citing Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232-33 (1986), and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978)).

105. *See* 46 U.S.C. app. § 762. DOHSA provides:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Id.

V. RAMIFICATIONS OF THE *ZICHERMAN* DECISION

Following *Zicherman*, U.S. federal courts handed down decisions involving nonpecuniary damages in two other cases arising out of the Flight 007 disaster. In 1996, the Sixth Circuit decided *Bickel v. Korean Air Lines*,[106] and the Ninth Circuit decided *Saavedra v. Korean Air Lines*.[107] The *Bickel* court performed a choice of law analysis and determined that U.S. law applied.[108] The court applied DOHSA,[109] and thus, reversed the award of damages for loss of society, survivor's grief, and decedent's pain and suffering.[110] As in *Bickel*, the *Saavedra* court found that DOHSA applied and quickly dismissed the loss of society damages.[111] The court also eliminated the survivors' grief damages on the same rationale.[112] The court reasoned that because DOHSA does not address predeath pain and suffering, courts cannot supplement Congress' remedy and allow a general maritime survival action that includes nonpecuniary damages.[113] The court, therefore, erased all nonpecuniary elements from the plaintiffs' recovery.[114]

Despite these windfalls for KAL, the *Zicherman* decision is no clear-cut victory for the airline industry because DOHSA does not always apply to cases involving an airline disaster. For example, in September 1996, the Second Circuit heard an appeal concerning the Lockerbie, Scotland disaster of 1988.[115] In that case, a bomb exploded in a suitcase on board Pan Am Flight 103 over Lockerbie, killing all 259 people aboard.[116] The jury determined

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106. 83 F.3d 127 (6th Cir. 1996).

107. 93 F.3d 547 (9th Cir. 1996).

108. *See Bickel*, 83 F.3d at 131. The court performed this choice of law analysis to determine which sovereign's law should apply in addition to the Warsaw Convention (e.g., U.S. law, Korean law, Japanese law, etc.). *See id.* In *Zicherman*, this was not an issue because both parties agreed that U.S. law should apply. *See Zicherman*, 116 S. Ct. at 635.

109. *See Bickel*, 83 F.3d at 131-32.

110. *See id.* The court subsequently reinstated the predeath pain and suffering award, however, on essentially procedural grounds. *See* Bickel v. Korean Air Lines, 96 F.3d 151 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

111. *See Saavedra*, 93 F.3d at 551-52.

112. *See id.* at 552.

113. *See id.* at 553-54 (citing *Higginbotham*, 436 U.S. at 618, Miles v. Apex Marine Corp., 498 U.S. 19 (1990), and *Zicherman*, 116 S. Ct. at 636).

114. The court disallowed over $2.5 million in nonpecuniary recovery. *See id.* at 550, 555.

115. *See* Pescatore v. Pan American World Airways, 97 F.3d 1 (2d Cir. 1996).

116. *See id.* at 3.

that Pan Am had engaged in willful misconduct by failing to comply with Federal Aviation Administration (FAA) regulations concerning baggage inspection.[117] The jury's finding of willful misconduct removed the $75,000 liability limit.[118] Pan Am sought review of the resulting $19 million verdict, which included damages for loss of society.

On review, the Second Circuit reasoned that *Zicherman's* holding required an evaluation of the law which would control the damage award if the Warsaw Convention did not.[119] The Court held that "the applicable body of substantive law governing damages is the law of Ohio, the plaintiff's domicile and residence, not federal maritime law."[120] Under the Ohio wrongful death statute, a plaintiff may recover compensatory damages for loss of society, loss of services, loss of support, and pre-judgment interest.[121] Thus, unlike in *Bickel* and *Saavedra*, the court upheld the entire $19 million verdict, including the $5 million award for loss of society.

These cases demonstrate that following the decision in *Zicherman*, the law regarding recoverable damages in airline disasters is inconsistent and somewhat incoherent. The *Zicherman* opinion distorts U.S. jurisprudence on international aviation into irreconcilable legal rules. The types of compensation and its availability for the victim of an international airline disaster post-*Zicherman* depends upon a multitude of factors including: the country where the action is filed;[122] the air carrier;[123] whether the accident resulted in death or merely injury;[124] whether the accident occurred over land, territorial waters, or over the high seas;[125] and the location of the plaintiff's home.[126] A plaintiff may even be able to ob-

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117. *See In re* Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 37 F.3d 804, 811-12 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) [hereinafter *Lockerbie II*].

118. *See* Warsaw Convention, *supra* note 5, art. 25(1), 49 Stat. at 3006, 137 L.N.T.S. at 26.

119. *See Pescatore*, 97 F.3d at 4-5.

120. *Id.* at 15.

121. *See* OHIO REV. CODE ANN. §§ 2125.02, 1343.03(C) (Anderson 1994); *see also Pescatore*, 97 F.3d at 15.

122. *See Bickel*, 83 F.3d at 130.

123. If the carrier has no U.S. operations, it will not be a party to the Montreal Agreement. *See* 14 C.F.R. § 203 (1997).

124. DOHSA only applies to *deaths* on the high seas. *See* 46 U.S.C. app. § 761.

125. *See id.* Where DOHSA does not apply, the Second Circuit contends that state law does. *See Pescatore*, 97 F.3d at 4-5.

126. If the court invokes state law, the plaintiff's domicile could determine which state

tain punitive damages in cases governed by a state law that views punitive damages as serving a compensatory function.[127] This situation epitomizes "jungle-like chaos."[128] A proper analysis of the text of Article 17 could certainly resolve this problem.

VI. ANALYSIS: THE INTERPRETATION OF ARTICLE 17

Various potential sources for the definition of *dommage survenu* confronted the Court as it interpreted the Warsaw Convention. The Court finally chose to characterize the words as "nothing more than a pass–through," allowing the various state and federal statutes to provide the meaning.[129] This has resulted in the chaotic approach described above. Consequently, this Note offers an alternative interpretation.

The alternative approach uses the method directed by customary international law, as declared in the Vienna Convention on the Law of Treaties, to interpret the Warsaw Convention.[130] Courts applying the Vienna Convention method must read the ordinary meaning of the treaty terms to fulfill the treaty's purpose.[131] Such an interpretation requires consideration of the context of the Warsaw Convention from the United States' perspective.[132]

The purposes of the Warsaw Convention, when examined in this context, include uniformity of international legal rules, deterrence of willful misconduct, and equal treatment of international airline passengers and air carriers. This Note asserts that the ordinary meaning of the language, as captured by the dictionary definition, reflects the intended purposes of the Convention. The pass–through definition of *Zicherman*, however, does not.

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law applies. *See id.*

127. *See Lockerbie I*, 928 F.2d at 1272. This view is a distinct minority. *See id.*

128. Reed v. Wiser, 555 F.2d 1079, 1092 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

129. *Zicherman*, 116 S. Ct. at 636.

130. *See* Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf. 39/27 (1969), arts. 31-32, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

131. *See id.* art. 31(1), at 8 I.L.M. 691-92.

132. *See id.*

A. Treaty Interpretation: The Vienna Convention Approach

Treaty interpretation begins with a choice of interpretive methods. In this regard, three schools of thought, subjective, textual, and teleological, dominate the field of international treaty interpretation.[133] The *subjective* approach aims to ascertain the "real" intentions of the parties.[134] The *textual* approach rigidly adheres to the words of the treaty.[135] The *teleological* approach seeks to give effect to the object and purpose of the treaty.[136] Commentators, however, often combine the various interpretive methods.[137] Articles 31 and 32 of the Vienna Convention on the Law of Treaties provide such a synthesis.[138] It states that "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 object and purpose."[139]

The Vienna Convention method of interpretation includes elements from the three primary theories of treaty interpretation. It follows the textual method by first looking to the objective meaning of the treaty's words. It is teleological because it seeks to fulfill the treaty's intended purpose. Finally, it is subjective as it attempts to ensure the signatories' contemplated result.

Although the United States did not sign the Vienna Convention, the Legal Adviser to the U.S. Department of State recognized the Vienna Convention as declaratory of customary international law.[140] Because of the importance of the Vienna Convention approach,[141] this Note uses its method as a guide to the interpretation of the Warsaw Convention.

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133. *See* SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 115 (1984); *see also* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 327 (1985) (discussing two additional methods: the contextual approach, which reads the Treaty in its "nearer and wider context;" and the logical method, which favors rational techniques of reasoning and abstract legal principles).

134. *See* SINCLAIR, *supra* note 133, at 115.

135. *See id.*

136. *See id.*

137. *See* VILLIGER, *supra* note 133, at 327.

138. *See* Vienna Convention, *supra* note 130, arts. 31-32, 8 I.L.M. at 691-92.

139. *Id.* art. 31(1), 8 I.L.M. at 691.

140. *See* VILLIGER, *supra* note 133, at 337; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a (1987). The Supreme Court has expressly held customary international law to be binding on the United States. *See* The Paquete Habana, 175 U.S. 677 (1900).

141. *See* Bechky, *supra* note 23, at 470-71.

B. The United States' Perspective

To ascertain the objectives in using the words *dommage survenu*, the interpreter must determine the proper perspective. The threshold question is whether those words have their own meaning in the treaty applicable to all signatories, or the words should derive their meaning from the various domestic laws. If the drafters intended only one meaning for the term regardless of the forum court, the task falls on the interpreter to find "the shared expectations of the contracting parties"[142] in using that term. If, on the other hand, the drafters intended for each domestic court to provide its own definition, the appropriate focus is on the forum nation's objectives in signing the treaty.

The *Zicherman* Court's conclusion that the forum nation's domestic law should determine the recoverable damages resulted from its examination of Article 24 of the Convention, the *travaux preparatoires*, the post–ratification conduct of other signatories, and the "virtually unanimous" opinion of expert commentators.[143] Such a result is reasonable because signatory nations would likely only join a treaty that contemplates a determination of compensation for harms found in their own legal systems.[144] In 1929, several of the Convention signatory nations had not recognized nonpecuniary damages as an element of wrongful death recovery.[145]

Recourse to domestic law, however, does not necessarily lead to the definition of *dommage survenu* as a "pass–through."[146] The Court may instead give the words their own single meaning within the treaty without bringing in other domestic laws. The Court could only justify its pass–through characterization if that result fulfilled the purposes of the Warsaw Convention. The pass–through definition, however, may actually defeat the purposes of the Convention depending upon the state and federal statute that is triggered. For example, the use of DOHSA to define the compensable harm limits the available recovery to only pecuniary loss,[147] thus, insufficiently deterring willful misconduct and failing

142. Air France v. Saks, 470 U.S. 392, 399 (1985).

143. *Zicherman*, 116 S. Ct. at 633-35.

144. *See id.* at 633.

145. *See id.* (identifying Czechoslavakia, Denmark, Germany, the Netherlands, the Soviet Union, and Sweden as nations that did not recognize such harm until many years after the Treaty's signing).

146. *See id.* at 636.

147. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-26 (1978).

to adequately protect the passengers' interests. In addition, the pass-through methodology itself defeats the purpose of unifying international air transportation law.

The Court justified the incorporation of U.S. laws into the Warsaw Convention by claiming that U.S. courts have no authority to do otherwise. The Court declared that "the Convention itself contains no rule of law governing the present question; nor does it empower us to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition."[148] By inquiring whether the Warsaw Convention "empowers" the Court to give meaning to the Convention's terms, the Court ignores its *inherent* authority. Since medieval times, common law nations have given courts the task of interpreting statutes.[149] A treaty, such as the Warsaw Convention, is the legal equivalent of a federal statute.[150] Furthermore, the Court's direct interpretation of the Warsaw Convention, which Congress ratified in 1929, would preempt the provisions of DOHSA, which Congress enacted in 1920.[151] While the resulting meanings have varied somewhat, common law courts in other nations have recognized their responsibility to give meaning to the words of the Convention.[152]

148. *Zicherman*, 116 S. Ct. at 636.

149. *See, e.g.*, Heyden's Case, 76 Eng. Rep. 637 (Ex. 1584). Justice Scalia should agree, having stated that an ambiguity in a statute in which Congress intended a particular result, but was not clear, is genuinely a question of law for the courts to properly resolve. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989).

150. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 4-5, at 225 (1988) (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)). The Warsaw Convention is reprinted at 49 U.S.C. § 40105 (1994).

151. *See* TRIBE, *supra* note 150, at 226 (citing Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889)).

152. *See* Preston v. Hunting Air Transp. Ltd., 1 Q.B. 454, 461 (1956) (U.K.) (interpreting *dommage survenu* to encompass nonpecuniary injury); McKenna v. Avior Pty Ltd. (1981) W.A.R. 255 (W.A. Sup. Ct) (Austl.) (interpreting *dommage survenu* to include only injuries capable of evaluation in monetary terms).

C. The Context of the Treaty: The Montreal Agreement

The Montreal Agreement[153] best defines the current context of the Warsaw Convention.[154] To understand the Warsaw Convention, one must appreciate the effect of the Montreal Agreement and the circumstances surrounding its adoption. In the United States, the Montreal Agreement changed the character of the Warsaw Convention almost overnight.[155] The Montreal Agreement clearly illustrates the United States' attitude toward the Convention's purpose. Although the Agreement did not alter the language of Article 17, "it provide[d] decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention."[156]

Although "the United States had nothing to do with formulation of the Convention and had adhered rather than ratified,"[157] it executed the Montreal Agreement with the International Air Transport Association (IATA).[158] In the Agreement, the United States agreed to withdraw its threatened denunciation of the Warsaw Convention, while the airlines agreed to raise the limits of liability and waive their Article 20 defenses.[159] The United States

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153. *See* Montreal Agreement, *supra* note 8.

154. Article 31(2) of the Vienna Convention states:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Vienna Convention, *supra* note 128, art. 31(2), 8 I.L.M. at 692. The Montreal Agreement was an instrument made in connection with the United States' withdrawal of its notice of denunciation of the Warsaw Convention. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 596. The "special contract" provision in Article 22 of the Convention indicates the signatories' acceptance of such agreements. *See* Warsaw Convention, *supra* note 5, art. 22(1), 49 Stat. at 3006, 137 L.N.T.S. at 24.

155. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 601.

156. Day v. Trans World Airlines, 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

157. Lowenfeld & Mendelsohn, *supra* note 50, at 502. The Lowenfeld and Mendelsohn article provides insightful analysis and is particularly relevant because both authors were intimately involved in the events surrounding the United States' denunciation of the Warsaw Convention and subsequent adoption of the Montreal Agreement. *See id.* at 497.

158. *See id.* at 596.

159. *See id.* Article 20(1) of the Warsaw Convention reads:

> The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or

negotiated the Montreal Agreement to pacify the strong U.S. public opinion against the low liability limits.[160] The U.S. government had unsuccessfully attempted to pressure other nations to secure higher limits.[161] Also motivating the Agreement and its goals and expectations was the realization in the United States that, throughout the world, the airline industry had progressed substantially, thus creating great concern for the passengers' interests.[162]

D. The Purposes of the Treaty

The Montreal Agreement establishes the United States' objectives toward the Treaty purposes. Nevertheless, because the United States did accede to the original Convention in 1934,[163] the intentions of the original drafters also influence the Treaty's interpretation. An analysis of the Convention's objectives reveals a concern for uniformity of legal rules, deterrence of willful misconduct, and a balance between the rights of passengers and the rights of airlines.

1. Uniformity

As evidenced by its title, the Warsaw Convention sought to unify international legal rules.[164] The Warsaw Convention establishes enforcement rules for the signatories' domestic courts. Without such a unified approach, neither the international traveler nor the airline knows which law will apply to any given flight.

Complete international uniformity is, nevertheless, probably unattainable for all aspects of the Convention.[165] Such inconsistency should not be compounded by forcing the application of the

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them to take such measures.

Warsaw Convention, *supra* note 5, art. 20(1), 49 Stat. at 3019, (unofficial English translation).

160. *See* MILLER, *supra* note 58, at 37.

161. *See id.*

162. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 507.

163. *See* SPEISER & KRAUSE, *supra* note 63, § 11:4, at 638.

164. The official title of the Treaty is the "Convention for the Unification of Certain Rules Relating to International Transportation by Air." Warsaw Convention, *supra* note 5, 49 Stat. at 3014 (unofficial English translation).

165. The extent of the carrier's liability in cases *without* willful misconduct, for example, may vary significantly, depending upon the laws of the nation where the plaintiff files suit. The airline may be subject to the limits of the original Convention, the Hague Protocol, or the Montreal Agreement. *See* MILLER, *supra* note 58, at 37. This situation could change with the possible global acceptance of the IATA Intercarrier Agreement. *See IATA Passenger Liability Agreements—On Track to Worldwide Implementation*, IATA Press Release (Jan. 15, 1997) (visited Oct. 21, 1997) <http://www.iata.org/pr/Prliab97.htm>.

various state statutes. The various state laws create the same potential for inequality of passenger treatment as do the various international legal systems.[166] In *Reed v. Wiser*,[167] the Second Circuit Court of Appeals coined the term "jungle-like chaos"[168] to describe the choice of law situation that arises if both the laws of the various states and the various nations control the Warsaw Convention's liability rules.[169] In the *Zicherman* case, KAL argued that the Warsaw Convention, as a federal treaty, "should be interpreted under one uniform law" within the United States.[170] Of course, KAL contended that the uniform law should include only pecuniary damages and that the Court should derive this law by analogy to DOHSA.[171] While such an approach would create uniformity, it fails to satisfy the other purposes of the Convention. The Second Circuit in *Zicherman* could not "reconcile DOHSA's limitation of damages to pecuniary loss with the 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention' including non-pecuniary loss."[172]

2. Deterring Willful Misconduct

When first established, the Warsaw Convention sought to protect the infant air transportation industry.[173] The original signatories felt that the fledgling industry could not attract capital unless protected from legal liability for catastrophic accidents.[174] This policy of protecting the airline industry no longer applies because of the current financial strength of the industry.[175] This policy is also wholly irrelevant when a plaintiff can prove that an airline en-

166. *See* RESTATEMENT, *supra* note 140, § 325 cmt. d (discussing the need to construe treaties uniformly regardless of the legal systems of the signatories).

167. 555 F.2d 1079 (2d Cir. 1977).

168. *Id.* at 1092.

169. *See id.* at 1091 n.18.

170. Respondent's Oral Argument, *Zicherman* (Nos. 94-1361, 94-1477), *available in* 1995 WL 672836, at *28-29.

171. *See id.* at *29.

172. *Zicherman*, 43 F.3d at 22 (quoting *Lockerbie II*, 37 F.2d at 829).

173. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 499.

174. *See id.*

175. *See* SPEISER & KRAUSE, *supra* note 63, § 11:4, at 636-37 (citing Reed v. Wiser, 414 F. Supp. 863 (S.D.N.Y. 1976), *rev'd on other grounds*, 555 F.2d 1079 (2d Cir. 1977)). *But see*, Greg Hill, Comment, *Terror in the Sky: Does Terrorism Return Airlines to an Infant Industry? Does the Warsaw Convention Liability Limit Fly High Again to Protect Vulnerable Airlines?*, 19 LOY. L.A. INT'L & COMP. L.J. 633 (1997).

gaged in willful misconduct. In the case of willful misconduct, the Convention's goal is to deter such conduct rather than protect the airline.

The Warsaw Convention seeks to deter willful misconduct by providing for the removal of the liability cap in such cases.[176] The United States placed great importance on the willful misconduct exception as far back as the Hague Conference in 1955.[177] The consequences alone of willful misconduct should sufficiently deter such behavior by the flight crew. The Convention, however, aims its deterrence effect at the airline, rather than the crew. The risk that courts will force the airlines to provide full compensation to victims should deter actions, such as those engaged by KAL in the Flight 007 case[178] and by Pan Am in the *Lockerbie* case.[179] A limitation to pecuniary damages, however, would provide "an unintended double layer of liability protection" for the airline industry.[180] Such restrictions on damages would limit the airlines' liability even in cases of willful misconduct, and insufficiently deter such conduct.

3. The Interests of Passengers

In molding the Warsaw Convention's liability rules into the desired form, the United States had the interests of both passengers and carriers in mind. The Montreal Agreement reflects the strongest evidence that "[t]he Convention embodies a trade–off between plaintiff passengers and defendant airlines."[181] This Agreement demonstrates the United States' intent to use the Warsaw system to protect passengers from the present day hazards of air travel and to spread the cost of air transportation among all passengers.[182]

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176. *See* Warsaw Convention, *supra* note 5, art. 25(1), 49 Stat. at 3006, 137 L.N.T.S. at 26.

177. *See* Lowenfeld & Mendelsohn, *supra* note 50, at 506.

178. The KAL Flight 007 crew failed to correct their navigation error because of fear of discipline by the airline. *See In re KAL*, 932 F.2d at 1478.

179. Terrorists gained access to the Lockerbie jet because of the airline's failure to comply with FAA rules. *See Lockerbie II*, 37 F.3d at 811-12.

180. Petitioners' Brief, *supra* note 76, at *12.

181. Bechky, *supra* note 23, at 458.

182. *See* Day v. Trans World Airlines, 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *see also* Husserl v. Swiss Air Transp., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973). In *Husserl*, the court stated:

> The Warsaw Convention as modified functions to redistribute the costs involved in air transportation: the carrier is best qualified initially to develop defensive

In *Sea–Land Services v. Gaudet*,[183] the Supreme Court included loss of society damages in general maritime law.[184] The Court reasoned that it must include these damages to "shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."[185] The humanitarian policy promoted by *Gaudet* is equally relevant in the context of international air travel. The Israeli Supreme Court also voiced this goal when it construed the Warsaw Convention to allow recovery for purely psychic injuries.[186] The court based this conclusion on a "desirable jurisprudential policy" (*la politique jurisprudentielle souhaitable*) that favors an expansive reading of Article 17.[187] The court cited the development of the aviation industry as one factor that led to this result.[188] With the growth of the airline industry, full compensation is essential for injured passengers to achieve equal treatment with the carriers, which enjoy limited liability for most accidents.

E. The Text in Light of the Purpose: The Ordinary Meaning

The Vienna Convention directs the reading of the Treaty terms in context and in light of the object and purpose of the Convention.[189] The conflict centers on the French term *dommage survenu*.[190] An ordinary French–English dictionary translates *dommage* as "damage, injury, hurt, detriment, loss, [or] harm."[191] When read with a consideration for the context and purposes as directed by the Vienna Convention, this dictionary definition furthers the Warsaw Convention's intent.

The ordinary meaning of *dommage survenu*, which encom-

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mechanisms to avoid such incidents, since it physically controls the aircraft and access to it; it is likewise the party most capable of assessing and insuring against the risks associated with air transportation; finally, it is the party most able to distribute efficiently the costs of the first two steps.

Husserl, 651 F. Supp. at 707.

183. 414 U.S. 573 (1974).

184. *See id.* at 587-88.

185. *Id.* at 588.

186. *See Floyd*, 499 U.S. at 551 (citing Cie Air France v. Teichner, 39 REVUE FRANÇAISE DE DROIT AÉRIEN 243, 23 EUR. TR. L. 102 (original in French)).

187. *See id.*

188. *See id.*

189. *See* Vienna Convention, *supra* note 130, art. 31(1), 8 I.L.M. at 691-92.

190. *See* Warsaw Convention, *supra* note 5, art. 17, 49 Stat. at 3005, 137 L.N.T.S at 22. French is the official language of the Warsaw Convention. *See id.* art. 36, 49 Stat. at 3008, 137 L.N.T.S. at 30.

191. CASSELL'S FRENCH DICTIONARY 266 (1965).

passes loss of society damages, satisfies the purposes of the Warsaw Convention as intended by both the original drafters and the United States. A single federal interpretation imposes a uniform system of liability upon all U.S. courts for any accident occurring in international air transportation. A broader meaning fulfills the purpose of deterring willful misconduct because it avoids an additional layer of protection for the perpetrator airline, even after its misconduct lifts the liability limits. Finally, a less rigid interpretation of the scope of the damages equalizes burdens between the passengers and the airlines which the United States views as a key purpose of the Convention. Allowing full recovery of damages, when willful misconduct is proven, counterbalances the fixed liability limits enjoyed by the airlines. Holding an airline liable for *all* of the damage that it causes when it commits willful misconduct, is a small price to pay for this privilege.

Another signatory's court has arrived at a similar conclusion. In *Preston v. Hunting Air Transport Ltd.*,[192] a British court addressed the availability of nonpecuniary damages under the Warsaw Convention. Although the court did not explicitly detail its analysis, it essentially looked at the plain meaning by simply asking if the plaintiffs sustained any damage as a result of the death of their mother.[193] The court subsequently held that the Warsaw Convention allows the recovery of nonpecuniary damages.[194]

The *Zicherman* Court, however, finds the plain meaning to be considerably too broad.[195] It maintains that this definition would incorrectly provide compensation for even "the mental distress of some stranger who reads about Kole's death in the paper."[196] The

192. 1 Q.B. 454 (1956).

193. *See id.* at 461.

194. *See id.*

195. *See Zicherman*, 116 S. Ct. at 632. Justice Scalia, the author of the *Zicherman* opinion, ordinarily advocates an objective textualist approach. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23-25 (Amy Gutmann ed., 1997). He has stated that "the main danger in judicial interpretation . . . of any law is that the judges will mistake their own predilections for the law." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989). Despite this warning, Scalia's decisions show that he often manipulates his textualist doctrine to infect the opinions with his personal conservative viewpoint. *See* Steven A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 110-21 (1995) (detailing Justice Scalia's textualist malpractice and conservative bias, particularly in the civil rights area).

196. *Zicherman*, 116 S. Ct. at 632.

Court, however, overlooks Article 24 of the Warsaw Convention that clearly states that domestic law determines "the persons who have the right to bring suit."[197] Thus, unless the applicable law provides a cause of action for a newspaper–reading stranger, the Court's fears are overstated. The drafters of the Warsaw Convention explicitly provided for the forum nation's laws to resolve *procedural* issues, such as permissible plaintiffs.

The Court could legitimately look to DOHSA for the *standing* requirements. DOHSA states that a personal representative of the decedent may only bring suit "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative."[198] Therefore, in the *Zicherman* case, Muriel Kole's mother should retain her damage award. Kole's sister, however, would need to prove dependency in order to collect.[199]

VII. CONCLUSION / RECOMMENDATION

The internationally accepted Vienna Convention approach to treaty interpretation leads to the conclusion that the ordinary meaning of *dommage survenu* best fulfills the Warsaw Convention framers' intent. Reading the Treaty terms in the context of the Montreal Agreement reveals that the United States' Treaty objectives are deterrence of willful misconduct, uniformity of international legal rules, and the achievement of equity between passengers and airlines. The *Zicherman* Court's failure to interpret "damages" within the Convention satisfies none of the Treaty's purposes.

Absent an overruling decision, federal legislation is the only possible solution to correct the current inconsistencies in the Warsaw Convention's interpretation. The *Zicherman* Court invited legislation, stating, "Congress may choose to enact special provisions applicable to Warsaw–Convention cases, as some countries have done."[200] Other countries have passed Warsaw Convention legislation. The United Kingdom, for example, enacted legislation which was designed to give the Treaty effect within the British le-

197. Warsaw Convention, *supra* note 5, art. 24, 49 Stat. at 3020, (unofficial English translation).

198. 46 U.S.C. app. § 761.

199. This result potentially reduces the total damage award in the *Zicherman* case by $28,000. *See Zicherman*, 43 F.3d at 21.

200. *Zicherman*, 116 S. Ct. at 636.

gal system.[201] This legislation did not define *dommage survenu*, properly leaving that task for the judiciary. Likewise, Canada enacted the same type of statute.[202] Australia enacted legislation that did address the scope of damages under the Convention, stating that "[i]n awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger."[203] The Australian courts still needed to resolve whether those damages could be nonpecuniary.[204] In the United States, however, the Supreme Court has declared the Warsaw Convention to be self–executing,[205] thus, removing the need for such implementing legislation.

This Note contends that Congress should supplement the Warsaw Convention. In order to fulfill the purposes of the Convention, Congress should pass a "gap–filling" or "clarifying" statute to uniformly resolve those issues on which the Convention is silent and the Court refuses to interpret. This statute should provide for pecuniary damages, such as loss of support and services based on the decedent's projected life expectancy, funeral expenses, loss of inheritance (i.e., prospective net accumulations of the estate), and interest on these damages. In addition, the statute should provide for nonpecuniary damages such as loss of society of the decedent,[206] predeath pain and suffering of the decedent, and mental anguish incurred by the plaintiff. As a measure to assure the necessary uniformity, Congress should also use such a statute to establish common procedural rules for all Warsaw Convention cases, including a determination of the standing requirements.

The Supreme Court has created anarchy in aviation law with *Zicherman v. Korean Air Lines*. Congress has the ability to implement international aviation rules that are consistent with the goals of the Warsaw Convention and, thus, reflect the interpreta-

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201. *See* Carriage by Air Act 1961 (9&10 Eliz 2 ch. 27) (Eng.); *see also*, SPEISER & KRAUSE, *supra* note 63, §§ 11:22-23, at 689-94 (discussing implementing legislation in Ireland, India, New Zealand, and Pakistan).

202. *See* Carriage by Air Act, R.S.C. ch. C-14, § 1 (1985) (Can.).

203. Civil Aviation (Carriers' Liability) Act, 1959, § 12(8) (Austl.).

204. *See* McKenna v. Avior Pty Ltd. (1981) W.A.R. 255 (W.A. Sup. Ct) (Austl.).

205. *See* Trans World Airlines v. Franklin Mint, 466 U.S. 243, 252 (1984). A self–executing treaty is one that does not require congressional action (implementing legislation) in order to have domestic legal effect. *See* TRIBE, *supra* note 150, at 226.

206. Loss of society should include loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education. OHIO REV. CODE ANN. § 2125.02(B)(3) (Anderson 1994).

tion of the Convention as directed by customary international law. Through legislation, Congress can achieve uniformity, deter the willful misconduct of the air carriers, and balance the rights of the passengers with those of the carriers.

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