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# COMPENSABLE DAMAGES REVISITED UNDER THE WARSAW CONVENTION: ZICHERMAN V. KOREAN AIR LINES, A NEW LOOK AT LOSS OF SOCIETY

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## I. INTRODUCTION

In *Zicherman v. Korean Air Lines*,[1] the United States Supreme Court interpreted the Warsaw Convention[2] as limiting international air carriers' liability for tortious injuries to their passengers to harm recognized under United States' federal common law based on statute, rather than federal general maritime law. Specifically, the Court analyzed the Warsaw Convention to determine if its terms provided guidance on whether loss of society[3]

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

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. app. § 1502 (1988).

3. Loss of society damages are those damages which, under general maritime law, embrace a broad range of mutual benefits each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort and protection; thus, widow, parent, brother, sister, or child may be compensated for loss of society. BLACK'S LAW DICTIONARY 1391

damages are recoverable in an international aviation disaster occurring on the High Seas. Reversing the Second Circuit Court of Appeals, the Supreme Court rejected the argument that general maritime law, which permitted a plaintiff's recovery for loss of society only if he was the decedent's dependent at the time of the accident, supplied the substantive compensatory damages law applicable in an action under the Warsaw Convention.[4] Writing for a unanimous Court, Justice Antonin Scalia noted that where an international air disaster occurs over the High Seas, the Convention itself does not resolve the issue as to what harms are compensable, and a court of competent jurisdiction must instead turn to the appropriate sovereign's domestic law to make that determination.[5]

Here, the Supreme Court held that the Death on the High Seas Act [hereinafter DOHSA],[6] is the applicable substantive law. DOHSA, however, limits recovery to pecuniary damages,[7] and as

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(6th ed. 1990).

4. Zicherman, 116 S. Ct. at 636.

5. *Id.* at 634-36.

6. Specifically, § 761 of the Death on the High Seas Act provides:

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

46 U.S.C. app. § 761 (1988).

7. Section 762 of DOHSA provides that recovery pursuant to section 761 "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. app. § 762 (1988). Pecuniary damages are those damages that can be estimated, in and compensated by, money; not merely the loss of money or salable property or rights, but all such loss, deprivation or injury as can be made the subjection of calculation and

such, the Court disallowed an award to the mother and sister of a passenger for loss of society.[8] Significantly, the Supreme Court's interpretation of the Warsaw Convention and the concomitant supplant by DOHSA narrows the scope of the Convention and places an extraordinary limit on the ability of relatives of victims of international aviation disasters to recover.

This Note analyzes the *Zicherman* Court's interpretation of the Warsaw Convention's provision for damages under Articles 17[9] and 24[10] in determining whether loss of society damages are recoverable under the Convention. Part II examines the history of the Warsaw Convention as a means to understand the purpose and intent of its framers in drafting liability provisions for international air carriers. Part III addresses the line of cases relied on by the Second Circuit. Part IV presents the facts of *Zicherman*, as well as

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of recompense in money. BLACK'S LAW DICTIONARY 392 (6th ed. 1990).

8. Zicherman, 116 S. Ct. at 637.

9. Article 17 of the official English translation of the Warsaw Convention provides:

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

49 U.S.C. app. § 1502 notes.

10. Article 24 limits the provision of Article 17, and provides, in pertinent part:

> (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.

*Id.*

the decisions of the lower courts and the Supreme Court, while Part V analyzes the Supreme Court's decision. Finally, Part VI concludes that the *Zicherman* decision places an extraordinary limit on the ability of plaintiffs to recover via the Warsaw Convention and U.S. law for deaths on the High Seas, and the decision leaves the question of recovery unanswered when the crash occurs on land.

## II. THE WARSAW CONVENTION: ITS HISTORY AND USE

Preparation for the creation of the Warsaw Convention came at a time when transportation systems were making great strides from limited travel by automobile to trans-Atlantic travel by air.[11] Two international conferences, the first held in Paris in 1925 and the second in Warsaw in 1929, together with the *Comité International Technique d'Experts Juridique Aériens* [hereinafter CITEJA], created by the Paris Conference, culminated in the creation of the Warsaw Convention.[12]

The Warsaw Convention was created with two purposes in mind. First, its Framers envisioned the Convention as a means to "link many lands with different languages, customs, and legal systems . . . [with] a certain degree of uniformity."[13] Thus, the Convention enabled diverse nations to establish uniform documentation and procedures for dealing with claims arising out

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11. Charles Lindbergh, for example, completed the first nonstop trans-Atlantic solo flight between New York City and Paris in his single engine monoplane *Spirit of St. Louis* on May 20, 1927.

12. For a thorough discussion of the Warsaw Convention history, see Andreas S. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967) [hereinafter Lowenfeld & Mendelsohn]. The following countries participated in the original drafting of the Convention: the German Reich, Austria, Belgium, Brazil, Bulgaria, China, Denmark, Iceland, Egypt, Spain, Estonia, Finland, France, Great Britain, Ireland and the British Dominions, India, Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, the Netherlands, Poland, Rumania, Sweden, Switzerland, Czechoslovakia, Russia, Venezuela, and Yugoslavia. 49 U.S.C. app. § 1502 notes.

13. Lowenfeld & Mendelsohn, *supra* note 12, at 498.

of international transportation via air[14] and provided specific provisions for carrier liability.[15] The Convention also established jurisdictional provisions which enabled passengers with claims to attain jurisdiction over the carrier at its place of business through which the contract was made, or at the flight's destination.[16]

Second, and significantly, the Convention provided a means to limit potential liability of air carriers for injuries to passengers either in the course of a flight or during embarkation or disembarkation.[17] However, while Article 17 of the Convention provided for liability of airlines in the course of international travel,

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14. *Id. See also* Haskell, *The Warsaw System and the U.S. Constitution Revisited*, 29 J. AIR L. & COM. 483, 484 (1973). The Warsaw Convention provided a two year period of limitation for claims arising out of the Convention (Article 29) and provided a standard for liability in which only the actual carrier providing the transportation was liable for damages caused in the course of the transportation (Article 30(2)) with respect to passengers. *See infra* note 15 at arts. 29 and 30(2).

15. For example, Articles 29 and 30(2) provided, in pertinent part:

Article 29

(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

Article 30(2)

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

49 U.S.C. app. § 1502 notes.

16. *See supra* note 2 at art. 28.

17. *See supra* note 9 at art. 17.

it also limited the amount of damages then recoverable to 125,000 "Poincaré francs."[18]

The presumption of liability was a cause of much debate among nations, as the 1929 Convention seemed to favor air carriers rather than passengers. Article 20, it was argued, allowed air carriers to avoid paying damages to their passengers by proving that they took "all necessary measures to avoid the damage or that it was impossible . . . not to take such measures."[19] Those who favored this limitation justified by it by arguing that the provisions rightly protected a fledgling airline industry by shielding air carriers from bearing the burden of liability alone and avoiding litigation by facilitating out-of-court settlements.[20] Others, however, relied on the provisions within Article 25, which removed the liability cap

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18. *See* Mendelson and Lowenfeld *supra* note 10, at 499. This limitation was equivalent to approximately $4,898 U.S. at the time of the Warsaw Conference in 1929. Because the *poincare franc* fluctuated with the gold standard and was not adjusted for inflation, by 1933, this dollar equivalent was approximately $8,300 U.S. *Id.*

19. *See supra* note 2 at art. 20(1).

20. *See* Eaton, *Recovery for Purely Emotional Distress Under the Warsaw Convention: Narrow Construction of Lesion Corporelle in Eastern Airlines, Inc. v. Floyd*, 1993 WIS. L. REV. 563, 569 (1993). *See also* Minutes, Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw, 13, 37-39 (English trans. Horner and Legrez, 1975) (explaining that such a provision also served to alleviate concerns of potential investors and insurers of new airlines).

upon a finding of "willful misconduct"[21] by an air carrier.[22] It was not until 1934, shortly after the United States officially became a party to the Convention,[23] that sharp criticism prompted a rethinking of the limitation on air carrier liability.[24]

The parties to the Convention ultimately met in 1955 at the Hague in the Netherlands, amending the Convention to increase carrier liability to approximately $16,600 U.S., forming what is

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21. Article 25(1) of the Warsaw Convention reads:

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

49 U.S.C. app. § 1502 notes.

22. The result of Article 25 has been an explosion of lengthy litigation to prove willful misconduct in an effort to circumvent the liability provisions of the Convention. Naneen K. Baden, *The Japanese Initiative on the Warsaw Convention*, 61 J. AIR L. & COM. 437, 441 (1995-1996). With respect to willful misconduct claims under the Warsaw Convention in the United States alone, *see generally*, Zicherman, *supra* note 1; In re Air Disaster at Lockerbie Scotland, 37 F.3d 804 (2d Cir. 1994); Ospina v. Trans World Airlines, 975 F.2d 35 (2d Cir. 1992); In re Inflight Exposition on Trans World Airlines, 778 F.Supp. 625 (E.D.N.Y. 1991); Iyegha v. United Airlines, 659 So. 2d 45 (Ala. 1995).

23. Interestingly, the United States did not send an official delegate to Warsaw and failed to participate in the preliminary drafting of the Convention; indeed, the United States only became a party to the Convention in 1934. *See* note following 49 U.S.C. app § 1502 (1988) at 437. Scholars have pointed to several reasons for the United States' lack of participation: (1) the lack of international flights from the United States (in 1929, the only international flights from the United States were between Key West, Florida, and Havana, Cuba); (2) preoccupation with the domestic airline industry; (3) the policy of isolationism; and (4) legal disfavor of limited liability for negligent acts. *See* EATON, *supra* note 20 at 570 n.27.

24. In the United States, for example, the recovery of damages for domestic flights in personal injury and wrongful death actions greatly exceeded the limits established by the Warsaw Convention. Lowenfeld & Mendelsohn, *supra* note 12, at 499.

referred to as the Hague Protocol.[25] The United States, however, concerned that the increase would be ineffective in providing a sufficient award of damages, refused to ratify the amendment.[26] Moreover, due to increasing dissatisfaction with liability limits, the United States, in 1965, formally announced its denunciation[27] of the Warsaw Convention as a means to protect American passengers.[28]

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25. *International Civil Aviation Organization* (ICAO) *Legal Committee, Report on the Revision of the Warsaw Convention*, ICAO International Conference on Private Air Law, vol. 2 at 96, ICAO Doc. 7686-LC/140 (1956).

26. *See generally* Lowenfeld & Mendelsohn, *supra* note 12 at 509-46.

27. Denunciation is a legal term of art which refers to a nation's formal withdrawal from a treaty or convention. BLACK'S LAW DICTIONARY notes that the term "denounce" is frequently used in regard to treaties, indicating the act of one nation in giving notice to another nation of its intention to terminate an existing treaty between the two nations. The French *denoncer* means to declare, to lodge an information against. *See* BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

Article 39 of the Warsaw Convention provides a formal process for denunciation:

> (1) Any one of the High Contracting Parties may denounce this convention by notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.
> (2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

49 U.S.C. app. § 1502 notes.

28. *U.S. Gives Notice of Denunciation of Warsaw Convention*, 53 DEP'T ST. BULL. 923, 923-24 (1965). The notice, in pertinent part, reads:

> The United States of America wishes to state that it gives this notification solely because of the low limits for liability for death or personal injury provided in the Warsaw Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955 . . . . To this end, the United States of America stands ready to participate in the negotiation of a revision of the Warsaw Convention which would provide substantially higher limits, or of a convention covering the other matters contained in the Warsaw Convention

However, the following year, in light of the new standard set forth in the Montreal Agreement,[29] which resulted in an increase in air carrier liability to $75,000 U.S., that notice of denunciation was withdrawn.[30]

While the Warsaw Convention appeared to support the interests of international air travelers, the ability to recover under the Convention was initially thwarted and has been the focus of intense courtroom battles. The United States, for example, only recognized a cause of action under the Warsaw Convention in 1978 in the Second Circuit opinion in *Benjamins v. British European Airways*.[31] Analyzing the minutes and documents of the 1925 and 1929 meetings of the Convention delegates, the construction of Articles 17 and 18 of the Convention, *in para materia*, and evidence of how other signatories of the Convention have interpreted it, the Second Circuit reversed a long line of cases holding that the Convention itself did not provide a cause of

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and Hague Protocol but without limits of liability for personal injury or death.

*Id.* at 924-925.

29. Liability Limitations of Warsaw Convention and Hague Protocol, Agreement C.A.B. 18900, approved by C.A.B. Order No. E-28680, May 13, 1966, 31 Fed. Reg. 7302 (1966) (known as Montreal Agreement), *reprinted in* 49 U.S.C. app. § 1502 notes (1988).

30. *Id. Editor's Note:* On January 8, 1997, the U.S. Department of Transportation approved without conditions the International Air Transportation Association's Intercarrier Agreement on Passenger Liability, which waives the liability limitation found in the Warsaw Convention. *See* Department of Transportation Order 97-1-2 (regarding Dockets OST-95-232, OST-9601607) (on file with law journal). *See also* Shapiro, *U.S. Clears Way for IATA Agreement,* BUS. INS. (Jan. 20, 1997), *reprinted in* Westlaw, ALLNEWS, 1997 WL 8293579.

31. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

action.[32] That holding opened the door to the question of what type of damages are available under the Convention.[33]

## III. THE WARSAW CONVENTION AND APPLICABILITY OF SUBSTANTIVE LAW

Two cases from the Second Circuit, *In Re Air Disaster at Lockerbie, Scotland* [Lockerbie I][34] and *In Re Air Disaster at Lockerbie, Scotland* [Lockerbie II][35] provided: (1) that federal common law supplies the substantive law under which damages may be claimed; and (2) that recovery depends on whether a plaintiff was dependent upon the decedent at the time of the air disaster. These cases formed the basis for the Second Circuit's decision in *Zicherman*.

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32. 572 F.2d at 917-19. As Judge Lumbard noted:

> We do . . . believe that the desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action. We do see that uniformity of development can better be achieved by making federal as well as state courts accessible to Convention litigation. We do find the opinions of our sister signatories to be entitled to considerable weight.

*Id.* at 919.

33. *See generally*, Eastern Airlines, Inc. v. Floyd, 111 S. Ct. 1489 (1991) (no liability for purely emotional distress under Article 17); In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267 (2d Cir.) [hereinafter Lockerbie I], *cert denied*, 112 S.Ct. 331 (1991) (punitive damages not available under the Convention).

34. 928 F.2d. 1267 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 331 (1991). [hereinafter Lockerbie I]

35. 37 F.3d 804 (2d Cir. 1994). [hereinafter Lockerbie II]

A. *Lockerbie I*

Lockerbie I stemmed from the terrorist bombing of Pan Am Flight 103 from London to New York on December 21, 1988 over Lockerbie, Scotland.[36] Surviving relatives and personal representatives sued Pan American World Airways, two Pan Am subsidiaries providing security, and Pan Am's parent corporation for wrongful death, as well as various other claims.[37] Following consolidation of the cases in the Eastern District of New York by order of the Judicial Panel on Multidistrict Litigation, a judgment was entered finding Pan Am liable.[38] A second action was brought regarding damages, and Pan Am moved for partial summary judgment on the punitive damages claims, arguing that those claims were barred by the Warsaw Convention.[39] For purposes of Pan Am's motion, the district court presumed carrier liability, that the carrier had committed willful misconduct, and that the applicable local law permitted recovery of punitive damages.[40] Shortly thereafter, the court granted Pan Am's motion for partial summary judgment on the issue of punitive damages, barring those claims.[41] The Chief Judge for the Eastern District of New York denied plaintiffs' motion for reargument, but granted certification under 28

36. 928 F.2d 1267, 1269 (2d Cir. 1991).

37. *Id.* at 1269.

38. *Id. See* 733 F. Supp. 547 (E.D.N.Y. 1992).

39. *See* 928 F.2d at 1269.

40. *Id.*

41. *Id.*

U.S.C. § 1292(b)[42] for immediate appeal of the case to the Second Circuit as involving a controlling question of law.[43]

On appeal, the Second Circuit held that punitive damages are not available under the Warsaw Convention, regardless of whether the airline is guilty of willful misconduct.[44] In reaching that conclusion, the Second Circuit noted that the Convention preempts state causes of actions and therefore bars state wrongful death actions arising under it.[45] Moreover, because air carrier liability is an international dilemma which requires uniform interpretation, the Convention must be interpreted according to federal common law, which does not contemplate a punitive damages claim within a compensatory damages framework.[46]

### 1. Preemption of State Causes of Action When the State Claim Alleged Falls Within the Scope of the Convention

The Second Circuit noted that although neither the Convention nor any Congressional action at the time of ratification expressly preempted state law, various sources supported the Circuit's conclusion that the Convention itself does not expressly

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42. 28 U.S.C. § 1292(b) provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order, if application is made to it within ten days after entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

43. *Id.*

44. *See* 928 F.2d at 1267.

45. *Id.* at 1273-78.

46. *Id.* at 1278-80.

preserve state law causes of action, including caselaw of the Fifth and Ninth Circuits and other contracting parties to the Convention including England, Canada, and Australia.[47] Importantly, the court specifically rejected plaintiffs' argument that the Framers of the Convention meant to leave matters such as the elements of damages to state law.[48] The use of a single substantive law by such countries as Australia and Canada supports the view that the Convention does not preserve any state law causes of action.[49] The desire for uniformity, as well as the implications of permitting state law causes of action, emphasize a reading of the Convention which forbids construing its text to create a "morass of conflicting rules."[50] To permit the existence of state causes of action under the Convention would result not only in "inconsistent application of law to the same accident, but would also cause enormous confusion for airlines in predicting the law upon which they would be called to respond . . . [sinking] federal courts into a Syrtis bog where they would not know whether they were at sea or on good, dry land . . . "[51]

2. Adopting Federal Common Law

Once the Second Circuit determined that the Convention preempts state law causes of action arising under it, the question remained as to what law should be applied in determining the plaintiffs' claims. The court looked to the source of the right to sue under the Convention and concluded that the power source was the Convention itself, noting the federal government's treaty-making power under the Constitution.[52] Where the source of the right is

47. *Id.* at 1273-74.

48. *Id.* at 1274.

49. *Id.*

50. *Id.* at 1275.

51. *Id.* at 1276.

52. *Id.* at 1278. *See* U.S. CONST. art. II, § 2, cl. 2; art. I, § 10, cl. 1.

federal law, it follows, then, that the substantive law to be applied is also federal law.[53]

The court, by analogy, held that tort law provides the closest analog from which to determine applicable law,[54] finding that federal common law recognizes a right to recover for a wrongful death and allows the award of punitive damages, but solely as a means to punish a defendant and deter certain kinds of conduct.[55] The issue then becomes whether the Warsaw Convention permits an award of punitive damages for the purpose of punishing a defendant and deterring misconduct.[56]

### 3. Shared Expectation of Contracting Parties: The Second Circuit Rejects an Award of Punitive Damages

In determining whether punitive damages are available under the Convention, the court examined the purposes of drafting the Convention and found that the Convention itself "represents an entire liability scheme, and . . . [serves] as a uniform, international law."[57] Moreover, the terms of the Convention "should be given a meaning consistent with the shared expectations of the contracting parties in order to more completely effectuate the Convention's purposes."[58]

Finally, the court presented a detailed analysis of Articles 17, 24(2), and 25.[59] Importantly, the court noted that Article 17,

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53. *Id.*

54. *Id.*

55. *Id.* at 1279-12 (citing Moragne v. States Marine Lines, Inc., 298 U.S. 375 (1970)).

56. *Id.* at 1280.

57. *Id.*

58. *Id.* (citations omitted).

59. *Id.* at 1280-88.

which established a carrier's liability, is limited to compensatory damages. Determining whether punitive damages were a part of this calculus depends on the legal meaning of the term "dommage survenu"[60] and whether it excludes the contemplation of punitive damages.[61] Emphasizing that the translation of "dommage survenu" as "damage sustained" is the one made by the State Department and found in the United States Code, as well as the translation used in 1934 when the Convention was ratified by the Senate, the court found that "the way in which the Convention uses the term indicates that Article 17 refers to actual harm caused by an accident rather than generalized legal damages."[62]

Next, the court addressed plaintiffs' contention that, based on Article 24(2),[63] regardless of the meaning of "dommage survenu," the Convention expressly left to local law: (1) the types of damages recoverable; (2) the issues of contributory negligence; and (3) the parties to be sued.[64] After analyzing the text of Article 24(2), its drafting history, and other commentary, the court rejected this argument, noting that the drafters' actions lent credence to the belief that they sought merely to limit recovery to compensation.[65]

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60. Article 17 reads as follows in French, the official language of the Warsaw Convention:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lesion corporelle subie pau un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquemet et de debarguement.

The term "dommage survenu" is interpreted in the English translation, as set forth in the United States Code as "damage sustained." *See supra* note 9 at 49 U.S.C. app. § 1502 note.

61. *Id.* at 1280.

62. *Id.* at 1281.

63. *See supra* note 10 for the text of Article 24.

64. *Id.* at 1282.

65. *Id.* at 1282-85.

Finally, the court addressed whether Article 25's willful misconduct provisions contemplated the recovery of punitive damages.[66] The court noted that "Article 17 is not one of the limitations or exclusions to which Article 25 refers; Article 25 voids only certain provisions in the event of willful misconduct, but the rest of the Convention remains fully operative . . . "[67] The court further rejected plaintiffs' arguments that Article 25's removal of the liability cap in cases of willful misconduct eliminates any and all limitations on damages.[68] Moreover, the court refused to acknowledge that construing Article 17 in such a manner limits plaintiffs' recovery by creating a cause of action for compensatory damages and simultaneously preempts state causes of action allowing for punitive damages.[69]

Instead, the court, analyzing various commentary on the construction of the Convention and referring to the policy considerations behind the Convention, concluded that to allow punitive damages would conflict with the Framers' vision of the Convention.[70] Punitive damages were not to be had under the Convention.

B. *Lockerbie II*

Following the Second Circuit's decision in *Lockerbie I* denying recovery of punitive damages, a jury awarded compensatory damages in three plaintiffs' cases, which formed the basis of Pan Am's appeal in *Lockerbie II*.[71] Pan Am appealed the

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66. *Id.* at 1285.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1286. Indeed, the Court recognizes that "the award of full compensatory damages alone is sufficient to deter willful misconduct, so punitive damages would be both excessive and redundant." *Id.* at 1285-86.

71. 37 F.3d 804, 811 (2d Cir. 1994).

trial court's exclusion of evidence not heard or considered by the jury relating to Pan Am's and its subsidiaries' alleged noncomplicance with security regulations concerning unaccompanied baggage. It also appealed the admission of evidence showing other alleged misconduct by Pan Am, coupled with the disallowance of defense testimony concerning alternate theories of causation, various other evidentiary rulings, and the legal bases for the damage awards.[72]

For the purposes of this Note, the bases for the damage awards under the Convention are significant. Specifically, in each of the three cases whose damage phases were tried, the jury was permitted to award compensatory damages to the decedent's spouse and children based on loss of financial contributions, loss of services, loss of society and companionship, and loss of parental care.[73] However, on appeal, Pan Am argued that under the Warsaw Convention, loss of society and companionship damages are not available, and that damages for loss of parental care should not be available to adult children of crash victims where there is no showing of dependence.[74]

The Second Circuit referred to its decision in *Lockerbie I*, noting that damages in a Warsaw Convention case are governed by general federal maritime common law principles consistent with the terms of the Convention.[75] Article 17 provides for recovery of compensatory damages.[76] Following the reasoning of *Lockerbie I*, to determine whether damages for loss of society and companionship are recoverable under the Convention, the court

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72. *Id.* at 812.

73. *Id.* at 828.

74. *Id.*

75. *Id.*

76. *Id.*

examined federal maritime law, "probably the oldest body of federal common law."[77]

Applying federal maritime law based on statute, Pan Am argued that the court should look to the Death on the High Seas Act[78] and the Jones Act,[79] which preclude recovery for loss of society damages.[80] The plaintiffs, on the other hand, argued that general maritime law cases that are not bound by a statutory restriction allow recovery for loss of society.[81] Interestingly, the court noted that a distinguishing feature in those cases which precluded loss of society damages under DOHSA and the Jones Act has been that damages are limited to pecuniary loss.[82]

Accordingly, to resolve the conflict between statutory cases, which deny loss of society, and general maritime cases, which permit recovery of damages for loss of society, the court again turned to the text of Article 17.[83] First, the court noted that the analysis of Article 17 must be evaluated by examining the governing text as drafted in French.[84] Citing *Lockerbie I*, the court noted that the English translation of Article 17's compensation for "dommage survenu" is "damage sustained" and that no reference to

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77. *Id.* (citing In re Mexico City Aircrash, 708 F.2d 400, 414-415 (9th Cir. 1983) (looking to general federal maritime law in holding that the Warsaw Convention creates a cause of action for wrongful death)).

78. *See* 46 U.S.C. app. § 761 (1988).

79. 46 U.S.C. § 688 (1988).

80. Lockerbie II, 37 F.3d at 828-29. *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 31-33 (1990).

81. Lockerbie II, 37 F.3d at at 829. *See, e.g.*, American Export Lines, Inc. v. Alvez, 446 U.S. 274, 280-83 (1980); Sea-Land Services, Inc., v. Gaudet, 414 U.S. 573, 585-88 (1974).

82. Lockerbie II, 37 F.3d at 829.

83. *Id.*

84. *Id.* (citing Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534-35 (1991); Air France v. Saks, 470 U.S. 392, 399 (1985)).

pecuniary loss appears in the text.[85] Moreover, the court explained that "the aim of the Convention's drafters and signatories appears from the simple language of the text to provide full compensatory damages for any injuries or death covered by the Convention."[86] However, nothing in French law supported limiting "dommage survenu" to exclude loss of society awards.[87]

Indeed, in light of the broad language in the Warsaw Convention for "damage sustained" and a lack of authority supporting a limitation of compensatory damages to pecuniary loss, the court turned to the principles of general maritime law under *Sea-Land Services v. Gaudet*[88] and its progeny, holding that the Warsaw Convention permits damage awards for loss of society and companionship.[89] Those cases allowed spouses to recover loss of society, permitting dependents as well as spouses to recover damages.[90] Where no maritime law extended loss of society damages to plaintiffs other than spouses and decedents, the court declined to award damages to those relatives who were not dependent upon family members killed during the crash, and the Second Circuit remanded the case to the lower court for a determination of that issue.[91]

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85. *Id.*

86. *Id.*

87. *Id.*

88. 414 U.S. 573 (1974).

89. Lockerbie II, 37 F.3d at 829-30.

90. *Id.* at 829-30.

91. *Id.*

## IV. ZICHERMAN V. KOREAN AIR LINES[92]

### A. *The Facts*

On September 1, 1983, Korean Air Lines [hereinafter KAL] Flight 007 from New York to Seoul, South Korea, strayed into Soviet airspace and was shot down over the Sea of Japan.[93] All of the passengers perished, including Muriel Kole.[94] Zicherman and Mahalek, the surviving mother and sister of Kole, brought suit in the Southern District of New York to recover damages.[95] All federal court cases arising out of the KAL disaster were transferred in 1983 to the United States District Court for the District of Columbia by the Judicial Panel on Multidistrict Litigation for coordinated and consolidated proceedings on the common liability issues.[96]

The common liability issues, including whether the destruction of Flight 007 by Soviet military aircraft was proximately caused by the "willful misconduct" of KAL or its employees, within the meaning of Article 25 of the Warsaw Convention, and whether punitive damages are recoverable, were tried to a jury in the District of Columbia.[97] There, the jury found that the passenger's deaths were caused by the willful misconduct

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92. In re Korean Air Lines Disaster of September 1, 1983, 807 F.Supp. 1073 (S.D.N.Y. 1992), *sub. nom.* Zicherman v. Korean Air Lines, 43 F.3d 18 (2d Cir. 1994), 116 S.Ct. 629 (1996).

93. 807 F. Supp. at 1076.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

of the flight crew and assessed punitive damages against the airline.[98]

The Court of Appeals for the District of Columbia upheld the jury finding of willful misconduct, but vacated the punitive damage award, holding that the Warsaw Convention does not permit the recovery of punitive damages.[99] Both plaintiffs and KAL filed a petition for writ of certiorari, which was denied by the Supreme Court on December 2, 1991.[100]

Once the common liability issues were determined, the cases were remanded to the original transferor courts for the trial of issues relating to compensatory damages, such as the type and by whom they are recoverable.[101]

B. *The District Court's Decision*

The Southern District of New York addressed whether compensatory damages sought by the plaintiffs, Kole's mother and sister in their individual capacities, and by her sister as executrix of Kole's estate for the benefit of the estate and its beneficiaries, were recoverable under the Warsaw Convention, or, in the alternative, under DOHSA.[102] Specifically, the plaintiffs sought to recover both pecuniary and non-pecuniary losses under the Warsaw Convention or pecuniary losses under DOHSA.[103]

The plaintiffs argued that the Warsaw Convention created a cause of action for injuries sustained in favor of any person who has suffered any loss, regardless of whether such loss was pecuniary or

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98. *Id. See* In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475 (D.C.Cir. 1991), *cert. denied*, 112 S.Ct. 616 (1991).

99. *Id.*

100. *Id. See* Dooley v. Korean Air Lines, 112 S. Ct. 616 (1991).

101. *Id.* at 1077.

102. In re Korean Air Lines Disaster of September 1, 1983, 807 F. Supp. 1073, 1077 (S.D.N.Y. 1993).

103. *Id.* at 1077.

non-pecuniary.[104] Kole's mother sought damages for mental anguish and grief associated with her daughter's death, as well as loss of love, affection and companionship.[105] Kole's sister sought damages for the same losses in her individual capacity, and as executrix of her sister's estate, for conscious pain and suffering before her death on the plane; loss of quality or enjoyment of life; loss of support; loss of services; and loss of inheritance for herself and her mother.[106]

The defendants, on the other hand, argued that plaintiffs were limited to an action brought by the estate for wrongful death caused by the airline disaster, a cause of action specifically provided for under DOHSA, which limits recovery to pecuniary losses.[107] The defendants further contended that DOHSA, enacted by Congress in 1920, specifically provided for a remedy in admiralty for the dependent survivors of seamen for wrongful death on the High Seas, and it is applicable only when the death occurs on the High Seas more than a marine league (three miles) from the shore of any state, the District of Columbia, or any territory of the United States.[108] DOHSA has been construed by the U.S. Supreme Court to limit dependent survivors' losses to pecuniary ones.[109]

Before addressing the plaintiffs' claims for damages, the district court responded to the defendant's motion to dismiss Muriel Mahalek as a party plaintiff suing in her own right, under a theory that DOHSA permits only the decedent's estate to bring a wrongful death action which is limited to pecuniary losses.[110] The court

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 622-23, *reh'g denied*, 439 U.S. 884 (1978)).

109. 806 F. Supp. at 1077.

110. *Id.* at 1080.

noted that Article 24(2) of the Convention provides that suit for "damages sustained" may be brought "however founded" and "without prejudice to the questions as to who are the persons who have the right to bring suit."[111] Accordingly, the district court denied the defendant's motion to dismiss Mahalek as a party plaintiff.

Next, the district court addressed the plaintiffs' damages claim *in seriatim*.[112] The plaintiffs' damages claims fell into three categories: (1) claims for a survival action on behalf of the decedent's estate; (2) damages for wrongful death (both pecuniary and nonpecuniary); and (3) personal damages.[113]

1. The Survival Action

The district court first addressed damages recoverable in terms of a survival action on behalf of the decedent's estate, including decedent's pain and suffering, loss of the enjoyment of life, and future lost earnings.[114]

The district court denied defendant's motion to limit plaintiff's recovery to pecuniary losses sustained by decedent's dependent survivors.[115] Recognizing the Supreme Court's earlier decision that damages under the Warsaw Convention are not recoverable where the injury is caused by anxiety or shock when unaccompanied by physical injury,[116] the court concluded that where physical injury results, passengers may bring a cause of action under the Convention for those injuries.[117] Further, other courts,

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111. *Id.*

112. *Id.* at 1080-89.

113. *Id.* at 1080.

114. *Id.* at 1080-84.

115. *Id.* at 1080.

116. *See generally*, Eastern Airlines v. Floyd, 499 U.S. 530 (1991).

117. Zicherman, 807 F. Supp. at 1081.

following *Lockerbie I*, have recognized plaintiffs' rights to recover damages for the pain and suffering of passengers injured or killed, because recovery for such conscious pain and suffering redresses actual harm, "dommage survenu," as required by the Warsaw Convention.[118] Moreover, the district court noted that there is "no federal statutory or common law bar to the survival action brought by decedent's estate . . . to recover damages for decedent's conscious pain and suffering prior to her death."[119]

The court also rejected the defendant's motion to preclude the expert testimony regarding decedent's conscious pain and suffering prior to her death, noting that it was relevant.[120]

Additionally, plaintiffs sought damages for the loss of enjoyment of life as part of the survival action on behalf of the decedent's estate.[121] The plaintiffs argued that federal courts have allowed such damages as "hedonic" damages, that is, those damages affecting one's ability to enjoy the "normal pursuits and pleasures of life."[122] The district court, however, rejected their request for damages for the loss of the quality or enjoyment of life of the decedent. The court noted that in cases where hedonic damages were recoverable, the plaintiffs sued on their own behalves, for injuries suffered during their lifetime.[123]

The defendant moved to deny recovery for lost future wages, arguing that Supreme Court precedent precludes recovery

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118. *Id.* (referring to In re Inflight Explosion on Trans World Airlines, 778 F.Supp. 625 (E.D.N.Y. 1991), *rev'd on other grounds* 975 F.2d 32 (2d Cir. 1992)).

119. 807 F. Supp. at 1081.

120. *Id.*

121. *Id.*

122. *Id.* Hedonic damages refer to damages for the loss of the enjoyment of life as affected by physical pain and suffering, physical disability, impairment and inconvenience affecting an individual's normal pursuits and pleasures of life. *Id.* at 1081, n.7.

123. *Id.* at 1083.

of future lost earnings by decedent's relatives.[124] Although the district court found that the Supreme Court's decision in *Miles v. Apex Marine Corp.*,[125] regarding damages recoverable by a seaman's estate was not direct precedent, it nevertheless found the Court's reasoning persuasive.[126] Accordingly, the court denied recovery for future lost earnings, emphasizing that to allow recovery would be tantamount to double recovery, and any award received would be subject to reduction by the amounts required by the decedent for her own support and income taxes.[127]

2. The Wrongful Death Action

Plaintiffs, in support of their wrongful death action, sought damages for loss of support; their mental injury and grief; and loss of love, affection, and companionship.[128]

The court found that the plaintiffs could recover for loss of support.[129] The court recognized that most states allow recovery in the form of loss of support, rather than for future lost wages, when there are beneficiaries.[130]

Regarding plaintiffs' mental injury and grief, the court found that wrongful death recovery generally has been extended only to cover pecuniary damages which are measurable.[131] The exception to the rule precluding recovery for grief occurs when a survivor's

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124. *Id.*

125. 498 U.S. 19 (1990) (no recovery for lost earnings beyond a seaman's lifetime).

126. 807 F. Supp. at 1084.

127. *Id.*

128. *Id.* at 1084-88.

129. *Id.* at 1084.

130. *Id.*

131. *Id.* at 1085.

damages extend beyond mere grief to actual mental injury, or the aggravation of a pre-existing physical injury.[132] Where damages are due to mental injury and are associated with physical injury, they are "damages sustained" as set forth under the Convention.[133] As the knowledge of KAL's "willful misconduct" is a factor in assessing plaintiffs' present actual mental injury, the court rejected the defendant's motion to preclude any mention of willful misconduct, as found by the liability jury.[134]

Finally, Kole's survivors, as plaintiffs sought recovery for their loss of Kole's love, affection and companionship.[135] Defendants, on the other hand, argued that loss of society, (covering the same grounds) is not recoverable under DOHSA, and that the Supreme Court's decision in *Miles v. Apex Marine Corp.*[136] precludes recovery.[137] However, the court held that the Convention provides for damages sustained, "actual harm experienced, whether physical injury to the passenger or, in the case of death, monetary or other loss to his survivors" as well as Fifth Circuit caselaw, which allowed damages for loss of love and affection in cases brought under the Warsaw Convention.[138]

Moreover, the Court found that because the Second Circuit in *Lockerbie* determined that federal common law applies in interpreting the Warsaw Convention, the measure of damages available under the Convention is also governed by federal law.[139]

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132. *Id.* at 1085-86.

133. *Id.* at 1086.

134. *Id.*

135. *Id.*

136. *See* 498 U.S. 19 (1990).

137. 807 F. Supp. at 1087.

138. *Id.*

139. *Id.*

Allowing survivors who are close family members of passengers to recover damages for loss of love, affection, and companionship, when proved, serves the underlying purposes and goals of the Convention, especially where the Convention provides not only for full compensation for victims but also for anyone who can prove damages sustained as a result of the crash.[140] Accordingly, the court declined to impose a dependency requirement on those seeking benefits, noting that a close relative who has suffered injury may be compensated.[141]

3. Loss of Inheritance and Loss of Services

Lastly, the court found that loss of inheritance, although not specifically sought by the plaintiffs, were recoverable in most jurisdictions and permitted by federal common law.[142] In addition, the court found that damages for loss of services, where the value of services lost is measurable, were recoverable.[143] Defendants agreed that loss of inheritance is recoverable and did not contest recovery for loss of services.[144]

In sum, the district court found that plaintiffs may recover for decedent's conscious pain and suffering; loss of support, mental injury and grief; loss of love, affection, and companionship; loss of inheritance; and lost services.[145]

C. *The Second Circuit's Decision*

Korean Air Lines appealed from the judgment entered by the Southern District of New York on April 12, 1993, following a jury

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140. *Id.* at 1087-88.

141. *Id.* at 1088.

142. *Id.* at 1088-89.

143. *Id.* at 1089.

144. *Id.*

145. *Id.*

verdict which awarded damages of $251,000 to Marjorie Zicherman and $124,000[146] to Muriel Mahalek and which granted prejudgment interest on the award, discounted by two percent per annum to the date of the accident.[147]

KAL based its appeal on four arguments: (1) federal maritime law precludes plaintiffs' recovery for loss of society; (2) federal maritime law precludes plaintiffs' recovery for mental injury of grief; (3) the evidence was insufficient to sustain an award to Zicherman as executrix of Kole's estate for Kole's conscious pain and suffering; and (4) the evidence was also insufficient to sustain an award to Zicherman for loss of support and loss of inheritance.[148] Zicherman and Kole cross-appealed the court's discounting of prejudgment interest.[149]

The Second Circuit affirmed the award for pain and suffering as well as the district court's calculation of prejudgment interest.[150] However, the awards for mental injury and for

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146. The awards were broken down as follows:

| | |
|---|---|
| Mahalek | |
| 1. Mental injury | $96,000 |
| 2. Loss of society | $28,000 |
| Zicherman (personal capacity) | |
| 3. Mental injury | $65,000 |
| 4. Loss of society | $70,000 |
| 5. Loss of support | $ 5,000 |
| 6. Loss of inheritance | $11,000 |
| Zicherman (as executrix of Kole's estate) | |
| 7. Kole's pain and suffering | $ 100,000 |

43 F.3d 18, 21 (2d Cir. 1994).

147. *Id.* at 20.

148. *Id.*

149. *Id.*

150. *Id.*

Mahalek's loss of society were vacated.[151] The awards for Zicherman for loss of society, loss of support, and loss of inheritance were reversed and remanded.[152]

1. Recovery for Loss of Society

In reviewing KAL's claims that federal maritime law precludes plaintiffs' recovery for loss of society, the Second Circuit turned to its decision in *Lockerbie I*, noting that the Warsaw Convention provides an exclusive cause of action.[153] Emphasizing that the Convention is silent on the question of damages, the court looked to federal law to decide the issues.[154] In doing so, the Second Circuit rejected KAL's argument that because Flight 007 was shot down over non-territorial waters, the applicable law is DOHSA, which expressly limits recovery to pecuniary loss.[155] Instead, the court noted that in *Lockerbie I*, the federal common law governs causes of action under the Warsaw Convention, and that in *Lockerbie II*, damages under the Convention should be determined by maritime law.[156]

Reiterating the holding of *Lockerbie II*, the court emphasized the discrepancies in recovery under either general federal maritime law or federal maritime law based on statute. The court recognized that while two maritime statutes, DOHSA and the Jones Act, preclude recovery for non-pecuniary loss, general maritime cases not brought under such statutory restrictions allow recovery.[157] Based on the language and underlying policies of the Convention,

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151. *Id.*

152. *Id.*

153. *Id.* at 21.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

however, the court concluded that compensatory, non-pecuniary damages are appropriate, and accordingly, under general maritime principles, the Warsaw Convention permits recovery for loss of society.[158]

The Second Circuit rejected KAL's argument distinguishing the holdings of the *Lockerbie* cases, where the accidents occurred on dry land, from the KAL disaster, which occurred over water.[159] To construct one rule for Convention cases occurring over water and another for those occurring over land would defeat the purpose of uniformity.[160] The Court noted that it "cannot 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."[161] Accordingly, the Court found that to maintain uniformity under the Warsaw Convention, general maritime law, rather than DOHSA, is more appropriate.[162]

Federal maritime law, in turn, allows recovery for loss of society only for dependents.[163] While this bright-line rule may unfairly deny recovery for some deserving parties, the Court noted that the decision is rational and efficient.[164] Under the rule of *Lockerbie II*, which extended to Convention cases the general maritime rule limiting loss of society damages to dependents,

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 22 (citations omitted).

162. *Id.*

163. *Id.*

164. *Id.*

plaintiffs may recover only if they can establish that they were Kole's dependents at the time of her death.[165]

KAL argues that, as a matter of law, Mahalek may not recover loss of society damages, because she failed to offer evidence to support a claim of dependency.[166] Further, Mahalek specifically conceded on cross-examination that she was not financially dependent on Kole.[167] Because no jury could find Mahalek entitled to recover damages as a dependent, the court reversed and vacated the award to Mahalek for loss of society.[168] Similarly, KAL argues that the evidence submitted by Zicherman, in the form of testimony that Kole gave her general financial assistance, is insufficient to establish the test for dependency; where the record does not establish that Kole in fact financed the purchase of a house, the Court reversed and remanded the award of loss of society damages to Zicherman, pending trial on that issue.[169]

2. Damages for Grief or Mental Injury

The court next addressed the issue of whether plaintiffs may recover additional damages for their grief or mental injury, as awarded by the district court, which reasoned that the Warsaw Convention permits recovery for "damages sustained" and that mental injury or grief of surviving relatives is one such type of damage.[170] The Second Circuit disagreed with the trial court, noting that under *Lockerbie II*, federal maritime supplies the

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165. *Id.* Dependency is the existence of "a legal or voluntarily created status where the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in [her] customary standard of living." *Id.* (citing Petition of United States, 418 F.2d 264, 272 (1st Cir. 1969)).

166. 43 F.3d at 22.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 23.

measure of damages for injuries arising out of accidents governed by the Warsaw Convention.[171] Federal maritime law does not permit surviving relatives to recover damages for mental injury or grief in addition to damages for loss of society.[172] Accordingly, the awards to Zicherman and Mahalek for mental injury were reversed and vacated.[173]

3. Pre-death Pain and Suffering

The court rejected KAL's argument that Zicherman, as executrix, failed to provide specific evidence from which the jury could infer that Kole: (1) survived the missile explosions; (2) was conscious and aware for a period of time; (3) and experienced pain and suffering.[174] Because it would be impossible to produce such evidence, expert testimony is sufficient such that the jury could reasonably infer Kole's pre-death pain and suffering; thus, the court affirmed the award.[175]

4. Loss of Support and Loss of Inheritance

Damages for loss of support and loss of inheritance are recognized wrongful death remedies under maritime law.[176] However, the award of such remedies has been conditioned upon a showing of full or partial dependency.[177] Consequently, the court reversed and remanded the awards to Zicherman for loss of support

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171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

and loss of inheritance for determination of the issue of dependency.[178]

5. Discount of Prejudgment Award

Finally, the Second Circuit noted that the calculation of prejudgment interest is a discretionary matter for the district court.[179] Here, where the district court discounted a jury verdict rendered in 1992 for an accident which occurred in 1983, and where the verdict may have reflected the inflationary impact of the intervening nine years, the discount is not an abuse of its discretion.[180]

D. *The Supreme Court's Decision*

Both parties appealed to the Supreme Court of the United States. Zicherman, on behalf of the Petitioners, filed a petition for writ of certiorari with the United States Supreme Court, arguing that dependency, under either common law or general maritime law based on statute, is not a requirement for loss of society damages under the Warsaw Convention.[181] Respondents KAL responded and filed a cross-appeal, arguing that nonpecuniary damages for loss of society are not recoverable under the Warsaw Convention because the national law of each contracting party determines which damages are recoverable. In addition, where the aviation disaster occurs on the High Seas within the meaning and scope of DOHSA, damages are limited only to pecuniary losses.[182]

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178. *Id.*

179. *Id.* at 24.

180. *Id.*

181. Brief for the Petitioners/Cross-Respondents at 7, Zicherman v. Korean Air Lines, 116 S. Ct. 629 (1996) (Nos. 94-1361, 94-1477).

182. Brief for Respondent/Cross-Petitioner at 12-15, Zicherman v. Korean Air Lines, 116 S. Ct. 629 (1996) (Nos 94-1361, 94-1477).

The Supreme Court granted certiorari, framing the issue as whether, in a suit brought under Article 17 of the Warsaw Convention governing international air transportation, a plaintiff may recover damages for loss of society resulting from the death of a relative in a plane crash on the High Seas.[183]

1. The Plain Meaning of Article 17

Justice Scalia, writing for a unanimous court, first turned to Article 17 to determine whether it provided any indication as to the types of damages provided for under the Convention's terms.[184] From the outset, the Court noted that the English word "damage" or "harm," or in the official French text "dommage," could be applied to a wide range of phenomena, "from the medical expenses incurred as a result of Kole's injuries (for which every legal system would provide tort compensation), to the mental distress of some stranger who reads about Kole's death in the paper (for which no legal system would provide tort compensation."[185] To allow the use of the term in its broadest sense would explode tort liability beyond what any legal system in the world allows.[186] Accordingly, the Court refused to simply look to English dictionary definitions of "damage" and apply "plain meaning."[187]

Rejecting the Petitioners' suggestion to look to the dictionary definition of the term, the Court noted that there were two alternatives.[188] One alternative to Article 17's meaning of "dommage" might be to look to the term's meaning under French

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183. Zicherman v. Korean Air Lines, 116 S. Ct. 629, 631 (1996).

184. *Id.* at 632.

185. *Id.*

186. *Id.*

187. *Id.* (citing Petitoners' Brief at 7-9).

188. 116 S. Ct. at 632.

law dating from 1929, when the Convention was drafted.[189] The Petitioners suggested that French law in 1929 recognized not only "dommage material," pecuniary harm, but also "dommage moral," nonpecuniary harm encompassing loss of society.[190] However, the Court referred to its previous rejection of a broad meaning of the term "damage," noted that the question is not whether the Court will be guided by French legal usage, but "whether the word 'dommage' establishes as the content of the concept 'legally cognizable harm' what French law accepted in 1929."[191] The Court noted that no United States Supreme Court case has ever provided for adopting French law in such a detailed manner; indeed, where the Court looked to the French language for the meaning of the term, it did not inquire how French courts would resolve the question, but instead "made that judgment for [itself]."[192] The Court acknowledged that in the case at hand, it would have been unlikely that the parties to the Convention "would have understood Article 17's use of the general term 'dommage' to require compensation for elements of harm recognized in France but unrecognized elsewhere, or to forbid compensation for elements of harm unrecognized in France but recognized elsewhere."[193] Many nations who are signatories, including Czechoslovakia, Denmark, Germany, the Netherlands, the Soviet Union, and Sweden, did not, years after the Warsaw Convention, recognize a cause of action for nonpecuniary harm resulting from wrongful death.[194]

The Court noted that the other alternative, and the one it considered most realistic, was that "dommage" refered to "legally

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189. *Id.*

190. *Id.*

191. *Id.* at 632-33.

192. *Id.* at 633 (referring to its decisions in Eastern Airlines v. Floyd, 499 U.S. 530 (1991) (narrowly construing the term "lesion corporelle" in Article 17) and Air France v. Saks, 470 U.S. 392 (1985) (interpreting the word "accident")).

193. 116 S. Ct. at 633.

194. *Id.*

cognizable harm" and that Article 17 leaves it to adjudicating courts to determine what harm is specifically cognizable.[195] Moreover, the Court acknowledged that such an interpretation is not unusual, enumerating examples within domestic law which provide generally for "damages" or reimbursement for "injury," but leave the question of what types of harms are compensable to the courts.[196]

2. The Limitation of Article 17 by Article 24

The Court's preference for the second alternative is supported by an *in para materia* reading of the Convention.[197] Article 17's provisions are expressly limited by Article 24.[198] The Court noted that the most natural reading of Article 24 is that, in an action brought under Article 17, the law of the Convention should not be read to affect the substantive questions regarding who may bring suit and for what compensation.[199] Petitioners' reading of Article 24 would be awkward at best: 1929 French law as set forth in the Convention would determine what harms arising out of international air disasters must be indemnified, while current domestic law would determine who is entitled to the indemnity and how it is to be divided among claimants.[200] Such a reading is inappropriate where the more comprehensible result is that the Convention leaves to domestic law the questions of who may recover and what compensable damages are available.[201]

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195. *Id.*

196. *Id.* (referring to the Jones Act, 46 U.S.C. § 688 (1988), the Lanham Trade-Mark Act, 15 U.S.C. § 1117(a), and various state statutes).

197. 116 S. Ct. at 633.

198. *See supra* note 10 and accompanying text.

199. 116 S. Ct. at 634.

200. *Id.*

201. *Id.*

### 3. The Convention's Negotiation, Drafting History, and Post-Ratification Conduct of the Contracting Parties

The Court next turned to the negotiation and drafting history, or "travaux preparatoires," and the post-ratification understanding of the contracting parties to determine the appropriate interpretation of the relevant provisions of the Convention.[202] These sources confirmed the Court's finding that compensable injury must be determined according to domestic law.[203] First, the Court examined the statements made by the *Comite International Technique d'Experts Juridiques Aeriens*, which produced the preparatory work culminating in the Warsaw Convention.[204] Importantly, the Court noted that the CITEJA's report of May 15, 1928 acknowledged that determining the types of damages subject to reparation is a difficult one in that "it was not possible to find a satisfactory solution before knowing exactly the legislation of the various countries."[205] In fact, the CITEJA report accompanying the 1929 draft of the Convention emphasized that the question of what persons had a cause of action under the Convention and the types of damages subject to reparation is a "question of private international law [which] should be regulated independantly [sic] from the present Convention."[206] The Court also noted that the questions of who may recover and the compensatory damages recoverable are intertwined, and that the framers of the Convention,

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202. *Id.*

203. *Id.*

204. *Id. See also* note 12, *supra*, and accompanying text.

205. *Id.* (citing Report of the Third Session by Henry de Vos, CITEJA Reporter (May 15, 1928), *reprinted in* International Technical Committee on Legal Experts on Air Questions 106 (May 1928)).

206. 116 S. Ct. at 635. (citing Report of the Third Session of CITEJA by Henry de Vos (Sept. 25, 1929)), *reprinted in* Second International Conference on Private Aeronautical Law Minutes, Warsaw 1929, 255 (R. Horner & D. Legrez transl. 1975).

unable to resolve these issues, sought to leave them to the private international law arena.[207]

Also, the conduct of the contracting parties to the Convention following ratification demonstrates the understanding that the damages recoverable for harm incurred are to be determined by domestic law.[208] England, Germany, and the Netherlands, for example, have adopted domestic legislation governing the types of damages recoverable in a Convention case.[209] Canada, on the other hand, has adopted legislation setting forth who may bring suit under Article 24(2), but has left the question of the type of damages recoverable to provincial law.[210] The Court of Appeals of Quebec has specifically rejected the argument that Article 17 allows damages unrecoverable under the domestic law of Quebec.[211] Finally, the Court noted that expert commentators have been virtually unanimous in their view that the type of harm compensable is to be determined by domestic law.[212]

4. Choice of Law Issues

Once the Court decided that compensable harm is determined by domestic law, the next question was which sovereign's domestic law is applicable.[213] However, resolution of that thorny issue was not necessary, as the parties agreed that if the

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207. 116 S. Ct. at 635.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* (citing Dame Surprenant v. Air Canada, [1973] C.A. 107, 117-8, 126-7 (Ct.App. Quebec) (opinion of Deschenes, J.)).

212. 116 S. Ct. at 635.

213. *Id.*

issue of compensable harm is not resolved by the Convention itself, then it is governed by United States' law.[214]

Accordingly, the Court looked at which particular law of the United States provided guidance on the issue of compensable harm.[215] Significantly, the Court rejected the Second Circuit's notion of the need to maintain a uniform law when it held that general maritime law governed causes of action under the Convention, regardless of whether the accident out of which they arise occurs on land or on the High Seas.[216] Indeed, the Court emphasized that the Convention itself contains no such rule of law governing the question at hand.[217] Moreover, the Convention does not empower the Court to devise a common law rule "under cover of general admiralty law or otherwise . . . [which would] supersede the normal federal disposition."[218] The Court noted that such legislation may be fashioned by Congress, following other contracting nations.[219] However, where such legislation does not exist, the Convention offers little assistance: "Articles 17 and 24(2) provide nothing more than a pass-through, authorizing [the Court] to apply the law that would govern in absence of the Warsaw Convention."[220]

The applicable domestic law in this case is DOHSA.[221] The death at issue here falls within the literal terms of the provision, and the Court noted that the law is clear that DOHSA's terms apply to

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214. *Id.*

215. *Id.* at 636.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id. See* 46 U.S.C. app § 761 (1988).

airplane crashes.[222] Under DOHSA, the petitioners may not recover loss of society damages.[223] Moreover, where DOHSA applies, neither state law nor general maritime law provides a basis for loss of society damages.[224]

The Court rejected Petitioners' argument that DOHSA should not apply because of the need for uniformity when addressing Convention cases.[225] In fact, the Court noted that the Convention does not allow implicit authorization for national courts to create uniformity between airplane disasters which occur over sea and those which occur over land.[226]

Lastly, the Court rejected Petitioners' argument that the supplant of DOHSA would result in an unintended "double cap" of the $75,000 limit per passenger liability (except in cases of willful misconduct), which when combined with a DOHSA rule prohibiting compensation for nonpecuniary harm, would not sufficiently deter willful misconduct.[227] The Court noted that the Convention "unquestionably envisions the application of domestic law" and that

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222. 116 S. Ct. at 636. (citing Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 263-4 (1972)).

223. 116 S. Ct. at 636.

224. *Id. See generally*, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232-3 (1986) (state law preempted by DOHSA) and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625-6 (1978) (no loss of society under general maritime law where DOHSA applicable). The Supreme Court declined to address the issue of whether § 761 of DOHSA calls into question the district court's determination that the decedent's mother is the proper party to the suit, or its grant of a jury trial, and whether § 762 contradicts the district court's allowance of pain and suffering damages, as KAL challenged none of those rulings in its petition for certiorari. 116 S. Ct. at 636, n.4.

225. 116 S. Ct. at 636.

226. *Id.*

227. *Id.* at 637.

it is the function of Congress, rather than the Court, to decide that domestic law provides inadequate deterrence.[228]

Having concluded that Articles 17 and 24(2) of the Convention permit compensation only for legally cognizable harm, leaving the specification of what harm is cognizable to domestic law applicable under the forum's choice of law rules, the Court held that DOHSA provides the substantive United States law where the airline crash occurs on the High Seas.[229] Where DOHSA is applicable, there is no entitlement to damages for loss of society.[230] Consequently, the Court noted that it need not reach the question, whether under general maritime law, dependency is a prerequisite for loss of society damages.[231]

Accordingly, the Court reversed the Second Circuit's judgment permitting Zicherman to recover loss of society damages if she could establish her dependency on the decedent, and affirmed the judgment vacating the award of loss of society damages to Mahalek.[232]

## V. ANALYSIS

The *Zicherman* decision represents an important phase in Warsaw Convention litigation. Only the fifth case to be decided by the Court regarding the Convention's applicability,[233] the *Zicherman* decision limits the type of damages recoverable under the Convention to pecuniary damages under DOHSA, placing broad

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228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See generally*, Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991); Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Air France v. Saks, 470 U.S. 392 (1985); and Trans World Airlines, Inc. v. Franklin Mint Corp, 466 U.S. 243 (1984).

restrictions on recovery for the death of a relative in an international aviation disaster on the High Seas.

Importantly, the *Zicherman* decision arguably reverses a move towards uniform decisionmaking under the Warsaw Convention as set forth by the Second Circuit in the *Lockerbie* cases. While the Second Circuit attempted to create a framework establishing uniformity for air disasters occurring over either land or sea, the Supreme Court specifically rejected the creation of a uniform rule by the judiciary. The Court noted that the place for creation of such rules lies with the legislators of the contracting nations. As Justice Scalia pointed out, absent legislation creating special provisions applicable to Warsaw Convention cases, the Court must "apply the law that would govern in the absence of the Convention."[234]

Justice Scalia analyzed the Convention according to its plain meaning, looking at the language and context of the provisions, the negotiation and drafting history, and the conduct of the parties.[235] Such an analysis enabled the Court to conform to the framers' intentions of limiting air carriers' liability while addressing survivors' damages.

Importantly, the Supreme Court cautioned lower courts that the Warsaw Convention does not empower the creation of "some common-law rule--under cover of general admiralty law or otherwise--that will supersede the normal federal disposition."[236] Such a cautionary note serves as a reminder that the Warsaw Convention does not authorize creation of an international or federal common law "in derogation of otherwise applicable law."[237] Rather, the Court noted that the Convention serves only as a "pass-

234. 116 S. Ct. at 636.

235. *See supra* Part IV.

236. 116 S. Ct. at 636.

237. *Id.*

through" which directs courts to apply the law that governs in the absence of the Convention.[238]

The Court's rejection of the Second Circuit's more expansive reading of the Convention to allow loss of society damages using general maritime law provisions arguably opens the door on the debate which haunted the Convention's framers during the early part of this century. Does the Convention's failure to specify the types of damages available to decedents' survivors unfairly favor international air carriers?

Some may argue that this is the Convention's greatest failure, as demonstrated by the *Zicherman* decision. Importantly, the *Zicherman* decision is significant not so much in what it says, but in what it does not say. While it is true that *Zicherman* places great limitations on who may recover under the Convention, it also poses important questions regarding choice of law issues and whether the Warsaw Convention provides the exclusive cause of action in a wrongful death suit.

For example, the *Zicherman* decision seemingly applies only to those international air disasters which occur over the High Seas, in which case the Death on the High Seas Act is the appropriate substantive law to apply, and recovery is limited accordingly. However, where the air disaster occurs over land, the scenario is entirely different, and the Supreme Court does not answer what substantive law would be appropriate.

Arguably, in cases such as the *Lockerbie* disaster, where the incident occurs over land, the ability to recover nonpecuniary damages such as loss of society will depend entirely on the forum's choice of law rules. As Articles 17 and 24(2) "provide nothing more than a pass-through," it is unclear what the result will be. Because the Supreme Court has discarded the Second Circuit's analysis in the *Lockerbie* cases, it is likely that courts will be required to revert to the complicated choice of law analysis referred to in Justice Scalia's opinion which had plagued the courts years

238. *Id.*

earlier.[239] In international aviation disaster litigation, jurisdiction would be predicated on the federal question presented under the Warsaw Convention, and the federal court would be the forum.[240] However, the question still remains as to whether courts should apply a federal common law choice of law rule or state choice of law principles in non-diversity cases. Arguably, the Supreme Court rejected the former in favor of the latter. As a result, much money will be spent determining choice of law issues, for example, in cases where a state's or another country's law applies, depending on issues such as domicile.

Unfortunately, the likely result is that judgments will vary from state to state, depending on the choice of law rules of each state. Accordingly, the results for the families of two passengers sitting next to each other on an ill-fated plane will be entirely different.

The question of choice of law also affects whether the Convention is the exclusive remedy for an international aviation disaster. In *Lockerbie I*, the Second Circuit: (1) determined that punitive damages were outside the scope of the Convention; (2) held that the Convention provides the exclusive remedy for wrongful death suits; and (3) that plaintiffs' claims for punitive damages were preempted by the Convention.[241] However, it is unlikely that this interpretation of the Convention will stand, in light

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239. *See* Stephen J. Fearon, *Recoverable Damages in Wrongful Death Actions Governed by the Warsaw Convention*, 62 DEF. COUNS. J. 367 (July, 1995). As one commentator has noted, prior to the Second Circuit's decision in Lockerbie,

> American courts would conduct an exhaustive choice of law analysis and apply the wrongful death law of one U.S. state or another (or that of a foreign country) as the local (substantial) law in such cases. In air disaster litigation involving numerous plaintiffs from many different states and country, the result was that the survivors of deceased passengers often received disparate recoveries, even when their decedents earned similar incomes, left similar estates and were sitting alongside one another when death occurred.

*Id.*

240. *See supra* note 31 and accompanying text.

241. *See* Lockerbie I, *supra*, Part III.

of *Zicherman*, because damages are determined by the substantive law of the forum; thus, the source of damages can not be the Convention itself.[242] Consequently, at least in air disasters over land, courts will have to turn to states' choice of law rules to determine what damages are available in cases arising under the Warsaw Convention. Courts will also need to address whether dependency must be established to recover damages in actions under the Convention, as the Supreme Court in *Zicherman* fails to address that issue.

*Zicherman*, while laying to rest the question of damages available in air disasters over the High Seas, fails to shed light on the issue of the type of damages available in crashes over land.

## VI. CONCLUSION

Inasmuch as the Convention's purpose was to provide uniform decisions in international air disasters, that goal is unlikely to be realized, considering the current state of U.S. law interpreting the Convention. The Supreme Court's decision in *Zicherman* portends future problems in the applicability of the Convention's use. As discussed above, at least in cases involving international aviation disasters on land, it is not at all clear that the types of damages recoverable will be uniform from jurisdiction to jurisdiction, as no federal legislation exists to supplement the Warsaw Convention's provisions.

Accordingly, in light of the Supreme Court's refusal to fashion a rule to provide for damages in Convention cases, it is the responsibility of legislators to supplement the Convention by fashioning legislation which would provide guidance on the types of damages recoverable and by whom. Until then, the survivors of those killed in international air crashes will be forced to litigate these issues.

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242. *See generally*, Kreindler, *'Zicherman' - Methodology in International Accidents*, 215 N.Y.L.J. (Feb. 29, 1996) (critiquing Supreme Court's analysis).