

7-1-1965

Wilful Misconduct Under the Warsaw Convention: Recent Trends and Developments

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Juan E. Acosta, *Wilful Misconduct Under the Warsaw Convention: Recent Trends and Developments*, 19 U. Miami L. Rev. 575 (1965)
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WILFUL MISCONDUCT UNDER THE WARSAW CONVENTION: RECENT TRENDS AND DEVELOPMENTS

JUAN E. ACOSTA*

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I. INTRODUCTION

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, which in common usage is known as the "Warsaw Convention," was enacted on October 12, 1929, at Warsaw, Poland, during the Second International Conference on Private Air Law.¹

Adherence by the United States Government came on October 29, 1934, thus the Convention became part of the law of the land superseding any other law in regard to international transportation by air.²

It should be noticed that the draftors of the Convention were primarily from Civil Law Nations; and it was drawn without the participation of the United States. The French version is the official text of the Convention and the version officially accepted by the Senate of the United States.

It is a well-known fact that the primary purpose of the Convention was to limit the liability for personal injuries to \$8,300.00,³ so that in the 1930's fledgling air carriers could obtain insurance coverage. In this regard, the Convention has been subject to severe criticisms⁴ in the United States. It has been argued that after World War II, the Convention had outlived its usefulness in the United States and that there was no longer any reason to maintain such limitation for personal injuries since the air carriers are now well established enterprises.

The United States began diplomatic negotiations toward removal of the liability limitation in the 1950's. However, these efforts culminated

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1. DELASCIO, *MANUAL DEL DERECHO DE LA AVIACION* 192 (1959).

2. 49 Stat., pt. II 3000 (1929) (hereinafter cited as the Convention).

3. Convention art. 22.

4. *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. AIR L. & COM. 255, 267-268 (1959).

in a compromised amendment to the Warsaw Convention, known as the Hague Protocol of 1955.⁵ The Hague Protocol, which has not yet been ratified by the United States, was an agreement to raise the Warsaw limitation for personal injuries to \$16,600.00. In addition, the Hague Protocol would introduce language so rigid that it would become vastly more difficult for passengers—or their estates—to recover damages beyond the \$16,600.00 limit.⁶ This, of course, has not satisfied the advocates of unlimited liability in cases of personal injuries.

In 1951, the United States Government referred this matter preliminarily to the Inter-Agency Group on International Aviation (IGIA). This advisory group, consisting of personnel from various agencies, was to recommend either the denunciation of the Warsaw Convention or the ratification of the Hague Protocol. At the end, the IGIA group attempted to compromise by developing new schemes designed to satisfy both parts in controversy.⁷

Presently, however, there is in existence a very strong tendency to denounce the Warsaw Convention as repugnant to American Law.

II. APPLICABILITY OF THE CONVENTION

Before Wilful Misconduct under Article 25 of the Convention can be ascertained, applicability of the Convention under Article 1 must first be considered. This is necessary in every case, since the Convention only applies to international flights.

The Convention does not look into the nationality of the carrier or the citizenship of the passengers in order to determine its applicability.⁸

5. KREINDLER, AVIATION ACCIDENT LAW 375 (1963).

6. The Hague Protocol, if ratified, would effect a fundamental change in what is presently considered the meaning of Wilful Misconduct in the United States. (For the definition of Wilful Misconduct, see quotation in text at notes 11 and 13, *infra*.) Article 23 of the Protocol provides that article 25 of the Convention (see *infra* note 13) shall be deleted and replaced by the following:

The limits of liability specified in article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.

In summary, the Protocol would introduce the same language used by the court in the *Jane Froman* case, *infra* at note 21.

7. Speiser, Memorandum on the Warsaw Convention, The Hague Protocol and the Igia Recommendations, NACCA L.J. Bar Association (1963).

8. *Glenn v. Compania Cubana de Aviacion*, 102 F. Supp. 631 (S.D. Fla. 1952) where the decedents were being carried as passengers for hire from Miami to Havana, Cuba, and return. Cuba was not a signatory power. The Court held that "since the purpose and object of the Convention was to unify rules pertaining to international transportation by air and not to inquire into the citizenship of any passenger or nationality of the carrier, it was proper for the defendant air carrier to avail itself of the provisions of the Convention"; *Garcia v. Pan American World Airways, Inc.*, 269 App. Div. 287, 55 N.Y.S.2d 317 (2d Dep't 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257 (1946), *cert. denied*, 338 U.S. 824 (1949); *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (1943), *aff'd*, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dep't 1944), *cert. denied*, 324 U.S. 882 (1945); *Tumar-*

It is, predicated exclusively, upon the place of departure and the place of destination established within the contract of carriage.

Article 1 of the Convention establishes the limits of what is considered an international flight. Any flight, in which, according to the contract made by the parties, the place of departure and the place of destination are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party is deemed an international flight within the provision of this article.⁹ Article 1 provides further that if there is an agreed stopping place within a territory subject to the sovereignty of another Power, the flight is considered an international flight even though that Power is not a party to this Convention. Conversely, a carriage without such an agreed stopping place between territories subject to the sovereignty of a Power, not a member of this Convention, is not deemed to be an international flight for the purposes of this Convention. Article 1 also provides that the carriage to be performed by several successive air carriers¹⁰ is deemed, for the purposes of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, and it does not lose its international character merely because one contract or a series of contracts are to be performed entirely within a territory subject to the sovereignty of the same High Contracting Party. Finally, it should be borne in mind, however, that the Convention does not apply to international transportation that may be "performed by the United States."¹¹

III. WILFUL MISCONDUCT

The Warsaw Convention provides that in case of disaster on international flight, the liability of the air carrier is limited to \$8,300.00¹²

kin v. Pan American World Airways, Inc., 1956 U.S. & C. Av. R. 383 (Super. N.J. L. Div. 1956); Grein v. Imperial Airways, Ltd., 1 K.B. 50 (C.A. 1936).

9. In *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), the Convention was held applicable to a "charter" flight from the United States to France and return and where each passenger was issued a ticket that referred to the Convention's liability limitation.

10. The Guadalajara Convention of 1961, supplementary of the Warsaw Convention, when in force, would introduce particular rules relating to international carriage by air performed by a carriage other than the contracting carrier. See 28 J. AIR L. & COM. 45, 373 (1961-1962).

11. United States reservation to article 2 of the Convention. Additional Protocol 49 Stat. 3025 (1929).

In a very recent decision, *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), the court held the Convention applicable to a charter flight of "military" personnel from the United States to Japan. The flight was performed "for" and not "by" the United States, the court concluded.

12. *Supra* note 3. To escape the \$8,300 liability, the carrier must prove that he and his agents have taken all necessary measures to avoid the damage or that it was impossible to prevent its happening, Convention art. 20; *Pierre v. Eastern Airlines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957); *Wyman v. Pan American Airways, Inc.*, *supra* note 8. In *Mertens v. Flying Tiger Line, Inc.*, *supra* note 11, where the ticket was delivered to the plaintiff-decedent when he had boarded the plane, the court found the Convention's liability limita-

unless it can be shown that the plaintiff's damages were the consequence of the carrier's wilful misconduct.¹³ The burden of proving wilful misconduct and that it was the proximate cause or a substantial factor in the result which ensued is on the plaintiff.¹⁴

In *American Airlines, Inc. v. Ulen*,¹⁵ the Court of Appeals defined wilful misconduct as follows:

The intentional performance of an act with the knowledge that the performance of that act is likely to cause harm, or the intentional performance of an act in such manner as to imply wanton or careless disregard for its probable consequences.

In addition, the Court cited with approval a very short definition of wilful misconduct to the effect that "conscious omissions to discharge a positive duty necessary to the safety of others" constitute grounds for wilful misconduct.¹⁶

In *Pekelis v. Transcontinental and Western Air, Inc.*,¹⁷ the court said that:

Wilful misconduct, likewise, is the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission.

It should be observed, that in the latter case the court rejected the short definition cited in *Ulen*, on the grounds that "it fails to require either that the actor knows that his duty was necessary to safety or that his failure to perform it would amount to recklessness."

tion inapplicable on grounds that the ticket was not "adequately" delivered as provided in article 3(2). The ticket, the court reasoned, must be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability; namely: (1) deciding not to take the flight; (2) entering into a special contract with the carrier providing for a higher limitation of liability (art. 22); or (3) taking out additional insurance for the flight.

13. Convention art. 25 provides:

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

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

See generally Guerreri, *Wilful Misconduct in the Warsaw Convention: A Stumbling Block?*, 6 MCGILL L.J. 267 (1960).

14. *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), cert. denied, 350 U.S. 989 (1956); *Horobin v. British Overseas Airways Corp.* (1952), 2 All. E.R. 1016 (Q.B.). 15. 186 F.2d 529 (D.C. Cir. 1949).

16. *Rowe v. Gatke*, 126 F.2d 61 (7th Cir. 1942).

17. 187 F.2d 122 (2d Cir. 1951), cert. denied, 341 U.S. 951 (1951).

Admittedly, Article 25 of the Convention as it appears translated from the original French has been the subject of a great deal of litigation. In *Ulen*, the defendant-appellant contended that the words *dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalent au dol*¹⁸ as they appear in the original French of the Convention, have been inaccurately translated into "wilful misconduct." *Dol*¹⁹ implies a deliberate design to cause a result. The advocates of such argument claim that the carrier must be guilty of "well-nigh criminal intent" before Article 25 has application.²⁰

In spite of the letter and spirit of Article 25, courts in the United States have not agreed that such language should be construed to that extent.²¹ Its wording—*d'après la loi du tribunal saisi*²²—left to the jurisdiction seized of the case to decide whether or not a particular fault is to be given the effect of *dol* and to remove the limitation of the carrier's liability.²³

The draftors of the Warsaw Convention, however, intended to assimilate *faute lourde* and *dol*.²⁴ While it may embrace intentional as well as unintentional acts, *faute lourde* can be established *in abstracto* by reference to the standard conduct required from a reasonable prudent man (or *bon père de famille*) without requiring the determination of the wrongdoer's state of mind.²⁵

18. These words have been translated into art. 25 as "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."

19. From Latin. In civil law *dolus* imports fraud or deceit; any subtle contrivance by words or acts with a design to circumvent. *Dolus* differs from *culpa* in that the latter imports error, negligence, heedlessness, or temerity, as well as indirect intention (*i.e.*, consequence intended but not desired), while to constitute the former there must be a will or intention to do wrong. BOUVIER, LAW DICTIONARY (8th ed. 1914). The Romans considered the *culpa lata* as enacted in the civil law systems as equivalent to *dolus*, mainly for psychological reasons; the *culpa lata* being so reckless and enormous. See generally Guerrerri, *Wilful Misconduct in the Warsaw Convention: A Stumbling Block?*, *supra* note 13.

It is submitted, that it seems doubtful, however, whether the general use of the word *dolus* in the civil law is not rather that of very great negligence, than of fraud as used in the common law.

20. *American Airlines, Inc. v. Ulen*, *supra* note 15.

21. With the exception of *Froman v. Pan American Airways*, 284 App. Div. 935, 135 N.Y.S.2d 619 (1st Dep't 1954), *leave to appeal denied*, 308 N.Y. 1050, 125 N.E.2d 434 (1955), *cert. denied*, 349 U.S. 947 (1955), where the court held that wilful misconduct appears to require that the act of the carrier or its employees be intentionally done.

22. *Supra* note 18.

23. *Berner v. British Commonwealth Pacific Airlines*, 219 F. Supp. 289 (S.D.N.Y. 1963), *rev'd*, 346 F.2d 532 (2d Cir. 1965). The Court of Appeals' reversal was predicated mainly on the ground that in holding the defendant airlines guilty of wilful misconduct as a "matter of law," the trial court substituted itself for the jury and drew its own inferences from the facts. In addition, it should be mentioned that it was also found error to hold that the Second Circuit does not require "knowledge" that damage would probably result, as a necessary element of wilful misconduct.

24. ROME CONVENTION, 1933. *Faute lourde* has been translated as "gross negligence." See generally DRION, *LIMITATION OF LIABILITY IN INTERNATIONAL AIR LAW* (1954).

25. *Supra* note 23.

In summary, in the United States the "intent"²⁶ of the actor to cause the result is not an element to predicate wilful misconduct or gross negligence under the Warsaw Convention. However, the courts have been very reluctant to hold an air carrier liable of wilful misconduct. This is evidenced by the fact that the verdict for the plaintiff in excess of the Convention limit was sustained prior to 1961 in only one instance.²⁷

A. *The Violation of an Air Safety Regulation*

In that one case exceeding the Convention limits prior to 1961 *American Airlines, Inc. v. Ulen*,²⁸ the plaintiffs were passengers on a flight from Washington, D.C. to Mexico City, Mexico, which crashed a few hours after take-off. The evidence showed that the air carrier's authorized and experienced agent had drawn a flight plan which called for the aircraft to fly at an altitude of 4,000 feet along the route where the crash happened. The "flight log"²⁹ indicated that the flight plan was being carefully observed at the time of the accident. It was also established that the aircraft crashed at an altitude of 3,910 feet. In contrast, it should be noticed that in accordance with the air safety regulation³⁰ in effect at the time, the aircraft was supposed to be flown, within the intended route, at least but not less than 5,000 feet of altitude. As an aggravating circumstance, interrogatories answered by the defendant air carrier showed that the "same pilot had flown this same route in the same manner several times before."

The obvious and sole purpose of the civil air regulation in effect at the time of this accident was the "safety of the passengers and the aircraft in a likely situation." In this respect, the Court said, "it imposes a duty upon all the scheduled air carriers."

Faced with this predicament, the Court held that the defendant's flight plan was a deliberate and intentional violation of that duty which

26. *Berner v. British Commonwealth Pacific Airlines*, *supra* note 23; *Pekelis v. Transcontinental & Western Air, Inc.*, *supra* note 17, where the court specifically held that wilful misconduct does not require that the actor intends to cause the ensuing result.

27. *Pekelis v. Transcontinental & Western Air, Inc.*, *supra* note 17, and see quotation in text at 15 *infra*; *Ritts v. American Overseas Airways, Inc.*, 1949 U.S. & C. Av. R. 65 (S.D.N.Y.), and *Goepp v. American Overseas Airlines, Inc.*, 281 App. Div. 105, 111, 117 N.Y.S.2d 276, 281 (1st Dep't 1952), *aff'd mem.*, 305 N.Y. 830, 114 N.E.2d 37 (1953), *cert. denied*, 346 U.S. 874 (1953), arising out of the same crash, see quotation in text at note 33, *infra*; *Rashap v. American Airlines, Inc.*, 1955 U.S. & C. Av. R. 593 (S.D.N.Y.), see quotation in text at note 35, *infra*; *Grey v. American Airlines, Inc.*, *supra* note 14, and see quotation in text at note 36, *infra*.

28. *Supra* note 15.

29. "Flight log" is an airborne device which automatically records on a screen or map the information concerning a particular flight, such as miles flown, altitudes of flight, air speed, temperature, winds, etc. ADAMS, AERONAUTICAL DICTIONARY 75 (1959).

30. Civil Air Reg. 61.7401, effective May 7, 1943, 8 Fed. Reg. 6589. "No scheduled air carrier aircraft shall be flown at an altitude of less than 1000 feet above the highest obstacle located within a horizontal distance of 5 miles from the center of the course intended to be flown."

caused the result complained by the plaintiff. Furthermore, it was also determined that the course intended to be flown at such planned altitude, if successfully carried out, would have passed within $\frac{1}{2}$ mile or at the most 2 miles from the point of impact. Under such circumstances, the Court held further, "it requires no stress of imagination to visualize what could happen and what did happen."

This, the Court added, does not mean that the mere violation of an air safety regulation constitutes by itself wilful misconduct.³¹ In *Ritts v. American Overseas Airways, Inc.*,³² the jury's finding of wilful misconduct was reversed on appeal. In limiting liability to \$8,300, the Court, in effect, found no violation of the alleged air safety regulation, and held, in the alternative, that even if there had been a violation, the plaintiff had not established it as the "proximate cause"³³ of the accident.

In addition, it should be taken into consideration as determinative factors,³⁴ (1) the seriousness of the consequences intended to be prevented by the regulation, (2) the degree of probability of these consequences as a result of the violation, and (3) the interest intended to be protected by such regulation. In other words, a line should be drawn to determine whether a violation of an air safety regulation which has met the requirements set forth previously may or may not constitute grounds for wilful misconduct.

Accordingly, in *Rashap v. American Airlines, Inc.*,³⁵ where, in the process of landing a plane with a feathered engine, the wing flaps were inclined to a degree that violated a regulation, it was not deemed under the circumstances to warrant a finding of wilful misconduct. Nor was wilful misconduct established in *Grey v. American Airlines, Inc.*,³⁶ arising out of the same crash as *Rashap*, where one officer shut off an engine

31. Normally a violation of a "safety" regulation gives rise to negligent actions. Negligence is merely a departure from a standard of conduct required by the law for the protection of others against unreasonable risk of harm. The standard of conduct may be one set by the common law as the traditional standard of the reasonable man of ordinary prudence or it may be laid down by the regulation. In short, negligence is the breach of a legal duty imposed by the rule of common law or by the particular statute or regulation. On the other hand, "negligence per se" is not "liability per se." At the most a violation of a "safety" regulation may constitute conclusive evidence of negligence, or, in other words, "negligence per se." *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W.2d 555 (1947).

See also Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1 (1936), for the proposition that there is wilful misconduct "per se" when violation of a safety regulation leads to an accident.

32. *Supra* note 27; and *Goepp v. American Overseas Airlines, Inc.*, arising out of the same crash, at same note *supra*.

33. PROSSER, TORTS § 252 (2d ed. 1955). "Proximate cause or legal cause is the name given to the limitation which the courts have compelled to place, as a practical necessity, upon the actor's responsibility for the consequences of his conduct. The connection between the duty or obligation which the defendant owes, or does not owe, to the plaintiff and the ultimate consequence of the defendant's act has been deemed as proximate cause."

34. *Dart v. Pure Oil Co.*, *supra* note 31.

35. *Supra* note 27.

36. *Supra* note 14.

at the same time the pilot attempted to gain altitude to make another approach. "The plane was 'in extremis,' whatever the first officer did or failed to do was done to save the aircraft and the lives of all on board including his own."

In *Pekelis*, however, the defendant's faulty installation of an "altimeter" was not considered grounds for wilful misconduct, despite of the seriousness of the violation and its causal relationship with the ensuing result.

In summary, wilful misconduct existed in all its elements in *American Airlines, Inc. v. Ulen*. In the "flight plan" (which called for an altitude not sufficient to fly over the point of impact) as well as in the "executing of the flight" (no attempt by the pilot to increase altitude in spite of the fact that he had flown this same route several times before), and considering the regulation in force, the case clearly fell within the range of Article 25 of the Convention. This was, indeed, a sound decision.

B. *The Non-Violation of an Air Safety Regulation*

In the case of *Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller*,³⁷ a finding of wilful misconduct under the Warsaw Convention was again upheld by the District of Columbia Court of Appeals on each of the four allegations of the plaintiff. In this case, the decedent was a passenger on a flight from Amsterdam to New York which crashed in the waters of the Shannon River, Ireland,³⁸ some 7,000 feet from the end of the airport runway. The decedent and another passenger escaped from the plane through a rear window and stood on the tail of the aircraft without life preservers awaiting rescue. Four hours later, just as a rescue launch was approaching and after all other passengers and crew members had made their way to safety, in rubber boats, the decedent lost his footing, fell off the tail, and drowned.

The first allegation of wilful misconduct was that the defendant air carrier "failed to properly instruct the passengers about the location of the life vest." An air safety regulation of the Irish government "does not require life vest instructions unless a flight is more than 30 minutes travel from land." The accident happened approximately within one minute after take-off, therefore, it cannot be said that a regulation was violated.

37. 292 F.2d 775 (D.C. Cir. 1961), *cert. denied*, 268 U.S. 921 (1961).

38. Article 28 of the Convention deals specifically with the question of judicial jurisdiction. Four specific jurisdictional contracts are provided, three relating to the carrier, and the last based on the place of destination: (1) court of the domicile of the carrier; (2) carrier's principal place of business; (3) where carrier has a place of business through which the contract has been made; and (4) before the court at the place of destination. In *Tuller*, the decision is silent as to jurisdiction. But presumably the ticket was bought in Washington, D.C., thus giving jurisdiction to the Court within art. 28. See McKenry, *Judicial Jurisdiction under the Warsaw Convention*, 29 J. AIR L. & COM. 205 (1963).

However, since the evidence showed that the defendant was alive within seconds before the rescue launch reached the aircraft, the jury inferred that if the decedent had been wearing a life vest, his life could have been saved.

As to this allegation, the court held "that the failure to instruct the passengers as to the location of the life vest was a conscious and wilful omission to perform a positive duty and constituted reckless disregard of its consequences." In addition, the court held further "that we are not bound by the limits of the Irish government's regulations as to when the life vest instructions should be given to fulfill the duty of care owed to passengers."³⁹

It seems evident that the court predicated its findings of wilful misconduct, as to this allegation, on the failure of the crew members to "anticipate the gravity of the harm" which would follow an emergency landing on water, particularly on a night flight which contemplated landing and take-off at at least two airports near the sea.

The second allegation was that the radio operator failed to fasten his seat belt, fell off his seat during the descent and was unable to send a "distress message." The court held that there was no attempt to send a message "either before or after" the crash, in spite of the fact that the plane had three workable radios at three different positions.

The third allegation, the failure of the crew members to assist the passenger and abandon him at his peril, was held sufficient on the grounds that the crew, knowing the decedent was on the tail of the aircraft awaiting rescue, did not make sufficient effort under the circumstances to rescue him, despite the fact that "various alternatives were available at the time."

Finally, the court upheld the fourth allegation, the "unawareness" of the ground agent of the defendant air carrier of the loss of radio contact with the aircraft and its delay to initiate prompt search and rescue operations when he had learned about the crash. These, the court held, "were conscious omissions to discharge a positive duty necessary to the safety of the passengers." Prompt rescue could have prevented the decedent's death who was alive just before the rescue launch arrived.

There has been speculation whether this decision constituted an expansion of the concept of wilful misconduct. A close scrutiny of the most relevant cases involving wilful misconduct would reveal that the court in *Tuller* adhered, excepting the first allegation, to the letter of the standard conception of wilful misconduct⁴⁰ given in *Ulen*, in spite of the

39. *Horobin v. British Overseas Airways Corp.*, *supra* note 14.

40. In both *Goepp v. American Overseas Airlines, Inc.*, *supra* note 27 and *Grey v. American Airlines, Inc.*, *supra* note 14, the court said:

[I]n order that an act may be characterized as wilful, there must be on the part

fact that it relies also on a short definition "suggested" in that case to the effect that "conscious omissions to discharge a positive duty necessary to the safety of others" constitute grounds for wilful misconduct.⁴¹

However, if we analyze this case carefully, we will be able to ascertain that the real basis of the court's ruling was the "public nature" of the duties of a common carrier and the duties of the crew members toward "common carrier passengers." It is evident that under the circumstances they had the means available to perform such duties up to the standard required from them; but they did not.

C. *An Objective, not a Subjective Test*

The "intent" of the actor to cause the result is not an element to predicate wilful misconduct or gross negligence under the Warsaw Convention. In *Berner v. British Commonwealth Pacific Airlines, Ltd.*,⁴² the court held further that:

it is enough if he acted freely knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct not only created an unreasonable risk of harm to the passengers, but also involve a high degree of probability that substantial harm would result to the aircraft and the passengers by the doing or failing to do the act in question.

In this case, the plaintiff-decedent was a passenger for hire in a flight between Sidney, Australia, and San Francisco, California, with intermediate scheduled stops at Nandy, Figi Island, Canton Island, and Honolulu, which crashed near Half Moon Bay, California, on October 29, 1953. Reports prior and after the crash failed to reveal any evidence of mechanical failure or malfunction which might have indicated that the aircraft was not air-worthy at the time of the disaster.

Three times, the San Francisco Airport Control Tower directed the pilot as follows:

"Maintain at least 500 feet above all clouds, contact San Francisco approach control after passing the Half Moon Bay fan

of the person sought to be charged a "conscious intent to do or omit doing" the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.

SEAWCROSS & BEAUMONT, AIR LAW 364 (2d ed. 1951):

[W]ilful misconduct means a deliberate act or omission which the person doing or omitting (1) knows is a breach of his duty in the circumstances, or (2) knows is likely to cause injury to third parties, or (3) with reckless indifference does not know or care whether it is or is not a breach of his duty or is likely to cause damage. . . . It is essential to remember that "the misconduct," not the conduct, must be wilful.

41. *Supra* note 16.

42. *Supra* note 23.

marker.⁴³ Cloud tops reported in the bay area 1,700 feet." He was also instructed to proceed "direct from the Half Moon Bay fan marker to the Instrument Landing System (ILS)⁴⁴ outer marker⁴⁵ before descending."

These "clearances" were given by voice, acknowledged and read back by the pilot, but they were not carried out. King's Mountain, the crash site, was between the two markers but not on a direct line and was "below" the minimum permitted altitude.

In spite of the fact that the pilot did not observe the clearance instructions and instead veered from his assigned course and descended into the clouds before he properly established the airliner's position over the outer marker, the jury returned a verdict for the defendant and awarded nothing to the decedent's estate. On Plaintiff's Motion for Judgment *non obstante veredicto* and a *new* trial limited to damages, granted.

In the most recent case, *Leroy v. Sabena Belgian World Airlines*,⁴⁶ the question of "intent" came before the United States Court of Appeals for the Second Circuit. In that case, the decedent was an international passenger on a flight from Brussels to Rome that crashed into a mountain-side northeast of Rome on February 13, 1955. It was established that the flight plan called for the aircraft to fly within a ten-mile wide airway from Florence to Rome.

The site of the crash, thirty miles east of the airway, and the transcript of the radio conversation between the Sabena plane and Rome, revealed that the pilot did not follow the flight plan instructions. Instead, the Sabena crew deliberately misled the Rome controller of their position in order to avoid the delay in landing that the Rome controller would have required had they reported that they were uncertain of their position.

The plaintiff did not contend that the plane was off-course as a result of wilful misconduct. Rather, he contended that the Sabena crew's misrepresentation caused the Rome controller to authorize a descent that, though it would have been safe within the established airway, was fatal over the mountainous country to the east where the plane was then flying.

43. "Fan marker" is a location marker that transmits a fan shaped radiation pattern in a vertical direction. Fan markers used in an Instrument Landing System (ILS) indicate distance to the runway. See ADAMS, *supra* note 29.

44. "Instrument Landing System" is a radio guidance and communication system designed to guide aircraft through approaches, let downs, and landings under conditions of little or no visibility. The ILS consists essentially of directional transmitters establishing the angle of the glide path and indicating the direction of the runway, and of radio marker beacons establishing locations along the approach path. ADAMS, *supra* note 29.

45. "Outer marker" is the outermost location marker from the end of the runway. See ADAMS, *supra* note 29.

46. 344 F.2d 266 (2d Cir. 1965).

Finally, the plaintiff's theory was heavily supported by the "range" of the Viterbo radio beacon⁴⁷ that marks the flight's airway from Florence to Rome. The evidence showed that the plane's position when its crew reported that it passed the Viterbo beacon, was more than 30 miles from the beacon. In contrast, it was also established that the maximum range at which a radio compass⁴⁸ would home on the beacon was only about 22 miles.

In the sub-judice cases, the courts' reasonings seem to be predicated on the grounds that the pilots' acts were creatures of their "free choice" and even though they did not intend the harm, they elected not to observe the clearance instructions with careless disregard for their consequences. A violation, the court concluded, the actors knew or had reason to know would create an unreasonable risk of harm which, in fact, was the proximate cause of the disaster.

As in *Ulen*, the "clearance instruction's sole and obvious purpose was intended to protect the passengers and the aircraft from a likely accident." It is, indeed, a case within the ambit of Article 25 of the Convention.

D. Rate of Descent

Generally, out of record cases do not exceed much above the minimum amount of \$8,300.00 provided in Article 17 of the Convention. *Capohart v. Aerovias Nacionales de Colombia, S.A. (AVIANCA)*,⁴⁹ was a rare exception to the general rule. In this case, the decedents were passengers on a flight from New York City to Bogota, Colombia, with scheduled stops at Miami, and Montego Bay, Jamaica. On January 20, 1960, in landing at Montego Bay Airport, the aircraft, "a Lockheed Super Constellation," crashed, skidded down the runway, rolled over on its back, caught fire, and burned. All the passengers, save four, were killed and the majority of the crew, five out of seven, escaped without injury. Among them, the pilot, co-pilot, and flight engineer made their way out to safety through the cockpit exit.

The plaintiffs' main contentions were that (1) the crew members failed to assist the passengers during the emergency caused upon landing and abandoned the passengers at their perils while the plane was in

47. "Radio beacon" is any radio transmitter, together with its associated equipment, that emits signals enabling the determination, by means of suitable receiving equipment, of direction, distance, or position with respect to the beacon. ADAMS, *supra* note 29.

48. "Radio compass" is a direction-indicating radio-receiving apparatus used aboard aircraft, which makes use of directional characteristics of a loop antenna for finding and indicating direction in relation to a radio-transmitting station to which the receiver is tuned. Radio compasses are used in homing on a transmitting station and in obtaining bearings and fixes. ADAMS, *supra* note 29.

49. Unreported, *docket* No. 10,315-M-Civil-E.C. (1963). The United States District Court for the Fifth Circuit rendered judgment on verdict of \$227,000 for plaintiffs. On appeal, it was compromised to \$200,000.

flames, and (2) in landing at Montego Bay Airport the aircraft exceeded far above the designed maximum "rate of descent"⁵⁰ for this type of airplane (10 feet per second with a maximum of 12).

A sequence of facts were alleged and rolled together in support of these allegations.⁵¹ The crew members of this aircraft were not supposed to be on duty longer than ten hours.⁵² The evidence showed that at the time of landing, the crew had been on duty for some 19 hours and 10 minutes. They were so tired that the pilot misjudged the landing approach altitude and instead of executing a "missed approach"⁵³ he chose to "dive"⁵⁴ the aircraft. The "rate of descent" was so great that the craft did not "flare-out"⁵⁵ but hit the runway with such tremendous impact that it broke one of its wings right off and destroyed the landing gear.

By circumstantial evidence,⁵⁶ it was proved that the rate of descent of this aircraft was such that the pilot and co-pilot would have to know about it by looking at the instruments they had in the cockpit panel. Under such circumstances, the plaintiffs alleged, the pilot had a "choice" to execute a "missed approach" or to attempt to land the aircraft at such altitude. He chose to "dive" the aircraft, thus causing the alleged result.

The jury's finding of wilful misconduct sustained plaintiffs' contention that in landing the aircraft at the proven rate of descent, the pilot exercised a "free choice" which was an intentional act on his part with certain degree of knowledge of its probable consequences. The pilot's choice, as in *Ulen* and *Berner*, constituted a violation of a "rate-of-de-

50. "Rate of descent" is the rate at which an aircraft descends, *i.e.*, the vertical component of its air speed in descending. ADAMS, *supra* note 29.

51. It should be remembered that each allegation of wilful misconduct has to be considered and proved separately. See *Horobin v. British Overseas Airways Corp.*, *supra* note 14.

52. By Special Civil Air Reg. No. SR-405 (1954), the crew flight limitation in trans-continental nonstop operations were extended by the board from eight to ten hours after it was found to have no adverse effect on safety operations. See also Certification and Operation of Flag Air Carriers, 29 Fed. Reg. 19186 (Dec. 31, 1964).

53. "Approach" is an act or instance of bringing an aircraft in to a landing, or of an aircraft coming in to a landing, including flying a landing pattern and descending, as, to begin an approach, or, to make a landing in the first approach. ADAMS, *supra* note 29.

54. "Dive" is an act or instance of an aircraft descending nose downward, its longitudinal axis remaining substantially coincident with its line of flight. ADAMS, *supra* note. 29.

55. "Flare-out" is to descend in a smooth curve in landing, making a transition from a steep descent to a direction of flight substantially parallel to the surface. ADAMS, *supra* note 29.

56. "When necessity for resort to circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in the reception of circumstantial evidence." 20 AM. JUR., *Evidence* § 271 (1939).

In a very recent case, *Green v. Reynolds Metals Co.*, 328 F.2d 372 (5th Cir. 1964), the court held that "proof of negligence may be made out completely with circumstantial evidence, and if there is evidence that points to any plausible theory of causation, there is basis for recovery."

scent" regulation for this type of aircraft, which was intended for the "safety" of the passengers and the aircraft in a likely situation.

It should be noticed that in the instant case, the first allegation of the plaintiffs was disregarded by the jury's finding of wilful misconduct. In *Tuller*, the factual situation differs to some extent. In the former, the evidence showed that the aircraft was in flames. To this extent, the jury in the *Capehart* case accepted defendant's contention that the crew "did not have means available at the time," as it was the situation under *Tuller*.

E. Civil Aeronautics Board's Reports

In an action for wrongful death under the Warsaw Convention, *Berguido v. Eastern Airlines, Inc.*,⁵⁷ the decedent was a passenger for hire on a flight that crashed near Imeson Airport, Jacksonville, Florida, in the early morning hours of December 21, 1955. The plaintiff's theory was that due to the steadily increasing weather deterioration in the airport vicinity, the flight's crew came in at an excessive rate of speed attempting to land before the airport closed down.

The evidence indicates that the pilot was making an Instrument Landing System (ILS) approach to the runway. In doing so, the pilot flew below his "glide slope"⁵⁸ and authorized minimum⁵⁹ ceiling and visibility required for an "ILS" approaching. At this time, its "angle of descent" (2½ degrees) and its "rate of descent" (at ten feet per second), leads to the inescapable conclusion that the aircraft was under absolute control of the crew.

Based upon expert testimony, the plaintiff's main contention was that the pilot took a calculated risk and deliberately and intentionally flew the aircraft below the "glide slope" during his "ILS" approach. This, the plaintiff contended, caused the result complained of.

The United States District Court sustained plaintiff's contention and rendered judgment on verdict for the plaintiff on grounds of wilful misconduct. On appeal it was reversed and remanded for a new trial. The court held "that expert testimony based upon Civil Aeronautics

57. 317 F.2d 628 (3d Cir. 1963), *cert. denied*, 275 U.S. 895 (1963).

58. "Glide slope" is, essentially, a radio beam that gives slope control—elevation control—at a pre-set angle of approach to the end of the runway and indicates to the pilot whether or not he is at the correct elevation as he comes in for his approach. ADAMS, *supra* note 29.

59. "Minimums" refer to the weather minimums—required ceiling and visibility prescribed by the Civil Aeronautics Board. ADAMS, *supra* note 29.

"The minimums for an aircraft of this type (constellation) on an ILS approach were 200 foot ceiling and 1/2 mile visibility. If the pilot has reached the 200 foot level and does not have visual reference to the ground, he must execute a 'missed approach.' When the approach is visual, the ceiling is 400 feet and visibility 3/4 of a mile." *Supra* note 57, at 630.

Board (CAB) Reports⁶⁰ which express agency views as to the probable cause of the accident is barred from being admitted as evidence or use in any action, drawing out of any matter mentioned in such reports."⁶¹ Since the expert testimony in the instant case was predicated upon CAB reports, the admission of such evidence, the court added, was "substantially prejudicial to the defendant."⁶²

Despite the unequivocal words of the statute, it was argued that *Lobel v. American Airlines, Inc.*,⁶³ establishes, *a contrario sensu*, that the CAB rule does not prohibit a CAB investigator to testify from his personal observation about the scene of the crash and the condition of the plane after the accident. This, however, the court concluded, blurs the essential policy and reason behind Section 1441(e).⁶⁴

In the last two cases, the courts' findings of wilful misconduct were predicated substantially upon the same basis; the pilot's "free choice" to execute the landing of the aircraft under the circumstances. In both cases, the pilot had the free choice of executing a "missed approach." The distinguishing factor was reflected in the *Berguido* case where the plaintiff's expert testimony was based upon CAB Reports; whereas, in the *Capehart* case, the plaintiffs' contention of wilful misconduct was predicated strictly upon circumstantial evidence. It was, indeed, a great difference.

IV. CONCLUSION

In view of the foregoing decisions, it may be concluded that no matter what kind of violation encompasses the alleged circumstances—whether an air safety regulation or otherwise—in order to determine whether the air carrier's misconduct is within the ambit of Article 25 of the Convention, we must ascertain (1) the actor's duty under the circumstances; (2) whether the actor's misconduct was creature of his "free choice"; and (3) whether that free choice was a "flagrant" violation of a duty intended to protect the kind of interest proximately affected as a result of the disaster.

As stated, the "intent" to cause the result is not an element to predicate wilful misconduct. The actor's conduct can be established "in ab-

60. Civil Aeronautics Act, § 1441(e), 49 U.S.C. §§ 1301-1542 (Supp. 1962) (hereinafter referred to as CAB). *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951); *Universal Airline, Inc. v. Eastern Airlines, Inc.*, 188 F.2d 993 (D.C. Cir. 1951); *Ratner v. Arrington*, 111 So.2d 82 (Fla. 3d Dist. 1959).

61. *Supra* note 60; to the same tenor, *Universal Airline, Inc. v. Eastern Airlines, Inc.*, and *Ratner v. Arrington*, *supra* note 60.

62. *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628 (3d Cir. 1963), *cert. denied*, 275 U.S. 895 (1963).

63. 192 F.2d 217 (2d Cir. 1951); *Ritts v. American Overseas Airlines, Inc.*, *supra* note 27.

64. *Supra* note 60.

tracto" by reference to the standard conduct required from a reasonable prudent man (or bon pere de famille) under similar circumstances.⁶⁵ Similarly, absolute knowledge that the result would ensue is not required. It would be sufficient if the actor knew or had reason to know his "choice" would create an unreasonable risk of harm, which, in fact, was the proximate cause of the accident.⁶⁶

From the practitioner's point of view, these cases show also that wilful misconduct under the Warsaw Convention is far from impossible. Its most common enemy is the "directed verdict." However, once you have passed by it, it may not be too difficult to communicate to the jurors the concept and elements embraced in the misconduct.

65. *Supra* note 26.

66. *Ibid.*