Spring 1987

Flying the Unfriendly Skies: The Liability of Airlines under the Warsaw Convention for Injuries Due to Terrorism

Roberta L. Wilensky

Follow this and additional works at: http://scholarlycommons.law.northwestern.edu/njilb

Part of the Air and Space Law Commons

Recommended Citation
Flying the Unfriendly Skies: The Liability of Airlines Under the Warsaw Convention for Injuries Due to Terrorism

I. INTRODUCTION

The year 1986 ended with yet another hijacking. On December 25, 1986 sixty-two persons were killed when an Iraqi airline crashed in Saudi Arabia during a hijacking. Only a few months before, Arabic-speaking hijackers killed sixteen passengers and wounded many more just as Pakistani officials began a rescue attempt of the New York bound Pan American jet. Slightly more than one year before that incident, a group of Shiite Moslems overtook TWA flight 847 just after leaving Athens International Airport. In addition to these acts of hijacking, terrorists are now, with alarming frequency, committing additional crimes by planting bombs on aircraft.

Increased international terrorism has raised concerns regarding airport security. The public, national governments, and airlines recognize that some terrorist incidents might have been prevented had security devices, presently available, been in use. In fact, some victims of terrorist attacks have brought suit against the airlines, arguing that existing secur-

---

4 N.Y. Times, June 27, 1985, at A1, col. 4 (a bomb exploded as El Al Airlines security personnel inspected a suitcase at the Madrid International Airport, wounding 12); N.Y. Times, May 5, 1986, at A3, col. 1 (an explosion on an Air Sri Lanka jet, possibly the result of a bomb, killed approximately 20 people while they were boarding the plane); N.Y. Times, Apr. 3, 1986, at A1, col. 6 (an apparent bomb explosion killed four and wounded nine on a TWA jet from Rome to Athens); N.Y. Times, June 24, 1985, at A1, col. 4 (a bomb, apparently planted in a suitcase aboard an Air Canada jet, exploded while the plane was being unloaded at Tokyo's Narita Airport); N.Y. Times, June 24, 1985, at A1, col. 5 (an Air India jet enroute from Montreal International Airport crashed into the sea; officials speculated that a bomb was the cause).
ity devices should have been used. These lawsuits raise the question of the extent to which airlines are liable to victims of terrorism when the best available security measures are not employed by airlines to prevent such attacks.

Airline companies' liability for accidents in the course of international air travel is governed by the Warsaw Convention ("Convention"). Originally, the Convention limited airline liability to approximately $8,300. In 1955, an amendment to the Convention increased the liability figure to $16,600. A voluntary agreement executed in 1966 by a group of international airlines increased this amount to $75,000. The most recent revisions to the Convention set the liability limit at approximately $120,000 and allow signatory nations to establish supplementary compensation plans to increase that amount even further.

The Convention does not limit the liability of an airline in instances where the airline is found to have engaged in wilful misconduct. Critics of current airline and airport security believe courts should enforce this wilful misconduct provision in cases where airlines have not employed adequate security measures currently available. These steps, the critics claim, would reduce the total number of airport hijackings by promoting increased airport safety. Moreover, by not limiting airlines' liability, courts could more adequately compensate victims of terrorism.

On the other hand, although the present liability limitations may be

---

7 Diamond, Should an Airline Be Liable for Poor Airport Security, N.Y. Times, July 21, 1985, § 4 (Week in Review), at 7, col. 3.
9 Id. art. 22.
13 Warsaw Convention art. 25. See infra notes 66-71 and accompanying text.
15 Broder, supra note 14.
Warsaw Convention
8:249(1987)

considered rather low, one must question whether removing these limits would be tantamount to casting the airlines in the role of scapegoats for an international political problem. One must also ask whether removing the liability limits would violate the spirit and policy of the Warsaw Convention. In view of such considerations, this Comment will first explore the history of the Convention, then examine the expansion of airline liability in cases of terrorism and wilful misconduct. Finally, the Comment will explore alternative means of compensating victims of terrorism.

II. HISTORY OF THE WARSAW CONVENTION

The Warsaw Convention was the result of two international conferences held in Paris in 1925 and in Warsaw in 1929. It was hoped that the conferences would plan for and alleviate problems which would confront the emerging civil aviation industry in the future. The primary goals of the conference planners were to establish uniformity in documentation (tickets and waybills), maintain uniformity in both procedural and substantive law applicable to claims arising out of international transport, and limit airlines' liability for damages arising out of accidents. At the time, airlines needed to attract capital which might not otherwise be available because of the risk of catastrophic accidents and large liabilities for losses suffered in such accidents. Consequently, the limitation of liability was clearly recognized as the most important of these goals.

Although the Warsaw Convention primarily served to protect the airlines, certain provisions also protected passengers. The Convention rendered void "[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which [was] laid down in [the] Convention." Additionally, the Convention shifted the burden of proof to the carrier to show that "he and his agents [had] taken all necessary meas-


\[17\] See Block, 386 F.2d at 327; Lowenfeld & Mendelsohn, supra note 16, at 498-500.

\[18\] Lowenfeld & Mendelsohn, supra note 16, at 499.

\[19\] Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, SEN. EXEC. DOC. No. 6, 73d Cong., 2d Sess. 3-4 (1934); Matte, The Warsaw System and the Hesitations of the U.S. Senate, 8 ANNALS AIR & SPACE L. 151, 153 (1983).

\[20\] Warsaw Convention art. 23.
ures to avoid the damages or that it was impossible for him to take such measures.”

Thus, the quid pro quo given to passengers in exchange for the shifting of the burden of proof to airlines to prove non-negligence was the limitation of airlines’ liability at approximately $8,300.22 The subsequent Montreal Agreement further protected passengers by establishing a system of strict liability for injuries covered by Article 17 of the Warsaw Convention23 and by increasing the liability limit to $75,000.24

The limitation on airline liability does not apply in the case of wilful misconduct on the part of the airline or its agents.25 Article 25 of the Convention, however, does not define wilful misconduct and, as a result, the term has been criticized because it is unclear and leads to difficulty in interpretation.26 Some critics contend that Article 25 conflicts with the Convention’s objective of achieving uniformity in the substantive law because it allows courts in different jurisdictions and countries to interpret wilful misconduct in accordance with their own laws.27 Some critics also argue that if the proper limit for liability had been set, no means should be available to circumvent that limit. On the other hand, supporters of Article 25 contend that the limited liability provision should not protect intentional acts.28

Partly as a result of the criticism of Article 25, a diplomatic conference was convened in 1955 at the Hague to amend the Warsaw Convention.29 Article 25 was replaced by Article 13 of the Hague Protocol which provided a definition of wilful misconduct.30 The delegates to the

21 Id.
22 Lowenfeld & Mendelsohn, supra note 16, at 500.
23 Article 17 of the Warsaw Convention states:

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.

25 Warsaw Convention art 25.


27 Lowenfeld & Mendelsohn, supra note 16, at 503.

29 Hickey, supra note 28, at 605. Although 26 countries have signed the Hague Protocol, it has never been signed or ratified by the United States.
Warsaw Convention
8:249(1987)

Hague Protocol believed Article 13 would bring uniformity to the application of the wilful misconduct standard while, at the same time, keeping the door open to unlimited liability. As case law and the continued disputes among commentators have shown, the Hague Protocol did not achieve the desired uniformity. As a result, the 1971 Guatemala Protocol and, more recently, the Montreal Protocol Number 3 declared that the liability limitations could not be broken even in the event of wilful misconduct. One critic of inviolate liability limitations stated that:

The leap from a system premised upon the concern for compensating the victim by eliminating fault in lieu of an absolute limited liability in all cases even where the blameworthy conduct is performed intentionally, wantonly, or in reckless disregard for the consequences is morally indefensible. The victim is not completely compensated for the damages resulting from conduct which is tantamount to intentional conduct, and the wrongdoer enjoys the protection of limited liability exposure regardless of the nature of his conduct.

Although the United States adheres to the Warsaw Convention, it has not ratified any of its protocols. The primary reason for resistance to the Warsaw system by the United States has been the notion that the liability limitations are too low. In fact, in 1965, the United States denounced the Warsaw Convention for this very reason. The United States withdrew its denunciation when the airlines signed the Montreal Agreement, thereby imposing a system of strict liability and increasing a victim's potential recovery to $75,000. The Montreal Agreement, how-

31 Cheng, supra, note 26, at 90.
32 See supra note 26. The main controversy is whether the Hague Protocol requires an objective or subjective standard in determining wilful misconduct. For a detailed discussion of these standards, see infra notes 73-102 and accompanying text.
33 Guatemala Protocol, supra note 12.
34 Montreal Protocol no. 3, supra note 11.
35 Hickey, supra note 28, at 608.
36 See In re Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982). "The United States has not adhered to the Hague Protocol, at least in part because the limit on liability is still too low to satisfy critics of the Warsaw Convention." Id. at 1305. For a more detailed discussion of the Hague Protocol, see Lowenfeld & Mendelsohn, supra note 16, at 509-16, 532-46. See also SENATE COMMITTEE ON FOREIGN RELATIONS, HAGUE PROTOCOL TO THE WARSAW CONVENTION, S. EXEC. REP. No. 3, 89th Cong., 1st Sess. (1965).

Another reason the Guatemala Protocol was never submitted to the Senate for advise and consent was primarily because the liability limitations were linked to the price of gold, which was subject to severe fluctuations. Matte, supra note 19, at 158.

Although the Montreal Protocol No. 3 expressed liability in terms of special drawing rights based on a basket of international currencies, the protocol was defeated because the liability limitations were still too low. Opponents to the Montreal Protocol No. 3 hoped that its rejection would lead to the overthrow of the Warsaw Convention's system of limited liability. See Kreindler, Recent Developments in Aerial Hijacking: The Issue of Liability, 6 AKRON L. REV. 157 (1973).
37 See Montreal Agreement, supra note 11.
ever, made no changes with respect to the definition of wilful misconduct. Therefore, Article 13 of the Hague Protocol and Article 8 of the Guatemala Protocol, while considered to be persuasive precedent, are not binding on United States courts.

One judge viewed the Warsaw Convention and its subsequent modifications as a double-edged sword—the basis of liability being strict, but the recovery awarded being limited. The wilful misconduct provision can effectively dull the limited liability edge, especially if courts apply a loose standard. Yet the modifications of the Convention reveal tension over the degree to which the wilful misconduct provision should be broadly interpreted.

III. HIJACKING AND OTHER FORMS OF TERRORISM AS ACCIDENTS

In order to recover for injuries sustained as a result of terrorist acts, a plaintiff must first show that an “accident” occurred. Article 17 of the Warsaw Convention provides that:

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.

In Air France v. Saks, Justice O’Conner, speaking for the United States Supreme Court, recommended that a flexible definition of “accident” be applied. She stated that liability under the Convention arises “if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger.” Justice O’Conner noted that lower courts have broadly interpreted Article 17 to include acts committed by terrorists.

In fact, United States courts have long recognized that hijackings are within the ambit of the term accident as used in Article 17. In Hus-

---

39 Id.
40 Warsaw Convention art. 17.
41 470 U.S. at 405.
42 Id. at 405.
serl v. Swiss Air Transport Company, Ltd., the defendant's aircraft was hijacked to Jordan while en route from Switzerland to New York. The plaintiff, a passenger, brought an action under the Warsaw Convention for $75,000 for bodily injury and mental anguish resulting from the hijacking. Swiss Air contended that if the cause of the damage was intentional on the part of the terrorists, then an accident had not occurred and the airline could not be held liable under the Convention. The district court rejected the defendant's argument. Concluding that the hijacking was within the ambit of the term accident, the court stated:

The Warsaw Convention as modified functions to redistribute the costs involved in air transportation: the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents, since it physically controls the aircraft and access to it; it is likewise the party most capable of assessing and insuring against the risks associated with air transportation; finally it is the party most able to distribute efficiently the costs of the first two steps. Although the current problem of hijacking may have been initially unanticipated, it is not unreasonable that the law would leap to fill this logical gap.

Some courts have expanded liability under the Convention to cover injuries resulting from terrorist acts within airport terminals. In Day v. Trans World Airlines, Inc. and in Evangelinos v. Trans World Airlines, Inc. passengers sued TWA for injuries sustained in a terrorist attack which occurred in an airport transit lounge. TWA argued that it was not liable under the Convention because passengers in a transit lounge were not engaged in the "course of embarking" as required by Article 17. The United States Courts of Appeal for the Second and Third Circuits rejected TWA's argument and found the airline liable under the Convention.

In an analysis similar to Husserl, the Second Circuit in Day based its decision primarily upon modern theories of cost allocation. The court found that holding the airline liable would further the goal of accident prevention by encouraging airlines to adopt more stringent security

---

44 Husserl, 351 F. Supp. at 702.
45 Id. at 707.
46 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976).
47 550 F.2d 152 (3d Cir. 1976).
48 Evangelinos, 550 F.2d at 155; Day, 528 F.2d at 33-34.
49 Day, 528 F.2d at 34. The court referred specifically to the works of Guido Calabresi, arguing that "accident losses will be least burdensome if they are spread broadly among people and over time." G. CALABRESI, THE COSTS OF ACCIDENTS 39 (1970). The airlines are able to spread the cost of increased security among all customers through ticket prices. See also Union Oil Co. v. Oppen, 501 F.2d 558, 669-70 (9th Cir. 1974)(imposing duty on oil companies, as best cost-avoiders, to conduct commercial activities in a reasonably prudent manner in order to avoid inflicting commercial injury on fishermen).
measures against terrorist attacks. Airlines, the court reasoned, are in a better position than passengers to persuade or compensate airport management to provide increased airport security. Airlines can also hire additional security guards. The court concluded that "[airlines] can better assess the probabilities of accidents, and balance the reduction in risk to be gained by any given preventive measure against its cost." Additionally, the Second Circuit stressed the advantage of the reduced administrative costs of a system of strict liability similar to the Montreal Agreement as opposed to the maintenance of costly suits contesting liability against airport operators in foreign countries. Thus, the court adopted a rather broad definition of "embarking," inclusive of passengers in a transit lounge, to enable the plaintiffs to recover under Article 17.

The Third Circuit, in Evangelinos, agreed with the result in Day but based its decision on other grounds. The court placed less emphasis on carrier control and developed a tripartite test to determine liability. The factors in the test include: 1) the location of the accident; 2) the activity in which the injured person was engaged; and 3) the control of the person by the airline. Based on these factors, the court found TWA liable for the plaintiff's injuries.

The Day and Evangelinos decisions have been criticized for expanding liability contrary to the intent of the drafters of the Warsaw Convention. For instance, the dissent in Evangelinos noted an inconsistency between the desire to shield airlines from liability and the desire to impose liability on the party most able to bear the cost. Additionally, it is argued that, even though the system of strict liability and higher liability limitations reflect an increased emphasis on passenger protection and compensation of victims of "mindless crimes," these concerns should not cast airlines in the role of scapegoats for a complex problem confronting many nations.

A partial retrenchment from Day and Evangelinos occurred in Martinez Hernandez v. Air France. In that case the United States Court of

---

50 528 F.2d at 34.
51 Id.
52 550 F.2d 152.
53 Id. at 155.
54 Id. at 158.
56 Evangelinos, 550 F.2d at 159 (Seitz, C.J., dissenting in a 6-3 decision).
57 Note, Terrorism in the Terminal, supra note 55, at 289.
58 Note, Warsaw Convention, supra note 16, at 386-88.
59 545 F.2d at 282.
Appeals for the First Circuit expressed approval of the *Day* decision and the *Evangelinos* tripartite test, but failed to expand liability under the Warsaw Convention to include acts of terrorism which occurred in a baggage retrieval area. In *Martinez Hernandez*, the terrorists stored their weapons in luggage which had been transported and handled by the airline from the point of departure to the final destination. The terrorists retrieved their luggage, took out submachine guns and grenades, and opened fire on other passengers in the baggage retrieval area. The court limited the scope of the term "disembarking" to activity effecting the separation of passengers from the plane. The court found that baggage retrieval was not an activity effecting separation from the plane and, consequently, passengers retrieving their baggage were not in the process of disembarking. The court reasoned that since the passengers were no longer under the airline's control when they claimed their luggage (i.e., they could roam the terminal at will), the airline should not be held liable under the Convention for injuries to the passengers.

In its analysis in *Martinez Hernandez*, the First Circuit claimed to endorse the modern theories of cost distribution espoused in *Day*, but limited the application of such theories.

A fundamental premise of the argument for expanding carrier liability in this case is that the risk of death or injury in a terrorist attack is appropriately regarded as a characteristic risk of air travel. The court found that terrorist attacks, such as those in baggage retrieval areas in airports, could occur in any public place and therefore were not characteristic risks of air travel. Yet just because the attack could have occurred in other public places does not mean that an airline should not be found liable. It could be reasonably argued that a close logical nexus

---

60 Id. at 281.
61 Id. at 282.
62 Id. at 282-83.
63 545 F.2d at 284. *See also Evangelinos*, 550 F.2d at 159-60 (Seitz, C.J., dissenting).
64 For example, the Federal District Court for the District of Maryland found that the definition of "accident" in Article 17 of the Warsaw Convention would encompass injuries sustained aboard a flight by a passenger when an intoxicated fellow passenger fell on her. Oliver v. Scandinavian Airlines System, 17 Av. Cas. (CCH) 18,283, 18,284 (D. Md. 1983) This type of accident clearly could have occurred in other public places, yet the airline still was found liable.

The *Martinez Hernandez* court distinguished attacks in a baggage retrieval area from hijackings because hijackings, by definition, involve aircraft. 545 F.2d at 284. *See also Evangelinos*, 550 F.2d at 159. The First Circuit in *Martinez Hernandez*, failed to recognize that other modes of transportation, for example a boat, could be involved in a hijacking. Thus, under the First Circuit's reasoning, even hijackings might not be risks characteristic of air travel. Finally, it is difficult to reconcile the
between the injury and the air travel exists when, as in this case, the terrorists retrieved their submachine guns and grenades from their luggage which had been transported and handled by the defendant airline.\textsuperscript{65}

Thus, although the First Circuit might be justified in limiting the scope of the term disembarking, it wrongly justified its decision in trying to limit the scope of cost allocation.

IV. WILFUL MISCONDUCT—THE OBJECTIVE OR SUBJECTIVE TEST?

Once a court finds that an accident falls within the ambit of the Warsaw Convention, the court must then decide whether the liability limitations of Article 17 should be enforced. The low liability limitations often lead to injustice and provoke distorted interpretations of the Convention by courts.\textsuperscript{66} Moreover, the low limits encourage circumvention by juries.\textsuperscript{67} The most obvious means of avoiding the limitations is to find that an airline engaged in wilful misconduct.

The Warsaw Convention provides that:

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his 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.\textsuperscript{68}

The term wilful misconduct is a translation from the Convention’s official French text of the word \textit{dol}. The French concept of \textit{dol} differs from the English concept of wilful misconduct.\textsuperscript{69} Typically, \textit{dol} requires a showing of fraud, deceit, or malicious or felonious intent.\textsuperscript{70} An actor must have intended to cause the damage resulting from an act. Under the English common law conception of wilful misconduct, an actor need only have intended to cause the risk of damage and not necessarily the damage itself.\textsuperscript{71} Thus, plaintiffs attempting to avoid the liability limitations in jurisdictions which have adopted the official French text of the Warsaw Convention, requiring a showing of \textit{dol}, have a more difficult

\begin{footnotesize}
\begin{footnotes}
\item First Circuit decision’s support of Day and Evangelinos—extending liability to attacks in a transit lounge as a characteristic risk of air travel—with its finding that attacks in the baggage retrieval area are not characteristic risks of air travel.
\item \textsuperscript{65} 545 F.2d at 281.
\item \textsuperscript{66} Martin, \textit{Intentional or Reckless Misconduct: From London to Bangkok and Back Again}, 3 \textit{ANNALS AIR & SPACE} L. 145 (1983).
\item \textsuperscript{67} See Diamond, \textit{supra} note 7.
\item \textsuperscript{68} Warsaw Convention art. 25.
\item \textsuperscript{69} Cheng, \textit{supra} note 26, at 76.
\item \textsuperscript{70} American Airlines v. Ulen, 186 F.2d 529, 533 (D.C. Cir. 1949).
\item \textsuperscript{71} Cheng, \textit{supra} note 26, at 76.
\end{footnotes}
\end{footnotesize}
burden of proof than plaintiffs in jurisdictions which have adopted the English concept of wilful misconduct.

In 1955, a meeting was held at the Hague in part to resolve the controversy over the correct interpretation of Article 25. The drafters of the Hague Protocol attempted to provide a clear and uniform definition of wilful misconduct. Article 13 of the Hague Protocol states that:

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; provided that, in the case of an act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment. 72

According to Article 13 of the Hague Protocol, a showing of something less than dol—e.g., recklessness with knowledge that damage would probably result—would be sufficient to avoid the limits of liability.

Unfortunately, Article 13 of the Hague Protocol has not resolved the controversy over the meaning of wilful misconduct and, thus, has not led to uniformity in the substantive law. In particular, courts disagree over whether the Hague Protocol imposes, with regard to knowledge of the probability of damage, an objective test (imputed knowledge) or a subjective test (actual knowledge). 73 A subjective test would, of course, place a heavier burden of proof on plaintiffs and make it more difficult for them to prove wilful misconduct.

Supporters of a subjective test argue that delegates to the Hague Protocol, in a preferential vote, rejected an objective test in favor of a subjective test. 74 Others contend that the minutes of the conference reveal no explanation of the drafters’ intent regarding the text which was ultimately adopted. 75 Even if the drafters intended a subjective test, the United States has not yet ratified the Hague Protocol and its courts are

---

73 In Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 538 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966), the court rejected the objective test and required actual knowledge, which could be inferred from the surrounding circumstances, for a showing of wilful misconduct. For a detailed discussion, see infra notes 78-86. In Goldman v. Thai Airlines Int'l Ltd., 1 W.L.R. 1186 (1983), the Court of Appeal adopted the subjective test; similarly in Tondrau v. Air India, Judgement of Jan. 27, 1977, Cass. Belg., 1977 Revue Française de Droit Aérien [R.F.D.A.] 195, the Belgian Cour de Cassation adopted the subjective test. For a more detailed discussion of the subjective test, see infra notes 87-92 and accompanying notes. In Emery v. Sabena Belgian World Airlines, Judgement of Dec. 5, 1967, Cass. civ. Irre, Fr., 1968 R.F.D.A. 184, a French court rejected the subjective test, which had previously been the standard, and adopted the objective test. More recently, however, the French Cour de Cassation returned to the subjective standard. For a more detailed discussion, see infra notes 93-99 and accompanying text.
74 Cheng, supra note 26, at 90.
75 Lowenfeld & Mendelsohn, supra note 16, at 506.
not bound by it.\textsuperscript{76}

Under an objective test, victims of an accident involving international air travel must show that an ordinary, reasonable airline would know, or should have reason to know, of the high risks associated with its conduct.\textsuperscript{77} In \textit{Berner v. British Commonwealth Pacific Airlines, Ltd.},\textsuperscript{78} the defendant airline's plane crashed into a mountain as it began to land. Berner, a relative of a passenger killed in the crash, alleged that the accident was caused solely by the defendant airline's wilful misconduct.\textsuperscript{79} Although the jury returned a verdict for the airline, the district court judge ultimately directed judgment \textit{non obstante verبدو}, holding as a matter of law that the evidence established wilful misconduct on the part of the airline. The judge stated that:

The Warsaw Convention was a device by which to subsidize the then infant industry of international air transportation. It is a strange concept to us in the United States that a subsidy should be taken out of the widows and orphans of passengers. And, it is a far cry from the infant industry of 1929 to the international air giants of today.\textsuperscript{80}

Even though the Hague Protocol required plaintiffs to show actual knowledge on the part of the airline that damage would probably result from the airline's conduct, the \textit{Berner} court held that such a showing was not required.\textsuperscript{81}

The pilot need not recognize this as extremely dangerous; it is enough if he knows or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct. The test is an objective one. . . .\textit{It is enough that he realizes or, from the facts which he knows, should realize that there is a strong possibility that harm may result even though he hopes or even expects that his conduct will prove harmless.}\textsuperscript{82}

The United States Court of Appeals for the Second Circuit, however, reversed the district court's decision to grant Berner's motion for judgment \textit{non obstante verبدو}. The appellate court found that the trial court had erred in stating that the Second Circuit did not require actual knowledge on the part of the airline that harm would result from its conduct.\textsuperscript{83} Muddying the waters even further, the court further stated

\textsuperscript{77} \textit{Id.} at 325.
\textsuperscript{78} \textit{Berner}, 346 F.2d at 534.
\textsuperscript{79} \textit{Berner}, 219 F. Supp. at 326.
\textsuperscript{80} \textit{Id.} at 322-23 (emphasis in original).
\textsuperscript{81} \textit{Id.} at 323.
\textsuperscript{82} \textit{Id.} at 325-26.
\textsuperscript{83} \textit{Berner}, 346 F.2d at 534. In \textit{Pekelis v. Transcontinental & Western Air, Inc.}, 187 F.2d 122 (2d Cir.), \textit{cert. denied}, 341 U.S. 951 (1951), the following jury instruction was upheld:
Warsaw Convention
8:249(1987)

that the wilful misconduct standard is not entirely subjective. Consequently, although the court rejected an objective test, the court did not necessarily adopt a subjective test either. Rather, the court required at least a showing of an airline's knowledge which could reasonably be inferred from surrounding circumstances. In this way, the court followed the spirit of the Convention, by requiring a showing of the airline's knowledge, but made it somewhat easier for victims to recover by enabling them to prove knowledge by inference. Nonetheless, the court held that even though the trial court judge improperly instructed the jury regarding the standard for wilful misconduct, the jury's finding that the airline was not guilty of wilful misconduct should stand because the same result would have been reached under the Second Circuit's stricter standard.

English courts take an even more rigorous approach toward wilful misconduct. In *Goldman v. Thai Airways International, Ltd.*, the plaintiff was injured when the defendant's plane encountered turbulence. In contravention of a rule found in the airline's operations manual, the captain had failed to switch on the seatbelt sign. The trial court, applying an objective standard, found that the captain's omission “amounted to recklessness with knowledge that the damage would probably result within the meaning of Article 25.”

The Court of Appeal in *Goldman* reversed and applied a subjective test, finding that the plaintiff failed to make the showing required by Article 13 of the Hague Protocol that: 1) the damage resulted from an act or omission; 2) the act was done with intent to cause damage; or 3) the actor was aware damage would probably result but acted in disregard of that possibility; and 4) the damage complained of was the kind of

wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences. ... or 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. . . .

*Id.* at 124. Similarly, in *Grey v. American Airlines*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956), the Court of Appeals for the Second Circuit stated that an airline has engaged in wilful misconduct if it has:

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

*Id.* at 285.

84 Berner, 346 F.2d at 538 n.4.
85 Cheng, *supra* note 26, at 75.
86 Berner, 346 F.2d at 538.
87 1 W.L.R. 1186 (1983).
88 *Id.* at 1191.
89 *Id.* at 1191-92.
damage known to be the probable result of such action.\textsuperscript{90} The Court of Appeal found that, even though the pilot broke a rule apparently intended for passenger protection, he still had to have actual knowledge that injury would probably result from breaking that rule.\textsuperscript{91} One commentator stated that, by adopting such an approach, the English courts discouraged airlines from settlements in amounts above the Convention's limits to avoid costly litigation because, under the subjective test adopted by the Court of Appeal in Goldman, wilful misconduct would indeed be hard to prove.\textsuperscript{92}

It follows that, if a court applies an objective test, the court is more likely to find wilful misconduct than if it were to apply either the test adopted by the Second Circuit in Berner or a subjective test. In Emery v. Sabena Belgian World Airlines,\textsuperscript{93} the defendant's airliner inadvertently veered off course by sixty-five kilometers and crashed. The trial court, in a decision later affirmed by the Paris Court of Appeal, ruled that the airline must have had effective knowledge of the mistake.\textsuperscript{94} The Cour de Cassation, the highest French court of ordinary jurisdiction, reversed this ruling and held that, by subjectively assessing the mistakes made by the airline, the lower courts violated the Warsaw Convention.\textsuperscript{95} On remand, the Court of Appeals of Orleans applied an objective test and, not surprisingly, found that because the crew did not use all available navigational aids to verify their position, they had engaged in wilful misconduct notwithstanding their lack of knowledge that they were off course.\textsuperscript{96}

More recently, the Cour de Cassation seems to have applied a subjective standard for determining wilful misconduct. In Bornier v. Air-Inter,\textsuperscript{97} a passenger who was seriously injured by a hijacker sued the airline and alleged wilful misconduct under Article 25. The airline did not conduct preflight checks on passengers and did not intervene with authorities to achieve effective checks.\textsuperscript{98} The Cour de Cassation held that the airline did not act with actual knowledge. The airline was found not

\textsuperscript{90} Id. at 1194. The court stated that if Article 25 of the Hague Protocol only contained the word "recklessly"—thus deleting the knowledge requirement—the plaintiff would have proved his case because the pilot ignored safety instructions, thereby demonstrating a willingness to accept responsibility for the risk to the passengers' safety.

\textsuperscript{91} Id. at 1200.

\textsuperscript{92} Martin, supra note 66, at 149.


\textsuperscript{94} 1965 R.F.D.A. at 549.

\textsuperscript{95} 1968 R.F.D.A. at 194.


\textsuperscript{98} Id.
guilty of wilful misconduct and the plaintiff was subject to the limitations on liability.\textsuperscript{99}

In \textit{LeRoy v. Sabena Belgian World Airlines},\textsuperscript{100} which arose out of the same accident as in \textit{Emery}, the United States Court of Appeals for the Second Circuit also found that the liability limitations of the Warsaw Convention did not apply when the airline engaged in wilful misconduct.\textsuperscript{101} Unlike \textit{Emery}, in which the plaintiff claimed the crew should have known they had veered off course, the plaintiff in \textit{LeRoy} contended that, in order to avoid a delay in landing, the crew falsely reported their position to the controller. The plaintiff supported this proposition with indirect evidence. The Second Circuit found that the jury's finding of wilful misconduct was supported by the evidence, even if the plaintiff's theory relied on indirect evidence.\textsuperscript{102} Thus, even though the Second Circuit applied a more rigorous standard by requiring a showing of knowledge, which could be inferred from surrounding circumstances, and thereby allowing the plaintiff to recover in an amount beyond the liability limitations, the Second Circuit reached the same conclusion the Court of Appeals of Orleans in \textit{Emery}. Had the Second Circuit applied the subjective test in the same manner as the English courts, it seems doubtful the court would have found evidence of wilful misconduct on the part of the airline.\textsuperscript{103}

\section*{V. Wilful Misconduct—The Proximate Cause Issue}

Even if an airline engages in wilful misconduct, in order to recover beyond the liability limitations, plaintiffs must be able to show that the wilful misconduct was the proximate cause of their harm.\textsuperscript{104} In \textit{Goepp} v.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{100} 344 F.2d 266 (2d Cir.), cert. denied, 382 U.S. 878 (1965).
\item \textsuperscript{101} \textit{Id.} at 268.
\item \textsuperscript{102} \textit{Id.} at 271. The Second Circuit applied the same standard for wilful misconduct (i.e., whereby knowledge of the probability of harm can be inferred from the surrounding circumstances) as it did in \textit{Berner}, 346 F.2d at 538. \textit{See supra} notes 83-86 and accompanying text.
\item \textsuperscript{103} \textit{See Goldman}, 1 W.L.R. at 1200 (the subjective test requires actual knowledge that injury would probably result from the defendant's act).
\item \textsuperscript{104} \textit{Pekelis}, 187 F.2d at 124. The Second Circuit upheld a jury instruction stating: 

If, however, you find that the defendant... committed one or more acts of wilful misconduct, then you must go on to consider whether or not such wilful misconduct as you have found was the proximate or legal cause of the death of Mr. Pekelis... I say that the wilful misconduct must be a substantial factor in bringing about the death. You will note I did not say it must be the sole substantial factor contributing to the death. 

\end{itemize}
\end{footnotesize}
American Overseas Airlines, Inc., a New York appellate court reversed a jury's finding of wilful misconduct. The plaintiff in Goepp brought suit for the wrongful death of a passenger aboard the defendant airline's plane which crashed. The jury found that because the airline violated safety regulations of the United States Civil Aeronautics Board, the airline was guilty of wilful misconduct and awarded the plaintiff damages of $65,000. On appeal, however, the court reasoned that the alleged violations bore no causal connection to the accident and, therefore, the airline was not liable in amounts beyond the Convention limits. Judge Breitel, dissenting, stated that the proximate cause issue was a question of fact for the jury and that the jury could have reasonably found that the violations were the proximate cause of the crash. Judge Breitel stated that:

It should be obvious too that with respect to air accidents, because of the mysteries in which the fatal and more serious accidents become shrouded, a liberal approach in finding proximate cause from any kind of misconduct which may lead to multiple fatalities is socially justified, if not required. The risks of air transportation are great and are assumed by the passenger; but he should have the right to rely on the carrier's adherence to officially required standard of care.

A New York district court relied on the New York Court of Appeals' proximate cause analysis in Goepp to find that an airline was not guilty of wilful misconduct in an action to recover the value of a plaintiff's stolen shipment. In Wing Hang Bank, Ltd. v. Japan Air Lines Co., Ltd., the defendant airline transported the plaintiff's cash shipment of $250,000 from Hong Kong to New York. Upon its arrival in New York, the defendant, pursuant to agreement, delivered a package to another airline for storage until it was to be picked up by the plaintiff's consignee. The storage area was enclosed by heavy wire, kept under lock, patrolled by guards, and monitored by closed circuit television. The guards, however, were unarmed and no particular employee was responsible for monitoring the television. While the plaintiff's package was in storage, armed robbers broke in and stole the package along with other items.

The plaintiff bank claimed the airline was guilty of wilful misconduct because it knew the other airline's security was poor since a robbery

---

106 Id. at 107-08, 117 N.Y.S.2d at 278.
107 Id. at 110, 117 N.Y.S.2d at 280.
108 Id. at 113, 117 N.Y.S.2d at 283 (Breitel, J., dissenting).
110 Id. at 95-96.
 Warsow Convention
8:249(1987)

had occurred at that storage facility approximately one year earlier.\textsuperscript{111} The district court, however, found that because of the large volume of valuable freight which had been safely handled by the storage facility, one robbery “hardly [made] a case of poor security.”\textsuperscript{112} The \textit{Wing Hang Bank} judge chose not to use the liberal approach to proximate cause recommended by Judge Breitel in his dissent in \textit{Goepp}, stating that:

\begin{quote}
[w]hile it is true that the guards patrolling the area were unarmed, that fact could not be said to have contributed to the robbery since robberies occur every day despite the presence of armed guards. . . . [T]he proximate cause of plaintiff’s loss was the armed robbery, and not the carelessness, malfeasance or misfeasance of the carriers.\textsuperscript{113}
\end{quote}

The court held that the plaintiff could not recover beyond the established limits of the Warsaw Convention because it failed to show that the airline’s wilful misconduct set the armed robbery in motion.\textsuperscript{114}

A stricter approach to proximate cause may be socially justified when the loss involves damage to cargo. In cases in which passenger safety is at stake, however, courts should consider Judge Breitel’s policy argument in \textit{Goepp} and adopt a more liberal approach to proximate cause issues.

\section*{VI. \textbf{Wilful Misconduct and Airline Liability for Terrorism}}

As long as an airline is aware that an airport poses threats to passenger security, a jury might find the airline guilty of wilful misconduct even if the airline did not have total control of airport security.\textsuperscript{115} In many airports, however, the airport itself is responsible for preboarding security and the airlines, at their option, may provide additional security checks. Airports as well as airlines now possess, or could easily possess, security measures which, if implemented, would reduce the risk of terrorist activities. Available security measures include metal detectors, X ray and physical search of carry-on and checked luggage, and profiles of potential terrorists.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{111} \textit{Id.} at 97.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.} \textbf{See also International Mining, 45 N.Y.2d at 916, 383 N.E. 2d at 867, 411 N.Y.S.2d at 221, in which the court overturned a jury’s finding of wilful misconduct. The court stated that: “No evidence was offered which established the manual procedures, if carefully followed, were insufficient to provide reasonable security protection or that the carrier’s security system was otherwise deficient in design or organization.” \textit{Id.}
\item \textsuperscript{115} \textit{See} \textit{Diamond, supra} note 7.
\item \textsuperscript{116} For example, New York's Kennedy and LaGuardia Airports and New Jersey's Newark Airport now rely on increased security measures including increased police patrols, tamper resistant employee identification cards, intelligence briefings to personnel, and an employee incentive program which rewards $25 to airport workers who prevent unauthorized entry into restricted areas and arms
\end{itemize}
Several factors, however, influence the amount of additional security measures airlines attempt to provide. For example, because profiles of potential terrorists list young Arabs as being highly suspect, local governments, claiming that the use of such profiles harms their relations with Middle Eastern countries, pressure airlines to stop using them.\textsuperscript{117} Physical searches of luggage cause passenger inconvenience which airlines prefer to avoid.\textsuperscript{118} Although the economic costs associated with some of these security measures may not be very high, airlines might still choose not to employ them. One method of determining the amount of security measures to be provided balances the costs of the security measures, including passenger inconvenience, against potential harm to airline passengers.\textsuperscript{119} Ideally, as the risk of terrorism increases, so should the amount of security measures, even in the face of increased inconvenience and costs.\textsuperscript{120}

The question remains, however, whether an airline, in balancing these costs, engages in wilful misconduct or negligent conduct if the se-

\textsuperscript{117} See Broder, supra note 14, at 1, col. 1.

\textsuperscript{118} See Broder, supra note 14, at 4, col. 2. In particular, the Greek government pressured TWA not to use the profiles. TWA claimed it stopped using the profile because all passengers were checked with X ray devices and magnetometers by airport and TWA personnel, thus there was no need to use the profile. The use of profiles, however, might have provided TWA with an opportunity to search highly suspect individuals. Id.

\textsuperscript{119} See Broder, supra note 14, at 4, col. 3.

\textsuperscript{120} In response to recurring and intense terrorist threats, Italy tightened its security measures at Rome's Leonardo da Vinci Airport. These measures included placing large numbers of armed police at the international terminal, requiring travelers chosen at random to produce tickets and passports, and increasing the number of plainclothes police. N.Y. Times, Dec. 29, 1986, at A3, col. 1. Many passengers delayed by similar increased security measures at major United States airports welcomed such vigilance. N.Y. Times, July 6, 1986, at A1, col. 1.
curity measures fail to thwart the efforts of terrorists. One case which raised this question\textsuperscript{121} involved the bombing of a TWA jet leaving Athens in 1974. The plaintiffs, suing TWA for the wrongful deaths of those killed on board the plane, contended that the incident occurred “as a result of TWA’s persistent refusal to institute and maintain an effective and adequate security system at the Athens Airport.”\textsuperscript{122} The jury found TWA liable for lack of due care, i.e., negligence, but, more importantly, did not find wilful misconduct on the part of the airline.\textsuperscript{123}

In 1985, another TWA plane departing from the Athens Airport was the subject of a terrorist attack.\textsuperscript{124} Critics of TWA argue that, in light of increasing international terrorism, and especially in light of the similar circumstances involving the 1974 bombing, TWA was or should have been on notice to improve its security measures.\textsuperscript{125} As one critic stated, “[TWA’s] reluctance to learn from its own experience would be evidence tending to prove wilful, wanton malfeasance.”\textsuperscript{126} Still, a finding of wilful misconduct depends on what standard a court applies and whether the wilful misconduct was the proximate cause of a plaintiff’s injuries.

If a court applies an objective test,\textsuperscript{127} a finding of wilful misconduct may be more likely than if it applies the subjective test. Arguably, an airline might have reasonably believed, or should have reasonably believed, that harm from terrorist activity would increase and yet not employ the above-mentioned security measures. If so, a judge or jury might find evidence showing wilful misconduct. Alternatively, if a court applies a subjective test,\textsuperscript{128} or the Second Circuit’s test, in which knowledge may be inferred from surrounding circumstances,\textsuperscript{129} a finding of wilful misconduct is less likely, although not impossible. The question with respect to these tests is not whether the airline knew of the possibility of harm, but whether it knew of the probability of harm.\textsuperscript{130} For instance, an airline might be able to successfully argue that because of the high volume of passengers transported safely, the airline’s security measures

\textsuperscript{121} \textit{In re} Air Crash Disaster in the Ionian Sea on September 8, 1974, 438 F. Supp. 932 (S.D.N.Y. 1977).
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} N.Y. Times, June 15, 1985, at A1, col. 6.
\textsuperscript{125} Broder, \textit{supra} note 14, at 4, col. 4.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} See \textit{supra} notes 77-82, 93-96 and accompanying text.
\textsuperscript{128} See \textit{supra} notes 87-92 and accompanying text.
\textsuperscript{129} See \textit{supra} notes 83-86, 100-02 and accompanying text.
\textsuperscript{130} Cheng, \textit{supra} note 26, at 70.
were adequate\textsuperscript{131} and that the airline had no reason to know of the probability of harm to its passengers. On the other hand, if an airline was warned of impending terrorist activity and failed to increase its security measures, the airline would know that its failure to act would probably lead to injury.\textsuperscript{132} Or, if an airline violated specific safety rules (either its own rules or those of a government or regulatory agency), it could be argued that the airline knew of the probability of injury.\textsuperscript{133} Absent a showing of such knowledge, however, an airline should not be found liable under either the subjective or Second Circuit test.

Additionally, an airline might argue that, even if its actions constituted wilful misconduct, such actions still were not the proximate cause of its passengers' injuries. In other words, the airline could argue that its failure to employ better security measures did not necessarily contribute to the terrorism since such acts occur despite the presence of improved security measures.\textsuperscript{134} In fact, no matter how extensive the security measures are, some terrorists will probably be able to evade the measures, board the aircraft, and commit crimes.\textsuperscript{135} Unless passengers could show that the airline's wilful misconduct set the hijacking in motion, it could be argued that the carelessness, misfeasance, or malfeasance of the airline was not the proximate cause of the passengers' injuries and that the airline should be protected by the Warsaw Convention's limitations on airline liability.\textsuperscript{136} Yet a court might justify a more liberal approach to the proximate cause issue in order to provide more protection to passengers who must rely on an airline to transport them safely to their final destination.\textsuperscript{137}

Clearly, if airlines are exposed to unlimited liability for terrorist activities, the airlines might consider the potentially unlimited cost as a

\textsuperscript{131} See supra notes 104-114 and accompanying text.

\textsuperscript{132} In the Air India crash in which the plane left from Montreal, the Canadian government stated that "extraordinary security measures were not put into place for Flight 182 because no specific threat had been made against the flight." Broder, supra note 14, at 4, col. 3. Yet as a result of a threat sent in a letter, Air India requested that Canada increase security measures. See N.Y. Times, June 15, 1985, at A1, col. 6.

\textsuperscript{133} One court approved the following charge to the jury:

\textit{Now, the mere violation of those [safety rules and regulations]. . . even if intentional, would not necessarily constitute wilful misconduct, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with wanton and reckless disregard of the consequences.} American Airlines, 186 F.2d at 533. See also Goepp, 281 A.D. 105, 117 N.Y.S.2d 276 (1952); International Mining, 45 N.Y.2d at 916, 383 N.E.2d at 867, 411 N.Y.S.2d at 221.

\textsuperscript{134} See Wing Hang Bank, 357 F.Supp. at 97.

\textsuperscript{135} Panel Discussion, supra note 119, at 294.

\textsuperscript{136} See Wing Hang Bank, 357 F. Supp. 94.

\textsuperscript{137} See Goepp, 281 A.D. at 113, 117 N.Y.S.2d at 283 (Breitel, J., dissenting).
reason to improve further security measures. A broad interpretation of wilful misconduct in such cases would accord with courts' concerns over improved passenger protection. Such reasoning, however, conflicts with the purpose of the Warsaw Convention and its subsequent protocols: limiting airlines liability for disasters.

Although courts are bound by the Warsaw Convention limitations, they generally do not favor them, especially when widows and orphans are not fully compensated by the airline industry. Courts presumably would prefer not to distinguish claims arising from accidents occurring on international flights from those occurring on domestic flights. In domestic air travel, an airline's liability is based on a negligence standard and liability is potentially unlimited. Yet courts should not employ the wilful misconduct provision of the Warsaw Convention simply to allow plaintiffs to recover amounts comparable to those recoverable in domestic airline accident cases unless such courts apply a proper standard for finding wilful misconduct on the part of an airline. Based upon the history of the Convention, it seems that courts should apply a standard which requires a showing of an airline's knowledge of the probability of harm as a result of the airline's actions. Although this might result in seemingly harsh settlements for victims of terrorism, a change in the law involving an international convention should come from Congress, not the courts. This difficult burden of proof placed on the victims can be somewhat relaxed by following the standard set by the Court of Appeals for the Second Circuit in Berner, which allows the knowledge element to be inferred from surrounding circumstances.

VII. ALTERNATIVE MEANS OF PROTECTING PASSENGERS

Aircraft hijackings are not uncontrollable if interested parties—governments, air carriers, air transport personnel, and the travelling public—are willing to take and endure necessary, albeit inconvenient, safety precautions. To this end, Congress recently passed the Security and Development Act, which includes a section dealing with international

\[138\] See Hickey, supra note 28, at 618-19.
\[139\] Lowenfeld & Mendelsohn, supra note 16, at 499.
\[140\] Berner, 219 F. Supp. at 322-23.
\[142\] See supra notes 68-76 and accompanying text.
\[143\] See supra notes 83-86 and accompanying text.
terrorism and foreign airport security. Specifically, the act lists the following security measures which might be employed to curb airline-related terrorism: 1) blacklisting unsafe foreign airports; 2) increasing aid to foreign governments for the purchase or manufacture of anti-terrorist devices; 3) suspending aid and military exports to those foreign nations whose airports fail to meet United States security standards; 4) granting funds for research and development of new security measures; 5) barring foreign carriers from landing in the United States if they are arriving from unsafe airports; 6) studying the merits of a sky marshall program; and 7) seeking multilateral and bilateral agreements on strengthening enforcement measures and standards for compliance.\textsuperscript{146} It has been suggested that both airlines and airports be publicly rated with respect to their security measures in the same manner restaurants and hotels are rated for the services they provide.\textsuperscript{147} Insurance companies might improve security by refusing to provide coverage for unsafe airlines.\textsuperscript{148} Another possibility would be a statutory requirement on gun manufacturers to include a specified amount of metal in otherwise plastic guns, sufficient to trigger a metal detector.\textsuperscript{149} Finally, some individuals have suggested holding an international conference on terrorism which would confront various issues, including cooperation among countries to discourage and to punish terrorism.\textsuperscript{150}

In addition to attempting to reduce the risk of terrorism, Congress should also consider modifying the existing system of liability in order to ensure proper recovery for victims of terrorism. Congress should denounce the Warsaw Convention and adopt a negligence system of airline liability similar to the one applicable to domestic air travel. Congress could establish a trust fund to provide additional compensation to victims of terrorism as acts of terrorism are usually committed with the stated object of furthering some political interest or goal. Alternatively, airlines could establish a compensatory trust fund to compensate victims.

\textsuperscript{146} Id.

\textsuperscript{147} Broder, supra note 14, at 4, col. 4. Additionally, a New York Times editorial suggested that, to establish a "leak-proof system of diplomatic deterrence," the United States could use the purchasing power of travelers to compel collaboration among world governments. Airlines, if not allowed to land in the United States, would face bankruptcy, and many tourist economies would collapse in the face of a United States boycott. \textit{Yes, There Is Something We Can Do}, N.Y. Times, June 26, 1985, at A26, col. 1.

\textsuperscript{148} See N.Y. Times, Feb. 2, 1987, at A13, col. 1. Insurers of Middle East Airlines—Lebanon’s national airline—withdrawd all coverage of passengers flying with that company. As a result, the airline halted all flights to Beirut Airport.

\textsuperscript{149} N.Y. Times, Feb. 9, 1986, at E22, col. 2.

\textsuperscript{150} N.Y. Times, June 24, 1985, at A15, col. 5. Signatory nations would prosecute those charged as terrorists or extradite them to countries wishing to prosecute. Information would be exchanged between signatories in order to facilitate an international effort to capture wanted terrorists.
of airline-related terrorism, perhaps by adding a surcharge to the price of airline tickets.151

VIII. CONCLUSION

In many cases, the Warsaw Convention precludes adequate compensation for victims of terrorism. To date, airlines are automatically liable only up to $75,000 for accidents occurring on board an airplane or during the course of embarking or disembarking.152 Courts in the United States have consistently found that hijacking and other forms of terrorism are within the ambit of an accident, although some courts have refused to extend liability for accidents occurring in an airport terminal.153

Plaintiffs wishing to recover beyond the liability limitations of the Warsaw Convention must show that an airline, in performing its security-related duties, engaged in wilful misconduct.154 The original text of the Warsaw Convention provided little guidance to the appropriate definition of wilful misconduct. Subsequent protocols have failed to resolve the controversy or achieve uniformity, especially since the United States has not ratified any of the protocols.155 United States courts appear to have rejected an objective standard but, at the same time, have not embraced a subjective standard.156

United States courts should not broadly interpret the wilful misconduct provision simply to bypass the Warsaw Convention liability limitations which are generally not favored.157 Congress should denounce the Warsaw Convention and return to the negligence standard of potentially unlimited airline liability applicable to domestic travel. In the meantime, victims of terrorism might be better compensated through the use of trust funds established either by the governments or by airlines.158

Airline passengers require protection from terrorists. Courts can assist passengers by not enforcing the Warsaw Convention’s liability limita-

151 This would be similar to the Guatemala Protocol and the Montreal Protocol No. 3, supra note 11, both of which provide for “[r]ecognition of the right of each participating nation to establish a supplemental compensation plan to operate within its territories.” To this end, the Civil Aeronautics Board in July 1977 approved a supplemental compensation plan that would provide an additional $200,000 for loss of life and unlimited medical coverage and assess a $2.00 per ticket surcharge to provide for a compensation fund to pay supplemental recoveries. S. REP. NO. 1, 98th Cong., 1st Sess. 5 (1983).
152 See supra notes 8-11 and accompanying text.
153 See supra notes 44-65 and accompanying text.
154 Warsaw Convention art. 25.
155 See supra notes 36-37 and accompanying text.
156 See supra notes 77-92, 100-02 and accompanying text.
158 See supra notes 142-49 and accompanying text.
tions, by using the less rigorous objective standard, or by adopting a more liberal approach to the proximate cause issue. Nonetheless, such interpretations of the Convention would conflict with the Convention's aim of limiting airline liability. Until the Warsaw Convention is denounced, the solution to the problems involved in increasing airline security measures lies with the government passing legislation and using diplomacy to provide safer airports and with passengers using their purchasing power to persuade airlines to increase security measures.

Roberta L. Wilensky