The Warsaw Convention-Does It Create a Cause of Action?

Glenn Pogust
NOTES
THE WARSAW CONVENTION—DOES IT CREATE A CAUSE OF ACTION?

INTRODUCTION
For twenty-one years, Judge Lumbard's opinion for a unanimous court in *Noel v. Linea Aeropostal Venezolana* stood for the proposition that the Warsaw Convention did not create a cause of action for wrongful death or personal injury. Recently, however, with Judge Lumbard's majority opinion in *Benjamins v. British European Airways*, the Second Circuit completely discarded this precedent.

Prior to *Benjamins*, federal courts entertained litigation involving the Warsaw Convention only if the parties satisfied the requirements of diversity jurisdiction. The effect of *Benjamins*, however, is that any action involving "international transportation" over which the United States has "treaty"

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. Although the United States was not a party to the Warsaw Conference, the Department of State sent observers to the proceedings. On April 17, 1934, President Roosevelt transmitted the Warsaw Convention to the Senate requesting its advice and consent to adherence by the United States. Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. Exec. Doc. No. G, 73d Cong., 2d Sess. (1934), reprinted in 1934 U.S. Av. 239. The United States Senate gave its advice and consent to the Convention on June 15, 1934 and it became the law of this country. The President, with the advice and consent of the Senate, has the power to make treaties for the United States. U.S. Const. art. II, § 2. All treaties made by the United States are, in conjunction with the Constitution and the laws of the United States, the supreme law of the land. Id. art. VI. The lack of supplementary or enabling action by the Senate in adhering to the Convention prompted one commentator to state that "there is no evidence that, by advising adherence, the Senate had any intention of circumscribing the jurisdiction of the Federal courts." Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 McGill L.J. 352, 355 (1963), reprinted in Hague Protocol to Warsaw Convention: Hearings on Executive H Before the Senate Comm. on Foreign Relations, 89th Cong., 1st Sess. 85, 87 (1965) [hereinafter cited as Hague Hearings].
6. International transportation is defined in the Convention by article 1: "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft
jurisdiction now satisfies federal question jurisdiction. In *Benjamins*, the district court was found to have subject matter jurisdiction over an action brought by a Dutch citizen who resided in California against a British airline and a British aircraft manufacturer for the wrongful death of his wife, also a Dutch citizen, resulting from an accident that occurred in England. Mrs. Benjamins was one of 112 passengers aboard an aircraft, owned and operated by British European Airways, that crashed on June 18, 1972 shortly after takeoff from London on a flight to Brussels. All the passengers and crew were killed in the accident, and, subsequently, claims were brought by relatives of the deceased in England, Belgium, and the United States.

for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

“(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

“(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.” Warsaw Convention, supra note 2, art. 1.

7. Article 28 of the Convention provides for jurisdiction in the “treaty sense” in that it expressly limits the number of jurisdictions in which the plaintiff may sue. Article 28(1) provides: “An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.” Warsaw Convention, supra note 2, art. 28(1).

8. Under *Benjamins*, the amount in controversy must still exceed $10,000 in order for a case to satisfy federal question jurisdiction. 28 U.S.C. §1331(a) (1976) provides: “The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.”

9. British European Airways (BEA) never flew to or from the United States. The aircraft involved in the accident was a Trident, manufactured by Hawker Siddeley Aviation, Ltd. (HSA). Both BEA and HSA are British corporations with their principal places of business in the United Kingdom. Benjamins v. British European Airways, 572 F.2d at 914. No airline in the United States owns or operates any Trident aircraft, nor does any foreign airline operate Trident aircraft to or from any point in the United States.

10. Although several Americans were on board the flight, the majority of the passengers were British and Belgian. Of the 17 wrongful death actions brought in this country, two were filed in state court. See Clarizio v. British European Airways Corp., No. 73 L 5997 (Cir. Ct. Ill., filed 1973); Rauworth v. British European Airways Corp., No. 72 L 14039 (Cir. Ct. Ill., filed 1972). The other 15, including *Benjamins*, were consolidated pursuant to 28 U.S.C. § 1407 (1976),
Under Article 28 of the Convention, "treaty" jurisdiction was available to the Benjamins estate in any court of the United States because Mrs. Benjamins had purchased her ticket in Los Angeles, and because that was the ultimate destination of her journey. In the federal court, however, there must also be "domestic" subject matter jurisdiction—usually diversity or federal question jurisdiction—in order to maintain the action. The Benjamins opinion is a search for a source of "domestic" jurisdiction.

This Note will contend that the Warsaw Convention does not create an independent cause of action. After surveying the basic history and principles of the Convention and the status of the law in the United States prior to Benjamins, it will criticize the reasoning of the court's opinion. The analysis will include an examination of the legal considerations relevant to the creation of a cause of action addressed during the drafting, adoption, and revision of the Convention and a discussion of the possible ramifications of the court's decision.

I. THE WARSAW CONVENTION

The purpose of the Warsaw Convention was to ensure uniform application of certain rules relating to international air transportation. The need to establish such uniform rules resulted in the First International Conference on Private Aeronautical Law at Paris in 1925. The delegates at Paris established the Comité International Technique d'Experts Juridique Aériens (CITEJA), a committee assigned the task of drafting international agreements relating to all aspects of international air law. In 1929, CITEJA presented to the

and assigned to the United States District Court for the Eastern District of New York for coordinated pretrial and discovery proceedings. In Re Air Crash Disaster at Staines, England, June 18, 1972, No. 147 (J.P.M.D.L. Oct. 26, 1973) (order of consolidation). All the American cases, except Benjamins, were settled out of court.

11. The United States, therefore, satisfies the last two options set forth in article 28. See note 7 supra and accompanying text. The United Kingdom, the domicile and principal place of business of BEA, would satisfy either of the first two options.


13. The Benjamins action was commenced in the United States District Court for the Central District of California with subject matter jurisdiction allegedly based on diversity of citizenship. Benjamins v. British European Airways, No. 73-381 (C.D. Cal., filed Feb. 21, 1973). The same case was later filed in the United States District Court for the Eastern District of New York where both British defendants conceded to the in personam jurisdiction of the court. 572 F.2d at 915 n.4. The district court first dismissed the case for lack of diversity jurisdiction and subsequently dismissed plaintiff's amended complaint based on federal question jurisdiction. Id. at 915. Simultaneously with his appeal to the Second Circuit, Mr. Benjamins filed a wrongful death action in a New York state court. That action has been dismissed on the grounds of forum non conveniens. Benjamins v. British European Airways, No. 15138/77 (Sup. Ct. N.Y. May 5, 1978). Since the decedent and the plaintiff were both resident in California, that state was probably the most convenient venue available to Mr. Benjamins in the United States.

14. CITEJA and its successor, the Legal Committee of the International Civil Aviation Organization (ICAO), have been responsible for several draft conventions in addition to the Warsaw Convention. The most important of these treaties is the Chicago Convention, Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, which governs nearly all of the technical aspects of international civil aviation. The Rome Convention of 1962, Convention on Damage Caused by Foreign Aircraft to Third Parties on the
delegates a draft relating to the rights and liabilities of air carriers, passengers, and consignors and consignees of goods. After eight days of debate the draft took its final form as the Warsaw Convention.15

The Convention has since been revised by the Hague Protocol in 1955,16 the Guadalajara Convention in 1961,17 the Guatemala Protocol in 1971,18 and, most recently, the four Additional Montreal Protocols in 1975.19 Their practical effect on the Warsaw Convention has been to create a web of approximately fourteen liability schemes.20 Application of a particular scheme to any one passenger is governed by the itinerary specified in the passenger ticket rather than by the route of the flight in question.21 Consequently, depending on their individual contracts of carriage, the rights of passengers aboard the same flight may be governed according to different schemes of liability.22 Nevertheless, no matter which scheme of Convention-related

Surface, Oct. 7, 1952, 310 U.N.T.S. 181, governs the liabilities of the carrier to third parties for damages to property on the ground. The United States did not sign or adhere to the Rome Convention.

15. A list of those nations present at the Warsaw Conference can be found in the preamble to the Convention. For a list of the 93 current adherents to the Convention, see Civil Aeronautics Board, Aeronautical Statutes and Related Material 509 (1978).


17. Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, September 1961. 500 U.N.T.S. 31. This Convention was adopted to govern international air charter transportation; it has never been adhered to by the United States.


19. Additional Protocols Nos. 1-4, ICAO Docs. 9145-9148 (1975). These protocols have not been adhered to by the United States. They amend the previous protocols by specifying the damage limitations in terms of Special Drawing Rights created by the International Monetary Fund rather than in terms of gold. See generally Fitzgerald, The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage By Air, 42 J. Air L. & Com. 273 (1976).


21. Factors such as the domicile of the passenger or the airline, the origin or destination of the particular flight from which the claim arose, or, in the case of an accident, the place where such accident occurred, are irrelevant to the determination of which scheme is to apply to any one case.

liability applies to an action for the wrongful death or personal injury of a passenger, a basic compromise is always present—the carrier is presumed liable on the happening of an accident, but its liability is limited to an amount prescribed by the treaty.

Because they anticipated universal adherence to the Convention, the delegates at Warsaw in 1929 had to establish a set of liability rules that were compatible with a diverse group of national legal systems. Although the delegates were able to unify “certain rules” and allocate certain burdens imposed by questions of conflicts of laws, they were unable to provide for several substantive and procedural questions.

Contrary to the contentions of the Benjamins majority, a review of the historical materials available indicates that rather than create a new and independent cause of action, the drafters of the Warsaw Convention intended to establish certain rules to: (1) unify procedures in international air transportation regarding ticketing and air cargo documentation; (2) create a presumption of liability in favor of passengers in case of accidents; (3) limit the number of fora in which an action can be brought; and (4) limit the liability of the carrier with respect to each passenger in order to protect the young

436 (1971). The protocols to the Warsaw Convention were meant to be progressive, and it was hoped that each would supersede the existent versions of the treaty. The scope of the application of a treaty, however, depends upon the number of nations that ratify or adhere to it.

23. Warsaw Convention, supra note 2, art. 17.
24. Id. art. 22. Whenever the contract of carriage between the passenger and the carrier includes an agreed stopping place in the territory of the United States, the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement No. 18900, approved by CAB Order No. E-23660, May 13, 1966, CAB Docket 17325, 31 Fed. Reg. 7302 (1966) [hereinafter cited as the Montreal Agreement], increases the liability of the carrier to $75,000. The Montreal Agreement, although not a treaty, is an agreement by over 100 carriers to include provisions in their conditions of carriage that increase their maximum liability limitation and waive their ability under article 20 of the Convention to escape liability by proving that they took all necessary measures to avoid the accident. The Montreal Agreement resulted from the denunciation of the Convention by the United States, which was to take effect only one day after the Agreement was signed. As a result of the Agreement, however, the United States withdrew its denunciation. See Note, Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal, 45 Fordham L. Rev. 369, 372-74 (1976). See generally Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).
25. Without the presence of a delegation from the United States, however, the delegates could not have been expected to address the possible ramifications of the Convention in a nation consisting of the general jurisdictions of 48 states, each having its own body of substantive law, as well as the limited jurisdiction of the federal courts. See generally G. Miller, Liability in International Air Transport 228 (1977).
27. In interpreting the Convention, the following factors should be considered: the text of the Convention, the intent of the delegates as expressed in the minutes, and the subsequent interpretation by international committees, conferences responsible for updating the Convention, and nations that are parties to the Convention. See, e.g., Reed v. Wiser, 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977); Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).
28. Warsaw Convention, supra note 2, arts. 3-16.
29. Id. art. 17.
30. Id. art. 28.
31. Id. art. 22.
and vulnerable airline industry from damage awards which might drain its economic resources.\(^\text{32}\) Prior to \textit{Benjamins}, the United States courts had approached questions of the substantive effect of the Warsaw Convention in a similar fashion.

### II. Causes of Action Prior to \textit{Benjamins}

The first case in the United States to address the issue of whether the Convention created a cause of action was \textit{Choy v. Pan-American Airways Co.}\(^\text{33}\) In \textit{Choy}, the court disallowed a wrongful death claim founded upon the Warsaw Convention, holding that the treaty could not be enforced in this country without an enabling act creating a cause of action or naming those who could sue for a passenger's death.\(^\text{34}\) This reasoning was followed in \textit{Wyman v. Pan American Airways, Inc.},\(^\text{35}\) in which the court stated that the Warsaw Convention did not create new substantive rights, but operated within the framework of existing rights and remedies.\(^\text{36}\) Neither the \textit{Choy} nor \textit{Wyman} decision, however, cited any authority for its conclusion, and, subsequently, a contrary argument emerged.

In \textit{Salamon v. Koninklijke Luchvaart Maatschappij, N.V.},\(^\text{37}\) the court construed article 17, which states that "[t]he carrier shall be liable" in the case of an accident,\(^\text{38}\) as the source of a cause of action for wrongful death. It cited \textit{Garcia v. Pan American Airways, Inc.},\(^\text{39}\) which found that the treaty was self-executing, as "impliedly" holding that the Warsaw Convention creates a cause of action.\(^\text{40}\) The \textit{Salamon} court, however, overlooked \textit{Garcia}'s ultimate holding that the issues therein, including the choice of the applicable wrongful death statute, were to be governed by the law of the forum.\(^\text{41}\) Consequently, it is not surprising that \textit{Salamon} had never been followed prior to \textit{Benjamins}.\(^\text{42}\)

Nevertheless, the purpose of article 17 was clarified by Judge Leibell in

\(^{32}\) \textit{See} Lowenfeld & Mendelsohn, supra note 24, at 499-500.

\(^{33}\) 1941 A.M.C. 483 (S.D.N.Y. 1941).


\(^{36}\) \textit{Id.} at 966, 43 N.Y.S.2d at 423.


\(^{38}\) Warsaw Convention, supra note 2, art. 17.


\(^{40}\) 107 N.Y.S.2d at 772-73. The \textit{Salamon} court ignored the \textit{Wyman} decision. \textit{See} notes 35-36 supra and accompanying text.

\(^{41}\) 269 A.D. at 293, 55 N.Y.S.2d at 323.

\(^{42}\) Ironically, Judge Lumbard quoted this holding in \textit{Benjamins}, 572 F.2d at 916, while in \textit{Noel v. Linea Aeropostal Venezolana}, 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957), he dismissed \textit{Salamon}'s significance in light of the strength of the \textit{Wyman} decision.
Komlos v. Compagnie Nationale Air France.\textsuperscript{43} Relying on the report of Secretary of State Hull that was submitted with the Convention to the Senate,\textsuperscript{44} he held that, rather than create a cause of action for wrongful death, article 17 created only a presumption of liability. The source of the cause of action was to be determined by the law of the forum court.\textsuperscript{45} Four years later, in Noel v. Linea Aeropostal Venezolana,\textsuperscript{46} the Second Circuit, though aware that the plaintiff might be left without a remedy, followed Komlos and held that the Convention did not create a cause of action for wrongful death.\textsuperscript{47} In spite of its harshness, Noel was followed for twenty-one years without opposition,\textsuperscript{48} until overruled by Benjamins.

The Noel rule also withstood several challenges in Congress. On two occasions legislation was proposed that would have extended federal question jurisdiction to all wrongful death and personal injury cases involving the Warsaw Convention. The first occasion was in 1965 when the Senate held hearings of ratification of the Hague Protocol. The Protocol was subject to considerable opposition; many people thought that its limitation of liability to approximately $16,000 per passenger was unconscionable by American standards of damage recovery.\textsuperscript{49} In an attempt to alleviate this dissatisfaction, a companion bill was proposed that would have required all American carriers to insure each passenger for an additional $50,000.\textsuperscript{50}

\textsuperscript{44} In the report, Secretary of State Cordell Hull set forth the reasons in favor of adherence to the Convention. He stated that "[t]he effect of article 17 . . . of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier . . . ."
\textsuperscript{45} The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations compromises were undoubtedly necessary. On the whole, it is believed that [what] the Convention adopted should be regarded as acceptable as a basis for regulating international transportation of passengers, baggage, and goods, and that any apparent departures from accepted procedure in this country are not sufficiently serious to warrant a withholding of adherence to the Convention." Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. Exec. Doc. No. G, 73d Cong., 2d Sess. (1934), reprinted in 1934 U.S. Av. 239, 243-44.
\textsuperscript{46} 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957).
\textsuperscript{47} Id. at 680.
\textsuperscript{48} See cases cited note 3 supra.
\textsuperscript{50} S. 2032, 86th Cong., 1st Sess. (1965). This bill was challenged on the theory that it would invite sabotage. The same attorneys who argued against adherence to the Protocol suggested that compulsory insurance would provide anonymity to those passengers who would attempt suicide by planting a bomb on an airplane so that their families would collect on the large insurance policies they purchased prior to the flight. The compulsory insurance would eliminate the need to
would have created a cause of action for all cases covered by the Convention. Nevertheless, the Hague Protocol was never ratified, and the companion bill was never passed.

In 1968 and 1969 the Senate again addressed the situation brought to light by Noel when it conducted hearings on legislation to establish exclusive federal question jurisdiction over all aircraft crash litigation. The bills were drafted to be compatible with the Warsaw Convention and were supported by the federal judiciary. Nevertheless, the legislation never passed, probably because of the opposition from plaintiffs' attorneys who expressed fears of increased litigation costs and who believed that state laws should govern wrongful death actions. As a result, the Noel rule remained intact, and cases involving the Warsaw Convention were not within the ambit of federal question jurisdiction.

III. THE BENJAMINS DECISION

A. The Uniformity Argument in Benjamins: National Law and the Warsaw Convention

Despite the established strength of Noel, the Second Circuit, in Benjamins, found that the Warsaw Convention did create a cause of action for wrongful

purchase insurance and prevent the FBI from tracing the saboteur. See Hague Hearings, supra note 2, at 10 (statement of Leonard Meeker), 21 (statement of Najeeb Halaby), 53-54 (statement of Stuart Speiser), 102 (statement of Brackley Shaw).

51. Leonard Meeker presented the position of the Department of State at the hearings. Referring to Noel, he stated: "The proposed legislation would change this result, and would expressly create a cause of action arising out of a treaty, which would be cognizable either in State or Federal courts. The statute would thus bring about a uniform U.S. interpretation of the convention, in line with its interpretation in other countries." Hague Hearings, supra note 2, at 6. The difference of interpretation referred to by Mr. Meeker did not result from a misinterpretation of the Convention by the American courts but because the United States, unlike England, did not enact enabling legislation when it adhered to the Convention. For a discussion of the British interpretation of the Convention, see notes 142-50 infra and accompanying text.

52. The legislation was designed to simplify litigation of air crash cases with the use of the federal provisions for multidistrict litigation. Aircraft Crash Litigation: Hearings on S. 3305, S. 3306 & S. 961 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. and 91st Cong., 1st Sess. 9-10 (1968-1969) [hereinafter cited as Aircraft Hearings] (remarks of Sen. Tydings, sponsor of the legislation). See also id. at 1-9, 199-225.

53. See S. 3305, 90th Cong., 2d Sess. § 1407(b) (1968), reprinted in Aircraft Hearings, supra note 52, at 1; S. 3306, 90th Cong., 2d Sess. § 2744(c) (1968), reprinted in Aircraft Hearings, supra note 52, at 6; S. 961, 91st Cong., 1st Sess. § 1408(d) (1969), reprinted in Aircraft Hearings, supra note 52, at 208.


55. The attorneys believed that the airlines would be more inclined to offer larger settlements at earlier dates if they were forced to defend claims in several different jurisdictions rather than in one federal court. Id. at 163 (statement of Lee Kreindler), 174-76 (statement of Stuart Speiser & Donald Madole), 242 (statement of Lee Kreindler).

56. Id. at 167-63 (statement of Lee Kreindler), 166 (statement of Milton Sincoff), 244-47 (statement of Lee Kreindler).
Moreover, the denial of a Convention-created cause of action for wrongful death was inconsistent with its view of the Convention as an "internationally binding body of uniform air law." The Benjamins majority found that the debates that led to the adoption of the Warsaw Convention clearly indicated that the delegates intended to create a uniform body of law "with absolutely no reference to any national law (except for the questions of standing to sue for wrongful death, effects of contributory negligence and procedural matters . . .)." The Convention, however, contains several substantial concessions to national law, and an examination of the history of their development indicates that the delegates could not have intended to create a cause of action for wrongful death and personal injury.

1. Contributory Negligence

Article 21 of the Convention specifies that the law of the forum court will determine whether the negligence of a passenger will reduce his recovery by a degree comparable to his own fault or act as a bar to any recovery. This provision represents a compromise between civil law nations, which had traditionally followed a doctrine of comparative fault, and common law jurisdictions, which had traditionally followed the doctrine of contributory negligence.

CITEJA, in its draft provision submitted to the Warsaw Conference, had not included any provision regarding the negligence of a passenger. In response, the United Kingdom proposed that the carrier be exonerated from liability when the passenger's own negligence contributed to his injuries. After considering the proposal, the drafting committee presented article 21 to the delegates as a compromise, and it was adopted in its present form.

Although article 21's effect would be contrary to a uniform application of the Convention, the delegates agreed that the conceptual differences between civil law and common law systems were so great that national law should govern the issue of contributory fault. Moreover, they decided that it was

57. 572 F.2d at 919.
58. Id. at 917.
59. Id.
60. See Warsaw Convention, supra note 2, arts. 21 (contributory negligence of the passenger), 24(2) (who has the right of action), 25 (standard by which willful misconduct is defined), 28(2) (questions of procedure), 29(2) (limitation on the time to sue). Two of these references were omitted by the Benjamins majority.
61. "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Id. art. 21. Since the rules of liability set out in the Convention are based on a theory of fault, the concepts of comparative fault and contributory negligence are not adverse to the Convention's legal objectives. Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw Minutes 252 (R. Horner & D. Legrez trans. 1975) [hereinafter cited as Warsaw Minutes].
62. Warsaw Minutes, supra note 61, at 252.
63. Id. at 208.
64. The Greek delegate pointed out the inequality inherent in article 21. In response, the Swiss delegate argued that even if the Convention did establish a uniform rule, a Judge will never "apply other than his law." He noted that with article 21 "we satisfy the English proposal, and we cannot come out against a national law which applies the common law. We create a
beyond the purpose of the Convention to provide for cases in which the forum court had no rule with respect to the negligence of the passenger. They felt that the Convention could only apply to the extent that it could refer to national law.\textsuperscript{65}

This concession to national law was challenged at subsequent international conferences that considered revision of the Convention. At the Rio De Janeiro Conference in 1953 it was proposed that, in the interest of uniformity, article 21 be amended to provide for application of the rule of comparative fault.\textsuperscript{66} By this time the United Kingdom had adopted a system of comparative fault,\textsuperscript{67} and only American courts continued to follow the common law doctrine of contributory negligence.\textsuperscript{68} The sole objection to this amendment came from the United States delegate, Mr. G. Nathan Calkins, who stated that serious problems would arise if article 21 were to conflict with the existing law of the United States.\textsuperscript{69} The proposal was narrowly rejected, and article 21 remained intact when presented to the Hague Conference in 1955. At The Hague, Greece, supported by the United Kingdom, Australia, and France, renewed the proposal that the Convention adopt a test of comparative fault.\textsuperscript{70} Once again, Mr. Calkins urged the retention of a reference to national law,\textsuperscript{71} and this time the proposal was soundly rejected.\textsuperscript{72}
The history of article 21 demonstrates that although the essential purpose of the Warsaw Convention was to establish uniformity, the delegates realized that the Convention could not act as an independent body of substantive law. Extensive concessions to national law were required. It seems correct to conclude, therefore, that under article 21 these defenses to a cause of action, as created by national law, will act to define or negate the carrier's liability that is presumed by the Convention. Conversely, it seems illogical to conclude that the Convention creates an independent cause of action. Article 21 would then allow the substantive forum-created defenses to define or negate an action which exists in and by reason of the Convention. If the drafters at Warsaw had intended to create an independent uniform cause of action they would not have subordinated it to the known inconsistencies of their countries.

2. Who Has a Cause of Action for Wrongful Death?

Under article 24 of the Convention the determination of who possesses the right of action for wrongful death and personal injury, and the damages they may recover, is a question of national law of the forum court. Reference was made to national law because it was CITEJA's opinion that the issues were beyond the scope of a convention on aeronautical law.

None of the delegates at Warsaw objected to this reference to national law, but at the Rio Conference, Mr. Garnault, the French delegate, proposed that it be omitted. He feared that plaintiffs might circumvent the Convention's limitation of the carrier's liability by arguing that rights provided by national law were not subject to conditions and limitations of the Convention. In his view, even if the Convention were silent on the matter

73. In both British and American tort law, freedom from contributory fault was a basic element of a cause of action in negligence. Any act of the plaintiff that was a proximate cause of his injuries extinguished his right to sue. See 28 Halsbury's Laws of England 75 (3d ed. 1959) (the plaintiff must "prove facts from which the proper inference is that the injury complained of was the result of the defendant's negligence and not of his own"); W. Prosser, Handbook of the Law of Torts § 65, at 416-18 (4th ed. 1971).

74. See note 23 supra and accompanying text.

75. Article 24 provides: "(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention. "(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." Warsaw Convention, supra note 2, art. 24. An early commentator on the Convention interpreted the "without prejudice" clause of article 24 as follows: "The question of whether the plaintiff has in fact a right of action, and if in the affirmative, the extent of the obligation to be indemnified, will be decided by the court, using as basis the international private law in force for the court seised of the case." D. Goedhuls, National Airlegislations and the Warsaw Convention 270 (1937).

76. "It was not possible to find a satisfactory solution to this problem, and CITEJA [deemed] that this question of private international law should be regulated independently from the present Convention." Warsaw Minutes, supra note 61, at 255 (report of Henri De Vos).

77. Id. at 211-12, 229, 277-78. A Swiss proposal to specify that the law of the nation of the deceased apply received little attention or debate. Id.

78. Rio Minutes, supra note 66, at 140.

79. The quarrel was not with the reservation of the nation's right to determine who could bring an action, but with the nation's prerogative to "determine 'their respective rights.' " Id.
the determination of who possessed a cause of action for wrongful death would be considered a question of national law. In opposition to the proposal, Mr. Calkins, the United States delegate, argued that absent a reference in article 24 to the application of national law, judges questioning the deletion might conclude that they had no right to consider the question of who had a right to sue. Major Beaumont, the British delegate, also opposed revision of article 24 because the Convention would then conflict with the rights created by the British wrongful death statute. He stated that the Convention had to remain compatible with the Anglo-Saxon systems of law. The French proposal was withdrawn, and article 24's reference to national law was left intact by both the Hague and the Guatemala Protocols.

The debates at the Rio Conference indicate that none of the delegates intended the Convention to interfere with the rights created by wrongful death statutes that existed in national law. Moreover, Major Beaumont's discussion of some of the problems he faced while preparing the draft revisions of the Convention leaves little doubt as to the effect of article 24 with regard to the creation of a cause of action by the Convention. Because article 24 did not create a cause of action and the plaintiff would be left without a remedy in those fora that lacked any provision for wrongful death, he suggested that the Convention specify the law to be applied in such a case. This proposal was never adopted. Nevertheless, this discussion demonstrated...
strates that the Warsaw Convention was meant to be applied to existing causes of action for wrongful death and not to create a new cause of action.89

3. The Standard of Conduct That Will Negate the Limitation of Liability

Under article 22 of the Warsaw Convention a carrier's liability for the death or injury of its passengers is limited,90 except when it engages in egregious conduct. Article 25 leaves the definition of the applicable standard of conduct to the law of the forum court.91

At the Warsaw Conference the delegates did not want to provide claimants and the courts with a facile means of avoiding the Convention's damage ceiling,92 and, consequently, a vigorous debate ensued over the correct word to define the standard of conduct that would negate the carrier's protection.93

The possibility of finding a single word or expression that could be uniformly interpreted in all jurisdictions94 seemed so remote, however, that the British delegate proposed that reference be made to the national law of the place where the contract of carriage was made.95 Although many delegates were at first opposed to the suggestion,96 they eventually realized that unless a

the law to be applied in case the matter is not covered by the national law of the Court trying the action, both in the case of death and in the case of all other claims." Id. at 18. Interestingly, these remarks refer to "all" claims subject to the Convention, and include cargo and baggage claims as well as wrongful death and personal injury actions.

89. Miller suggests one reason why the delegates may have neglected to provide for the problem envisioned by Major Beaumont. "It seems that most of the delegates at the Warsaw Conference saw the situation as it was in France. There was no need to create a cause of action since every plaintiff appeared to have one, based either in contract or in tort." G. Miller, supra note 25, at 232. Under French law, "[i]n carriage by air, the cause of action will in most cases be provided by the contract of carriage which can provide a basis for any action, be it wrongful death, personal injury, delay or damage to baggage or cargo." Id. at 231 (footnote omitted).

90. Warsaw Convention, supra note 2, art. 22.

91. "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." Id. art. 25(1).

92. They had to balance their desire to deprive a carrier that causes injury in an illicit or reckless manner of the benefit of limited liability with their desire not to defeat the purpose of the Convention.

93. Intertwined with the problem was the standard of conduct on the part of the carrier which would make it liable for the reckless acts of its servants. Warsaw Minutes, supra note 61, at 58-66. They eventually addressed this problem in article 25(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." Warsaw Convention, supra note 2, art. 25(2).

94. The jurisprudence of the nations represented seemed to construe each proposed term with a varying degree of definition. Although everyone agreed that the French word "dol" was the most suitable, it could not be precisely translated into other languages. Warsaw Minutes, supra note 61, at 59-61.

95. Id. at 63-64.

96. Id. at 64-66. This opposition occurred at the end of the third of the eight sessions of the Warsaw Conference. In this session the delegates addressed the substance of the Convention for the first time. The Italian and French delegations were adamantly opposed to any recourse to national law at that early stage of the conference. The French delegate announced what he thought was an agreement: "[W]e are absolutely opposed to a formula that would lead to the
reference to national law were made, article 25 would not be adopted. 97 The British proposal was modified to refer to the national law of the forum court 98 and was adopted by the Conference. 99 

At The Hague in 1955 many delegates, bothered by the varied standards of conduct that had developed in the courts of the signatory nations, argued that it was necessary to define a standard of conduct so that article 25 would be applied uniformly. 100 When the Department of State translated the Convention for use in the United States it employed the term "willful misconduct" as the standard that would subject the carrier to unlimited liability. 101 The interpretation of willful misconduct that had developed in American courts was important to plaintiffs' attorneys. They believed that their chances of proving a carrier's willful misconduct were, in most cases, sufficient to induce settlements in excess of article 22's limits. 102 Although at The Hague Mr. Calkins was not opposed to the adoption of a uniform rule, he was opposed to any revision of the language that would be inconsistent with the law that had developed in America. 103 

Nevertheless, article 25 was amended by the Hague Protocol so that attempts to circumvent the limited damage provisions would be severely, if not completely, restricted. 104 Consequently, during the hearings before the United States Senate in 1965 concerning American ratification of the Hague application of national law. It's the first time that application of national law is required, and if it were allowed for this question, it would be required for others. From our point of view, one would thus arrive in destroying the Convention, if one establishes recourse to national law upon each article. "We will be as conciliatory as possible on the formula to be adopted; we will develop it as much as possible, but I beg the delegates not to enter upon this dangerous course which would consist in reserving the result of the litigation to national law." Id. at 66. To this Mr. Clarke of Great Britain replied: "We are quite in agreement, if one can find a formula." Id. Nevertheless, as the Conference progressed, the delegates realized that the Convention would not be accepted unless it made substantial concessions to national law. See note 60 supra and accompanying text. 

97. The drafting committee had been asked to formulate language without referring to national law. Warsaw Minutes, supra note 61, at 66. Later, when presenting article 25, Mr. Giannini, president of the committee, stated that the use of a reference to the national law for the definition of the standard of conduct was the only solution that would satisfy all of the delegates to the Conference. Id. at 212-14. 

98. On the second presentation of article 25 no one objected to the reference to the national law of the forum court. See id. 

99. Id. at 229-30. 

100. Hague Minutes, supra note 68, at 192-200. 

101. See note 91 supra. 

102. See Hague Hearings, supra note 2, at 11-12 (statement of Leonard Meeker), 59 (statement of Stuart Speiser), 65-67, 75 (statements of Lee Kreindler), 82-83 (statement of Charles Robbins), 107-08 (supplementary statement of Lee Kreindler). 


104. The Hague amendment reads as follows: "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 such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment." Hague Protocol, supra note 16, art. XIII. See also authority cited note 102 supra.
Protocol,\(^{105}\) several plaintiffs' attorneys testified that, although the Protocol's damage limitation was twice as great as the Convention's, if the Protocol were ratified one of their means of recovering unlimited damages\(^ {106}\) would be lost. They preferred to forgo the Protocol's higher damage limitation, rather than to lose the interpretation of willful misconduct that had developed in the United States.\(^ {107}\) Because of substantial opposition to the Hague Protocol it has never been ratified by the United States and has no effect here.\(^ {108}\)

In this country, therefore, the law of the forum court provides the definition of a carrier's willful misconduct. Although the Hague Protocol changed the Convention's concession to national law, the debates at the Hague Conference show that the rationale for this change was to protect the airline industry from excessive damage awards rather than to create a uniform body of substantive law.

Because the definition of the egregious conduct standard in the Warsaw Convention is left to the admittedly divergent laws of the contracting nations, national law can conceivably be used to undermine the purposes of the damage limitation. Article 25's effect on this essential element of the Convention seems inconsistent with any intention of the delegates at Warsaw to create an independent uniform cause of action.

4. The Enforceability and Res Judicata Effect of Judgments

Although the CITEJA draft of the Convention specified that all actions for the death or personal injury of the same passenger be litigated in a single court,\(^ {109}\) the absence in the draft of provisions relating to the enforceability and res judicata effect of judgments created considerable controversy at the Warsaw Conference. Many delegates believed that the carrier would need protection against suits for the wrongful death of the same passenger brought by different claimants in different jurisdictions.\(^ {110}\) They feared that the aggregate amount of judgments against the carrier might exceed the carrier's limited liability for the death of any one passenger.

CITEJA had attempted to solve this problem in its draft, but, absent a corollary provision for the enforcement of judgments, one claimant might have been denied recovery because another claimant had previously filed suit in a jurisdiction where the carrier had no assets.\(^ {111}\) After a lengthy debate\(^ {112}\)

---

\(^{105}\) See notes 49-57 supra and accompanying text.

\(^{106}\) The other method was to argue that the passenger ticket did not provide adequate notice of the liability limitation. See Lisi v. Alitalia-Linee Italiane, S.p.A., 370 F.2d 508 (2d Cir. 1966) (notice of liability limitation printed on ticket in "lilliputian" size print), aff'd by an equally divided Court, 390 U.S. 455 (1968). The carriers, however, corrected this problem by changing their tickets.

\(^{107}\) Hague Hearings, supra note 2, at 59 (statement of Stuart Speiser), 75 (statement of Lee Kreindler), 83 (statement of Charles Robbins). Moreover, these attorneys stated that their true preference was the complete denunciation of the Warsaw Convention by the United States. Id.

\(^{108}\) See note 16 supra.

\(^{109}\) Warsaw Minutes, supra note 61, at 266.

\(^{110}\) For example, a decedent's spouse could bring an action in one country while the decedent's children were bringing an action in a different country. Moreover, differences in wrongful death statutes might prompt an adopted or illegitimate child to sue in a jurisdiction different from that in which the decedent's natural children were bringing an action.

\(^{111}\) Under the CITEJA provision not only would that subsequent claimant be precluded
the delegates rejected the CITEJA proposal\textsuperscript{113} and article 28 was adopted without a res judicata or an enforcement of judgments provision. 

The issue of enforceability was raised again at the Hague Conference. After strong opposition from the United States delegation, however, the delegates decided merely to recommend that the question be studied by another conference.\textsuperscript{114} Thus, neither the Warsaw Convention nor the Hague Protocol provides protection for the claimant who obtains a judgment against a carrier in one jurisdiction but needs to execute it in another, or for the carrier that is faced with multiple claims in different countries for the same death.\textsuperscript{115} At both conferences the prevailing argument against the provisions for the enforcement and res judicata effect of judgments was that they were not within the scope of the Convention and should be considered elsewhere.\textsuperscript{116}

Nevertheless, provisions for res judicata and enforcement are essential elements of all judgments. If the delegates intended to create an independent cause of action that would be recognized as uniform and identical in each of the adhering nations, they also would have intended that any judgments on that cause of action be similarly recognized. Their refusal to provide for either enforcement or the res judicata effect of judgments indicates that they had no intent to create an independent cause of action.

5. Summary

At Warsaw, two delegates proposed that provision be made for specific issues not covered by the rules of the Convention.\textsuperscript{117} This provision was thought to be unnecessary, however, since it was clear "that this Convention does not provide for the entire matter . . . ."\textsuperscript{118} Thus, the delegates were clearly aware that they could not expect the Convention to cover every issue of aviation litigation. Because of their appreciation of the substantial differences among the legal systems of the world, the delegates expressly refrained from governing issues unrelated to the particular problems of international

\textsuperscript{112} Various proposals were made to alleviate this problem. They ranged from the British proposal to restrict treaty jurisdiction to the domicile of the carrier, id. at 118, to the German proposal that any judgment rendered by a competent court be enforced without need to retry the merits of the case. Id. at 123.

\textsuperscript{113} Id. at 125.

\textsuperscript{114} Hague Minutes, supra note 68, at 260-61. Miss Colclaser, speaking for the American delegation, was not only adamantly opposed to any provision for the execution of judgments but to further study of the question by the ICAO Legal Committee. Id. at 260.

\textsuperscript{115} See generally D. Goedhuis, supra note 75, at 289-92.

\textsuperscript{116} See Warsaw Minutes, supra note 61, at 119-20; Hague Minutes, supra note 68, at 260-61.

\textsuperscript{117} The Czechoslovakian and Yugoslavian delegations made these proposals. Under the Czechoslovakian proposal each nation would have applied its national law relative to carriage in the absence of provisions in the text of the Convention. Warsaw Minutes, supra note 61, at 176.

\textsuperscript{118} Id. at 178. Mr. Giannini, president of the drafting committee, remarked that the limited character of the Convention would be made clear with the use of the word "certain" in its title. Id. at 176; see note 2 supra.
Similarly, the minutes of the Conferences at Rio De Janeiro and The Hague reveal that Mr. Calkins and the United States delegation were reluctant to recommend adherence to a treaty that would replace or substantially modify existing American law.

Although the creation of an independent uniform cause of action could not be within the purpose of the Convention, uniformity with regard to its primary purpose was not in jeopardy. The Convention's damage limitation could be incorporated into any legal system without conflicting with any of its legal principles. The carrier's liability is limited no matter who has the right to sue and no matter how their cause of action is founded.

B. The Uniformity Argument in Reed v. Wiser

The Benjamins majority also stated that the denial of a Convention-created cause of action would be inconsistent with the Second Circuit's

119. Nearly all of the problems addressed at Warsaw were unique to the liability situations engendered by international air transportation. The delegates were reluctant to formulate rules that were not necessary to a convention on aeronautical law. See, e.g., Warsaw Minutes, supra note 61, at 170, 173-74 (statements of Mr. Giannini, president of the drafting committee). For instance, questions of procedure were left to the law of the forum court. Warsaw Convention, supra note 2, art. 28(2). Article 28 limited the jurisdictions where an action could be brought to fora in which the carrier could expect to be sued at the time it entered into the contract of carriage. See note 7 supra. The British were opposed to the CITEJA provision that suit be allowed in the jurisdiction of the place of the accident, Warsaw Minutes, supra note 61, at 266, because in cases of flights over several countries the location of the accident is fortuitous and not within the contemplation of either the passenger or the carrier. See id. at 113. Absent such a provision, however, the carrier was assured that it would not be sued in a nation whose judicial procedures were unorganized.

Given article 28, a carrier may avoid treaty jurisdiction in any given country by not maintaining its domicile or principal place of business there, by not entering into any contracts of carriage there, and by refusing to enter into any contract of carriage in which that country is designated as the place of destination. The Convention provides that nothing in the treaty will prevent the carrier from refusing to enter into a contract of carriage. Warsaw Convention, supra note 2, art. 33. Once these safeguards were established the delegates had little concern for the operation of the forum court's procedures.

For instance, the Convention also does not address the case in which the law of the forum court is to apply the substantive law of another court. Such a situation would have occurred in the United States where courts applied the law of the place of the accident. See, e.g., Komlos v. Compagnie Nationale Air France, 209 F.2d 436, 438 (2d Cir. 1953), cert. denied, 348 U.S. 820 (1954). It would appear that under the Convention the forum court was free to do so as long as the conditions and limitations of the Convention were complied with. See, e.g., G. Miller, supra note 25, at 248; Sack, International Unification of Private Law Rules on Air Transportation and the Warsaw Convention, 4 Air L. Rev. 345, 384-88 (1933). See generally D. Goedhuis, supra note 75, at 286-88.

The Convention's final reference to national law is article 29(2), the limitation on the time to sue. The CITEJA draft had provided that national law would govern “the causes of suspension and interruption of the period of limitation,” Warsaw Minutes, supra note 61, at 267, but Mr. Giannini feared that such a provision would be detrimental to the carrier because the right to sue for damages might be delayed indefinitely. Id. at 110-13. Consequently, the law of the forum determines whether the action has been timely commenced and article 29(1) limits any right to two years. Id. at 171; see D. Goedhuis, supra note 75, at 294-95.

120. See notes 69, 71, 81, 103, 114 supra and accompanying text.

121. 572 F.2d at 917.
decision in Reed v. Wiser. The plaintiffs sued employees of an airline, arguing that the liability limitations of article 22 were available to the carrier only. They were aware that the airline would indemnify the defendants for any judgment awarded against them. The court, however, rejected this attempt to circumvent the damage limitation and held that since one of the clear and unequivocal purposes of the Convention was to limit the liability of the carrier, the Convention should be interpreted so that this intention was uniformly applied.

As noted by Judge Van Graafeiland in his dissent in Benjamins, the Reed decision does not suggest that the Convention creates a cause of action. The Reed court held that the purpose of the Warsaw Convention was to impose certain conditions and limitations on every possible cause of action, and its reasoning implies that, at that time, the Second Circuit recognized that there could be several sources of a cause of action subject to the Convention. The Benjamins court, on the other hand, held that the Warsaw Convention was the single source of an independent cause of action. It is submitted that, contrary to the contentions of the majority, Benjamins is actually inconsistent with Reed.

C. The Commentators' View of the Delegates' Intentions

Although the minutes to the Warsaw Conference do not explicitly indicate whether the delegates intended to create a cause of action for wrongful death, the observation by the Benjamins majority—that some commentators attribute this silence to an assumption by the delegates that “the Convention itself supplied the cause of action”—requires qualification. First, the commentators relied on by the court, Messrs. Lowenfeld and Mendelsohn, were not referring to the time of the drafting of the Convention in 1929, but to the period in the early 1960's when ratification of the Hague Protocol was under consideration by the United States Senate. Second, the commentators' statement is inaccurate. The American proponents of the Hague Protocol knew that the Convention did not create a cause of action, and, therefore, drafted companion legislation that would have created one.

123. Id. at 1081.
124. Id. at 1090.
125. Id. at 1092.
126. 572 F.2d at 922 n.5 (Van Graafeiland, J., dissenting). Judge Van Graafeiland sat on both the Reed and Benjamins panels. The Reed decision was unanimous.
127. 555 F.2d at 1084-85.
128. 572 F.2d at 917 n.8 (citing Lowenfeld & Mendelsohn, supra note 24, at 517).
129. See notes 50-51 supra and accompanying text. When he presented the position of the Department of State on the compulsory insurance bill at the Hague Hearings, Leonard Meeker (who was accompanied at the hearings by his acting deputy Mr. Lowenfeld) testified that “[i]t had always been assumed that the Warsaw Convention, by providing in article 17 that ‘the carrier shall be liable . . .’ and by providing in article 28 for the place where action could be brought had secured a clause [sic] of action to Warsaw passengers on [sic] their survivors in all cases covered by the Warsaw Convention.” Hague Hearings, supra note 2, at 6. Mr. Meeker, however, like Messrs. Lowenfeld & Mendelsohn and the Benjamins majority, never identifies those parties who made such an assumption.
The court also referred to an article written by G. Nathan Calkins in 1959 as support for its conclusion. In his article, Calkins points to "overwhelming" evidence that the draftsmen of the Convention intended to create a cause of action. Calkins argues that the delegates feared that national law would require application of the doctrine of lex loci delicti, as was then the law in the United States. Therefore, he reasons, the delegates must have intended to create an independent cause of action to prevent such a result.

There are, however, several flaws in the Calkins argument. There is no indication in the Warsaw minutes that the doctrine of lex loci delicti was ever contemplated by the delegates. The United States did not send a delegate to Warsaw and the minutes do not contain any references to the peculiar legal situation created by the multiplicity of jurisdictions in this country. In addition, the laws of many countries represented at Warsaw did not apply the doctrine of lex loci delicti in the case of a foreign accident. In Great Britain, for example, the courts had retreated from the doctrine since the turn of the century, especially when its application would work to the detriment of one of the parties. In France, at the time of the Convention, an accident was deemed a breach of the contract of carriage, which indicates that France would apply the law of the place of the contract rather than the law of the place of the accident in carrier liability actions.

The Calkins article also seems less than objective in its presentation of evidence, and many available facts are simply not mentioned. Although

131. 572 F.2d at 917 n.8.
132. Calkins, supra note 130, at 218, 227. A reading of Calkins' article indicates that although his stated purpose is to argue that the Convention creates a cause of action, his arguments are founded on his dislike of the choice of law doctrine of lex loci delicti. His "evidence" merely demonstrates that the delegates did not wish to require that the law of the place of the accident would apply when an issue was left to national law. See, e.g., id. at 231-32, 234, 236, 343. In fact, the final paragraph of the two-part article addresses only the ills of the lex loci delicti doctrine and is silent with regard to the Convention. Id. at 343.
134. See G. Miller, supra note 25, at 235-37. In France an action in contract is apparently the exclusive form of civil action recognized in Warsaw cases. Id. at 235-37.
135. The traditional rule in contract cases is to apply the law of the place of the contract. See, e.g., Milliken v. Pratt, 125 Mass. 374 (1876); Restatement of Conflict of Laws § 332 (1934).
136. Calkins supports his arguments as to the intent of the delegates at Warsaw by reasoning that the legal purpose of the Convention was not substantially modified between the time it was drafted by CITEJA and the time the treaty was adopted by the Conference. See, e.g., Calkins, supra note 130, at 221, 223 (discussion of article 23 of the CITEJA draft), 224 (discussion of article 27 of the CITEJA draft), 227. The minutes of the Warsaw Conference, however, indicate that the initial intention to create a comprehensive body of law was superseded by the desire to adopt a treaty that could be applied in all nations in spite of their conceptually diverse legal systems. See notes 118-21 supra and accompanying text. Calkins' reliance on his own translation of the minutes of the CITEJA meetings and the Warsaw Conference is also questionable. Although Calkins chose the English vocabulary for these translations, he frequently points to and emphasizes particular phrases in his translations which "convince" him of the "intent" of CITEJA and the Warsaw delegates.
Mr. Calkins was the chairman of the United States delegations to the Madrid Conference in 1951, the Rio Conference in 1953 and the Hague Conference in 1955, his article, written in 1959, does not refer to any of those proceedings. For instance, the delegates at The Hague discussed *Komlos v. Compagnie Nationale Air France*, which held that the Convention did not create a cause of action for wrongful death. The French delegate explained that the case had been correctly decided because the Convention required the application of the law of the forum to determine whether the claimants had a cause of action for wrongful death. The United States delegation did not respond to this explanation and it was apparently acceptable to the other delegates because discussion on the matter was ended. Nevertheless, Calkins completely ignores the discussion and approval of the *Komlos* case at The Hague and argues that the decision was contrary to the purposes of the Convention.

Calkins also argues that the references to national law in the Warsaw Convention are not substantial. Yet this belies his own statements on behalf of the United States at the Rio and Hague Conferences that the replacement of several of those references with uniform provisions was unacceptable because it would interfere with existing law. In spite of these inconsistencies, however, many of Calkins' arguments appear in the *Benjamins* decision.

For example, one of Calkins' semantical arguments is his claim that the State Department mistranslated the official French text of article 24. (This translation of article 24 is quoted at note 75 *supra*.) The French text reads as follows: "(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention." 49 Stat. 3006 (1934). Calkins feels that although the term "conditions," which appears in both the British and American translations, is a proper translation of the "English legal sense" of the French term "conditions," the translation which more accurately reflects the apparent intent of CITEJA is "fundamental basis." Calkins, *supra* note 130, at 226 & n. 21. Calkins then argues that because article 24 provides that the Convention must create the cause of action, the Convention must create the cause of action. *Id.* at 226. In support of his argument, Calkins provides his translation of a CITEJA debate in which "basis of the convention" or some variation thereof is employed throughout. *Id.*


138. The question of *Komlos* arose when the British delegate expressed concern that the United States had subordinated the Warsaw Convention to the law of the forum. Hague Minutes, *supra* note 68, at 315-16. The French delegate stated that *Komlos* addressed the question of "whether the claimants had a right of action and were entitled to claim compensation," *id.* at 316, and that the issue "had been settled outside the Convention as was permitted by the Convention." *Id.*

139. See *id.* at 316-17. The British had proposed an article that would have required the application of the Convention in all cases involving international transportation as defined in article 1. *Id.* at 314. This provision was deemed unnecessary by the other delegates. *Id.* at 317.

140. See notes 69, 71, 81, 103 *supra* and accompanying text.

D. The Warsaw Convention in Great Britain

An example of the *Benjamins* court’s reliance on Calkins is its reference to the law of the United Kingdom, which it considered “compelling” evidence that the Warsaw Convention created a cause of action for wrongful death.\(^1\) Calkins states that in Britain “all doubt has been removed that liability is created by the Convention.”\(^1\) Both Calkins and the Second Circuit assume that the Convention and the Carriage by Air Act of 1932,\(^1\) which incorporated the Convention into the national law of Britain, are one and the same.\(^1\) This assumption is incorrect. The Carriage by Air Act of 1932 consists of six provisions of enabling legislation and two appended schedules. The First Schedule is the text of the Convention and the Second Schedule consists of provisions similar to a wrongful death statute.\(^1\) The text of the entire Act indicates that only the liability of the carrier arises out of the Convention; the Second Schedule creates the cause of action.

Moreover, an examination of the Carriage by Air Act of 1961,\(^1\) which replaced the 1932 Act, reveals more conclusive evidence that the United Kingdom never interpreted the text of the Convention to create a cause of action for wrongful death. The primary purpose of the 1961 Act was the incorporation of the Hague Protocol into British law, but, in addition, major alterations were made in the process by which the provisions of the Convention were to be enforced. The Second Schedule of the earlier Act was replaced by a provision that any occurrence that gave rise to liability under article 17 in the Warsaw Convention was to be considered a “wrongful act\(^1\) as referred to in Britain’s general wrongful death act—the Fatal Accidents Act.\(^1\) The 1961 Act has been interpreted to provide that the liability presumed in the Convention gives rise to a cause of action created by the wrongful death statute.\(^1\) Thus, in Britain, the cause of action is created by

---

\(^1\) See 572 F.2d at 918-19.

\(^2\) Calkins, supra note 130, at 324.


\(^4\) 572 F.2d at 918-19; Calkins, supra note 130, at 324.

\(^5\) The Second Schedule is entitled “Provisions as to Liability of Carrier in the Event of the Death of a Passenger.” The first paragraph of the schedule names those who shall have a right to enforce any liability of the carrier. The second paragraph provides that “[a]n action to enforce the liability may be brought . . .” 22 & 23 Geo. 5, c. 36, sched. 2 (1932), reprint in Air Law, supra note 144, at 692. The only reference to the Convention in the Second Schedule is with respect to the limitation of damages. Paragraph 4 provides: “The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier . . . .” Id.


\(^7\) Id. § 3, reprint in C. Shawcross & K. Beaumont, supra note 20, app. B, at 54.

\(^8\) 1976, c. 30.

\(^9\) C. Shawcross & K. Beaumont, supra note 20, at 427. In examining the question of whether the Convention creates a cause of action in the various legal systems of the world, one commentator states that “[t]he new provision extends the scope of the *Fatal Accidents Act* 1846 (i.e. Lord Campbell’s Act) so that it will provide a cause of action for any occurrence which gives rise to the carrier’s liability. Thus it is now impossible to argue that it is the Convention which
the wrongful death act and not by the Convention. Nevertheless, the *Benjamins* majority, neglecting the 1932 Act's reference to the Second Schedule and the 1961 Act's reference to the Fatal Accidents Act, stated otherwise.\textsuperscript{151}

E. Wrongful Death Statutes and the Warsaw Convention

The relationship between the Convention and the Fatal Accidents Act in the new Carriage by Air Act is also significant in light of the history of the cause of action for wrongful death. As Judge Van Graafeiland argued in his dissent in *Benjamins*, no action for wrongful death can be sustained without the existence of a statute authorizing the suit.\textsuperscript{152} The Fatal Accidents Act was designed to create a cause of action for wrongful death, and it has remained the sole source of a wrongful death action in Britain. Similarly, every state of the United States has created a statutory cause of action for wrongful death.\textsuperscript{153}

Even if one were to assume that the Warsaw Convention does create a cause of action, it lacks all the essential elements of a wrongful death statute.\textsuperscript{154} As a set of conditions and limitations, the Convention can easily be applied to a state-created cause of action for wrongful death or personal injury. Conversely, however, if the Convention creates an independent cause of action, there is no statutory basis in the United States for the determination of who may sue for wrongful death and what damages are recoverable.\textsuperscript{155}

The *Benjamins* majority, however, failed to specify how this Convention-provides a cause of action in cases of wrongful death." G. Miller, *supra* note 25, at 229 (emphasis in original).

\textsuperscript{151} 572 F.2d at 918-19. The majority quoted the following text from the lengthiest of the enabling provisions of the 1932 Act entitled "Provisions of Convention to have force of law": "Any liability imposed by Article seventeen of the said First Schedule [the Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law . . . ." 22 & 23 Geo. 5, c. 36, *reprinted in Air Law*, *supra* note 144, at 682. The court omitted the following language of the enabling provision: "[T]he provisions set out in the Second Schedule to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced." *Id.*


\textsuperscript{153} For a list of state statutes see 2 S. Speiser, *supra* note 152, at 644-787, app. A.

\textsuperscript{154} The wrongful death statutes create a cause of action, designate those persons who possess the right to enforce that action, and define the nature of the damages recoverable. *See id.* The Warsaw Convention not only lacks these three essential elements but article 24(2) expressly provides that the Convention is to apply "without prejudice" to the question of who possesses a right of action and to the nature of damages they may recover. *See note 75 supra* and accompanying text. Also, a wrongful death statute applies only to a preexisting source of liability, e.g., negligence; it does not establish a rule for the creation of that liability. The cause of action for wrongful death under the applicable national law applies to article 17's presumption of liability. *See note 23 supra* and accompanying text.

\textsuperscript{155} *See* 572 F.2d at 922 (Van Graafeiland, J., dissenting).
created cause of action is to be implemented. Presumably, it left this problem to the development of a federal common law, either by the creation of a federal common law wrongful death action or by the development of procedures for applying rules that already exist in the state-created causes of action.156

Problems may also arise in state courts when they are faced with Warsaw Convention cases. The Second Circuit did not determine whether the newly recognized federal cause of action is to operate in conjunction with, or independent of, the existing state-created rights. If the Warsaw Convention cause of action is exclusive, the state court cannot apply its own law for wrongful death. The existence of these problems, however, is not surprising; the debates concerning the revision of the Convention clearly demonstrate that the Convention was not meant to replace existing causes of action for wrongful death.157

F. Seth v. British Overseas Airways Corp. and Article 30(3) of the Convention

In searching for a cause of action, the Benjamins majority158 relied on, by analogy, article 30(3) of the Convention and the First Circuit's opinion in Seth v. British Overseas Airways Corp.159 Article 30 deals with contracts of carriage that are to be performed by successive carriers.160 In cases involving the loss, damage, or delay of baggage or cargo, article 30(3) states when the passenger, consignor, or consignee "shall have a right of action."161 It is the only provision in the Convention that employs such language. In Seth, the court found that the language of article 30(3) created a cause of action for the loss, damage, or delay of baggage or cargo during carriage by successive carriers.162 The decision in Seth, which had not been cited prior to Benja-

---

156. In finding that the Warsaw Convention creates a cause of action for wrongful death, the Benjamins court ignored the issue of how the federal or state courts are to determine who has a right to bring an action under the Warsaw Convention. Although they found a Convention-created right of action for the death of Hilde Benjamins, they never looked to see, nor did they ask the district court to determine, whether Abraham Benjamins, as personal representative of the estate, had a right to bring it.

157. See notes 88-89 supra and accompanying text.

158. 572 F.2d at 918.

159. 329 F.2d 302 (1st Cir.), cert. denied, 379 U.S. 858 (1964).

160. Article 30(1) provides: "In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision." Warsaw Convention, supra note 2, art. 30(1).

161. "As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee." Id. art. 30(3).

162. 329 F.2d at 305. Like Mr. Benjamins, Mr. Seth was an alien attempting to sue an alien airline in the federal court, and diversity jurisdiction could not be sustained.
makes no reference to any other authority or to the Warsaw Conference.

Nevertheless, even if Seth is correct it should be limited to its facts because article 30(3) refers specifically to baggage and cargo. Article 30(2), however, which deals with the carriage of passengers by successive carriers, restricts the right to sue, rather than state that a passenger has a right of action. A passenger "can take action only against the carrier who performed" the relevant transportation. In addition, although an examination of the baggage provisions of the Convention is beyond the scope of this discussion, it should be noted that these provisions are more detailed than those dealing with the carrier's liability for injuries to passengers.

G. Policy Considerations

Although there is dubious justification for reliance on considerations of policy unique to the United States to interpret the purposes of an international multilateral convention, the Benjamins majority advanced several policy arguments in support of its conclusion. In any event, the policy considerations advanced by the court lack merit.

The majority expressed fears that claimants would be left without redress if the Convention did not create a cause of action. Although under the peculiar facts of Noel v. Linea Aeropostal Venezolana such a result was possible, recent developments in the law of this country—for example, the decline of the doctrine of lex loci delicti—have rendered such problems.

163. In a district court case with similar facts in the same circuit as Seth, the court, without citing Seth, held that federal question jurisdiction was not applicable. Fabiano Shoe Co. v. Alitalia Airlines, 380 F. Supp. 1400 (D. Mass. 1974).

164. "In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey." Warsaw Convention, supra note 2, art 30(2).

165. See id. arts. 4-16. See generally H. Drion, Limitation of Liabilities in International Air Law 135-36 (1954); G. Miller, supra note 25, at 249-56.

166. "The holding that the Warsaw Convention does not create a cause of action has the effect of subjecting Warsaw cases to all the uncertainties affecting the question in the United States where the issue can become quite complex because of the federal structure of the country . . . . But despite the possible importance of a decision on jurisdiction upon the final outcome of a case, the question of jurisdiction . . . does not relate to the interpretation of the Convention itself but is a question of municipal law of the United States." G. Miller, supra note 25, at 228 (footnotes omitted).

167. 572 F.2d at 919.

168. Id. at 918 n.9.

169. 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957), discussed at notes 47-48 supra and accompanying text. The Noel case arose out of an accident in which the aircraft crashed into the ocean. Therefore, applying the doctrine of lex loci delicti, the court held that the only remedy would be in admiralty. See id. at 680.

nonexistent. Realistically, for any possible cause of action under the Warsaw Convention there is a counterpart in our domestic law. In fact, at the Senate hearings on the United States adherence to the Hague Protocol plaintiffs' attorneys argued that the United States should denounce the Warsaw Convention because it did not confer any rights on the plaintiff that were not already available under state law.

As another policy consideration the majority reasoned that the Multidistrict Litigation Act "makes federal jurisdiction peculiarly appropriate in large air crash cases." Although multidistrict litigation solves many problems involving air crash litigation, the recognition of an independent cause of action might actually be disruptive of uniformity in those proceedings. For example, if an aircraft manufacturer or another airline, not the passenger's carrier, were joined as co-defendant with the Warsaw carrier, there would be two separate causes of action for the wrongful death of the same passenger: one created by the Convention against the Warsaw carrier and one founded on the applicable state law against the co-defendant. In contrast, under the pre-Benjamins law there would be a single state-created cause of action against the joint tortfeasors, but the liability of the Warsaw carrier would be both presumed and limited.

Another consideration is the proposed legislation that would abolish diversity jurisdiction over actions between citizens of different states. If such legislation is passed, domestic plaintiffs could bring only two types of actions

Andreas Lowenfeld), 110 (statement of Donald Traurman), 245 (statement of Lee Kreindler); Hague Hearings, supra note 2, at 64-65 (statement of Lee Kreindler); Lowenfeld & Mendelsohn, supra note 24, at 526-32.

171. See 572 F.2d at 923 (Van Graafeiland, J., dissenting).

172. "I think you will find that neither the Warsaw Convention nor the Hague Protocol confers any benefits whatsoever on anybody except the air carriers. That is the sole purpose of these two conventions to limit the liability of carriers. It does not confer any benefits on the passengers." Hague Hearings, supra note 2 at 58 (statement of Stuart Speiser); accord, id. at 64 (statement of Lee Kreindler). See also 111 Cong. Rec. 20378 (1965) (discussion of the Hague Protocol on the floor of the House).


174. 572 F.2d at 919.

175. Cases in which the manufacturer is joined as a defendant are common. The manufacturer was joined in Benjamins. See note 9 supra. Another example is the litigation arising from the crash of a Turkish Airlines DC-10 near Orly airport in Paris on March 3, 1974. Over 200 lawsuits were brought for the wrongful deaths of 337 passengers and crew members. The defendants were Turkish Airlines, the international carrier, McDonnell Douglas, General Dynamics, and the United States. The latter three were alleged to be responsible for design defects of the aircraft. For a discussion of the procedural and substantive complexity of that litigation, see In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 741-42 (C.D. Cal. 1975).

176. Such a situation arose from an accident on March 27, 1977 when a KLM 747 and a Pan American 747 collided on the runway at Tenerife, Canary Islands. Several cases were brought by or on behalf of Pan American passengers against Pan American, as the international carrier, and KLM and Boeing. In re Air Crash Disaster at Tenerife, Canary Islands on March 27, 1977, No. 306 (P.M.D.L. Aug. 19, 1977) (order of consolidation) (The Convention would not apply between these passengers and KLM since there was no contract of carriage between them.

in federal courts. The first type would be those against a domestic airline if the plaintiff had a contract for “international transportation.” The second type would be those against an alien airline since the proposed legislation would retain diversity jurisdiction over actions involving a domestic citizen and an alien. Ironically, however, the federal courts would have jurisdiction over actions by alien plaintiffs against domestic airlines (diversity) and, under Benjamins, alien airlines (federal question).

Moreover, if Benjamins is upheld a considerably greater number of cases will come within the federal question jurisdiction of the federal courts than those in which “plaintiffs and defendants are all aliens,” the only increase envisioned by the Benjamins majority. In addition to cases similar to Benjamins in which aliens sue foreign airlines in the United States, Benjamins will admit all cases involving international transportation in which the plaintiff and an American carrier reside in the same state. Finally, the Second Circuit’s decision will permit carriers sued in their own state court to remove cases involving the Warsaw Convention to the federal court. In addition, if Congress abolishes diversity jurisdiction all of the Warsaw Convention cases which satisfied the diversity requirements, and which would then be excluded from the federal courts, would nevertheless be within the federal question jurisdiction recognized by Benjamins.

178. See note 6 supra and accompanying text. Since international transportation under the Convention includes all flights performed under an international contract of carriage, a domestic sector in the itinerary of that contract is deemed international transportation under the Convention.


180. This is a problem presented by the facts arising from an Eastern Airlines accident that occurred at John F. Kennedy International Airport in New York on June 24, 1975. John F. Kennedy International Airport Air Disaster Litigation, No. 227 (J.P.M.D.L. Feb. 9, 1976) (order of consolidation). The aircraft was on a domestic flight from New Orleans and there were several Norwegians on board. The abolition of diversity jurisdiction would bar all Americans with domestic contracts of carriage from access to the federal courts. The Norwegians, however, would be able to sue Eastern Airlines in the federal court.

181. It is not clear whether the other circuits will follow Benjamins as readily as they followed Noel. In Dunn v. Trans World Airlines, Inc., No. 77-1649 (9th Cir. Sept. 21, 1978), the Ninth Circuit was faced with the question of whether it was necessary for a plaintiff to plead the Montreal Agreement, see note 24 supra, in order that it apply. It reviewed the pre-Benjamins rule that the Convention provided only a presumption of liability to be applied to existing substantive law and then observed that Benjamins, in recognizing a Convention-created cause of action, may also require that the treaty be pleaded. The court decided, however, that under Fed. R. Civ. P. 15(b) plaintiff could correct his pleadings at any time, including at the appellate level. No. 77-1649, slip op. at 3139. The court did not have to decide at that time whether it should follow Benjamins.

182. 572 F.2d at 919.

183. Removal of such cases under 28 U.S.C. § 1441(b) (1976) would only be permissible if jurisdiction could be based on a federal question.

The combination of *Benjamins* with the proposed elimination of the minimum amount in controversy requirement for federal question jurisdiction\(^{185}\) would open the federal courts to the thousands of minor injury and baggage claims that are usually litigated in small claims courts. Thus, although Congress is considering a substantial contraction of federal jurisdiction, the *Benjamins* majority has chosen to expand it in a case that ironically involves no United States citizen or event. More importantly, Congress has declined on several occasions to create a cause of action for Warsaw Convention cases,\(^{186}\) and the courts should not be permitted to create a cause of action anyway. As Judge Van Graafeiland noted in his dissent, the *Benjamins* majority drew “within the ever widening ambit of federal jurisdiction an entirely new class of cases which Congress probably never intended should be there.”\(^{187}\)

**CONCLUSION**

The *Noel* rule, simple in reasoning and application, led a peaceful existence for twenty-one years. Nevertheless in *Benjamins* the Second Circuit, with an erroneous view of the Warsaw Convention, overruled *Noel* and held that the Convention creates a cause of action for wrongful death. In providing Abraham Benjamins with the opportunity to litigate his claim in a federal court, the Second Circuit has created a morass of unnecessary and unwanted problems.

Glenn Pogust

---


\(^{186}\) See notes 49-56 supra and accompanying text.

\(^{187}\) 572 F.2d at 920 (Van Graafeiland, J., dissenting). In another context the Supreme Court has stated: “It may be . . . that aviation tort cases should be governed by uniform substantive and procedural laws, and that such actions should be heard in the federal courts so as to avoid divergent results and duplicitous litigation in multi-party cases. . . . If federal uniformity is the desired goal with respect to claims arising from aviation accidents, Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.” Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 273-74 (1972).