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Can Lufthansa Successfully Limit its Liability to the Families of the Victims of Germanwings flight 9525 Under the Montreal Convention?

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Contents

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Ⅰ. Introduction

The Montreal Convention is an agreement that governs the liability of air carriers for injury and death to passengers travelling internationally by air[1]. The Montreal Convention serves as the exclusive legal framework for victims and survivors seeking compensation for injuries or death arising from accidents involving international air travel. The Montreal Convention sets monetary liability caps on damages in order to promote the financial stability of the international airline transport industry and protect the industry from exorbitant damages awards in courts that would inevitably bankrupt an airline. The Convention allows a litigant suing under the Convention to avoid the liability caps in instances where the airline's culpability for the injury or death is the direct result of negligence, another wrongful act, or an omission of the airline or its agents.

The Montreal Convention identifies specific locations as appropriate venues to advance claims for litigants seeking compensation. These venues are closely tied to either the carrier's business operations or the passenger's domicile. In March 2015, in an act of suicide stemming from reactive depression, the co-pilot of Germanwings flight 9525 intentionally crashed the aircraft into the French Alps killing the passengers and the remaining crew. Subsequent to the crash, there were media reports that Lufthansa made varying settlement offers to families of the passengers who died aboard the flight ranging from $8,300 USD to $4.5 Million USD depending on the passengers' citizenship[2]. The unverified offers by

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1) The Montreal Convention is the successor treaty to the Warsaw Convention and unifies and replaces the system of liability that derives from the Warsaw Convention. Hosaka v. United Airlines, Inc., 305 F.3d 989, 996 (9th Cir. 2002); Ehrlich, 360 F.3d at 371; American Home Assurance Co. v. Kuehne & Nagel (AG & Co.) KG, 544 F. Supp. 2d 261, 263 (S.D.N.Y. 2008). United States courts widely recognize that the Montreal Convention is a direct successor to the Warsaw Convention, and that, because many of the provisions are similar, when interpreting the provisions of the Montreal Convention, it is appropriate to refer to the large body of established Warsaw Convention jurisprudence.

Lufthansa prompted outcries from the families of the decedent passengers that they would institute suit against the airline in a more plaintiff friendly jurisdiction such as the United States[3]. The first part of this article accomplishes two goals. First, it examines the Montreal Convention's venue requirement along with an overview of the recoverable damages from countries comprising the citizenship of the passengers who were not American. The intentional crash of Germanwings flight 9525 by its First Officer encompasses the possibility that Lufthansa[4] may be exposed to unlimited compensatory damages beyond the liability caps contained in the Convention. The second part of this article explores the application of the Convention's liability limits to the Germanwings flight to demonstrate that the likelihood of escaping the liability limits is slim.

Ⅱ. Background

On Tuesday, March 24, 2015, at 09:30:13 the Captain of Germanwings flight 9525 pushed his seat back and left the cockpit of the Airbus A320 aircraft to use the restroom[5]. Eleven minutes later, the Captain along with the other 148 souls onboard the flight would be dead due to the actions of the First Officer.

During the next eleven minutes, the Captain attempted to re-enter the cockpit through multiple means ranging from knocking on the door; signaling the First Officer to unlock the door via the airplane interphone system; attempting to override the door control locking system; and by the use of violent blows using a blunt object in an attempt to forcefully overcome the electromagnetic locks

2) Daily Mail, "Revealed: How Families of victims of the Germanwings crash are offered as little as $8,300 compensation if they are Indonesian but up to $4.5m if they are American," (July 1, 2015).
3) Id.
4) Lufthansa is the parent corporation of Germanwings Airlines. Lufthansa holds 100% of the shares in the Germanwings Corporation.
5) Bureau d'Enquêtes et d'Analyses "BEA" Preliminary Report, p. 7 (May 2015). The BEA is the French authority responsible for safety investigations into civil aviation accidents or incidents.

holding the bullet proof and reinforced door in place[6]. Meanwhile, immediately after the Captain left the cockpit, the First Officer reprogrammed the autopilot to fly the airplane at an altitude of 100' mean sea level[7]. Once re-programmed by the First Officer, the airplane commenced a controlled descent from 38,000 feet to the programmed altitude descending at the rate of 3,500' per minute. The flight ended when the aircraft crashed into the north side of the French Alps in the Prads-Haute-Bléone region at an altitude of 5,085 feet[8].

The aircraft impacted the ground while travelling at a speed of 345 knots. The impact with the ground was catastrophic and violent resulting in the immediate death of all persons on board the aircraft[9]. Aircraft wreckage was spread over an area 4 hectares[10]. Although the aircraft was descending at the rate of 3,500 feet per minute, the passengers would not have felt either positive or negative Gs. The aircraft's descent stabilized very quickly after the First Officer commanded the autopilot to maintain the lower altitude. As a result, the passengers were conscious and aware of the descent for the entire time that elapsed after the Captain left the cockpit up until the moment of impact[11].

Including crew and passengers, there were 150 people aboard Germanwings Flight 9525. The predominant citizenship of the passengers was either German or Spanish, totaling 123. There were also citizens onboard the aircraft from the

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6) Id.
7) Id. at 8.
8) Id. at 24.
9) Id. at 25.
10) Id. at 24.
11) When an aircraft descends as commanded by an autopilot, the aircraft will descend at a constant rate. Once the descent is stabilized, which only takes a few moments, the forces felt by the passengers dissipate and the body reacts as if the aircraft were in stable flight. Therefore, no more than 1 G of force was felt by the persons onboard the Germanwings flight during the entire descent from 38,000 feet until the moment of impact. Additionally, the BEA Report makes no reference to the First Officer disabling or manipulating the pressurization system causing a loss of consciousness to anyone onboard. As a result, absent any evidence adduced in the ongoing investigation by the BEA, the people on board were conscious and alive up until the moment of impact. This deduction is supported by the Cockpit Voice Recorder's data capturing muffled voices and the sounds of blunt objects hitting the cockpit door up until the moment of impact.

following countries: Argentina, Kazakhstan, United Kingdom, United States, Australia, Colombia, Iran, Japan, Mexico, Morocco, Venezuela, Belgium, Chile, Denmark, Israel, and the Netherlands. Some passengers onboard the aircraft had dual citizenship[12].

The First Officer

The First Officer aboard Germanwings flight 9525 was Andreas Lubitz "Lubitz". Lubitz was 27 years old at the time of the crash and he had been flying with Germanwings since September 2, 2014. Lubitz had amassed 540 hours flying the Airbus A320 inclusive of his time earning his type rating. Mr. Lubitz commenced his professional pilot training on September 1, 2008, with Lufthansa Flight Training Pilot School in Bremen Germany[13]. Lubitz's training stopped unexpectedly shortly after he started for unexplained medical reasons, at his request, on November 2, 2008. Supposition and conjecture abound that this break in Lubitz's flight training was directly related to a lengthy episode of depression that was unreported to the airline at the time[14]. Nearly a year later, on August 29, 2009, Lubitz resumed his flight training with Lufthansa[15]. Lubitz was actively enrolled in some form of pilot training for Lufthansa from August 29, 2009, through December 23, 2013. Lubitz began flying the line—transporting

12) "Spain Raises Spanish Death Toll on Germanwings Flight to 51". Reuters. 25 March 2015. Gordon Rayner; Josie Ensor (25 March 2015).; "Germanwings Crash: British Victims named as Martyn Matthews, Paul Bramley and Julian Pracz-Bandres". The Daily Telegraph.; "Third American Killed in Germanwings Crash, State Department Says". The Huffington Post. 25 March 2015.; "Germanwings plane crash: Two Australians among 150 victims of Airbus A320 crash, which included 16 school children". Australian Broadcasting Corporation. 25 March 2015.
"Two Japanese feared dead in French Alps plane crash; voice recorder found". Japan Times.; "Germanwings includes two Venezuelans among plane crash victims". El Universal. 25 March 2015.; "Germanwings Flight 9525 crash: 2 Americans among 150 killed". AL.com. 25 March 2015.

13) BEA Preliminary Report, pp. 12.

14) Correlating Lubitz's treatment beginning in January 2009 with this break in training suggests that he terminated his pilot training due to his depression.

15) As the parent corporation of Germanwings Airlines, Lufthansa trains the pilots for Germanwings.

passengers for hire on behalf of Germanwings after completing the company's line orientation flight training on June 26, 2014[16].

Lubitz's performance and professionalism, as an airman, during training were judged to be above standard[17]. A review of Lubitz's medical history is not as favorable and paints a different picture. Lubitz first obtained the necessary 1st Class Medical Certificate from the Lufthansa Aeromedical Centre on April 9, 2008[18]. This medical certificate remained valid for one year. However, on April 9, 2009, Lubitz's medical certificate was not revalidated by Lufthansa's Aeromedical Center due to Lubitz's diagnosis of depression and the medication that he was taking to treat the condition. Lubitz's second request for renewal of his medical certificate was again rejected three months later on July 14, 2009. In addition, Lufthansa informed the German Civil Aviation Authority that Lubitz had not met the requisite medical standards for revalidation and issuance of his medical certificate.

A mere two weeks later, Lubitz obtained a new 1st class medical certificate on July 28, 2009, that remained valid until April 9, 2010. The new medical certificate contained restrictions imposed by the Luftfahrt-Bandesamt requiring that the Lufthansa Aeromedical Centre contact the license issuing authority for approval before proceeding with any subsequent extensions or renewals of Lubitz's medical certificate[19]. From July 2009 going forward, Lubitz obtained his medical certificate with each one containing the restriction for the Aeromedical Center to contact the issuing authority for approval before proceeding with any medical evaluation. At the time of the crash, the Lufthansa Aeromedical Centre had issued Lubitz his latest medical certificate on July 28, 2014, with an expiration date of August 14, 2015, consistent with the restrictions imposed by the Luftfahrt-Bandesamt.

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16) BEA Preliminary Report, p.12.
17) Id. at 13.
18) The 1st Class Medical certificate was issued to Lubitz in accordance with the standards set forth by the German Civil Aviation Authority, the Luftfahrt-Bandesamt.
19) Id.

During a portion of his pilot training, Lubitz spent time in Lufthansa's training program in Phoenix, Arizona from November 8, 2010, until March 2, 2011[20]. The medical documents obtained by the BEA Investigation indicate that Lubitz was treated for reactive depression from January to October 2009. On June 14, 2010, Lubitz applied for a medical certificate with the United States' Federal Aviation Administration ("FAA") in order for him to undergo training at Lufthansa's facility in Phoenix, Arizona. On July 8, 2010, the application was denied by the FAA due to Lubitz's history of reactive depression. Dr. Warren Silberman, acting on behalf of the FAA, denied Lubitz his medical certificate and demanded more detailed information regarding Lubitz's reactive depression diagnosis, his prognosis, the medications prescribed to him, and a follow-up plan to treat his depression going forward from his physician. Upon receipt of the requested materials from Lubitz's treating physician, Dr. Silberman was satisfied that Lubitz's depression was in remission and under control with the essential monitoring from a medical professional. Lubitz received his medical certificate from the FAA and was cleared to fly prior to starting training on November 8, 2010.

Upon review of Lubitz's medical history, it is plainly evident that there were two occasions—one in 2009 and one in 2010 where Lubitz was denied a medical certificate to perform duties as a required flight crew member in commercial operations. The pivotal allegation that litigants seeking compensation will seek to prove is that under the Montreal Convention, Lufthansa's actions in allowing Lubitz to ascend to the crew seat in a cockpit with a proven record of depression amounted to *negligence, a wrongful act, or omission* by the carrier in the discharge of its duties towards the safety of its passengers. Based on regulatory adherence by Lufthansa and industry custom, proving the allegation of negligence is highly unlikely.

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20) Id. at 12.

Ⅲ. The Montreal Convention Applies to the Germanwings Accident

The Montreal Convention provides the exclusive remedies against the air carrier when the passengers carried in international travel are injured or suffer death while onboard the aircraft or during the boarding or disembarking phase of the process. The Montreal Convention applies where the litigation involves the international carriage of persons by aircraft and the places of departure and final destination are both State Parties to the Convention[21]. The Germanwings flight was an instrumentality being used in the international carriage of persons by aircraft between Barcelona, Spain and Dusseldorf, Germany. Both Germany and Spain are signatories to the Montreal Convention, each adopted the Montreal Convention on June 28, 2004[22]. Accordingly, the Montreal Convention serves as the exclusive remedy for claims against Germanwings/Lufthansa for the deaths suffered aboard flight 9525.

Montreal Convention Article 33

Article 33 of the Montreal Convention specifies where actions seeking damages under its purview must be initiated.

Article 33 - Jurisdiction

> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its

21) Montreal Convention Article 1(1) - 2242 U.N.T.S. 309; S. Treaty Doc. No. 106-45 (2000).
22) Int'l Civil Aviation Organization Website, (Accessed Oct. 17, 2015).

principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) **"commercial agreement"** means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "**principal and permanent residence**" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case[23].

The flight originated from Barcelona, Spain and was bound for Dusseldorf, Germany. Applying the first provision of paragraph (1) of Article 33 allows the families to seek redress in courts of one of the State Parties to the Convention for the place of arrival and departure, in either Germany or Spain. The families of passengers may also initiate actions under the Montreal Convention in a court where the carrier has its principal place of business or the domicile of the carrier. In this case, Germanwings' domicile and principal place of business as a German corporation would require filing an action in Germany under this provision of paragraph (1). The next provision in paragraph (1) allows the initiation of actions in the place where the airline has a place of business and made the contract at issue. In other words, if the airline maintains a ticket office outside of Germany and the passenger purchased their ticket in that foreign country, then the families can maintain an action under the Montreal Convention in the country where the ticket office is physically located. Each of the countries serving as the country of citizenship for the passengers could qualify as a proper forum for purposes of adjudicating claims under the Montreal Convention[24].

Paragraph (2) to Article 33 creates a fifth location for parties seeking redress to initiate actions—namely the place where the passenger had his domicile or permanent place of residence, as long as the carrier operates service to that location directly or through a codeshare agreement with another carrier[25]. Germanwings directly provides international carriage of passengers by air to Morocco, the United Kingdom, and Spain[26]. Therefore, applying paragraph (2)

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23) Montreal Convention Article 33 (2000).

24) At the time authorship for this article, it was not possible to determine whether or not Germanwings maintained a ticket office in every country tied to the citizenship of all of the passengers aboard flight 9525.

25) A codeshare agreement is a reciprocal agreement through which two or more airlines offer their passengers one-booking, one-ticket, and (if there is no stopover) one check-in flight to a destination only one of them serves (with no loss of frequent-flier mileage). In this arrangement, the airlines share (for all legs of the flight) the same two-letter code that identifies the carrier in the Global Distribution System (GDS) used by travel agents.

26) Germanwings Airline Website, (Accessed Nov. 2, 2015). Germanwings also flies directly to Tehran, Iran; however, Iran is not a signatory to the Montreal Convention.

of Article 33 would allow families of decedent passengers to initiate litigation in two additional countries besides Germany and Spain, as long as they can prove that their loved one was a domiciliary of either Morocco or the United Kingdom based on direct service by Germanwings.

There are six other airlines listed as codeshare partners with Germanwings which include the following: Air Canada, Austrian Airlines, Brussels Airlines, SWISS, and United Air Lines[27]. The codeshare partners, as listed, would enable families of passengers with permanent domiciles in the United States and Belgium to initiate actions in those respective countries as well in accordance with paragraph (2) of Article 33. The passenger list of Germanwings flight 9525 did not indicate that citizens of Austria, Canada, or Switzerland perished in the crash. However, a lack of citizenship in one of these countries does not necessarily mean that there were not passengers who were domiciled in one of these countries thus enabling their heirs to take advantage of the forums of Austria, Canada, or Switzerland to file a claim under the Montreal Convention.

Ⅳ. The United States Cannot Serve as a General Forum for Claims Under the Montreal Convention

While the United States potentially qualifies as a forum in which some of the families can initiate suit under the Montreal Convention, its courts cannot be considered the main hub for litigation arising from the Germanwings flight 9525 crash. A review of the passenger list shows that only 3 of the 144 passengers

27) Centre for Aviation Website, (Accessed Nov. 2, 2015). Neither the International Civil Aviation Organization (ICAO) nor any other identifiable agency compiles one list of airline codeshare partners. Therefore, it is possible that Germanwings is a member of codeshare agreements with airlines not identified that would then give the families of those passengers access to those countries' courts for purposes of advancing a claim under the Montreal Convention.

were Americans. Assuming arguendo that these three passengers were domiciled in the United States and were on the Germanwings flight via a ticket purchased directly from the airline or in accordance with a codeshare agreement, then these three passengers' families would properly be able to access United States courts to advance suit against Germanwings under Article 33 (2) of the Montreal Convention. Absent a showing of being domiciled in the US, then the remaining 141 passengers' families would not be allowed to utilize the United States courts as a forum to initiate suit because to do so would contradict the specific terms of the Montreal Convention regarding venue.

The United States courts are the favored venue for air disaster litigation due to the courts' adherence to liberal discovery rules; a larger scope of compensable damages and an overall jury system that is considered to be generous with its awards to prevailing plaintiffs[28]. In the past, US courts have strictly construed the terms regarding venue for Montreal Convention actions and denied litigants the opportunity to advance their claims in the United States under the doctrine of forum non conveniens.

The doctrine of forum non conveniens allows a court to decline to accept jurisdiction over a case where there is a more suitable forum to hear the case[29]. Foreign plaintiffs seek to file their claims in US Courts in order to take advantage of higher damages awards and a broader scope of compensable damages than those available in their home countries. In order to prevent a flood of foreign litigants with international accident claims, US Courts often draw upon the forum non conveniens doctrine to dismiss those claims that have little or no nexus to the United States[30].

With respect to the 3 families with decedents likely domiciled in the USA, then the panoply of damages available to them under the Montreal Convention

28) Michelle Milde, "Liability in international carriage by air: the new Montreal Convention," Unif. L. Rev. vol.4 835, 858 (1999).

29) Melinda R. Lewis, "The Lawfare of Forum Non Conveniens: Suits by Foreigners in U.S. Courts for Air Accidents Abroad" 78 J. Air L. & Com. 319, 327 (2013).

30) Id.

exceeds those available to families with loved ones domiciled in other countries. First and foremost, none of the families can seek or obtain exemplary or punitive damages against Lufthansa because Article 29 of the Convention specifically forbids this category of damages[31]. The question then turns to the determination of the scope of compensable damages in the United States under the Montreal Convention. The liability cap of the Montreal Convention would serve to limit the carrier's financial liability to 113,100 SDRs which is approximately $159,697 USD[32]. US litigants would seek to maximize payment under the Convention by seeking compensatory damages for lost income, pain and suffering, burial costs, loss of consortium, and attorneys' fees. If the families of the US passengers were to be successful in removing the liability caps of the Montreal Convention, then upon prevailing with their claims the families could seek the full value of each of the aforementioned categories of damages. Early estimates of the full value of these damages categories, results in varying degrees of damages awards ranging from as low as $5 Million USD to as high as $15 Million USD, based on the age of the passengers at the time of the crash and calculating their life-expectancy earnings with actuarial tables[33]. As will be more fully discussed below in Part Ⅱ, the likelihood of eliminating the liability caps for the carrier under the Montreal Convention is doubtful regardless of the jurisdiction.

The categories of damages that are available to a claimant under the Montreal Convention are determined by the law of the forum[34]. Regardless of the categories of damages allowed, the carrier's liability remains limited to 113,100 SDRs. The drafters of the Montreal Convention leave to domestic law the

31) Montreal Convention Art. 29 (2000).

32) A Special Drawing Right (SDR) is a fictitious monetary currency created by the International Monetary Fund based on a conglomeration of the Japanese Yen, the U.S. Dollar, the British pound sterling, and the Euro. The SDR value converted into US dollars as of October 21, 2015, is $159,697. (Accessed Oct. 21, 2015).

33) Germanwings Insurer reportedly set the initial reserve for payment of damages for the flight 9525 accident at $300 Million USD. Lorenzo Vismara, "A Comparison of Compensation for Personal Injury Claims in Europe," Gen Re Newsletter 1 (January 2014).

34) Joseph Zirkman, "New York's Choice of Law Quagmire Revisited," 51 Bkn. L. Rev. 579, fn153 (Spring 1985).

determination and composition of compensatory damages available to the claimant. The Montreal Convention's drafters envisioned that the specification of what harm is legally and ultimately cognizable to the domestic law applicable under the forum's choice-of-law rules[35]. Because of the deference to a forum's local laws for calculation of damages, the value of a claim under the Montreal Convention varies greatly based on the venue under Article 33.

Other Forums

In order to understand the motivation for families of crash victims to advance their claims in the United States, it is important to be familiar with the extent of damages available in some of the other appropriate forums under the Montreal Convention.

(1) Germany

The German law approach views damages for torts under a compensatory len s[36]. German law on torts damages takes into account prevention of future harm. "The preventive function alone will not justify the imposition of damages. However, where a loss occurred, the aim of prevention can be taken into account when assessing the amount of damages[37]. Under German law, a family member of a decedent passenger would be able to seek limited damages amounting to compensation for burial costs and compensation for the bodily harm/death to the passenger[38]. Under German law, the close relative of a decedent passenger such as a spouse is able to recover compensation for bereavement or loss of consortium of the spouse, which is a similar element of damages in torts claims

35) Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 231 (1996).
36) Ulrich Magnus, "Damages Rules in the Common European Sales Law and In the Principles of European Tort Law,"17 Int'l. Trade Bus. L. Rev. 224, 228 (2014).
37) Id.
38) Ulrich Magnus, "The Reform of German Tort Law", (Working Paper, p.5) (April 2003).

in the United States[39]. On the whole, a damages award under German law will not merit characterization as gross, excessive, or exorbitant because one aspect of the public policy in German torts law is that "*damages should compensate the loss but not enrich the injured party*"[40].

(2) Spain

In 1995, Spain instituted a system that provides set compensation amounts for victims of torts. The amount of compensation is determined by the "Baermo" which is a statutory table that fixes the amount of compensation[41]. The Baermo, in arriving at a figure for a wrongful death, takes into consideration the age of the victim and the number of descendants. The amount will also vary according to other circumstances such as income of the deceased, siblings, and dependents. The family members in Spain also receive a state annuity without having to initiate a claim in the courts against the tortfeasor or the liability insurer. Moreover, the amount of the annuity paid has no bearing on the calculation of economic damages[42]. On the whole, the air carrier tortfeasor can expect to limit damages awards to be consistent with the Baermo and those awards would not approach the high levels seen in a verdict from a US court.

(3) Japan

The majority of the passengers aboard Germanwings flight 9525 were either Spanish or German. As such, Lufthansa's liability and compensation will be governed by the laws of these two countries to the extent that the damages awards do not exceed the liability caps set by the Montreal Convention. Other nations, who are signatories to the Montreal Convention, had citizens onboard

39) Magnus, 17 Int'l Trade Bus. L. Rev. at 229.
40) Id. at 234.
41) Lorenzo Vismara, "A Comparison of Compensation for Personal Injury Claims in Europe," Gen Re Newsletter 1, 4 (January 2014).
42) Id.

the flight. One of those nations is Japan. Japanese law addresses the death of individuals through its criminal and tort laws. For the purposes of this article, only the torts laws will be referenced.

Pursuant to Article 709A of the Japanese Civil Code, a person who negligently infringed the rights of others becomes liable for compensation for any resulting damages[43]. Article 711 of the Japanese Civil Code specifically provides that where the life of another is taken due to a tortious act then the wrongdoer must compensate the father; mother; and spouse and children of the victim[44]. Due to restrictions in the Japanese legal system that were in place until 1986, there is a sense of a lack of rights arising from the law that is prevalent among the Japanese people. The result of this view regarding a lack of rights combined with the obstacles in place prior to the changes instituted in the system is that there is a dearth of cases upon which to rely when attempting to categorize the true scope of tort damages under Japanese law.

> Japanese tort law sets up the broad general requisites of willfulness, negligence and infringement of rights…but since these requisites are vague, in reality a remedy has not always been widely granted. At the very least, it probably can be stated that tort remedies have not been carried out precisely with concrete validity[45].

Regardless of the uncertainty of damages accompanying sections 709A and 711 of the Civil Code, Japanese law does not provide for punitive damages and its courts will not enforce punitive damages awards against its citizens obtained abroad.

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43) Japanese Civil Code §709A (2015). Special thanks to my research assistants Minyoung Shin and Ju-Yeon Lee for their assistance in identifying and translating the applicable Japanese law.

44) Id. at § 711.

45) Ichiro Kato, "The Concerns of Japanese Tort Law Today-In Comparison with American Law," 1 Law Japan 79, 82 (1964).

From this brief overview of the torts laws governing the majority of the passengers' survivors' claims, it is evident that jurisdictions other than the United States limit the recovery for wrongful death significantly in comparison to the United States. In some instances, the value of the claim will not reach the Montreal Convention's liability limits of 113,100 SDRs. Therefore it is no surprise that litigants outside of the United States actively seek legitimate ways to initiate and keep their international accident claim in a US court in order to maximize their potential recovery of tort damages, which are quite simply not available in their home jurisdiction.

Ⅴ. Montreal Convention Article 17

Under Article 17, the air carrier is liable for any damages sustained from an accident in the case of death, or bodily injury by a passenger, when the injury occurs onboard the aircraft or in the course of operations involving the embarkation or disembarkation of passengers from the aircraft[46]. The carrier can escape liability for damages sustained when the carrier can show that the resulting injuries were caused by the passengers themselves[47]. Alternatively, the carrier can reduce its proportionate liability for the 113,100 SDRs if it can prove that the damages incurred were the result of the negligence or the wrongful act of a third party[48]. The converse is also true, specifically, if the plaintiff can show that the carrier committed negligence, a wrongful act, or omission by one of its agents or servants leading to the death of the passengers, then the carrier cannot take advantage of the liability limitation.

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46) Montreal Convention Article 17 (2000).

47) Montreal Convention Article 20 (2000). Where a passenger contributes to his or her injury, then the carrier is allowed to invoke partial exoneration and therefore limit a passenger's recovery with a reduction based on the contributory percentage.

48) Id.

The deaths of all persons onboard the aircraft occurred during the flight when the First Officer intentionally crashed the airplane into the French Alps. Therefore the air carrier, in this case, Lufthansa, is strictly liable under the provisions of Article 17. Since the accident caused the death of all persons onboard the aircraft, Germanwings is liable up to the full liability limit of 113,100 SDRs per passenger to the families of the decedent passengers. However, based on the venue, the value of the claim may not get anywhere near the 113,100 SDRs limit. Yet when a claim's full value does exceed the liability limit, amid the public outcry and backlash over the circumstances of the accident, the next threshold question is whether or not Lufthansa can limit its liability to the caps in the Montreal Convention. An analysis of the facts and the Montreal Convention below demonstrates that Lufthansa has a favorable chance of limiting its liability irrespective of the public backlash over the incident.

Lufthansa's Employment of Lubitz As a First Officer Aboard Germanwings Flight 9525 Did Not Amount to Negligent Conduct

When the world learned of the First Officer's documented problems with depression as part of his official medical history, it seemed that every news outlet on the planet asked if Lubitz should have ever been allowed into the cockpit as a vital member of the crew. One news agency in Europe alone printed more than 50 articles reporting on different aspects of the Germanwings crash[49]. Faced with such a strong backlash in public opinion, it is easy to conclude that Lufthansa is in for a fight if it intends to prove that it either could not or should not have done more to determine whether or not Lubitz was fit to fly as a cockpit crewmember.

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49) Daily Mail Website, (Accessed Nov. 9, 2015).

Under the common law of torts, in order to prove a negligence claim, the party with the burden of proof must establish the following elements: a duty, a breach of that duty, causation of harm (actual and proximate), and damages. With respect to the Germanwings accident, in order to establish a claim for negligence, plaintiffs must show: 1) a duty owed to them by Lufthansa; 2) a breach of that duty; 3) that the breach actually and proximately caused the deaths; and 4) damages. A plaintiff has the burden to establish each element of the case in order to prevail on a negligence claim[50].

(1) Duty

Without question, Lufthansa as an international air carrier has a duty to provide for the safety of its passengers aboard its aircraft when transporting them from one city to another. "What is the scope of the duty of care that the airline has to exercise when transporting passengers for hire?" Is it ordinary care? Or is it a heightened duty of care? The question regarding the applicable duty is as old as airplane accidents themselves. The failure to resolve this question spawned two international treaties governing recovery of damages in international air travel, namely the Warsaw Convention of 1929 and the Montreal Convention of 1999, which both effectively removed the negligence component from the equation and replaced it with strict liability. It is therefore somewhat perplexing that within the text of the Montreal Convention, the agreement places the removal of liability caps for personal injuries or death to passengers on a determination of the carrier's negligence, especially when the negligence doctrine was the very thing the Convention's strict liability provision was meant to supplant[51].

Notwithstanding the circular and perplexing nature of the drafters' lateral pass back to the negligence doctrine for removal of the liability limits, plaintiffs

50) Allen v. American Airlines, 301 F.Supp.2d 370, 374 (E. Dist. Penn. 2003).
51) Montreal Convention Article 20 (2000).

seeking to extract compensation beyond the liability limits afforded by the Montreal Convention must prove negligent conduct by Lufthansa. Relying on a review of United States law, there is a strong preference for assigning air carrier conduct the highest degree of care due to the possibility of loss of life in each and every flight undertaken for hire.

> While a carrier of passengers by aircraft is not an insurer of the passengers' safety, the view is generally held that such a carrier is under the duty to exercise either a high or the highest degree of care for the safety of its passengers, such care being required not only in the operation of the plane, but also with respect to its equipment and maintenance[52].

In fact, the Warsaw Convention was promulgated on the fundamental principle that a carrier has a heightened duty of care towards its passengers[53]. In the process of formulating the Warsaw Convention, the drafters considered that countries from around the world approached air carrier liability using both the civil and common law systems[54]. The drafters recognized that in a common law system the air carriers were obligated to conduct their operations in accordance with a heightened duty of care towards passenger safety[55]. The drafters of the Warsaw Convention eschewed choosing either the civil or common law system as the mechanism for recovery of damages and opted instead to impose strict liability for injuries or death with a cap on damages. The drafters of the Montreal Convention embraced the same approach with respect to liability.

In Article 21 of the Montreal Convention, the drafters specifically predicate an

52) 31 A.L.R. Fed§ 270 (2015).
53) Tory A. Weigand, "Accident Exclusivity and Passenger Disturbances Under the Warsaw Convention," 16 Am. U. Int'l L. Rev. 891, 898 (2001).
54) Id.
55) Id.

exception to the liability limits if the carrier exhibits negligence in its operations. With signatories throughout Europe, Asia and the rest of the modern world, the presumption is sound that for purposes of international liability the signatories of both the Warsaw Convention and the Montreal Convention expected that international air carriers would be governed by the highest duty of care towards their passengers. The heightened duty of care requires the air carrier to use the greatest amount of care and foresight which is reasonably necessary under the circumstances to prevent harm to befall its passengers[56].

(2) Breach

With the establishment of the heightened duty of care, the next point in the analysis is to determine whether or not Lufthansa breached that duty of care by allowing Lubitz access to the cockpit as a crewmember on Flight 9525. Before an airman ascends to the right seat in the cockpit of a commercial airliner, there are multiple requirements that must be met. First, the pilot must have a Commercial Pilot Certificate[57]. To achieve this certificate, the airman must pass a security background check; a criminal proceedings check to insure the absence of a criminal record; issuance of a first class medical certificate; and obtain flying experience inclusive of instrument flying, crew resource management, multi-engine operations, with a minimum of 250 hours of flight time[58]. The Commercial Pilot Certificate allows the airman to act as co-pilot of a multi-crew aircraft[59].

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56) Id.

57) The EASA Airline Transport Pilot's License is a common license standard that has been agreed to by 26 European countries including Germany and Spain. EASA is a rulemaking EC body which has taken over responsibility for Airworthiness Directives, aircraft Certification Specifications and licensing standards from the National Authorities. The EASA Airline Transport Pilot's License (ATPL) and Commercial Pilot's License (CPL) are European licenses, accepted in all EU States. Although EASA sets the rules, the National Authorities still exist, and act as agents of EASA.

58) Luftfahrt-Bandesamt Website, (Accessed Nov. 4, 2015).

59) Id.

A review of Lubitz's training record shows that he amassed the necessary flight time and passed his airman proficiency checks en route to becoming a First Officer at Germanwings. His airmanship skills were rated as above standard. Moreover, from Lufthansa's perspective, Lubitz obtained a valid medical certificate issued by the German Civil Aviation authority annually after 2010. Lufthansa had no indication that Lubitz was experiencing recurring problems with depression.

As a point of comparison, the European system issues 1st Class medical certificates to airman that are valid for a period of time based on the airman's age. Lubitz at age 27 at the time of the crash held a 1st class medical certificate valid for one year[60]. In the United States, those same 1st Class Medical Certificates are valid for only six months regardless of age[61]. Is it reasonable to argue that Lufthansa should have required Lubitz to be reexamined more frequently than yearly intervals considering that he had a history of depression? No, the designation of medical exam validation periods was not up to Lufthansa. Instead, the onus for determining certificate validity fell to Luftfahrt-Bandesamt to impose different requirements based on Lubitz's depression diagnosis. The Luftfahrt-Bandesamt did just that by requiring that Lubitz's medical certificate renewal application be reviewed for approval by its certifying physicians. Essentially, the German Civil Aviation Authority cancelled its former delegation of authority to Lufthansa's Aeromedical Centre to issue Lubitz a valid medical certificate. Thus, it was not possible for Lufthansa to issue Lubitz a medical certificate under its designee powers and therefore cannot be held to have breached a duty of care. The decision was out of Lufthansa's hands. Would review of Lubitz's medical qualifications at six month intervals been adequate to identify that Lubitz's depression was no longer in remission? We will never know.

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60) Flying Academy Website, (Accessed Oct. 15, 2015).
61) 14 Code Fed. R. § 61.143 (WEST 2015).

Nonetheless, the inquiry with respect to proving breach of the duty of care must evolve around showing that Lufthansa failed to exercise the greatest amount of care to prevent Lubitz from harming or endangering its passengers. To properly assess whether Lufthansa's conduct fell below the standard of care, the company's actions can be measured against adherence to regulations and industry norms. In Lufthansa's defense, Lubitz was a competent airman. He completed the necessary flight training; amassed the requisite amount of flight hours; and successfully completed his supervised Line Orientation Flights before Germanwings assigned him to line flying as a First Officer[62]. A thorough review of his airmanship record does not reveal shortcomings in pilot skills such as failure to properly execute standard commercial pilot maneuvers, like instrument approaches in bad weather or landings in high winds, which routinely signal poor airmanship[63]. The BEA Preliminary Report makes no mention of Lubitz being required to repeat portions of either initial or recurrent training modules due to unsatisfactory performance during training or qualification checks. Instead, the BEA Preliminary Report indicates that Lubitz's instructors and Government examiners judged his airmanship performance to be above standard. The problem with Lubitz was not his flying abilities it was his mental health.

With respect to mental health, an air carrier is obligated to adhere to regulations regarding the medical fitness of its pilots. With respect to medically authorizing an employee pilot to continue flying, the air carrier had to rely on government examiners to review this pilot's medical history and current medical state for continued fitness to fly. In this instance, Lufthansa subjected Lubitz to annual medical examinations by its Aero Medical Centre with each one receiving final approval by the Luftfahrt-Bandesamt, due to Lubitz's history of depression. Thus, absent any indication from government medical examiners, who reviewed and approved his applications for renewed medical certificates; or indicia from

62) BEA Preliminary Report, p.12.
63) Id. at 13.

Lubitz himself that his mental state and his medical fitness were inadequate, then Lufthansa lacked notice of the deficiency. Therein rests the problem with proving that Lufthansa failed to take all actions necessary to prevent harm to its passengers under a heightened duty of care. There was nothing more that Lufthansa could do other than prohibit Lubitz from flying as a crewmember from 2014 forward based on a medical condition that was identified, treated and deemed not a disqualifying factor by the responsible government agency.

A litigant seeking to impose higher liability amounts than those afforded by the Montreal Convention must somehow show that Lufthansa could have taken actions beyond those that it did to prevent Lubitz from flying as a First Officer while afflicted with a recurrence of his depression. One way to advance such an argument is to contend that industry norms require air carriers to monitor their pilots' medical fitness at more frequent intervals than a yearly basis. This contention is refutable because in accordance with EASA guidelines, the national civil aviation authorities have direct responsibility for setting medical examination intervals throughout Europe. In Germany, the Luftfahrt-Bandesamt established that commercial pilots of Lubitz's age possessing a German commercial pilot certificate must pass a medical exam every year. While the standard for conducting a medical examination for commercial pilots in the United States is every six months, it is inequitable and unreasonable to expect a jury or judge to impose a foreign standard on a German airline that was operating in accordance with German and European law. As an industry standard, litigants seeking to advance such a notion will not find an airline to hold up as the benchmark example that imposes more frequent medical examinations on its pilots than the frequency set forth by its governing aviation body.

Taking a step back from the Lufthansa-Lubitz scenario, there arises the question in what instances have the courts held that an air carrier breached its heightened duty of care towards its passengers under the Montreal Convention.

A thorough and exhaustive review of reported cases has not revealed a decision on this issue since creation of the Montreal Convention in 1999. By shifting the research inquiry to the Warsaw Convention, which is the precursor and treaty upon which the Montreal Convention was based, there exists a case upon which useful comparisons can be made.

In a case where Articles 22 and 25 of the Warsaw Convention were applied, an air carrier faced a claim by a passenger for losing his luggage on a flight from Paris to Rome. The passenger sought the full value of the lost baggage which exceeded the liability limits of the Warsaw Convention. The initial tribunal granted judgment for the passenger citing the air carrier's gross negligence which deprived the carrier of the benefit of the liability limitations under the Warsaw Convention[64]. The initial tribunal held that the air carrier was guilty of gross negligence on the basis that leaving luggage unattended might cause it to be stolen. The court characterized this election by the carrier as "misconduct with foreknowledge" that met the requirements of Article 25 of the Warsaw convention, i.e. reckless conduct of the air carrier and its knowledge that damage would probably result[65]. The Italian Appellate Court upheld the tribunal's decision when it reasoned that such misconduct with foreknowledge consisted of a party's understanding that damage would probably occur but the air carrier failed to alter its conduct knowing that it could have taken actions to avoid the inevitable damage of stolen luggage left unattended.

How does this case contribute to the Lufthansa-Lubitz question? The Italian court's reasoning, while adjudicating the claim based on gross negligence, can be adopted and tweaked to apply to the duty of heightened care standard. For instance, the court adjudicating claims against Lufthansa for the Germanwings accident could require that in order to prove breach of the heightened duty of care, the litigant must show that it was reasonable to assume that a pilot

64) Anna-Isabelle Anfray, "Summary of Cases Applying and Interpreting Uniform International Law Instruments", 11 Unif. L. Rev. n.s. 434 (2006).

65) Id. at 436.

suffering from depression would take actions to endanger his life and the life of the carrier's passengers, even while undergoing treatment and having the condition in remission. While this contention seems straightforward, to truly bring this case into the confines of the holding reached by the Italian Court, the litigants would also have to show that Lufthansa knew Lubitz was actively suffering from depression when he was dispatched on the fatal flight on March 24, 2015. The present evidence adduced through the preliminary report by the BEA does not indicate that Lufthansa knew or should have known that Lubitz's depression was no longer in remission when he embarked on the fatal trip.

The Restatement of Torts strengthens this conclusion. It is considered negligent behavior to entrust a third person with possession and use of an instrumentality when the first person knows or should know that the third person is not qualified or experienced enough to operate the device[66]. Consider the following classic example, "A permits B to drive his car. B is a girl of 14 who, to A's knowledge, has never driven a car before. B's inexperience causes a collision in which C is hurt. A is negligent toward C." Lufthansa's act of entrusting piloting duties to Lubitz on flight 9525 is analogous to this example. Yet, the only reason that Lufthansa's actions cannot be construed to breach the duty of care is that Lufthansa took all necessary and government mandated precautions to make sure that Lubitz was properly trained and medically certified to embark on the flight as a cockpit crewmember.

(3) The Negligence Claim Fails

As with any negligence claim, the plaintiff has to prove every element of the cause of action. When the plaintiff cannot establish a breach of the duty of care, then the negligence cause of action in its entirety cannot be proven[67]. There is no evidence of a breach of the duty of care, despite the public outcry, because

66) Rest. 2d Torts § 308 (2015).
67) Allen, 301 F.Supp.2d at 374.

Lufthansa adhered to regulations governing medical certificate issuance; conformed to industry custom by subjecting Lubitz to medical examinations on a yearly basis; and there were no opportunities that Lufthansa did not take advantage of to discover Lubitz's recurrence of depression. With the failure to establish that Lufthansa somehow breached its heightened duty of care, the claimant will not be able to prove negligence and therefore remove the liability limitations imposed by the Montreal Convention.

Ⅵ. Conclusion

The Montreal Convention's venue requirement will limit the adjudication of claims that arise against the air carrier to a limited number of forums. Only a very small percentage of the passengers' families will be able to take advantage of the US forum to seek redress under the Montreal Convention against the carrier even though the narrow scope of damages in other countries makes the US an attractive forum. While Lufthansa has exposure to damages beyond the liability limits of the Montreal Convention, the application of sound legal principles pertaining to breach of the duty of care will effectively serve to constrain those claims and damages awards to fall within the Montreal Convention's damages limitations so as not to exceed 113,100 SDRs.

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초 록

Ronnie R. Gipson Jr., J.D.*

몬트리올협약은 국제항공운송에서 발생한 사고에 따른 여객의 사망이나 상해에 관하여 항공운송인의 책임을 배타적으로 규율하고 있다. 국제항공산업의 재정적인 안정과 항공사를 파산으로 이끌 수도 있는 과도한 배상책임으로부터 항공산업을 보호할 목적으로 몬트리올협약은 금전배상에 있어서 책임제한제도를 운영하고 있다. 하지만 여객의 사망이나 상해가 항공사 혹은 그 대리인의 직접적인 과실이나 불법적인 작위 혹은 부작위의 결과라는 점이 인정될 경우에 그러한 책임제한원칙은 유지될 수 없고, 손해배상을 청구하는 자는 협약이 정하는 제한책임액 이상의 배상을 받을 수도 있다. 한편, 몬트리올협약은 손해배상을 청구하는 원고가 소송을 제기할 수 있는 법정지에 관해서도 관할권 관련 조항에서 일정한 제한을 두고 있다. 이러한 관할권은 특히 피고 항공운송인의 영업소나 원고의 주소지가 주요 결정요인이 된다.

지난 2015년 3월, Germanwings 항공사 9525편에 발생한 사고는 당시 심한 우울증을 앓고 있었던 부기장의 의도적인 행동이 원인이었고, 해당 항공기가 프랑스령 알프스산맥에 추락하면서 대부분의 탑승 여객과 승무원의 사망이라는 결과로 이어졌다. 보도 자료에 따르면 사고 직후, 항공사는 사망승객의 국적에 따라 금액의 차이는 있지만 미화 8,300불에서 4백5십만불에 이르는 손해배상액을 합의금으로 제시하였다고 한다. 이러한 합의제안에 대해 몇몇 유가족들은 보다 많은 배상액을 얻기 위하여 미국과 같이 피해자에게 관대한 법정지에서 소송제기를 계획하고 있다고 한다.

본 논문은 위 사고와 관련하여 두 가지 쟁점에 관하여 기술하고 있다.

첫째, 본 논문은 몬트리올협약상 관할권 조항과 관련하여 미국 시민이 아닌 피해자가 미국 법정지에서 소송을 제기할 가능성에 대해 살펴보았다.

둘째, 본 사고의 직접적인 원인이 부기장의 의도된 사고유발 행동이었던 점에서 사안의 항공사는 몬트리올협약이 규정하고 있는 책임제한원칙이 부정될 가능

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성이 있다. 이에 관하여 본 논문은 해당 항공사가 그럼에도 불구하고 협약상 책임제한규정을 원용할 수 있는 가능성이 있는지 여부를 중점적으로 살펴보았다.

주제어 : Montreal Convention, Forum Non Conveniens, Medical Fitness, Warsaw Convention, Liability Limitations

Abstract

Can Lufthansa Successfully Limit its Liability to the Families of the Victims of Germanwings flight 9525 Under the Montreal Convention?

Ronnie R. Gipson Jr.

The Montreal Convention is an agreement that governs the liability of air carriers for injury and death to passengers travelling internationally by air. The Montreal Convention serves as the exclusive legal framework for victims and survivors seeking compensation for injuries or death arising from accidents involving international air travel. The Montreal Convention sets monetary liability caps on damages in order to promote the financial stability of the international airline transport industry and protect the industry from exorbitant damages awards in courts that would inevitably bankrupt an airline. The Convention allows a litigant suing under the Convention to avoid the liability caps in instances where the airline's culpability for the injury or death is the direct result of negligence, another wrongful act, or an omission of the airline or its agents.

The Montreal Convention identifies specific locations as appropriate venues to advance claims for litigants seeking compensation. These venues are closely tied to either the carrier's business operations or the passenger's domicile. In March 2015, in an act of suicide stemming from reactive depression, the co-pilot of Germanwings flight 9525 intentionally crashed the aircraft into the French Alps killing the passengers and the remaining crew. Subsequent to the crash, there were media reports that Lufthansa made varying settlement offers to families of the passengers who died aboard the flight ranging from $8,300 USD to $4.5 Million USD depending on the passengers' citizenship. The unverified offers by

Lufthansa prompted outcries from the families of the decedent passengers that they would institute suit against the airline in a more plaintiff friendly jurisdiction such as the United States. The first part of this article accomplishes two goals. First, it examines the Montreal Convention's venue requirement along with an overview of the recoverable damages from countries comprising the citizenship of the passengers who were not American. The intentional crash of Germanwings flight 9525 by its First Officer encompasses the possibility that Lufthansa may be exposed to unlimited compensatory damages beyond the liability caps contained in the Convention. The second part of this article explores the application of the Convention's liability limits to the Germanwings flight to demonstrate that the likelihood of escaping the liability limits is slim.

Key words : Montreal Convention, Forum Non Conveniens, Medical Fitness, Warsaw Convention, Liability Limitations