LIABILITY CLAIMS UNDER THE WARSAW AND MONTREAL CONVENTIONS: A CASE STUDY OF A FICTITIOUS SOUTH AFRICAN PASSENGER OF GERMANWINGS FLIGHT 9525 OF 24 MARCH 2015

by

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STUDENT NUMBER: 10187228

Submitted in accordance with the requirements for the degree Magister Legum in International Law with Specialisation in Air, Space and Telecommunication Law

in the Faculty of Law

at the University of Pretoria

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October 2016

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Abstract

The objective of this research was to compare the different liability regimes created by the Warsaw Convention and the Montreal Convention. The researcher used the commercial airline catastrophe of Germanwings Flight 9525 of 24 March 2015 as a case study in determining the liability of the carrier in a South African court. The crucial elements in the respective conventions that should be considered by legal representatives, whether acting for the Plaintiff or Defendant, are highlighted. A proposed interpretation of the provisions and possible policy considerations that a court ought to use in reaching its decision is further given. Finally, this study shows that the liability system created by the Montreal Convention is more favourable to the claimant compared to the liability regime of the Warsaw Convention. Where the damage was caused by the intentional act of a pilot suffering from severe depression, the carrier will not be liable when the Warsaw Convention is applied and will only be liable in a limited amount under the Montreal Convention.

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CHAPTER 1

INTRODUCTION

1.1 The background of Germanwings Flight 9525

On 24 March 2015, Germanwings Flight 9525 was scheduled to fly from Spain (Barcelona-El Prat Airport) to Germany (Düsseldorf Airport).[1] The aeroplane never made it to its end destination since it crashed into the French Alps, killing everyone on board. On studying the 'black box' of the flight, it became apparent to the authorities that the co-pilot, Andreas Lubitz, was responsible for the crash after he had locked the pilot out of the cockpit and gradually descended until the aeroplane crashed into the mountain.[2]

It later became clear that Mr Lubitz suffered from severe depression. Neither he nor his doctors informed his employer about this illness.[3] The 150 deceased people on board were from 18 different countries,[4] mostly from Germany and Spain.[5] Subsequently, the question relating to liability and compensation for the loss of life came to the fore.

[1] https://en.wikipedia.org/wiki/Germanwings_Flight_9525 (accessed 13 March 2016).

[2] http://www.gq.com/story/germanwings-flight-9525-finalmoments?src=longreads (accessed 12 March 2016).

[3] http://www.bbc.com/news/world-europe-35797065?ns_mchannel=social&ns_campaign=bbc_breaking&ns_source=twitter&ns_linkname=news_centra (accessed 13 March 2016).

[4] There were no South African passengers on board.

[5] https://en.wikipedia.org/wiki/Germanwings_Flight_9525 (accessed 13 March 2016).

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The two conventions regulating the liability in international air carriage are the Warsaw Convention and the Montreal Convention.[6] These conventions are a form of *lex specialis* and not simply an outline for establishing liability.[7] A private legal system was created by them, which places the liability mainly on the shoulders of the airline carriers,[8] although it seems that in exceptional circumstances, it can be possible for another person to be held accountable.[9] The aim of the conventions, especially the Montreal Convention, was to find a balance between the interests of various parties involved in international air carriage.[10]

There is a difference in the liability regimes of the two conventions. The Warsaw Convention contains a system of limited liability for presumed fault,[11] whereas the Montreal Convention contains a system of strict liability for presumed fault,[12] A two-tier system is found in the Montreal Convention. If the claim is above 113 100 Special Drawing Rights (SDRs), then the carrier bears the onus to prove that the damage was not owing to its negligence or that it was only caused by the negligence of another party.[13] The rationale behind a system with strict liability is to circumvent the difficulty in proving fault.[14] Furthermore, the necessity for the capping of claims is to ensure that a carrier is not insolvent after a single catastrophe.[15]

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[6] G Deiró 'Jurisdiction and conflicts of laws in contracts of international carriage by air' (2012) 37(4/5) *Air and Space Law* 338.

[7] S Radošević 'CJEU's decision in *Nelson and Others* in light of the exclusivity of the Montreal Convention' (2013) 38(2) *Air and Space Law* 97.

[8] BF Havel & GS Sanchez *The principles and practice of international aviation law* (2014) 257.

[9] A Košenina 'Aviation product liability: Could air carriers face their "life and limb" being placed in peril for the exclusivity of the Montreal Convention?' (2013) 38(3) *Air and Space Law* 266.

[10] M Milde 'Liability in international carriage by air: The new Montreal Convention' (1999) 4(4) *Uniform Law Review* 849.

[11] Article 25 of the Warsaw Convention.

[12] Article 21 of the Montreal Convention.

[13] C Cotter 'Recent case law addressing three contentious issues in the Montreal Convention' (2012) 24(4) *Air and Space Law* 10.

[14] T Atherton 'Unlimited liability for air passengers: The position of carriers, passengers, travel agents and tour operators under the IATA Passenger Liability Agreement Scheme' (1997) 63 *Journal of Air Law and Commerce* 407.

[15] Atherton (n 14 above) 407.

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The municipal law of countries, usually applied in an action for damages, was not used seeing that the conventions form the exclusive basis for the claim.[16] However, municipal courts will have to give meaning to certain words and concepts contained in the conventions.[17] Both conventions are full of loaded provisions where the meaning of certain words has significant consequences in relation to the possible success of claims. Case law, where the Warsaw Convention was interpreted by courts, must be used when the Montreal Convention is interpreted.[18] This ensures continuality in the liability jurisprudence of international air carriage.

One of the scenarios in which a carrier can disprove negligence is in the situation of a terrorist act causing the damage, but on condition that it is the only causation of the damage and the carrier furthermore undertook a proper security screening of the person beforehand.[19] The act by a third party is important in the light of Mr Lubitz who intentionally flew the aeroplane into the mountain. It is possible to construe his behaviour as comparable to that of a terrorist. The problem that a defence lawyer would face is the fact that he was a servant (employee) of the carrier.

The interpretation by courts of the phrase 'within the scope of his employment'[20] will evidently be crucial to any argument to negate the liability of the carrier. In broad terms, 'vicarious liability' can be explained as the strict liability of one person for the delict of another on account of a particular relationship between the two persons.[21] It seems that in South Africa, the employer can escape liability if he or she can prove that the employee acted outside the scope of employment by freeing him- or herself wholly from the specific relationship and only advancing his or her own goals.[22] It is further possible that claims against employees are not pre-

[16] G Tompkins 'Summary of MC99 judicial decisions 2012' (2013) 38(2) *Air and Space Law* 127; *El Al Isr. Airlines Ltd. v Tseng* 525 U.S. 155, 161 (1999).

[17] Deiró (n 6 above) 351.

[18] G Tompkins 'Are the objectives of the 1999 Montreal Convention in danger of failure?' (2014) 39(4/5) *Air and Space Law* 204.

[19] Havel & Sanchez (n 8 above) 295.

[20] Article 25(2) of the Warsaw Convention and Article 30 of the Montreal Convention.

[21] J Neethling *Law of delict 7th edition* (2015) 389.

[22] Neethling (n 21 above) 393.

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empted by the conventions;[23] however, the system of presumed fault is not applicable to the employees.[24]

There are different interested parties who could claim damages after the death of a person. The deceased estate will have a claim for funeral costs and the relatives will have a claim for the loss of support.[25] Relatives who are held to be entitled to bring an action are the spouse,[26] children,[27] parents[28] and siblings.[29] The aim of the claim is to put the relatives in the position where they would have been if it had not been for the unlawful and culpable killing of their breadwinner.[30] The person instituting the action will still have the burden to prove that there was in fact a right to support and that the death caused damage.[31] Furthermore, mental suffering and distress will not be taken into account when calculating the quantum of damages.[32] The amount of damages will vary from case to case. The courts have established different formulas in calculating the damages, and it seems that they are not bound by any fixed method.[33]

1.2 Research objectives

The object of this study was to use the Warsaw[34] and Montreal[35] Conventions to determine the liability of a carrier and the possible claims in a situation where the

[23] McDonald, M 'The Montreal Convention and the pre-emption of air passenger harm claims' (2009) 44 *Irish Jurist* 211.

[24] Hong, J 'Liability of aviation security service providers and responsibility of states' (2010) 35(1) *Air and Space Law* 17.

[25] MM Corbett & J Buchanan, J *The quantum of damages in bodily and fatal injury cases* (1985) 76.

[26] Corbett & Buchanan (n 25 above) 78.

[27] Corbett & Buchanan (n 25 above) 79.

[28] Corbett & Buchanan (n 25 above) 80.

[29] Corbett & Buchanan (n 25 above) 81.

[30] JM Potgieter *Visser & Potgieter, Law of Damages* (2012) 478; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614; *Peri-Urban Areas Health Board v Munerin* 1965 (3) SA 317 (A).

[31] *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839.

[32] *Jameson's Minors v CSAR* 1908 TS 575 at 602.

[33] *General Accident Ins Co SA v Summers* 1987 (3) SA 577 (A); *Road Accident Fund v Monani* 2009 (4) SA 327 (SCA) at 329; *Hulley v Cox* 1923 AD 234 at 243.

[34] Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

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death of a South African passenger was caused as a direct result of an intentional act by an employee of the carrier, more specifically the co-pilot, during an international flight.

1.3 Delimitation of study area

This study intended to set out the liability systems of the Warsaw Convention and the Montreal Convention when dealing with claims for damages in the event where the death of a passenger was caused by the deliberate action of the pilot. By implication, other liability claims mentioned in the conventions were not investigated. For the purpose of this study, the applicability of each convention on Germanwings Flight 9525 was not assessed.[36] Other factors such as the historical development of the conventions, jurisdiction and exclusivity also did not form part of this study.[37]

The problem was thus approached with the supposition that a proper case was before the trial court. The main issues were the interpretation of the respective liability provisions, the limitation and exoneration clauses, and where the burden of proof lies in the different circumstances.

1.4 Research methodology

The research comprised academic, desk-based research using the applicable international law sources, specifically the Warsaw and Montreal Conventions. Essential for the interpretation of the conventions was case law of both domestic and foreign courts that ruled in matters related thereto and also the analysis by scholars in the field of aviation law.

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[35] Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999.

[36] South Africa is a signatory of the Montreal Convention. It was ratified on 22 November 2006 through the Carriage by Air Amendment Act 15 of 2006 and the effective date was 27 January 2007.

[37] South Africa ratified the Warsaw Convention and subsequently the Montreal Convention by enacting the Carriage by Air Act 17 of 1946 (as amended). For the purpose of this study both conventions will however be used and I will not refer to the Carriage by Air Act or the Carriage by Air Amendment Act.

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1.5 Research questions

The research questions for this study consist of the following primary and secondary questions:

1.5.1 Primary questions

1.5.1.1. Can a carrier be held liable under the two conventions for the intentional damage caused by one of its employees?

1.5.1.2. If so, what is the process that a South African court would follow to determine the claimable damages?

1.5.2 Secondary questions

1.5.2.1 How should the following words and phrases contained in the conventions be interpreted?

- 'Accident'[38]
- 'All necessary measures to avoid the damage'[39]
- 'Wilful misconduct'[40]
- 'Wrongful act'[41]
- 'Acted within the scope of his employment'[42]
- 'Wrongful act or omission of a third party'[43]

1.5.2.2 Questions relating to damages in South Africa:

- Who can claim damages for the loss of life?
- What are the types of damages that could be claimed for the loss of life?
- Is there a general rule to determine the amount of damages to be awarded for the loss of life?

[38] Article 17(1) of the Warsaw Convention and of the Montreal Convention.

[39] Article 20(1) of the Warsaw Convention.

[40] Article 25(1) of the Warsaw Convention.

[41] Article 21(2)(a) of the Montreal Convention.

[42] Article 25(2) of the Warsaw Convention and Article 30 of the Montreal Convention.

[43] Article 21(2)(b) of the Montreal Convention.

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1.6 Conclusion

In this case study, it is evident that where a fictitious South African passenger of Germanwings Flight 9525 was involved, there are various factors that must be taken into account in deciding the liability of the carrier. The different liability systems under the two conventions will most likely not have the same outcome for claimants. The non-disclosure of the mental illness of the pilot might play a role in the liability of the carrier on condition that a successful argument be made regarding the consequences of the omission by him and his doctors. The interpretation pertaining to the scope of employment will also be essential to prove or disprove vicarious liability. Lastly, the aspects pertaining to the substantive law of South Africa in claiming damages for the loss of support will ultimately show the prospects of dependants wanting to institute an action.

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CHAPTER 2

THE CASE FOR THE PLAINTIFF

2.1 Introduction

In this chapter, the case for the Plaintiff will be set out as close as possible to the events that would unfold during the court proceedings. The necessary elements that need to be proved will be examined, and I will indicate who bears the burden to prove throughout the argument. The rebuttal of the Plaintiff will also be dealt with in this chapter.

2.2 Was this an 'accident'?

Before counsel can start with any argument as to the liability of the Defendant, a closer look needs to be taken at the relevant articles in the Warsaw and Montreal Conventions. In both conventions, liability can be found in Article 17.

Warsaw Convention:

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

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Montreal Convention:

> The *carrier is liable* for damage sustained in case of death or bodily injury of a passenger upon condition only that *the accident which caused the death or injury* took place on board the aircraft or in the course of any of the operations of embarking or disembarking. (own emphasis)

Article 17 makes the carrier liable only for an 'accident' and therefore not every happening that causes damage is compensable.[44] The Plaintiff will firstly have to show that there was in fact an 'accident' if he or she wants to prove that the Defendant is liable.[45]

The term 'accident' was defined in various judgments.[46] It was initially defined as 'an unusual and unexpected event or happening that takes place without foresight'.[47] Later the preferred interpretation became the one given in the case of *Air France v Saks.*[48] To qualify as an 'accident' it had to be caused 'by an unexpected or unusual event or happening that is external to the passenger'.[49] In *Olympic Airways v Husain,*[50] it was held, in conformation with the *Saks* case, that the Plaintiff needed only to prove that some link in the causation was 'an unusual or unexpected event external to the passenger'.[51] The court further stated that 'inaction' is also a basis for liability in the same way as an 'action'.[52]

In casu the relevance of this subjective[53] and flexible[54] approach is the difficulty that it creates for the Defendant in showing that it was not an 'accident', which will trigger liability. Even if a case can be made out that the action of the pilot is not an 'accident', the reality is that the mere fact that the carrier authorised a pilot,

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[44] LB Goldhirsch *The Warsaw Convention annotated: A legal handbook* (2000) 80.

[45] *MacDonald v Air Canada* 439 F.2d 1402 (1st Cir. 1971).

[46] *De Marines v KLM Royal Dutch Airlines* 580 F.2d 1193, 1196 (CA3 1978); *Warsaw v Trans World Airlines* 442 F. Supp. 400 (E.D. Pa. 1977); *Abramson v Japan Airlines Co Ltd* 739 F.2d 130.

[47] G Leloudas *Risk and liability in air law* (2009) 101.

[48] 470 U.S. 392 (1985).

[49] *Air France v Saks* 470 U.S. 392 (1985), p. 405; G Leloudas *Risk and liability in air law* (2009) 103.

[50] 540 U.S. 644 (2004).

[51] GN Tompkins *Liability rules applicable to international air transportation as developed by the courts in the United States* (2010) 154.

[52] Tompkins (n 51 above) 155; Leloudas (n 47 above) 125.

[53] Havel & Sanchez (n 8 above) 284.

[54] Tompkins (n 51 above) 135.

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with questionable mental health, to fly an aeroplane is an 'inaction' creating a link and basis for liability. The carrier will consequently have to prove that a proper medical examination was conducted so as to avoid liability on the grounds of 'inaction'.[55] There are often various interrelated events[56] that play a role in causing an incident and by adopting a flexible approach the burden of proof is much less rigid for the Plaintiff.

What is further detrimental to the case of the Defendant is the reality that case law has found that the hijacking of an aircraft[57] and a terrorist attack[58] are in fact events that are Article 17 'accidents'.[59] The Plaintiff will thus only have to state that the pilot who flew the aircraft caused it to be flown into the mountains, which lead to the death of the passengers.[60] The court will have to determine whether the Plaintiff proved these facts and should then positively evaluate them against the requirements of Article 17.[61] The Plaintiff's argument is that the Germanwings incident was in fact unusual, unexpected and also not due to the actions of the passengers. The burden of proof will then consequently shift to the Defendant to show either that the present facts can be distinguished from the previous decisions or an argument must be made that the previous decisions were incorrect.[62]

[55] See Chapter 3 'The case for the Defendant' below.

[56] *Olympic Airways v Husain* 540 U.S. 644 (2004), p. 653.

[57] *Husserl v Swiss Air Transport Co.* 351 F. Supp. 702 (S.D.N.Y.), ***aff'd***, 485 F.2d 1240 (2d Cir. 1973); *Adler v Malev Hungarian Airlines*, 23 Avi. 18, 157 (S.D.N.Y. 1992); *Krystal v British Overseas Airways Corp.* 403 F. Supp. 1322 (C.D. Calif. 1975).

[58] *Evangelinos v Trans World Airlines, Inc.* 550 F.2d 152 (3d Cir. 1977); *Day v Trans World Airlines, Inc*. 528 F.2d 152 (3d Cir. 1977).

[59] Tompkins (n 51 above) 160, 161. See also Chapter 3 below for the 'terrorist' argument of the Defence in an attempt to negate liability.

[60] This is already common cause between the parties and is not in dispute.

[61] Tompkins (n 16 above) 129.

[62] See Chapter 3 'The case for the Defendant' below for further discussion as to the arguments for the Defence.

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The action of the pilot, which caused the death of the passengers, is a *prima facie* 'accident' in terms of the two conventions, and the carrier will thus be liable if it fails to prove the contrary.[63]

2.3 The different liability systems and the burden of proof

When the Plaintiff makes out a case that the death was caused by an Article 17 'accident', the liability of the carrier is triggered automatically. The respective articles pertaining to the limits of compensation and the appropriate burden of proof subsequently need to be examined.

2.3.1 Limited liability for presumed fault (Warsaw Convention)

The Warsaw Convention contains a system of limited liability for presumed fault that can be found in Articles 17[64] and 22:

> 1. In the carriage of passengers the liability of the carrier for each passenger is *limited to the sum of 125,000 francs.*[65] Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said *payments shall not exceed 125,000 francs*. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. (own emphasis)

With a proper reading of these two articles, it is clear that the convention changes the classic phrase of 'he who avers must prove' to 'he who denies must prove'. The liability of the carrier is still based on its fault or negligence, but the onus is on the Defence to prove the absence thereof.[66] Although this seems like a favourable position for the Plaintiff, it must still be set off against Article 22, which provides for a monetary limitation on the claimable compensation.[67] The Plaintiff will only be able to claim a maximum of 250 000 francs even if the actual damages exceed this amount. The rationale behind the limitation was policy decisions to

[63] Cognisance must still be given to the possible exclusion of liability in Article 20 of the Warsaw Convention.

[64] See 2.1 'Was this an accident?' above.

[65] This has been amended to 250 000 francs by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at the Hague on 28 September 1955 (The Hague Protocol 1955).*

[66] Milde (n 10 above) 837.

[67] Milde (n 10 above) 837.

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ensure that carriers would not be left insolvent after a single accident.[68] Limited liability thus goes against the classic principal of *restitutio in integrum,* and the *status quo ante* will not necessarily be restored.[69] Further, the Plaintiff is not guaranteed to be compensated to the amount of 250 000 francs, as he or she must first prove the actual damages suffered.[70]

2.3.2 Strict liability for presumed fault (Montreal Convention)

The Montreal Convention contains a system of strict liability for presumed fault that can be found in Articles 17[71] and 21 (own emphasis):

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000[72] Special Drawing Rights for each passenger, the *carrier shall not be able to exclude or limit its liability*.
2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
   (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
   (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

After perusing these articles, it is clear that there are similarities[73] to the Warsaw Convention. However, the Montreal Convention creates a faultless system of liability for proven damages of up to 113 100 SDRs.[74] It is thus not necessary for the Plaintiff to prove any negligence from the carrier and it will only have to show the court that there were actual damages suffered. The liability for the carrier in the Montreal Convention is thus strict without any limitation on the amount of damages

[68] Atherton (n 14 above) 407.

[69] Milde (n 10 above) 838.

[70] See Chapter 4 'Quantum of damages' below.

[71] See 2.1 'Was this an accident?' above.

[72] This has been amended to 113, 100 from 30 December 2009. See http://www.icao.int/secretariat/legal/Administrative%20Packages/mtl99_en.pdf (accessed 23 May 2016).

[73] As illustrated in 2.1 'Was this an accident?' above.

[74] Tompkins (n 51 above) 137.

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claimable.[75] Article 21(1) is the 'first tier' for liability and at this stage, the burden of proof lies with the Plaintiff to prove the existence of an 'accident'[76] and also that actual damage was suffered in order to claim a limited monetary amount. Article 21(2) is the 'second tier' for liability and it is at this stage that the burden of proof shifts to the Defendant. The Defendant must prove the absence of the contents of Article 21(2)(a) or the presence of the contents of Article 21(2)(b),[77] otherwise, it will be responsible for the entire amount of damages proven by the Plaintiff without any limitation thereon.

2.4 Wilful misconduct and wrongful act

The last aspect on which the Plaintiff will address the court is the interpretation and devastating effect of the words 'wilful misconduct' and 'wrongful act' on the case of the Defence.

2.4.1 Wilful misconduct (Warsaw Convention)

'Wilful misconduct' can be found in Article 25 of the Warsaw Convention:

> 1. The carrier shall not be entitled to avail himself of the provisions of this Convention which excludes 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 seised of the case, is considered to be equivalent to wilful misconduct.
> 2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier within the scope of his employment.

The Plaintiff will use Article 25 to nullify any argument under Article 20,[78] which may exempt the carrier of liability.[79] In defining the word 'wilful', one needs to study the French text of the convention as it is the authoritative version.[80] The French text makes use of the word *dol,* which can be translated as 'an intentional

[75] Tompkins (n 18 above) 204.

[76] Refer to 2.1 above.

[77] Košenina (n 9 above) 263. Also see Chapter 3 'The case for the Defendant' hereafter, where articles 21(2)(a) and 21(2)(b) will be applied.

[78] '1. The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.'

[79] See 3.5.1 below for a discussion on Article 20 and Article 25.

[80] Article 36.

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act'.[81] The substantive law of the country where the case is heard will be applied to ascertain whether there was the necessary intention.[82]

In South Africa, the Latin phrase *animus iniurandi* (intention) consists of two elements, namely 'direction of the will' and 'consciousness of wrongfulness'.[83] Intent can be divided into three forms,[84] namely *dolus directus, dolus indirectus* and *dolus eventualis.*[85] The Plaintiff will have to prove that either the carrier or the pilot intended to kill the passengers,[86] or that there was the intention to do something else and the killing of the passengers was an unavoidable consequence,[87] or that the killing of the passengers was not intended although it was foreseeable and the actor reconciled himself with this risk.[88]

The second element of intention is the 'consciousness of wrongfulness'. It is thus not only necessary for the Plaintiff to prove that the carrier or pilot acted wilfully, but also that the actor appreciated that the action is wrongful or at least foresaw the likelihood that his actions were wrongful.[89] For a person to commit a wrongful act knowingly, he or she must have the necessary mental capacity.[90] If someone is not able to distinguish between right and wrong due to a mental illness, or if such person is able to distinguish but he or she is not able to act in accordance with his or her understanding of the distinction, he or she will be regarded as *culpae incapax* and no fault can then be attributed to such person.[91]

It is common cause that the co-pilot suffered from severe depression.[92] South African courts use the DSM-V[93] coupled with expert psychiatric evidence to ascertain

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[81] Goldhirsch (n 44 above) 152.

[82] Goldhirsch (n 44 above) 152, 153.

[83] J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict 7th edition* (2015) 133.

[84] *Black v Joffe* 2007 3 SA 171 (K) 186.

[85] See Neethling & Potgieter (n 83 above) 133 for an in-depth discussion.

[86] *Dolus directus*.

[87] *Dolus indirectus*.

[88] *Dolus eventualis*.

[89] Neethling & Potgieter (n 83 above) 135.

[90] Neethling & Potgieter (n 83 above) 132.

[91] Neethling & Potgieter (n 83 above) 132; *Fradd v Jaquelin* (1882) 3 NLR 144 149.

[92] http://www.bbc.com/news/world-europe35797065?ns_mchannel=social&ns_campaign=bbc_breaking&ns_source=twitter&ns_linkname=news_centra (accessed 28 May 2016).

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the severity of the depression and the effect that it has on mental capacity.[94] There is a presumption that everyone has the necessary mental capacity until proven otherwise.[95] When averring that the pilot acted intentionally, the Plaintiff must also state that the pilot acted within the scope of his employment. The Defendant will, in turn, have to prove that the depression was so severe that the pilot did not have the necessary mental capacity to act intentionally and/or that he also did not act within the scope of his employment.[96]

The focus of the Plaintiff's case is also on the allegation that the carrier knew that the pilot had mental problems and still persisted to let him operate the aircraft. In 2012, the International Civil Aviation Organization (ICAO) published its 3rd Manual of Civil Aviation Medicine.[97] Chapter 9 of the manual specifically deals with the mental health of pilots, and this is supplementary to the Standards and Recommended Practices contained in Chapter 6 of Annex 1,[98] which deals with medical provisions for licensing.[99] Paragraph 6.3.2.2.1 of Annex 1 recommends,

> An applicant with depression, being treated with antidepressant medication, should be assessed as unfit unless the medical assessor, having access to the details of the case concerned, considers the applicant's condition as unlikely to interfere with the safe exercise of the applicant's licence and rating privileges.

The recommendation is that a pilot suffering from depression should not operate an aircraft unless the medical assessor is of the opinion that the depression will not have an effect on his or her work (a so-called 'waiver'). In order to detect any psychological problems, pilots must undergo an annual medical examination.[100]

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[93] *Diagnostic and Statistical Manual of Mental Disorders, 5th edition*.

[94] M Swanepoel 'Legal aspects with regard to mentally ill offenders in South Africa' (2015) (18)1 *Potchefstroom Electronic Law Journal* 32433.

[95] *Pheasant v Warne* 1922 AD 481; *Vermaak v Vermaak* 1929 OPD 13; *De Villiers v Espach* 1958 2 All SA 348 (T).

[96] See Chapter 3 'The case for the Defendant' below.

[97] http://airlines.iata.org/agenda/monitoring-the-mental-health-of-pilots (accessed 28 May 2016).

[98] http://web.shgm.gov.tr/documents/sivilhavacilik/files/pdf/saglik_birimi/mevzuat/ICAO_Annex%201-ed11.pdf (accessed 28 May 2016).

[99] http://www.icao.int/publications/Documents/8984_cons_en.pdf (accessed 28 May 2016).

[100] Final Report: Accident on 24 March 2015 at Prads-Haute-Bléone (Alpes-de-Haute-Provence, France) to the Airbus A320-211 registered D-AIPX operated by Germanwings, p. 86.

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According to the final report on the accident, published by the Bureau d'Enquêtes et d'Analyses (BEA), Mr Lubitz was correctly diagnosed with depression by Lufthansa as early as 2009, but he was granted a waiver by a psychiatrist and his Class 1 medical certificate was also renewed each following year thereafter.[101]

The carrier undoubtedly did not intend to kill the passengers; however, it can be argued that it foresaw the risks of letting a pilot with a record of depression fly an aircraft and the carrier reconciled itself with those risks. The case for the Plaintiff is that the carrier's failure to monitor the status of a pilot with a known history of depression properly must qualify as 'wilful misconduct' as envisaged in Article 25(1) in the form of *dolus eventualis*. Alternatively, the Plaintiff contends that the pilot acted within the scope of his employment, and a proper case under Article 25(2) has been made out for *dolus directus* or *dolus indirectus*. The liability of the carrier will consequently be unlimited if the court finds in favour of the Plaintiff.

2.4.2 Negligence and wrongful act (Montreal Convention)

'Wrongful act' can be found in Article 21(2)(a) and (b) of the Montreal Convention.[102] At this stage, the burden of proof lies with the Defendant to prove that 'the damage was not due to the negligence or other wrongful act or omission of the carrier' or that 'such damage was solely due to the negligence or other wrongful act or omission of a third party'.[103]

Since the Defendant is tasked with the burden of proof in Article 21(2)(a) and (b) of the Montreal Convention, the Plaintiff will be able to rebut after the Defendant's case. The argument put forward by the defence that the pilot did not act as servant when he caused the damage, cannot hold water.

The rationale behind vicarious liability is that the employer is in a better financial position than the employee and is able to spread his risk by way of taking out insurance.[104] In *C.P.R v Lockhart*,[105] it was found that a 'wilful' or 'wrongful' act committed by an employee could still be in the course of employment although

[101] Final Report (n 100 above) p. 86.

[102] See 2.2 'Strict liability for presumed fault (Montreal Convention)' above.

[103] Havel & Sanchez (n 8 above) 294, 295.

[104] S Deakin, A Johnston & B Markesinis *Markesinis and Deakin's Tort Law* (2013) 568.

[105] [1942] A.C. 591 at 600.

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expressly prohibited by the employer.[106] Only if the employer restricted the employee from the mode for which he was employed will the carrier be protected from liability.[107] The case for the Plaintiff is that the damage was caused whilst the pilot was busy doing the work he was hired to do.[108] There was indeed a 'sufficiently close connection' between the authorised flying of the aircraft and the unauthorised mode of flying the aircraft when all the passengers were killed.[109] In the Constitutional Court decision of *F v Minister of Safety and Security*,[110] the court held that the Minister was vicariously liable for the conduct of a police officer, who was on standby duty when he assaulted and raped a member of the public. The court found that there was a special relationship of trust between the public and the police, which rendered the employer liable when breached.[111]

The second argument for the Defence, in their attempt to persuade this court, was that the pilot had to be treated as a third party as envisaged in Article 21(2)(b). The alternative argument is that the damage was caused solely due to the negligence and omission by the medical practitioner who diagnosed the pilot with psychosis prior the flight.[112] Neither of these arguments can be accepted. Firstly, the pilot can never be regarded as a third party as he was employed by the carrier. Secondly, the medical practitioner who diagnosed the pilot prior to the flight was not able to report his findings to the carrier because he was bound to strict doctor–patient confidentiality, which has penal repercussions under the German criminal code.[113] If the court finds that the damage was solely due to the negligence of the medical practitioner it would cause a legal fallacy given that he could not have reported his diagnosis voluntarily.

Moreover, the Defendant failed to prove that the negligence was solely caused by the medical practitioner as the carrier had a duty of care to regularly

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[106] WVH Rogers *Winfield and Jolowicz on Tort 18th edition* (2010) 963; Deakin, Johnston & Markesinis (n 104 above) 571.

[107] Rogers (n 106 above) 963.

[108] Deakin, Johnston & Markesinis (n 104 above) 575.

[109] *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

[110] [2011] ZACC 37 at par 179.

[111] [2011] ZACC 37 at par 52.

[112] Final Report (n 100 above) p. 8.

[113] Final Report (n 100 above) p. 54.

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evaluate a pilot whose licence contained a waiver.[114] According to the final report of the BEA, the pilot should not have been issued with a Class 1 medical certificate in 2009.[115] The report states that the German regulations did not comply with Part-MED[116] where provision is made for a referral to the German civil aviation authority (Luftfahrt-Bundesamt) in cases where a pilot stopped using anti-depressant medication.[117]

The Plaintiff submits that all arguments under Article 21(2), which attempt to limit the liability of the Defendant, have been negated successfully. The Plaintiff is therefore justified to claim damages in an unlimited amount.

2.5 Conclusion

A proper case has been made out for the court to find in the Plaintiff's favour.

The Plaintiff showed that there was indeed an accident in terms of Article 17 of the Warsaw and Montreal Conventions.

In terms of the Warsaw Convention, the Defendant will be held liable for at least all the damages, limited to 250 000 francs. On a balance of probabilities, the Defendant was unable to prove that it was not negligent[118] and the burden of proof was consequently not discharged with. The Plaintiff successfully argued a case under Article 25, which removes any limitation and exception under the convention. The Defendant is thus liable for all proven damages.

In terms of the Montreal Convention, the Defendant is liable for the proven 113 100 SDRs. The Defendant was further not able to argue a winning case in terms

[114] Final Report (n 100 above) pp. 31, 86, 98.

[115] Final Report (n 100 above) p. 84.

[116] (EU) regulation No. 1178/2011 includes Part-MED in Annex IV, which establishes the requirements for the issue of the medical certificate required for exercising the privileges of a pilot licence, medical fitness of cabin crew, certification of aero-medical examiners and qualifications of general medical practitioners and occupational health medical practitioners.'

[117] Final Report (n 100 above) p. 84.

[118] See Chapter 3 'The case for the Defendant' below for the Defendant's argument on negligence.

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of Article 21(2)(a) and (b) to limit the claim.[119] The Defendant will consequently be liable for all proven damages.

[119] See Chapter 3 'The case for the Defendant' below for the Defendant's arguments on Article 21(2)(a) and (b).

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CHAPTER 3

THE CASE FOR THE DEFENDANT

3.1 Introduction

The case for the Defendant will not specifically deal with the different articles of the conventions, but the essential elements that need to be proved will be discussed. This approach is followed since many of the issues raised by the Plaintiff overlap each other. However, reference to specific articles will be made when necessary. In conclusion, the different elements will be brought together in order to show the court that the Plaintiff failed to prove its case, and the Defendant successfully discharged with its burden of proof. The Defendant will also argue a valid exception to liability in terms of Article 20 of the Warsaw Convention.

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3.2 Negligence of the carrier

The *locus classicus* for the test of negligence can be found in *Kruger v Coetzee.*[120]

Culpa arises if –

(a) a *diligens paterfamillias* in the position of the defendant –
  (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  (ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps.

The *diligens paterfamilias* or the 'reasonable person' should here be seen as the reasonable carrier.[121] Would the reasonable carrier in the same circumstances have foreseen the possibility of the pilot intentionally flying the plane into the mountains? If the answer is in the affirmative, which steps should have been taken to guard against such an occurrence?

3.2.1 Was the incident foreseeable?

On 28 July 2009, the pilot was issued with a Class 1 medical certificate, which was endorsed with a waiver,[122] having the effect that the certificate would become invalid if there was a relapse into depression.[123] After being issued with the Class 1 medical certificate, the pilot renewed and revalidated the certificate seven times with intervals varying from four to twelve months.[124] The BEA report states that the aero-medical examiners (AME) were all aware of the waiver, and during the prescribed examination the co-pilot did not show any signs that could raise concerns about mental illness.[125] It is the case of the Defence that the incident was therefore not foreseeable.

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[120] 1966 (2) SA 428 (A) at para 430E-G.

[121] For the purpose of this study, the 'reasonable expert' will not be investigated.

[122] FRA 091/09.

[123] Final Report (n 100 above) p. 31.

[124] 24 February 2010: revalidation; 18 June 2010: renewal; 29 March 2011: renewal; 7 November 2011: renewal; 5 November 2012: revalidation; 14 August 2013: renewal; 28 July 2014: revalidation; Final Report (n 100 above) pp. 31, 32.

[125] Final Report (n 100 above) p. 32.

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3.2.2 Steps taken to guard against this occurrence

If the court finds that the Defendant should have foreseen that a person with a history of depression could be a danger when flying, the question begs whether the necessary steps were taken to guard against it. As stated above, the carrier did comply with the prescribed regulations in conducting medical examinations. In five years' time, the co-pilot was examined on eight different occasions by qualified medical examiners.[126] It can thus not be argued that the Defendant failed to take the necessary preventative steps.

The Defendant was consequently not negligent in issuing the co-pilot with a Class 1 medical certificate as it complied with all the necessary measures. Courts have found that 'all necessary measures' must be seen as those that are reasonably available to the diligent carrier.[127] According to the BEA, neither the carrier nor authorities would have been able to prevent the pilot from flying on that day as they could not have possibly known of his mental illness.[128] It is sometimes easy to propose *ex post facto* more preventative regulations; however, at the time of the accident, the carrier acted like a reasonable carrier as it complied with the prescribed regulations of the ICAO.

3.3 The parameters of the scope of employment

In showing the court that the co-pilot acted outside the scope of his employment, the Defence will argue that the employee went on a 'frolic of his own'.[129] In *Storey v Ashton,*[130] Cockburn CJ states:

> it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is applicable to the present case, because here the cabman started on an entirely new and independent journey which has nothing at all to do with his employment.

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[126] 24 February 2010: revalidation; 18 June 2010: renewal; 29 March 2011: renewal; 7 November 2011: renewal; 5 November 2012: revalidation; 14 August 2013: renewal; 28 July 2014: revalidation.

[127] Goldhirsch (n 44 above) 112; *Grein v Imperial Airways Ltd.* 1 Avi 622 (Ct. App. England); *CPH International Inc. v Phoenix Assurance Company of New York* 1994 U.S. Dist. Lexi 7751 (D.C.N.Y. 1994).

[128] http://www.bea.aero/en/investigation-reports/notified-events/detail/event/descente-commandee-sous-pilot-automatique-collision-avec-le-relief/ (accessed 16 June 2016).

[129] PS Atiyah *Vicarious liability in the Law of Torts* (1967) 251.

[130] (1869) LR 4 QB 476, 479-80.

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There can be no vicarious liability if the employee does something that he or she is not employed to do.[131] The moment the co-pilot locked the door of the cockpit and started descending, he deviated to such a degree that he began with a journey that had nothing to do with his employment. In the case of *Minister of Police v Rabie,*[132] the court set out the test for vicarious liability:

> It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course of his employment, and that in deciding whether an act by the servant does fall outside, some reference is to be made to the servant's intention. The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his [or her] own interests and purposes and the business of his [or her] master, the master may yet, be liable. This is an objective test.[133]

Subjectively the co-pilot acted solely for his own interests and in no way can it be argued that he acted in the furtherance of the carrier.[134] The court will therefore have to make a factual finding that there were, objectively speaking, a close link between the act of the co-pilot and the business of the carrier. Botha and Millard propose a 'dual capacity' in which the employee could act simultaneously within and outside the scope of employment.[135] Such a possibility could materialise when an employee is prohibited to do something whilst on duty.[136]

In *Minister of Finance v Gore,*[137] the employer was intentionally defrauded by its employees. In *casu* the employees defrauded the employer by not disclosing the fact that they had an interest in a company to which they made a tender award. The court found that their actions were closely aligned with the function they were

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[131] Deakin, Johnston & Markesinis (n 104 above) 573.

[132] 1986 (1) SA 117 (A) 134.

[133] MM Botha & D Millard 'The past and future of vicarious liability in South Africa' (2012) 45(2) *De Jure* 232.

[134] The court found in *Mkhize v Maartens* 1914 AD 394 that 'the master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by the servant solely for his own interest and purposes and outside his authority is not done in the course of his employment, even though it may have been during employment'.

[135] Botha & Millard (n 133 above) 233.

[136] *Bezuidenhout NO v Eskom* 2003 24 *ILJ* 1084 (SCA); *Bazley v Curry* (1999) 174 DLR 45 (SCC) para 15.

[137] [2006] SCA 97 para 30.

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employed to perform. Although damage was caused when awarding the tender, they still made an award as employed to do. The Defence submits that a fitting application of this principle to the airline industry would be when a pilot decides to fly through a storm, even though he was ordered to turn the aircraft around, because he does not want to be late for the birth of his child. Consequently, the aircraft crashes and everyone on board is killed. It is clear that the pilot subjectively acted in his own interest, but objectively there is still a close link between the self-directed conduct and the business of the carrier to transport the passengers to the end destination.

The case for the Defence is that when the actions of the co-pilot are analysed objectively it cannot be said that his own subjective interest (to kill himself and everyone on board) and the business of the carrier are reconcilable. In deciding not to hold an employer vicariously liable, the court must state the policy reasons for its decision, because the very nature of attributing delictual actions committed by someone else has its roots in policy considerations.[138] The rationale or policy motive behind the liability systems in the conventions is to prevent a carrier being left insolvent after a single catastrophe.[139] The court must therefore consider the economic implications when applying its judicial discretion on the facts presented. On these facts, the court ought to find that it will not be in the interest of the local and global economy to hold the carrier liable for the wrongful actions of the co-pilot when he went on a 'frolic of his own'.

It must further be noted that should the court find that the co-pilot did indeed act outside the scope of his employment, he must effectively be regarded as a third party together with the appropriate associated consequences.

If the court finds that the co-pilot acted within the scope of his employment, it must first hold that he acted with the necessary intention before his actions can be attributed to the carrier. The co-pilot had 'direction of the will' but the necessary 'consciousness of wrongfulness' was not present. A physician suggested the treatment of possible psychosis in a psychiatric hospital,[140] which is indicative that the co-pilot lost touch with reality and could not have had the necessary realisation of

[138] *Bazley v Curry* (1999) 174 DLR 45 (SCC) para 15.

[139] Atherton (n 14 above) 407.

[140] Final Report (n 100 above) p. 8.

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the wrongfulness of his actions. If the employee cannot be held delictually liable, there will be no liability to attribute to the employer.

3.4 Damage solely due to the omission by a third party

Article 21(2)(b) of the Montreal Convention makes provision for the limitation of liability if the Defendant is able to prove that the 'damage was solely due to the negligence or other wrongful act or omission of a third party'. As shown in 3.3 above, the co-pilot must be treated as a third party. In 3.2, it was argued that the carrier was not negligent. Therefore, the wrongful act committed by the co-pilot falls squarely within the ambit of Article 21(2)(b).[141]

In addition, the Defence will put forward an argument that the physicians and psychiatrist of the co-pilot negligently withheld the information from the carrier, which ultimately led to the tragic events.

In the months before the accident, the co-pilot consulted five different physicians and a psychiatrist who issued sick leave certificates, prescribed medication and diagnosed him with possible psychosis and anxiety disorder.[142] It is common cause that the Defendant was not aware of these consultations, diagnosis or medical treatment.[143] The assertion that these medical practitioners were not able to inform the carrier cannot be upheld as there are exceptions to medical confidentiality under German law.[144]

Necessity can be found in section 34 of the German Criminal Code:[145]

> A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself [herself] or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.

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[141] Article 27 of the Warsaw Convention and Article 32 of the Montreal Convention*: 'In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate'.*

[142] Final Report (n 100 above) p. 32.

[143] Final Report (n 100 above) p. 8.

[144] Final Report (n 100 above) p. 56.

[145] Promulgated on 13 November 1998, Federal Law Gazette.

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It is clear that the medical practitioners would have been able to raise the defence of necessity if criminally prosecuted for a breach of medical confidentiality. If they were aware of their patient's occupation, the logical inference would have been that there was an imminent danger to the lives of his passengers should he continue flying.

The Defendant therefore contends that the medical practitioners acted negligently when they failed to disclose the information pertaining to the co-pilot's mental illness to the carrier. The wrongful act of the co-pilot and the omission by the medical practitioners justify a proper case under Article 21(2)(b). The liability of the Defendant must therefore be limited to 113 100 SDRs.

3.5 Conclusion

In concluding the case for the Defence the important elements are summarised as follow:

3.5.1 Warsaw Convention

The Defence concedes that there was 'an unusual or unexpected event external to the passengers'[146] as required in *Air France v Saks.*[147] A further concession is that the hijacking of aircrafts[148] and terrorist attacks[149] are also Article 17 'accidents'.[150] It is therefore correct to state, as the Plaintiff has done, that a *prima facie* case is before this court, leaving the Defendant liable in an amount limited to 250 000 francs.[151] The Defence will thus only address the court on Article 20 and Article 25.

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[146] Tompkins (n 51 above) 154.

[147] 470 U.S. 392 (1985).

[148] *Husserl v Swiss Air Transport Co.* 351 F. Supp. 702 (S.D.N.Y.), ***aff'd***, 485 F.2d 1240 (2d Cir. 1973); *Adler v Malev Hungarian Airlines* 23 Avi. 18, 157 (S.D.N.Y. 1992); *Krystal v British Overseas Airways Corp.* 403 F. Supp. 1322 (C.D. Calif. 1975).

[149] *Evangelinos v Trans World Airlines, Inc.* 550 F.2d 152 (3d Cir. 1977); *Day v Trans World Airlines, Inc*. 528 F.2d 152 (3d Cir. 1977).

[150] Tompkins (n 51 above) 160, 161. See also Chapter 3 below for the 'terrorist' argument of the Defence in an attempt to negate liability.

[151] Article 22.

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3.5.1.1 Article 25: Removing limitation of liability

The Plaintiff argued a case under Article 25[152] that would, if accepted by the court, remove the limitation set by Article 17. The important elements are 'wilful misconduct' and 'within the scope of his employment'.

The Plaintiff stated that, although there was no intention by the carrier in the form of *dolus directus*, the court should find that the requirements of intention *dolus eventualis* have been met.[153] In *Director of Public Prosecutions, Gauteng v Pistorius,*[154] the Supreme Court of Appeal clarified the term *dolus eventualis* at paragraph 26:

> a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed.

I submit that there is no evidence before this court that shows the carrier subjectively foresaw the eventual actions committed by the co-pilot.

The second element is if the co-pilot wilfully caused the damage within the scope of his employment. A proper analysis was made in paragraph 3.3 above. For this reason, the Defence merely reiterates that when applying the applicable authorities, the court should have had no hesitation in finding that the co-pilot acted outside the scope of his employment when he embarked on a 'frolic of his own'.

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[152] 1. The carrier shall not be entitled to avail himself of the provisions of this Convention which excludes 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 seised of the case, is considered to be equivalent to wilful misconduct.

2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier within the scope of his employment.

[153] Paragraph 2.4.1 above.

[154] (96/2015) [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA).

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3.5.1.2 Article 20: Excluding liability

The carrier will not be liable for any damages if the Defence is successful in proving the necessary elements under Article 20.[155] The crux is to determine whether the carrier took all necessary measures to avoid the damage, or the impossibility to take such measures. As argued in 3.2.2 above, the court should conclude that the carrier took all the required steps to guard against the damage as prescribed by the ICAO. Alternatively, if the court finds that more could have been done, the finding ought to be that it was impossible for the carrier to guard against the damage since the medical diagnosis of the co-pilot was never disclosed to it by the relevant parties.

When applying the liability regime of the Warsaw Convention, a proper case has been made out for the court to find in favour of the Defendant, and to conclude that the carrier is not liable for any damages suffered by the Plaintiff.

3.5.2 Montreal Convention

The concessions made pertaining to Article 17 under the Warsaw Convention applies *mutatus mutandis* to the Montreal Convention. In terms of Article 21(1),[156] the Defence accepts liability for all proven damages limited to 113 100 SDRs. However, the facts do not support a case for unlimited liability as envisaged by Article 21(2).[157]

As discussed in paragraph 3.2 above, the damage caused was not attributable to any negligence, wrongful act or omission from the carrier. In paragraph 3.4 above, it was argued how the damage was solely due to the actions by the co-pilot and the inaction by the medical practitioners.

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[155] 1. The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

[156] For damages arising under paragraph 1 of Article 17 not exceeding 100 000. Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

[157] The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.'

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When applying the liability regime of the Montreal Convention, a proper case has been made out for the court to find in favour of the Defendant, and to conclude that the carrier is liable for an amount limited to 113 100 SDRs.

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CHAPTER 4

THE QUANTUM OF DAMAGES

4.1 Introduction

Damages is defined by Visser and Potgieter as the 'monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage'.[158] Damages can be divided into patrimonial loss and non-patrimonial loss.[159] With patrimonial harm, the involved interests are directly assessable in money, while with non-patrimonial harm,[160] the involved interests do not have a direct monetary value and are not as easily assessable.[161] It is important to note that the conventions do not specifically exclude non-patrimonial damages and the municipal law of the country where the trial takes place must be used to determine which types of damages can be claimed.[162] South African courts do not allow dependants to claim non-patrimonial damages for the death of a breadwinner.[163] The dependants will only be able to claim the loss of support (patrimonial damages).[164]

The idea behind a claim from a dependant is to place him or her in the same position within which he or she would have been had the breadwinner not been

[158] Potgieter (n 30 above) 185.

[159] M Loubser & R Midgley *The Law of Delict in South Africa* (2009) 47.

[160] This includes the *actio iniuriarum* and the action for pain and suffering.

[161] Potgieter (n 30 above) 211.

[162] P Neenan 'The damaged quilt: Inadequate coverage of the Montreal Convention' (2012) 37(1) *Air and Space Law* 54; *Zicherman v Korean Air Lines Co. Ltd.* 516 U.S. 217 (1996).

[163] Loubser & Midgley (n 159 above) 284; *Jameson's Minors v CSAR* 1908 TS 575 at 602.

[164] Corbett & Buchanan (n 25 above) 76.

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killed.[165] The object of the amount claimed is therefore not to improve the dependant's material prospects.[166] The amount of damages will therefore vary depending on the specific facts of the case.[167]

4.2 *Locus standi* in claiming damages for the loss of support

Relatives who are held to be entitled to bring an action are the spouse,[168] children,[169] parents[170] and siblings.[171] The burden of proof lies with the person instituting the action to prove that there was a *duty to support* and also a *right to support.*[172]

In law, the *duty to support* must have been enforceable *inter partes*[173] and the *right to support* must have been protected from third parties.[174] Furthermore, there had to exist a need of support and the breadwinner must have been able to give such support.[175] Therefore, if the dependant cannot prove on a balance of probabilities that –

(i) the breadwinner was legally obliged to give support;[176]
(ii) the dependant needed such support; and
(iii) the breadwinner was financially equipped to give the financial support, he or she will not be able to claim from the carrier.

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[165] Potgieter (n 30 above) 478.

[166] *Hulley v Cox* 1923 AD 234; PJ Visser & JM Potgieter *Law of Damages through the cases* (2004) 460.

[167] Potgieter (n 30 above) 188. The intention of this study is to show the elements that will be considered in making an award. A specific calculation or probable award will therefore not be made because it will differ from case to case depending on the circumstances of the claimant and breadwinner.

[168] Corbett & Buchanan (n 25 above) 78.

[169] Corbett & Buchanan (n 25 above) 79.

[170] Corbett & Buchanan (n 25 above) 80.

[171] Corbett & Buchanan (n 25 above) 81.

[172] Loubser & Midgley (n 159 above) 282; *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA); *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839.

[173] Neethling (n 21 above) 293; *Santam Bpk v Henery* 1999 3 SA 421 (SCA) 430.

[174] Neethling (n 21 above) 294; *Santam Bpk v Henery* 1999 3 SA 421 (SCA) 430.

[175] Neethling (n 21 above) 294.

[176] Neethling (n 21 above) 294–296: Legal marriage, civil union, blood relations, adoption, statute, court order.

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In South Africa, the *locus standi* of a Plaintiff will be dealt with as a point *in limine*. If the carrier claims that the dependant does not have the necessary *locus standi,* the court will first have to make a decision on this issue before the main case will be heard.[177] The Plaintiff will therefore not even be able to get out of the starting blocks in proving his claim if the necessary *locus standi* is not proved.

4.3 Quantifying the loss of support

An actuary will calculate the amount of loss of support and will then present it to court by way of an expert witness report.[178] The actuary can be cross-examined in order to test the basis for the calculations made.[179] The patrimonial loss of a dependant will be calculated by deducting the losses from the benefits.[180]

Loubser and Midgley argue –

> a precise calculation of an award for the loss of future support is not possible, but courts recognise that a calculation on an annuity basis is an appropriate guide, based on assumptions indicated as reasonable by the available evidence.

In the case of *Hulley v Cox,*[181] the court stated that, in addition to the principle of an annuity, a just and general estimate of the loss can also be made.[182] Some of the factors that will influence the calculation are the period of support, the income the breadwinner would have earned, and the portion of income that would have been used for the benefit of the dependant.[183] It is thus clear that the quantification of the exact damage will, to some extent, entail informed speculation.[184]

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[177] Rule 33(4) of the Uniform Rules of Court.

[178] RJ Koch 'Damages for personal injury and death: Legal aspects relevant to actuarial assessments' (2011) 11 *SAAJ* 112. The calculation of the damages is therefore, to some extent, not a legal exercise but a mathematical exercise.

[179] Koch (n 178 above) 112.

[180] Loubser & Midgley (n 159 above) 284; some of the benefits may include inheritance, pension, insurance, dependant's own capacity, etc.

[181] 1923 AD 234 at 243-4.

[182] Potgieter (n 30 above) 479.

[183] Potgieter (n 30 above) 480–484.

[184] Potgieter (n 30 above) 188.

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4.4 Conclusion

The Plaintiff will have the opportunity to prove the actual patrimonial damages suffered, if the court finds that the Plaintiff has *locus standi*. A report by an actuary will carry a significant amount of weight in quantifying the specific damages[185] coupled by the court's inherent judicial discretion.[186] The court will apply the liability limitations of the conventions after the damages suffered have been established.

[185] Koch (n 178 above) 112.

[186] Loubser & Midgley (n 159 above) 284.

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CHAPTER 5

CONCLUSION

5.1 The judgment

In this chapter, I will conclude with a quasi-judgment for each convention. The legal findings under one convention will naturally also apply to the same points of the other convention. It is important to keep in mind that the South African legal system makes provision for appeal procedures if any party to the proceedings is aggrieved with the findings of this court.[187]

5.1.1 The Warsaw Convention

The Warsaw Convention contains a system of limited liability for presumed fault. The essence to an argument negating liability will be that the Defendant successfully proved that it was not at fault.

The Defendant correctly conceded in its closing remarks that there was indeed an ‘accident’. The basis for liability under the convention has therefore been established. It is common cause that the co-pilot intentionally flew the aeroplane into the mountain, and it made sense for the Plaintiff to argue a case of ‘wilful misconduct’ under Article 25. This argument was made in order to counter any possible exclusion of liability and also to remove the limitation on claimable damages.

This court was not persuaded by the argument suggesting that there was intention, be it in the form of *dolus directus, dolus indirectus* or *dolus eventualis,* by

[187] Rule 49 of the Uniform Rules of Court.

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the carrier to cause the damage. The more prudent argument was rather that there was some form of intention by the co-pilot.

One of the central points of dispute was if the co-pilot acted within the scope of his employment. The very nature of vicarious liability is rooted in policy decisions,[188] and the current *bonis mores* had to be considered. The Plaintiff tried to persuade this court that the decisive factor of vicarious liability is its Grundnorm, being that the employer is in a better financial position, and must therefore be held liable. The second contention was that the special relationship of trust between the passengers and the co-pilot was of such a nature that policy dictates that the employer should be held liable even if the actions were wrongful. The facts in *F v Minister of Safety and Security*[189] can be distinguished from the facts *in casu*. The trust relationship between the passengers and the pilot is not a constitutionally protected right.[190]

The Defendant successfully made the argument that the subjective interests of the co-pilot were not reconcilable with the objective business of the carrier. Public policy does not require that the carrier should be held vicariously liable for the wilful misconduct of the co-pilot, especially when one objectively reflects on the historical rationale behind the limitation of liability in preventing the insolvency of a carrier. The co-pilot did not act within the scope of his employment when he committed the delict whilst on a 'frolic of his own'. Furthermore, the co-pilot had to meet the legal requirements for intention to be held delictually liable.[191] The overwhelming evidence of the private medical practitioners, whom the co-pilot consulted, indicates that he did not have the necessary appreciation of wrongfulness as required.[192]

The Defendant contended that a successful case was made out for an Article 20 exclusion of liability. The Article states,

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[188] *Bazley v Curry* (1999) 174 DLR 45 (SCC) para 15.

[189] [2011] ZACC 37.

[190] Section 205(3) of the Constitution places a duty on the police service to protect the public. There is no specific provision in the Constitution placing a duty on pilots to keep passengers safe.

[191] This court already found that the carrier is not vicariously liable and the findings on intention are merely for the sake of completeness.

[192] For the purpose of this study, I accept that the evidence given in court by the private medical practitioners is sufficient for the court to find that the co-pilot's mental health, read with the DSM-V, made it improbable to act with the necessary appreciation of wrongfulness.

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> the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

The essence of this Article is to establish whether the carrier acted negligently. The reasonable carrier in the same circumstances must have foreseen the possibility of the pilot causing the damage, and failed to take the appropriate steps to guard against it.

The carrier complied with the prescribed safety regulations of the ICAO and acted in accordance with the reasonable carrier. The carrier would not have been able to prevent the accident in this regulatory framework and was therefore not negligent. When the incident is examined *ex post facto,* it seems that there are definitely deficiencies in the current regulations. However, the test is not what the regulations should have been, but rather whether the carrier objectively complied with the regulations that were in force at that time. The Defendant has successfully proved that all necessary measures were taken and the Article 20 exception must therefore succeed.

Order:

1. The Defendant is not liable for the damage caused.
2. Each party to pay its own costs.

5.1.2 The Montreal Convention

The Montreal Convention contains a system of strict liability for presumed fault. The Plaintiff does not need to prove the fault of the Defendant. The Defendant had the onus to prove certain facts in order to limit its liability in terms of Article 21(2)(a) and (b).

The Defendant proved that the damage was not due to the negligence of the carrier and that the co-pilot did not act within the scope of his employment. The wrongful actions of the co-pilot must be seen as being committed by a third party. This court will not go so far as to apportion any blame to the respective medical practitioners as they are not parties to these proceedings, although the confidentiality regime applicable should be revaluated by the appropriate authorities.

The claim will therefore be limited to 113 100 SDRs. In terms of Article 23, the conversion of the SDRs into national currencies must be made at the date of

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judgment. On 31 October 2016, a Special Drawing Right was valued at 1,371710 US dollars.[193] On the same date, $1 equated to R13,74. A dependant's claim will therefore be limited to the sum of R2 131 629,11.[194]

Order:

1. The Defendant is liable for proven damages limited to an amount of R2 131 629,11.
2. Interest on the capital amount calculated at 10,50% from date of judgment to date of payment.
3. Costs on a party and party scale.

5.2 The way forward for passengers and carriers

This case study illustrated the differences in the liability regimes of the Warsaw and Montreal Conventions. In the event of an accident during an international flight, a claimant will definitely be in a better position if the Montreal Convention is applicable. Among the 191 ICAO member states, the Montreal Convention has been ratified by 119 states.[195] The protection offered by a system of faultless liability is more favourable to claimants.

The accident of Germanwings Flight 9525 of 24 March 2015 should encourage member states to ratify the Montreal Convention. The convention ensures that passengers and their dependants are not left destitute. Article 50 further obliges state parties 'to require their carriers to maintain adequate insurance covering their liability under this Convention'. This case study illustrated the possibility for a carrier to make out a case to limit its liability. The prospects of limited liability will ensure that insurance premiums remain reasonable in the future. The Montreal Convention therefore successfully balances the interests of the carrier and claimants. Carriers

[193] https://www.imf.org/external/np/fin/data/rms_sdrv.aspx (accessed 31 October 2016).

[194] 1,371710 x 113 100 x 13,74 = R2 131 629,11.

[195] http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx (accessed 2 July 2016); the European Union is also a party to the Convention and therefore there are 120 parties. The states that signed but have not ratified the Convention are the Bahamas, Bangladesh, Cambodia, Central African Republic, Ghana, Mauritius, Niger, Senegal, Sudan, Swaziland, Togo and Zambia.

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are also advised not to defend litigious proceedings and rather approach a claimant with a realistic offer to settle the dispute amicably.

On the other hand, the Warsaw Convention does not offer the same benefits, and claimants are at a disadvantage because the carrier receives excessive protection. When this convention was drafted, the intention was to protect the airline industry from the devastating effects of a single accident. The industry has matured and is now able to overcome catastrophes of this nature.

To echo the preamble of the Chicago Convention,[196] it is better to take preventive steps opposed to reactionary steps in striving for a safe, orderly and economically sustainable industry. The mental health of pilots is vital for the safety and economic sustainability of the industry. All relevant parties need to work together to find a good and workable solution in offering support to pilots, treating mental illnesses and preventing possible dangerous situations.

[196] Convention of International Civil Aviation, signed at Chicago on 7 December 1944.

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