O/a 6-8-89

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IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,395**

EASTERN AIRLINES, INC.,

Petitioner,

vs.

CHARLES KING,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

PODHURST, ORSECK, JOSEFSBERG,
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TABLE OF CONTENTS

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TABLE OF CONTENTS

TABLE OF CASES

LAW OFFICES. PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P A - OF COUNSEL, WALTER H BECKHAM, J R
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN 6 PERWIN, P A ~ OF COUNSEL, WALTER H BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI. FLORIDA 33130-1780

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25 WEST FLAGLER STREET - SUITE 800. MIAMI FLORIDA 33130-1780

TABLE OF CASES

Page

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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

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I.
STATEMENT OF THE CASE AND FACTS

We have no quarrel with the ***procedural*** background recited in Eastern's statement of the case and facts. The "facts" argued thereafter in the briefs of both Eastern and its amicus are another matter, however. For example, notwithstanding that the plaintiff's amended complaint (a copy of which is included in the appendix to this brief) alleges that "Eastern failed to institute appropriate procedures to cure this maintenance problem despite . . . knowledge" of at least 12 prior engine failures for the same omitted O-ring, Eastern continues to assert here that it ***did*** institute some procedures which, unfortunately, simply fell short of a cure. There is no support whatsoever in the amended complaint for that factual argument, however, which is why it was explicitly rejected by the district court below:

> Eastern's response is predicated on its contention that its conduct demonstrated good faith efforts to correct defects even though it failed to eliminate the problem. Eastern cannot prevail at this stage of the proceedings, however. Eastern is not entitled to have the court draw such an inference merely from consideration of the pleadings, even though it may ultimately establish its defense as a matter of proof. In deciding a motion for judgment on the pleadings, the trial court is required to take as true the allegations of the non-moving party and must consider as denied allegations of the movant. . . . A judgment on the pleadings may be granted only if the moving party is clearly entitled to judgment as a matter of law. . . . A motion for judgment on the pleadings must be decided "on the pleadings only, without reference to any other affidavits, depositions, or other showings of fact." . . . In the case under consideration, the movant depends on inferences of fact and law concerning the good faith of its maintenance efforts as a basis for obtaining judgment on the pleadings, a clearly inappropriate predicate under the law. . . . We therefore reverse the trial court's ruling as to Count III and remand for further proceedings.

King ***v. Eastern Airlines, Inc.,*** 536 So.2d 1023, 1033-34 (Fla. 3rd DCA 1988) (en banc; citations omitted). Given the present procedural posture of this case, we respectfully submit that that is the appropriate jurisprudential response to Eastern's effort to change the facts upon which our allegations of liability are based.

The brief of Eastern's amicus strays even farther from the face of our amended complaint; it amounts to an extended, impermissible jury argument upon matters which have yet

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to be proven in any form in this case. For example, amicus suggests that installing O-rings may be more difficult, and curing the problem of their omission might not be such a simple matter, as common sense would seem to suggest; that the 15 omitted O-rings alleged here were probably a result of mere negligence; that the time frame over which those omissions occurred ought to be a relevant consideration; that Eastern's maintenance is regulated by the FAA and therefore ought to be considered safe; that the odds against the triple-engine failure in issue in this case were enormous; and that the airplane in question was safe in any event, because it had three engines.[1/] Most respectfully, these are matters which must be the subject of proof, and which should be reserved for closing argument; they are entirely inappropriate in the present procedural posture of this case.

Because Eastern escaped liability below by obtaining a "judgment on the pleadings", it is axiomatic that the allegations of our amended complaint must be both liberally construed and accepted as true. We accurately paraphrased the allegations of that complaint in our initial brief below, and because those facts provide the sole foundation for determination of the legal issues presently before the Court, they bear reiteration here:

> On May 5, 1983, Eastern Airlines Flight 855 departed Miami International Airport, bound for Nassau, in the Bahamas. Enroute to Nassau, one of the airplane's three jet engines lost oil pressure, and it was shut down by the flight crew. The airplane was turned around to return to Miami. Shortly thereafter, oil pressure was lost on the second and third engines, and those engines failed. Without power, the airplane began losing altitude, and the passengers were told that the airplane would be ditched in the Atlantic Ocean. Understandably, the engine failures and the announcement of the impending crash landing caused a considerable amount of mental distress among the passengers. Fortunately, after an extended period of descending flight without power, the flight crew was able to restart the engine which had initially been shut down, and land the airplane safely at Miami International Airport. (R. 40-44).
>
> Following the incident, it was discovered that Eastern's maintenance personnel had removed and replaced the magnetic "chip

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[1/] Amicus's extended statistical demonstration of "the odds" misses a very simple point. When mechanics have omitted O-rings on twelve prior occasions, and the same mechanics are sent out to service all three of a single airplane's engines at the same time, the odds of missing O-rings in all of the plane's engines are comfortable enough to make book on.

> detectors" in the oil system of each engine prior to flight, but had failed to install the required "O-ring" to seal the chip detectors against oil leaks. The result was that the oil in the engines had been pumped overboard through the gaps left by the omitted O-rings. While those omissions might initially be dismissed as mere negligence, it was also discovered that Eastern had experienced no less than a dozen prior engine failures for the identical reason. And, despite the knowledge that its maintenance personnel had failed to install O-rings in chip detectors on at least a dozen occasions prior to the traumatic flight of Flight 855, Eastern had done nothing to educate its maintenance personnel as to the necessity of installing the O-rings, or otherwise to correct this oft-repeated life-threatening omission. Convinced that this unforgivable conduct amount to outrageously reckless indifference to their safety, rather than mere negligence, a number of the passengers who had been nearly frightened to death on Flight 855 brought suit against Eastern, seeking compensatory and punitive damages. (R. 7-39, 40-44, 48-49).

(Appellant's initial brief, pp. 1-2).[2/]

Because we have had no opportunity to develop those facts through discovery or proof, we cannot disprove much of the inappropriate jury argument advanced by Eastern and its amicus at this preliminary point in the litigation. We can disprove some of it, however. The partial rebuttal to both inappropriate jury arguments is contained in the recent auto-biography of Eastern's former president, Frank Borman, in which he publicly conceded both the airline's responsibility for the incident, and that no corrective action was taken until ***after*** the frightening flight in issue here:

> In April 1984, I had hired a new senior vice president for Engineering and Maintenance named Joe Leonard--not as a potential successor, however, because I wasn't even thinking of one at the time. I hadn't been satisfied with our maintenance operation, and after a widely publicized incident involving one of our L-lolls--a near-ditching in the Atlantic--I decided changes had to be made. The TriStar had lost power in all three engines, a multiple malfunction traced to faulty installation of oil rings. There had been sloppy work by inadequately supervised mechanics.

2/ The only aspect of this statement which was challenged as inaccurate below was our reference to the engines' magnetic "chip detectors". We conceded in our reply brief that the amended complaint does not contain any reference to the "chip detectors"; by way of explanation, however, we observed that the matter had been widely reported in the press; that this is exactly what happened; and that Eastern knew that this is exactly what happened. In any event, the substance of our initial paraphrase of the allegations of the amended complaint is not affected by disregarding our references to the "chip detectors".

> . . . .
>
> Joe shaped **up** Eastern's maintenance in a hurry. He wasn't afraid to kick butts, but everyone liked him. He was the kind of hands-on operator we needed;. . .
>
> . . . .
>
> In March, 1986, the Federal Aviation Administration notified Eastern that it was being fined $9.5 million for violating government regulations covering aircraft maintenance practices.
>
> . . . .
>
> I wasn't surprised that Eastern was targeted for an investigation. The near-ditching incident, plus our known financial difficulties, had made us suspect. Yet, I was confident we had cleaned **up** our act after that L-1011 embarrassment. Some thought we should have fired the mechanics responsible, but I felt management was partially at fault--we had changed certain engine maintenance procedures without making sure the word had filtered down to the mechanics directly involved. Under Joe Leonard the gaps had been plugged. . . .

Frank Borman with Robert J. Serling, ***Countdown, an Autobiography,*** pp. 409-12 (William Morrow, New York, 1988).

Most respectfully, the frightening incident in suit has not been invented; neither has it been exaggerated, as Eastern and its amicus would like the Court to believe. The incident represents one of the most extreme and outrageous examples of corporate recklessness which the history of commercial aviation has ever seen. Neither has the plaintiff's mental distress been feigned. It does not take any great leap of imagination to understand that the outrageous incident probably caused the most severe fright of his life. And, in our judgment, that combination of extreme recklessness and severe mental injury ought to be considered both tortious and compensable, as the district court held below--and as we hope to convince this Court in the argument which follows.

II.
ISSUES ON APPEAL

In order to respond to Eastern's two issues on appeal, it is necessary that we argue a third. We therefore restate the three issues on appeal as follows:

A. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE FACTS ALLEGED IN THE PLAINTIFF'S AMENDED COMPLAINT STATE A CAUSE OF ACTION UNDER FLORIDA LAW FOR RECKLESS INFLICTION OF MENTAL DISTRESS.

B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE FACTS ALLEGED IN THE PLAINTIFF'S AMENDED COMPLAINT DID NOT STATE A CAUSE OF ACTION UNDER THE WARSAW CONVENTION.

C. WHETHER, UNDER ANY OUTCOME OF THE FIRST TWO ISSUES ON APPEAL, THE WARSAW CONVENTION PREEMPTS THE PLAINTIFF'S CLAIMS IN ANY RESPECT.

III.
SUMMARY OF THE ARGUMENT

Because of the need to add a third issue to the two issues argued in Eastern's 48-page brief, as well as a need to respond to a 25-page amicus brief, space is at a premium. In addition, the issues are complex and the arguments therefore cannot be readily summarized without extensive repetition. In the interest of efficiency and economy, we intend to turn directly to our arguments. We respectfully request the indulgence of the Court in that decision.

IV.
ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE FACTS ALLEGED IN THE PLAINTIFF'S AMENDED COMPLAINT STATE A CAUSE OF ACTION UNDER FLORIDA LAW FOR RECKLESS INFLICTION OF MENTAL DISTRESS,

We believe that the district court correctly held that Count III of our amended complaint states a cause of action for intentional or reckless infliction of mental distress.[3/] Our position here turns upon a pivotal fact which we might as well highlight up front. To

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3/ Count III was drafted before this Court's recent adoption of §46, Restatement (Second) of Torts, as a definition of the tort of intentional or reckless infliction of mental distress; it was therefore bottomed upon the language of a forerunner case, *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950), in which the tort was recognized without reference to the Restatement. Count III is therefore framed in terms of "entire want of care", "willfulness", and "wantonness", rather than the language of S46 of the Restatement. The two things amount to essentially the same thing, however, as the parties and the district court recognized, so we have taken the liberty here of describing Count III as an action for intentional or reckless infliction of mental distress. *Cf. Ingaglio v. Kraeer Funeral Home, Inc.*, 515 So.2d 428 (Fla. 4th DCA 1987).

fail to install an essential O-ring in an airplane engine's oil system is clearly negligent conduct, and not even Eastern has contended to the contrary here. To do it once, or twice, or perhaps even three times, is arguably merely negligence--negligence which can perhaps be accepted by the travelling public as an inevitable risk of human fallibility. An engine failure from such an oversight is undeniably a calamitous occurrence, however, since it has the potential for causing massive loss of human life. One would therefore expect an airline to learn from its obvious errors and correct its maintenance procedures after perhaps one or two, and certainly after three, engine failures caused by the failure to install a simple O-ring during engine servicing.

When the same failure occurs for the same reason for the fourth, fifth, and sixth times, something is clearly amiss--and an airline's failure to correct its maintenance procedures at that point clearly becomes something greater than mere negligence; it becomes gross negligence, and it begins to approach the unforgivable. At some point between the sixth engine failure and the ninth engine failure for the same simple omission, it becomes clear that the airline simply does not care about the safety of its airplanes or its passengers--that it is totally indifferent to safety, and that it has accepted easily preventable engine failures as normal events in its day-to-day operations, notwithstanding the potentially catastrophic consequences.

When the tenth, eleventh, and twelfth engine failures for the same omitted O-ring occur, any further indifference to the obvious (and now clearly known) problem can only be characterized as flagrantly reckless behavior--behavior so reckless and outrageous, given the life-threatening nature of the risk involved, that it is the equivalent of an intentional disregard of the safety of the airline's passengers. ***See Piper Aircraft Corp. v. Coulter,*** 426 So.2d 1108 (Fla. 4th DCA), ***review denied,*** 436 So.2d 100 (Fla. 1983) (failure to correct known defect in face of substantial danger to lives of aircraft occupants constitutes reckless conduct sufficient to justify civil punishment). ***Cf. Nesbitt v. Auto-Owners Insurance Co.,*** 390 So.2d 1209 (Fla. 5th DCA 1980) (conduct which is recklessly indifferent to safety of others is tantamount to intentional conduct). There are numerous Florida decisions in

accord.:[4] Perhaps the leading modern decision on this subject is ***Wangen v. Ford Motor Co.,*** 97 Wis.2d 260, 294 N.W.2d 437, 13 ALR4th 1 (1980). Reduced to its essentials, the decision holds that, to continue to manufacture or operate a product with a known defect which can cause loss of life, is "reckless" behavior justifying civil punishment. That, of course, is the rule nearly everywhere. ***See generally,*** Annotation, ***Allowance of Punitive Damages in Products Liability Case,*** 13 ALR4th 52 (1982). Given the decisions cited above and in footnote 4, that would appear to be the settled rule in Florida as well.

If the three omitted O-rings at issue here had caused Eastern's first three engine failures, we suppose we could accept a judicial declaration that Eastern's omissions were merely negligent, and that the plaintiff's undeniably real fear for his very life during those heart-stopping minutes over the Atlantic ocean (and the psychic trauma which followed) should not be cornpensable because of a public policy designed to eliminate trifling claims. There is, at least arguably, "some level of harm which one should absorb without recompense as the price he pays for living in an organized society." ***American Federation of Government Employees v. DeGrio,*** 454 So.2d 632, 638 (Fla. 3rd DCA 1984), ***approved in result only,*** 484 So.2d 1 (Fla. 1986). Arguable or not, of course, that is the view that this Court has accepted. ***See Brown v. Cadillac Motor Car Division,*** 468 So.2d 903 (Fla. 1985) (no cause of action for mere ***negligent*** infliction of mental distress, absent impact or physical consequences); ***Champion v. Gray,*** 478 So.2d 17 (Fla. 1985) (cause of action for negligent infliction of mental distress available where mental distress results in physical injury).[5]

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[4] ***See, e.g., Toyota Motor Co., Ltd. v. Moll,*** 438 So.2d 192 (Fla. 4th DCA 1983) (similar); ***American Motors Corp. v. Ellis,*** 403 So.2d 459 (Fla. 5th DCA 1981), ***review denied,*** 415 So.2d 1359 (Fla. 1982) (similar); *Johns-Manville* ***Sales*** *Corp.* ***v. Janssens,*** 463 So.2d 242 (Fla. 1st DCA 1984), ***review denied,*** 467 So.2d 999 (Fla. 1985) (similar); ***Dorsey v. Honda Motor Co., Ltd.,*** 655 F.2d 650 (5th Cir. 1981), ***modified,*** 670 F.2d 21 (5th Cir.), ***cert. denied,*** 459 **U.S.** ***880,*** 103 S. Ct. 177, 74 L. Ed.2d 145 (1982) (construing Florida law; similar). ***Cf. Dean Witter Reynolds, Inc. v. Leslie,*** 410 So.2d 961, 964 (Fla. 3rd DCA 1982) ("entire want of care or attention to duty" and "great indifference to . . . persons . . . has long been sufficient to justify" civil punishment).

[5] For what it is worth, we should note that the plaintiff in this case may well have been

We cannot accept such a declaration with equanimity on the facts in this case, however. The omitted O-rings at issue here were not the first three omitted O-rings, or even the eighth, ninth, and tenth omitted O-rings. They were, at minimum, the ***thirteenth, fourteenth, and fifteenth*** omitted O-rings, and they caused far more distress than merely trifling annoyance--and we therefore have no sympathy at all for a public policy designed to eliminate trifling claims on the facts in this case. By any measure which civilized society can bring to bear on the conduct of Eastern in this case, the plaintiff's claim is not trifling. Eastern's conduct was outrageous in the extreme, and clearly intolerable in a society which, when travelling, must rely upon the exercise of exceptional care by common carriers for their very lives--and we are convinced that the law of this State authorizes a recovery for the plaintiff's undeniably real mental distress as a result.

Although the courts of this state have not been particularly liberal in allowing the recovery of damages for *negligently*-inflicted mental distress, they have declined to extend the benefit of that conservative policy to cases like this one, in which the defendant's tortious conduct has exceeded that of simple negligence. Instead, Florida has adopted §46 of the Restatement (Second) of Torts, which authorizes the recovery of damages for mental distress caused by ***aggravated*** conduct, like that in issue here:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

This tort--which goes by the name of "intentional or reckless infliction of mental distress"--is undeniably actionable in Florida. ***See Metropolitan Life Insurance*** Co. ***v. McCarson,*** 467 So.2d 277 (Fla. 1985); *Dominguez* ***v. Equitable Life Assurance Society, etc.,*** 438 So.2d 58 (Fla. 3rd DCA 1983), ***approved,*** 467 So.2d 281 (Fla. 1985). The tort is not limited to intentional conduct; it clearly embraces reckless conduct as well. ***See*** Restatement (Second) of

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situated such that the "impact rule" itself was satisfied--since he was ***inside*** the airplane and therefore in intimate contact with it, when it lost all power and began its harrowing descent to what was almost certain to be a watery grave. ***Cf. Eagle-Picher Industries, Inc. v. Cox,*** 481 So.2d 517 (Fla. 3rd DCA 1985), ***review denied,*** 492 So.2d 1331 (Fla. 1986) (mere inhalation of asbestos fiber sufficient to satisfy "impact rule").

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Torts, §46, comment i. And the obvious reason for recognizing the tort is to provide not merely compensation to victims, but to erect a strong deterrent to the type of aggravated conduct which it recognizes as actionable.

Although the cause of action has been recognized as a deterrent, the circumstances in which it will lie have been circumscribed somewhat to eliminate merely trifling claims. The action will not lie for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities". Restatement (Second) of Torts, §46, comment d.[6/] Instead, an action for intentional or reckless infliction of mental distress lies--

> . . . only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Metropolitan Life Insurance** Co. **v. McCarson, supra at 278-79, quoting Restatement (Second) of Torts, §46, comment d. ***See Smith v. Telophase National Cremation Society, Inc.,*** 471 So.2d **163** (Fla. 2nd DCA 1985). Although this gloss upon S46 is certainly meant to exclude run-of-the-mill instances of negligent conduct, and even intentional conduct causing only minor upset, we believe that the facts in the instant case demonstrate far more than the "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" meant to be excluded by it--and that an action for intentional or reckless infliction of mental distress will lie on the clearly outrageous facts in this case.

If a first reading of our statement of the facts elicited the requisite exclamation of "outrageous" from the Court, then a major portion of the issue presented here has essentially been resolved. **If** the requisite exclamation was not forthcoming, we ask the Court to consider two additional factors which we believe militate in favor of recognition of the tort

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6/ ***See, e.g., Kent v. Harrison,*** 467 So.2d 1114 (Fla. 2nd DCA 1985) (telephonic harassment as aftermath of argument does not give rise to action); ***Ponton v. Scarfone,*** 468 So.2d 1009 (Fla. 2nd DCA), ***review denied,*** 478 So.2d 54 (Fla. 1985) (requests for sexual liaison do not give rise to action).

on the facts in this case. First, there is the nature of the "special relationship" between the plaintiff and defendant in this case. The defendant is a common carrier. It therefore owed the plaintiff not merely a duty to exercise reasonable care for his safety, but a significantly elevated duty--a duty to exercise the "highest degree of care" for his safety:

> . . . In accordance with the rule applying generally to common carriers of passengers for hire, it is the duty of a common carrier by aircraft to exercise with respect to passengers the highest degree of care consistent with the practical operation of the plane. It must use such degree of care not only with respect to the operation of the plane, but also with respect to its equipment, its maintenance and the adjustment of all its parts . . . .

Kasanof v. *Embry-Riddle* Co., 157 Fla. 677, 26 So.2d 889, 892 (1946).[7/]

According to the Restatement, conduct considered "trivial" in some circumstances is often condemned as "outrageous" when it occurs in the context of such a "special relationship". Restatement (Second) of Torts, §46, comment e. In fact, the Restatement contains a special rule for the type of "special relationship" in issue here--which authorizes the recovery of damages for mental distress against a common carrier when its conduct has not been sufficiently egregious to be considered actionable under §46:

> A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment.

Section 48, Restatement (Second) of Torts. This expansion of the type of conduct deemed actionable under S46 is explained as follows:

7/ ***Accord, National Airlines, Inc. v. Fleming,*** 141 So.2d 343 (Fla. 1st DCA 1962). ***See Eastern Airlines,*** *Inc.* ***v.*** *Dixon,* 310 So.2d 336 (Fla. 3rd DCA 1975); 9 Fla. Jur.2d, ***Carriers,*** §111 (and numerous decisions cited therein). This is, of course, but a corollary of the "well-established [rule] that the amount of care required increases with the dangerousness of the agency involved and thus with the likelihood of injury". ***Marks v. Delcastillo,*** 386 So.2d 1259, 1263-64 n.8 (Fla. 3rd DCA 1980), ***review denied,*** 397 So.2d 778 (Fla. 1981). ***Accord, Carter v. J. Ray Arnold Lumber*** Co., 83 Fla. 470, 91 So. 893 (1922).

This rule was not changed, as Eastern suggests, by ***Rindfleisch v. Carnival Cruise Lines, Inc.,*** 498 So.2d 488 (Fla. 3rd DCA 1986), ***review denied,*** 508 So.2d 15 (Fla. 1987). *Rindfleisch* deals with the duty owed a ship's passenger under the law of ***admiralty,*** for which federal law has established a different rule.

> Any public utility may of course be liable for the infliction of severe emotional distress by extreme and outrageous conduct, under the rule stated in §46. The rule stated in this Section goes further and makes such a defendant liable for conduct which falls short of extreme outrage, but is merely insulting. At the same time the rule of this Section does not extend to mere trivialities. . . .

Restatement (Second) of Torts, §48, comment c.

Because the defendant in *Metropolitan Life Insurance Co. v. McCarson, supra,* was not a common carrier, this Court had no occasion to address whether §48 of the Restatement should also be the law of Florida. In adopting §46 as a definition of the tort, however, we think the Court implicitly recognized the viability of §48. We reach that conclusion because the Court's opinion states that a district court should "conform its findings to the *comments* explaining the application of [§46]" (467 So.2d at 278; emphasis supplied)--and because the comments to §46 make it clear that §48 is merely a specific application of §46 to a particular "special relationship":

> . . . There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. . . . It is only where there is a special relation between the parties, as stated in §48, that there may be recovery for insults not amounting to extreme outrage.

Restatement (Second) of Torts, §46, comment d. In other words, as we have urged, conduct considered trivial when measured against a lesser standard of care can readily be condemned as outrageous when measured against an elevated standard of care.

It makes no difference to us, of course, whether a cause of action is recognized under the general rule of §46 because of the "special relationship!' existing between the plaintiff and defendant, or whether it is recognized under the more specific rule of §48 for the type of "special relationship" in issue here, because the plaintiff's amended complaint states a cause of action under either theory. The point is simply that the customer-passenger of a common carrier is given a favored position in the law where reckless infliction of mental distress is concerned, and he is therefore entitled to the benefit of the doubt in determining whether a particular defendant's conduct will be deemed actionable. Therefore, even if the

facts in this case have not initially elicited the requisite exclamation of "outrageous", any doubt as to whether the conduct is sufficiently egregious to justify recognition of the tort clearly must be resolved in the plaintiff's favor here.

There is a second factor which we believe militates in favor of recognition of the tort on the facts in this case--the peculiar helplessness of the plaintiff in the face of the defendant's reckless conduct:

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. . . .

Restatement (Second) of Torts, §46, comment f.

Clearly, a passenger strapped to his seat in the back of a commercial airliner is perfectly helpless and peculiarly susceptible to severe emotional distress when informed that the airplane must be ditched in the Atlantic Ocean because all of its engines have failed, and the defendant was certainly aware of that when it took no action to correct its maintenance procedures in the face of its knowledge of at least twelve prior engine failures. Given the plaintiff's peculiar susceptibility to mental distress under the circumstances created by the defendant's unforgivably reckless behavior, any doubt as to whether the defendant's conduct is sufficiently egregious to justify recognition of the tort surely should be resolved in the plaintiff's favor here. When this factor is joined with the additional factor of the "special relationship" between the plaintiff and the defendant implicated by the facts in this case, any doubt as to whether the tort should be recognized in this case clearly should be resolved against the defendant.

Because recognition of an action for intentional or reckless infliction of mental distress depends largely on this Court's sensibilities concerning what is tolerable and what is intolerable in a civilized society, we will not belabor the point. We do think a comparison of the facts in this case with the facts in prior cases in which the tort has been recognized might assist the Court in resolving the issue here, however. We therefore refer the Court

to the cases cited below, which recognize actions for intentional or reckless infliction of mental distress on facts far less egregious than those in the instant case.[8/] And because the various factors thought important in those cases exist in the instant case, we respectfully submit that Eastern's thoroughly inexcusable recklessness on the facts in this case should similarly be recognized as beyond the bounds which should be tolerated by a civilized society.

Although we think the defendant's conduct was sufficiently outrageous that this Court may declare it actionable as a matter of law, if the Court is still in doubt on that point we would submit that an affirmance of the district court is still in order, and that the issue should at least be submitted to a jury for determination.

> It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Restatement (Second) of Torts, §46, comment h. ***Cf. Kraeer Funeral Homes, Inc. v. Noble,*** 521 So.2d 324 (Fla. 4th DCA 1988).

Eastern has not strenuously quarreled with our assertion that its conduct was "extreme and outrageous"; instead, it has concentrated its argument on the issue of whether its conduct was "reckless", or merely negligent. On that issue, Eastern has largely ignored the numerous decisions cited at pages 6-7, ***supra,*** and merely advanced a number of differ-

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8/ ***See Kirksey v. Jernigan,*** 45 So.2d 188 (Fla. 1950); ***Dominguez v. Equitable Life Assurance Society,*** 438 So.2d 58 (Fla. 3rd DCA 1983), ***approved,*** 467 So.2d 281 (Fla. 1985); *Ingaglio* ***v. Kraeer Funeral Home, Inc.,*** 515 So.2d 428 (Fla. 4th DCA 1987); ***Dependable Life Insurance*** Co. v. ***Harris,*** 510 So.2d 985 (Fla. 5th DCA 1987); ***Smith v. Telophase National Cremation Society, Inc.,*** 471 So.2d 163 (Fla. 2nd DCA 1985); ***Knowles Animal Hospital, Inc. v. Wills,*** 360 So.2d 37 (Fla. 3rd DCA 1978), ***cert. denied,*** 368 So.2d 1369 (Fla. 1979); ***Ford Motor Credit Co. v. Sheehan,*** 373 So.2d 956 (Fla. 1st DCA), ***cert. dismissed,*** 379 So.2d 204 (Fla. 1979); ***Kirkpatrick v. Zitz,*** 401 So.2d 850 (Fla. 1st DCA), ***dismissed,*** 411 So.2d 385 (Fla. 1981); ***Korbin*** v. ***Berlin,*** 177 So.2d 551 (Fla. 3rd DCA 1965), ***cert. dismissed,*** 183 So.2d 835 (Fla. 1966); ***Chuy v. Philadelphia Eagles Football*** Club, 595 F.2d 1265 (3rd Cir. 1979) (en banc); ***Norman v. General Motors Corp.,*** 628 F. **Supp.** 702 (D. Nev. 1986). The factual circumstances of many of these cases are described in the majority opinion of the decision presently under review.

ent decisions. Although the cases upon which Eastern relies certainly reflect this Court's recent effort to rein in punitive damage awards and enforce a rigorous definition of "recklessness", the cases do not convince us that Eastern's conduct was merely negligent. Before we parse those cases, however, we think it is worth reminding the Court of the definition of "reckless". According to Comment i of §46 of the Restatement, §46 "applies ... where [the defendant] acts recklessly, as that term is defined in §500, in deliberate disregard of a high degree of probability that ... emotional distress will follow". Section 500 defines "reckless disregard of safety" as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

See Ingram v. Pettit, 340 So.2d 922 (Fla. 1976) (driving while intoxicated is "reckless" conduct; difference between negligence and recklessness is a matter of degree based upon public policy considerations of seriousness of risk of harm to others).

The distinctions drawn in the comments which follow in an effort to mark off "recklessness" as something between intentional and negligent conduct are difficult ones, to be sure, but we think they can be distilled into three essential elements, as follows: conduct is "reckless" if an actor (1) has knowledge of facts creating (2) a strong probability of serious harm and (3) intentionally acts or fails to act with a conscious disregard of, or indifference to, that risk. This is essentially how the concept is defined in Fla. Std. Jury Instn. (Civ.) 6.12 (punitive damages). *See also Kraeer Funeral Homes, Inc. v. Noble*, 521 So.2d 324 (Fla. 4th DCA 1988). This is also essentially the same as the conduct required to support a finding of "culpable negligence" in a manslaughter case. *See Campbell v. State*, 306 So.2d 482 (Fla. 1975); *State v. Greene*, 348 So.2d 3 (Fla. 1977).

All three elements of this concept certainly exist here. Eastern had knowledge of at least ***twelve*** prior engine failures from the same omitted O-ring--and, given the multi-million dollar cost of each ruined engine (not to mention the clear compromise to safety of

flight), those were facts which Eastern clearly could not overlook or ignore, but which it was simply bound to know. While the omission of the thirteenth, fourteenth, and fifteenth O-rings might be viewed as mere negligence by the particular mechanics involved, that is not the thrust of our cause of action. Our cause of action is based upon Eastern's failure to take any appropriate action to prevent this negligence, after knowledge that it had happened at least twelve times before--and ***that*** studied failure to act when action was clearly necessary can only be deemed intentional (or the equivalent of intentional) in the present procedural posture of this case. In addition, an airplane without engines cannot fly--and an airplane over the ocean which cannot fly presents an undeniably serious danger to the safety of its occupants, and an indisputably strong probability of injury. (We would add parenthetically that, in sharp contrast to the enormous danger presented by the risk, the action required to obviate the risk was basic, simple--and inarguably small.)

The only even arguable position which Eastern has here is that its failure to act when it clearly should have acted did not amount to "conscious disregard of, or indifference to" the serious risk of injury presented by the consistently omitted O-rings. On that point, we obviously disagree with Eastern. The plaintiff's amended complaint alleges actual knowledge of at least ***twelve*** prior engine failures from the same omitted 0-ring--each of which was a catastrophe of the highest order, both in terms of economic cost and danger of massive loss of human life, and none of which could have been ignored by even the shoddiest of commercial airlines. The amended complaint also alleges that, in the face of this knowledge, Eastern took no action (or, as Eastern would prefer it, no ***appropriate*** action) to correct this life-threatening deficiency in its most basic maintenance techniques. Given the grave nature of the risk, the knowledge of the risk, the obvious need for corrective action, and the simplicity of the required corrective action, Eastern's failure to take any action at all before the ***thirteenth, fourteenth, and fifteenth*** perfectly predictable engine failures simply has to be a "conscious disregard of, or indifference to" the risk--else the concept of "recklessness" simply no longer exists in Florida law. ***See*** the decisions cited at pages ***6-7, supra.***

The decisions upon which Eastern relies do not convince us to the contrary. In ***White Construction Co., Inc. v. Dupont,*** 455 So.2d 1026 (Fla. 1984), the defendant owned a large, heavy, slow-moving piece of construction equipment designed to load dump trucks with limestone, which it operated with knowledge of malfunctioning brakes. Because of the inoperative brakes, the "loader" struck a truck; the impact caused its gear to pop into forward, and the loader then advanced and rolled over on its side, striking the plaintiff. The Court held that these facts amounted to negligence (or perhaps to gross negligence), but not to "recklessness". What was missing, of course, was the "strong probability of serious harm" to human life, since the slow-moving loader had apparently been operated effectively without brakes for some time, and it posed no significant danger to any substantial number of persons. In short, the accident in ***Dupont,*** although preventable with reasonable care, was somewhat of a fluke.

In contrast, a perfectly predictable triple-engine failure in a three-engine commercial airliner presents a strong probability of massive loss of human life. The difference is one of degree, but as the Restatement makes clear, this difference in degree is the difference between negligence and "recklessness". ***See Butler v. Aeromexico,*** 774 F.2d 429 (11th Cir. 1985) (flying lower than instrument approach minimums, resulting in fatal commercial air crash, is "reckless" conduct); ***Pritchett v. State,*** 414 So.2d 2 (Fla. 3rd DCA), ***review denied,*** 424 So.2d 762 (Fla. 1982) (evidence of flying too low sufficient to support conviction of pilot for manslaughter by culpable negligence). To put the point another way: notwithstanding its conclusion in ***White Construction,*** we think this Court would have no difficulty in concluding that, unlike the operation of a slow-moving piece of construction equipment at a construction site, the high-speed operation of a Trailways bus full of people on I-95 with known defective brakes (or a known history of inadequate maintenance of the fleet's brakes, with no corrective action taken) would amount to "reckless" conduct. ***See Ingraham v. Pettit,*** *supra.* Of course, the instant case is far worse than our hypothetical bus case, and

therefore not even remotely similar to ***White Construction.***9/

Chrysler ***Corp. v. WoZmer,*** 499 So.2d 823 (Fla. 1986), also provides no support for Eastern's position. In that case, the Court held that the defendant's conduct was not "reckless" because "the test reports [which the district court had found sufficient to support a finding of "recklessness"] do not support the district court's determination that Chrysler had actual knowledge that it was marketing an inherently dangerous automobile." 499 So.2d at 826. The Court also observed that the defendant did correct the unrelated deficiencies revealed in the test reports. In short, two of the elements necessary to support the concept of "recklessness" were found missing in *Wolmer*--the "knowledge of facts" element, and the "conscious disregard of, or indifference to" element. In contrast, the plaintiff's amended complaint in the instant case alleges actual knowledge of at least twelve identical prior engine failures from the same omitted O-ring, and utter indifference to the problem. ***WoZmer*** is therefore not dispositive of the issue presented here.10/

Ten Associates v. *Brunson,* 492 So.2d 1149 (Fla. 3rd DCA), ***review denied,*** 501 So.2d 1281 (Fla. 1986), also does not support Eastern's position here. In that case, the court held

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9/ *Como Oil Co.,* ***Inc.*** v. *O'Loughlin,* 466 So.2d 1061 (Fla. 1985), also provides no support for Eastern's position. As in *Dupont,* the accident was somewhat of a fluke. In addition, the evidence reflected that the defendant merely ran a "shabby operation"--not that it had actual knowledge from repeated prior incidents that its shabby operation posed a strong probability of death to substantial numbers of persons.

10/ **Also** to be contrasted with the instant case is this Court's recent decision in ***American*** *Cyanamid Co.* v. *Roy,* 498 So.2d 859 (Fla. 1987). In that case, the defendant ***had*** provided a warning on the label of its toxic product, albeit the warning may not have been quite as emphatic or detailed as it could have been. The Court held simply that the presence of the warning, coupled with other facts proving conscientiousness and concern, proved that the defendant was, at most, negligent in providing an inadequate warning--and that the facts therefore disproved the plaintiff's contention that the defendant was guilty of "that 'entire want of care which would raise the presumption of a conscious indifference to consequences'." 498 So.2d at 862. In the instant case, the facts reflect the exact opposite. They reflect a total absence of conscientiousness and concern on the part of the defendant, and they reflect that the defendant failed to take any appropriate action whatsoever to protect its passengers from the enormous danger of engine failure, and consequent massive loss of human life, of which it was clearly aware.

Three additional decisions relied upon by Eastern are distinguishable from the far more egregious facts in this case for essentially the same reasons that ***White Construction*** and ***Wolmer*** are distinguishable: *Mobil Oil Corp.* ***v. Patrick,*** 442 So.2d 242 (Fla. 4th DCA 1983); ***Louisiana-Pacific*** *Corp.* ***v. Mims,*** 453 So.2d 211 (Fla. 1st DCA 1984); ***Gerber Children's Centers, Inc. v. Harris,*** 484 So.2d 91 (Fla. 5th DCA 1986).

that, although the defendant apartment-owner had knowledge of a problem with criminal incidents in its complex, it had taken ***appropriate*** steps to rectify the problem, including the hiring of security guards--and that the negligence of one of its security guards in failing to prevent a sexual assault did not amount to "reckless" conduct on the part of the defendant. Missing in that case, unlike the instant case, were the elements of a "strong probability of serious harm" and "conscious disregard of, or indifference to" the risk. ***Compare Preventive Security & Investigators, Inc. v. Troge,*** 423 So.2d 931 (Fla. 3rd DCA 1982) (punitive damages properly supported by evidence that security guard fell asleep on the job, and failed to prevent assault).[11]

Eastern's reliance upon ***Fisher v. Shenandoah General Construction*** Co., 498 So.2d 882 (Fla. 1986), is also misplaced. The issue in that case was not whether the defendant's alleged conduct was negligent or "reckless", but whether it was ***intentional*** (and therefore possibly immune from the "exclusive remedy" bar of the Workers' Compensation Act). The Court held simply that the conduct alleged was not intentional, and did not reach the question of whether it was "reckless". Since we have not alleged an ***intentional*** tort in this case, ***Fisher*** adds nothing to the issue presented here--except perhaps the following:

> . . . In the words of Prosser,
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> > [T]he mere knowledge and appreciation of a risk--something short of substantial certainty--is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.
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> ***Prosser & Keeton on Torts*** 36 (W. Keeton 5th Ed. 1984). . . .

498 So.2d at 884. That, of course, is precisely what we have argued here--that Eastern

[11] In addition, ***Ten Associates*** addressed the conduct of a defendant charged with failure to prevent a ***criminal act by a third party*** with whom neither the plaintiff nor the defendant had any "relationship". We take it that, because of the "special relationship" implicated here, a far different question is presented by a claim that a common carrier, charged by law with a duty to exercise the "highest degree of care" for the safety of its passengers, has failed to correct a known and easily-correctable defect in its most basic maintenance procedures--a defect which has threatened massive loss of human life on more than a dozen prior harrowing flights.

acted in conscious disregard of, or with utter indifference to, a known appreciable risk of harm; that the risk was ***great*** because of the potential for massive loss of life; and that, although not intentional, Eastern's conduct was clearly "reckless" as a result. If anything, therefore, ***Fisher*** supports our position here--not Eastern's.

It is also worth noting that ***Dupont, Wolmer, Ten Associates,*** and all of the other related decisions upon which Eastern might rely here purport to ***retain*** the concept of "recklessness" in the context of punitive damage awards, defined in its traditional sense as follows:

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them".

White Construction *Co.,* ***Inc.*** v. ***Dupont, supra*** at 1029, quoting ***Carraway v. Revell,*** 116 So.2d 16, 20 n. 12 (Fla. 1959). We respectfully submit once again that the facts alleged in this case amount to considerably more than mere negligence, and fall squarely within this traditional definition of "recklessness"--and that, for the Court to conclude otherwise, it must necessarily conclude that no defendant can ever be "reckless" in Florida again, a conclusion which would clearly be contrary to all of the decisions cited at pages 6-7, ***supra.***

Of course, a word is in order concerning the Fourth District's recent decision in ***Jeep Corp. v. Walker,*** 528 So.2d 1203, 1205 (Fla. 4th DCA 1988), in which it reluctantly concluded that this Court's recent decisions had "all but eliminated punitive damage awards in products liability cases"--and that punitive damages were now recoverable only where a manufacturer deliberately ***intended*** to maim or kill a consumer. Most respectfully, this Court's decisions simply do not go that far. They are clearly distinguishable from the circumstances in ***Jeep*** *Corp.*--in which the evidence showed that the defendant "continu[ed], without warning, to market a vehicle with a high propensity to roll over after it well knew of this most dangerous infirmity" (528 So.2d at 1206)--for the same reasons we have pre-

viously distinguished them from the facts in the instant case.[12/]

That the ***Jeep Corp.*** court misread this Court's recent decisions is clear for another reason. Nowhere in any of this Court's recent decisions on the subject did it ever intimate, as the district court concluded, that punitive damages are not recoverable for traditional recklessness, but only where the defendant deliberately ***intended*** to injure the plaintiff. In fact, the Court's recent decisions consistently reiterate the settled equation between "recklessness" and "culpable negligence" sufficient to support a manslaughter conviction--and the criminal law has never required proof of an intention to injure to support such a conviction. Only the following is required:

> . . . Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard for the safety of others.

Campbell v. State, 306 So.2d 482, 482 n.1 (Fla. 1975).[13/] That test was clearly met in ***Jeep Corp.,*** and it is clearly met in the instant case.

A final word is in order concerning the dissenting opinion below, which concluded that no action for reckless infliction of mental distress would lie unless the defendant ***intended*** to cause the plaintiff mental distress (in contrast to simply conducting itself recklessly and causing mental distress in the process). While that requirement might make sense where liability is bottomed upon an ***intentional*** act, it simply cannot be a requirement where liability is bottomed upon ***reckless*** conduct. By definition, reckless conduct is something

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12/ The district court was also clearly aware that it may have misread this Court's decisions--or, if it had read them correctly, that this Court may not have meant to say what the district court thought it said--as evidenced by the fact that it certified its conclusion to this Court for possible rectification. Unfortunately, the decision evaded rectification; the defendant was sufficiently concerned about its propriety that it settled with the plaintiff in exchange for a dismissal of the review proceeding.

13/ ***Accord, Dolan v. State,*** 85 So.2d 139 (Fla. 1956); ***McBride v. State,*** 191 So.2d 70 (Fla. 1st DCA 1966). ***See Tongay v. State,*** 79 So.2d 673 (Fla. 1955); ***Hulst v. State,*** 123 Fla. 115, 166 So. 828 (1936); ***Hamilton v. State,*** 439 So.2d 238 (Fla. 2nd DCA 1983); ***O'Berry v. State,*** 348 So.2d 670 (Fla. 3rd DCA 1977); ***Williams v. State,*** 336 So.2d 1261 (Fla. 1st DCA 1961). Incidentally, the conduct of the defendants in some of these cases was less egregious than Eastern's conduct in the instant case.

short *of* (but, in the eyes of the law, equivalent to) intentional conduct, and to impose a requirement for proof of an ***intent*** to cause mental distress would automatically destroy the tort of ***reckless*** infliction of mental distress. All that the Restatement requires is proof of a "deliberate disregard of a high degree of probability that the emotional distress will follow", as the dissenting opinion itself observes. However, to be "reckless" is, by definition, to act in deliberate disregard of a high degree of probability that an injury will be caused, so proof of recklessness which causes severe mental distress is all that is required--as the majority correctly held below.

The majority's conclusion is consistent, of course, with the decisions cited immediately above concerning the proof required to support a conviction for manslaughter. If proof of an intent to injure is not required to support a conviction for manslaughter, then it makes no sense to require such proof in a civil action to redress equally reckless conduct which causes injury. The majority's conclusion is also consistent with a recent decision of the Fourth District, in which it approved the following jury instruction in an action for reckless infliction of mental distress (which is clearly contrary to the dissenters' position below):

> Where it is claimed that the incident in question occurred intentionally or with reckless disregard that emotional distress would result, the test for determining such claim is not whether the Defendant actually intended to inflict severe emotional distress upon the Plaintiffs, but whether the Defendant knew or should have reasonably known that such distress was substantially certain to follow as a result of such incident.

Kraeer Funeral Homes, Inc. v. Noble, *521* So.2d 324, **325** (Fla. 4th **DCA** 1988).

In the instant case, of course, Eastern clearly knew (or reasonably should have known) that severe mental distress was substantially certain to follow a thirteenth (not to mention a fourteenth and fifteenth) in-flight engine failure. And where Eastern's conduct in failing to take ***any*** appropriate action to prevent that failure--notwithstanding that it clearly knew such action was required in light of the dozen prior failures and the enormity of the risk--satisfies even the most stringent standard for proof of reckless conduct in this State, proof of an ***intent*** to cause mental distress ought to be considered irrelevant (and left to the field of intentional torts). As §46 of the Restatement succinctly states, "[o]ne who by extreme

and outrageous conduct . . . recklessly causes severe emotional distress to another is subject to liability . . .". We respectfully submit that the facts alleged in the plaintiffs' amended complaint falls squarely within that definition of the tort, and that the district court was correct in saying so. We also respectfully submit that, as a matter of public policy, the need for a civil remedy to deter the type of outrageous indifference to public safety represented by the facts in this case is manifest, and that this Court should therefore affirm the district court's conclusion.

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE FACTS ALLEGED IN THE PLAINTIFF'S AMENDED COMPLAINT DID NOT STATE A CAUSE OF ACTION UNDER THE WARSAW CONVENTION.

As its second issue on appeal, Eastern argues that the district court committed an additional error--that it erroneously held that the absence of a cause of action for the plaintiff in the Warsaw Convention did not preempt the plaintiff's state law claim for reckless infliction of mental distress. A proper response to that contention must proceed on two separate fronts. First, we must point out that this particular preemption issue was presented to the district court only because it first held that the plaintiff had no cause of action for purely mental injury under the Convention. It would therefore appear to be a proper response to Eastern's second issue that the Convention ***does*** provide a cause of action to the plaintiff, and that the district court erred in concluding otherwise. (That issue is properly before the Court in any event--because it is settled that, once review has been granted by this Court, it is entitled to resolve all issues presented in the case.) We will therefore urge in this second issue on appeal that the Convention ***does*** provide a cause of action to the plaintiff. The second front of our response to Eastern's claim of preemption--the more particularized response that, even if the Convention does not provide the plaintiff a cause of action, it does not preempt the plaintiff's state law claim for reckless infliction of mental distress--will be reserved for argument under our restated third issue on appeal.

In our judgment, the district court erred in adopting the minority view that Count IV of the plaintiff's amended complaint did not state a cause of action for the recovery of damages for mental injury under the provisions of the Warsaw Convention. The relevant portion of the Convention is Article **17,** which reads as follows:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure *ou* de toute autre lesion corporelle subie par un voyageur lorsque l'accident qui a cause' le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de debarquement.

(emphasis supplied). The official American translation of this portion of the Convention reads as follows:

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

(emphasis supplied). 14/

Reduced to its essentials, the question presented here is whether the phrase "ou de toute autre lésion corporelle" ("or any other bodily injury") includes or excludes mental distress and other purely psychic injury. Unfortunately, the answer to that question depends upon the legal meaning of the original French, not the American translation. See Air France *v.* Saks, **470** U.S. **392, 105 S.** Ct. **1338, 84** L. Ed.2d **289 (1985)** (construing the word "accident" in Article **17).** As the Court might expect, courts to which the issue has been presented have reached diametrically opposite conclusions.

Two courts have construed the original French to exclude recovery for mental distress in the absence of physical injury. See *Burnett v.* Trans World Airlines, Inc., **368** F. Supp. **1152** (D.N.M. **1973);** In *Re* Eastern Airlines, Inc., Engine Failure, Miami International Airport *on* May **5, 1983, 629** F. Supp. **307** (S.D. Fla. **1986).** A third has reached the same result

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14/ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. **12, 1929, 49** Stat. **3000,** TS No. **876 (1934),** quoted in note following **49** U.S.C.A. **$1502.** The Convention has been modified by the Montreal Agreement of **1966,** as we shall explain in detail *infra.* For ease of discussion, we will simply refer to both of them as the "Warsaw Convention" or the "Convention".

by construing the American translation (which would now appear to be an impermissible jurisprudential approach, after ***Air France v. Saks, supra). See Rosman v. Trans World Airlines, Inc.,*** **34** N.Y.2d **385, 358** N.Y.S.2d **97, 314** N.E.2d **848, 72** A.L.R.3rd **1282 (1974).**

The clear weight of authority is to the contrary, however, since at least five courts have held that Article **17** authorizes the recovery of damages for mental distress and other purely psychic trauma. ***See Husserl*** v. ***Swiss Air Transport Co.,*** **388** *F.* Supp. **1238** (S.D.N.Y. **1975);** *Krystal* ***v. British Overseas Airways Corp.,*** **403** F. Supp. **1322** (C.D. Cal. **1975);** *Karfunkel* v. ***Compagnie*** *Nationale* ***Air France,*** **427** F. Supp. **971** (S.D.N.Y. **1977);** *Borham* v. ***Pan American World Airways, Inc.,*** **19** Avi. **18,236, 1986** Aviation Litigation Reporter **4,791 (U.S.** D. Ct. S.D.N.Y., Mar. 5, **1986);** ***Palagonia v. Trans World Airlines,*** **110** Misc.2d **478, 442** N.Y.S.2d **670 (S.** Ct. **1978).** A sixth court has held that Article **19** authorizes the recovery of damages for mental distress, and additional plaintiffs were awarded damages for mental distress under Texas law without mention of any limitation upon Texas law by Article **17.** ***See Tarar v. Pakistan International Airlines,*** **544** F. Supp. **471** (S.D. Tex. 1982).15/

If we were to proceed conventionally here, we would argue from the latter cases, with exegesis upon the French Civil Law, that the French phrase "lésion corporelle" was intended by its drafters to include both physical and mental injury--i. e., personal injury. Eastern, of course, would then argue to the contrary. We are not inclined to promote such a debate here, however, because we frankly doubt that the question really has an answer. We there-

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15/ Eastern will probably respond, as it responded below, that several of these decisions proceed from the once widely accepted premise that the Warsaw Convention creates no cause of action independent of local law, but merely imposes limits on local law--and that this interpretation of the Convention now appears to be no longer good law (a point which we shall develop under our third issue on appeal). We will have no real quarrel with such an observation. The observation will be beside the point, however, because it does not change the fact that the decisions also construed Article **17** of the Convention as providing no limitation upon (which is the same thing as saying that the Convention authorizes) the recovery of damages for mental distress--and those separate holdings clearly survive the upset of the quite different holdings which Eastern will now claim are no longer good law. Put another way, whether the Convention is viewed as creating an independent cause of action or merely as creating limitations upon local law, the cases representing the majority view still hold that Article **17** of the Convention authorizes the recovery of damages for mental distress--and on that point, they are clearly still good law.

fore simply refer the Court to Palagonia v. Trans World Airlines, supra. We think that Justice Marbach's analysis of the problem in that case is the most convincing of the several analyses of the problem which have been made--and we commend his resolution of the problem to this Court as being far superior to the district court's resolution of it below.[16/] We also think that *Husserl v.* Swiss Air Transport **Co.,** supra--which appears to be the leading decision--represents a better reasoned resolution of the issue, and we commend that case to the Court as well.

Although we could probably rest our case here on those suggestions, there are three additional aspects of the problem which we think are important here. First, the most obvious flaw in the reasoning of the minority view is the fact that the phrase "lésion corporelle" has everywhere been construed to authorize the recovery of damages for mental injury which accompanies physical impact or physical injury. If the phrase is broad enough to embrace mental injury in that circumstance, it is clearly broad enough to embrace mental injury without accompanying physical injury--because there are simply not enough letters in those two short words from which to spell out the complex and peculiar distinction upon which the minority view depends. In our judgment, the minority has grafted a peculiar rule of American tort law onto the Convention which finds no support whatsoever in the simple two-word phrase, "lésion corporelle". If those two words authorize the recovery of damages for mental injury which flows from physical injury, as universally recognized, then they clearly must embrace mental injury without accompanying physical injury. For this simple reason alone, we believe that the majority view is the better view.

Second, there is the Montreal Agreement of 1966, in which the world's major airlines (including Eastern) agreed to modification of the Warsaw Convention to prevent its denun-

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16/ The district court explained that it did not find Justice Marbach's analysis in *Palagonia* convincing, because the "court failed to examine records of the Convention's drafts and negotiations". 536 So.2d at 1028. With all due respect to the district court, this explanation is a makeweight. As we shall explain in more detail *infra*, we have read every word of the minutes of the Convention. We assure the Court that the minutes of the Convention are entirely silent on the issue of whether the drafters intended to provide a cause of action for all personal injury, or merely physical injury.

ciation by the United States. The background of that agreement and its relevance to the issue presented here is nicely explained in ***Day v. Trans World Airlines, Inc.,*** *528* F.2d **31** (2nd Cir. 1975), ***cert. denied,*** 429 **U.S. 890, 97 S.** Ct. **246,** 50 L. Ed.2d **172 (1976).** Although the decision deserves to be quoted at considerable length, we will reduce it to its essentials here in the interest of economy. It explains that the Convention must be viewed as a flexible document, capable of adaptation to meet changing conditions and times; that the conduct of the parties subsequent to its adoption is relevant in ascertaining its meaning; that the subsequent Montreal Agreement was designed to modernize the Convention by providing for more liberal recoveries and greater protection for international air travelers; and that the terms of the Convention itself must be read liberally in the light of that effort at modernization.

One of the provisions of the Montreal Agreement adopted by the signatory airlines was a requirement that passenger tickets contain a printed notice of the applicability of the Warsaw Convention. The notice adopted by the airlines translates the phrase "en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur" into the following English phrase: "For death of or ***personal injury*** to passengers" (emphasis supplied). As a result, Mr. King's ticket for Flight 855 advised him that Eastern's liability "for death of or ***personal injury*** to passengers" was limited to $75,000.00 (emphasis supplied). 17/

It should be abundantly clear from this notice that the airlines themselves have construed the phrase "lésion corporelle" broadly rather than narrowly--to mean "personal injury" rather than merely "bodily injury"--and at least two of the courts which have considered the question presented here have found this to be convincing evidence that the Con-

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17/ A complete copy of the plaintiff's ticket is included in Eastern's first Petition for Removal at R. 7 ***et seq.*** The Montreal Agreement itself contains two references to "bodily injury" and two references to "personal injury"--and the CAB order approving the Montreal Agreement contains four references to "bodily injury", four references to "personal injury", and one reference to mere "injury". The full text of the two documents (both of which are included in their entirety in Eastern's appendix) therefore leads to the inescapable conclusion that both the signatories of the Montreal Agreement and the CAB considered the two phrases to be synonymous and therefore freely interchangeable.

vention (as modified by the Montreal Agreement) provides for a recovery of damages for any and all personal injuries, including mental distress and purely psychic trauma. *See* ***Krystal v. British Overseas Airways Corp.,*** 403 F. Supp. 1322 (C.D. Cal. 1975); *Palagonia* ***v. Trans World Airlines,*** 110 Misc.2d 478, 442 N.Y.S.2d 670 (S. Ct. 1978).

More recently, the United States Supreme Court observed that, in determining the meaning of the Convention, courts may appropriately "look beyond the written words to the history of the treaty, the negotiations, and the ***practical construction adopted by the parties". Air France v. Saks,*** **470** U.S. **392,** 105 S. Ct. 1338, 84 L. Ed.2d 289, 295 (1985) (emphasis supplied). Since the very ticket which Eastern sold the plaintiff in this case represents a practical construction of Article 17 of the Convention to mean "personal injury" rather than "bodily injury", we respectfully submit that this Court should have no hesitation in following suit--or in concluding, as the majority of courts have held, that Article 17 permits a recovery of damages for mental distress and purely psychic injury.

Third, and finally, even if "lésion corporelle" means no more than "bodily injury", we think the phrase "bodily injury" includes both mental and physical injury. There was a time in the not so distant past of human evolution, of course, when the mind and the body were considered to be separate and distinct entities. Modern scientific developments have clearly put that mythic view of our being to rest, however--and, although the precise mechanisms of our thoughts and feelings remain largely uncharted, there is general scientific agreement that the sophisticated mental processes of our brain are, in actuality, merely physiological processes involving electrical charges and chemical reactions. In short, the current view of the human life form is that anxiety, fear, mental anguish, psychic trauma, and the like (except where caused by innate physiological abnormality) are physiological reactions to external stimuli--i. e., that a "mental injury" is, in fact, a "bodily injury".

Judge Tyler found this point convincing in ***Husserl v. Swiss Air Transport*** Co., ***Ltd., supra,*** in which he construed Article **17** to authorize recovery of damages for all "personal injury". Such a construction clearly makes much more contemporary sense than a construe-

tion which perpetuates a now thoroughly discredited view of human physiology, and we commend it to the Court as an additional justification for construing the phrase "lésion corporelle" to mean what Eastern has already acknowledged it to mean on the ticket it sold to the plaintiff: "personal injury"--a broad phrase which clearly subsumes and includes the mental injury suffered by the plaintiff in this case. For all of the foregoing reasons, we respectfully submit that the district court erred in concluding that Article 17 of the Warsaw Convention did not provide a cause of action to the plaintiff to recover compensation for his mental injury.

C. WHETHER THE WARSAW CONVENTION IS "EXCLUSIVE" DEPENDS TO SOME EXTENT UPON THE OUTCOME OF THE INITIAL ISSUES ON APPEAL, BUT THE BOTTOM LINE IS THAT IT DOES NOT PREEMPT THE PLAINTIFF'S CLAIMS AT THIS POINT IN THE LITIGATION.

We turn now to Eastern's claim of preemption, a claim which we have only partially addressed in our second issued on appeal. This final issue is not easily dispatched, because there are at least four possible outcomes to the first two issues on appeal, each of which requires a somewhat different answer to Eastern's claim of preemption. One possible outcome has a simple answer, of course. If the Court concludes that the plaintiff has neither a federal law remedy nor a state law remedy, then the question of the "exclusivity" of the Convention becomes moot, and need not be answered. There are three other possible outcomes which squarely present the issue, however: **(1)** the plaintiff has a state law remedy, but no federal law remedy; (2) the plaintiff has both a state law remedy and a federal law remedy; and **(3)** the plaintiff has a federal law remedy, but no state law remedy. Since we do not yet know which of these alternatives will be the outcome here, and since the effect of the Convention on each potential outcome may be different, we will brief each one of the potential outcomes separately.

1. If plaintiff has a state law remedy but no federal law remedy, the Warsaw Convention does not preempt his state law claim in any way.

First, we will assume that the plaintiff has a state law claim for reckless infliction of mental distress, and that the Convention does not provide a cause of action for mental

distress alone, as the district court held below. On that outcome, and in essence, Eastern contends that the Convention is the plaintiff's "exclusive remedy", whether it creates a cause of action for the plaintiff or not; that the failure of the Convention to create a cause of action for the plaintiff amounts to an "affirmative preclusion" of any recovery of damages for mental distress alone; that the plaintiff's state law claim is inconsistent with this "affirmative preclusion"; and that the non-remedy provided by the Convention therefore requires a holding that the plaintiff has no remedy at all for the damages caused by Eastern's outrageous tortious conduct.

We assure the Court at the outset that Eastern's contention is erroneous. Unfortunately, the issue is not without some complexity, so our demonstration of that error will have to be lengthy. Our demonstration of the error will also have to be presented "in the alternative", because there are arguably two ways to read Article 17 of the Convention, and different responses are required depending upon how Article 17 is initially read. Our first task is therefore to define the problem in the two alternative ways in which it arguably presents itself here.

First, Article 17 can be read as creating a specific cause of action imposing absolute liability on the carrier for physical injury, and as being silent on whether other remedies requiring a showing of fault are available outside the context of the Convention. This, as we intend to demonstrate, is the way the federal courts have uniformly read the provision when dealing with preemption claims. It is also the reading supported by the 'legislative history" of the Convention, and we think it is the most reasonable reading of it. Eastern has read the provision a different way. It argues, in effect, that by recognizing a single cause of action--absolute liability for physical injury--Article 17 was meant to ***affirmatively preclude*** any and all other remedies available under local law. In the argument which follows, we will state our preference for the first reading and the conclusion which flows from it, but we will demonstrate that the bottom line is the same even if Article 17 contains the notion of "affirmative preclusion" for which Eastern contends.

a. Our first response.

(1) The decisional law.

Our first position--which was the position ultimately adopted by the district court below--is this: Article 17 of the Convention does not preempt all remedies available to an international air traveler; it simply creates a cause of action in the nature of absolute liability for physical injury which preempts all local law remedies for physical injury which are ***inconsistent*** with it; but it does not preclude resort to available local law remedies which are not positively inconsistent with it, such as a claim for reckless infliction of mental distress. We believe that the federal decisional law fully supports this position.

There was a time, of course, when the Convention was thought to create no independent causes of action at all. According to the early decisions on the point, a plaintiff had to find a remedy available under local law, and the Convention merely imposed limitations upon recoveries otherwise available under local law.[18/] If that were still the law, then Eastern would have no position here at all; and a conclusion that the plaintiff can maintain his state law claim (and that proof of "wilful misconduct" would waive all limitations upon the plaintiff's recovery on the state law claim) would be indisputably correct. More recently, however, the federal appellate courts have been holding that the Convention creates independent causes of action for the various claims which are expressed in it, and that suit can therefore be bottomed directly upon the Convention, without the need to resort to local law. The progenitor of this line of authority is *Benjamins* v. ***British European Airways,*** 572 F.2d 913, 51 A.L.R. Fed. 934 (2nd Cir. 1978), ***cert. denied,*** 439 U.S. 1114, 99 S. Ct. 1016, 59 L. Ed.2d 72 (1979). Other courts have followed suit.[19/] These

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[18/] ***See, e. g., Maugnie*** v. ***Compagnie Nationale Air France,*** 549 F.2d 1256, 39 A.L.R. Fed. 440 (9th Cir.), ***cert. denied,*** 431 U.S. 974, 97 S. Ct. 2939, 53 L. Ed.2d 1072 (1977); ***Noel v. Linea Aeropostal Venezolana,*** 247 F.2d 677, 67 A.L.R.2d 997 (2nd Cir.), ***cert. denied,*** 355 U.S. 907, 78 S. Ct. 334, 2 L. Ed.2d 262 (1957); ***Husserl v. Swiss Air Transport*** Co., ***Ltd.,*** 351 F. Supp. 702 **(S.D.N.Y. 1972), *aff'd,*** 485 F.2d 1240 (2nd Cir. 1973).

[19/] ***See St.*** *Paul* ***Insurance*** Co. *of Illinois* ***v. Venezuelan*** *International* ***Airways, Inc.,*** 807 F.2d 1543 (11th Cir. 1987); ***In Re Mexico City*** *Aircrash of* ***October 31, 1979,*** 708 F.2d 400 (9th Cir. 1983); ***Boehringer-Mannheim Diagnostics, Inc. v.*** *Pan* ***American*** *World* ***Airways,***

decisions have also held that, where independent causes of action have been created by the Convention, they are exclusive--and that all local law remedies which are ***inconsistent*** with the causes of action spelled out in the Convention are preempted. 20/

Eastern has acknowledged the existence of some of these decisions in its initial brief, but has sought to distinguish them by arguing that local law was preempted whenever an "accident" had occurred within the meaning of Article 17, whether or not the Convention otherwise "applied" or provided a remedy. The contention is suspect on its face, of course; if the plaintiff sustained no compensable injury as a result of Eastern's triple-engine failure, then no "accident" occurred. Be that as it may, even if an "accident" occurred, a fair reading of these cases, as well as the ones we will subsequently discuss, will convince the Court that no such distinction can be drawn from them. The decisions hold simply and generally that where a plaintiff has an independent cause of action under the Convention, inconsistent local law remedies are preempted; but that, where a plaintiff has no cause of action under the Convention *for* ***whatever reason,*** local law remedies are not preempted. ***See, e.g.,*** *In* ***Re Mexico City Aircrash of October 31, 1979,*** 708 F.2d 400 (9th Cir. 1983) (although plaintiff's decedent was killed in crash, Convention did not apply because she was not a "passenger", and local law therefore governed)--which we will discuss in more detail ***infra.***

The point has been appropriately summarized by a leading commentator as follows:

> Once a passenger suffers bodily injury or death as a result of an accident in international transportation, the Warsaw Convention

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Inc., 737 F.2d 456 (5th Cir. 1984), ***cert. denied,*** 469 **U.S.** 1186, 105 S. Ct. 951, 83 L. Ed.2d 959 (1985).

20/ ***See, e. g., Boehringer-Mannheim Diagnostics, supra*** at 459 ("Having concluded that the Warsaw Convention creates the controlling cause of action, we further conclude that it preempts state law ***in the areas covered. . . .*** Any state law ***in conflict with*** a treaty is invalid." [emphasis supplied]); ***Highlands Insurance*** Co. v. ***Trinidad & Tobago (BWIA International) Airways*** *Corp.,* 739 F.2d 536, 537 n. 2 (11th Cir. 1984) ("The Warsaw Convention preempts local law ***in areas where it applies."*** [emphasis supplied]). ***Cf. Tokio Marine & Fire*** *Ins. Co., Ltd.* ***v. McDonnell Douglas*** *Corp.,* 617 F.2d 936 (2nd Cir. 1980) (state law governing contribution claims applies where Convention is not inconsistent with it); ***Rhymes v. Arrow Air, Inc.,*** 636 F. Supp. 737 **(S.D.** Fla. 1986) (state law fully enforceable, but only to extent not inconsistent with Convention).

> applies and provides the exclusive remedy for claims. If the Convention does not apply, however, a cause of action may be maintained under ordinary common law negligence rules.

Kreindler, *Aviation Accident Law,* §1107, **pp. 11-93** to **11-94 (1987).** As we shall demonstrate, there is abundant authority for this statement of the rule.

Although there are several recent decisions which make the point, it is worth noting that the very progenitor of the decisions relied upon by Eastern indirectly makes the same point as well. In *Benjamins,* the issue was whether the federal courts had jurisdiction to entertain a wrongful death action arising out of an aviation accident in England, brought by a Dutch citizen residing in California. The Court held (in a two to one decision) that, because the Convention created its own independent cause of action for wrongful death, the federal courts had jurisdiction over the claim. The majority did not address the issue of whether and to what extent local law remedies might be preempted by this newly-recognized cause of action. In dissent, however, Judge Van Graafeiland made an observation with which the majority did not quarrel:

> . . . Ther is no reason to believe that the new right of action is exclusive? State and federal rights of action will co-exist and may be pleaded in the same case. . . .

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6. Although the majority does not expressly address the question, there is good reason to believe that the right is not exclusive. Certainly an exclusive right would be inconsistent with the "however founded" language in Article **24.** Furthermore, Calkins, in the article upon which the majority relies, viewed the right as non-exclusive. J. Calkins, ***The*** *Cause of Action Under the Warsaw Convention* (Parts I and 11), **26 J.** Air. L. & Com. **217 & 323, 327 (1959).**

Benjamins, supra at **922** (dissenting opinion). As noted above, the decisions subsequently following *Benjamins* have reached the common sense conclusion that local laws must give way to the terms of the Convention's independent causes of action whenever they are *inconsistent* with them, but none of them have rejected Judge Van Graafeiland's unchallenged observation that the newly-recognized causes of action do not preempt local laws which are *not* inconsistent with them.

When that latter issue--whether a local law remedy is available when the Convention

does ***not*** provide an independent cause of action inconsistent with that remedy--has been presented to the federal courts, the decisions have uniformly recognized that Judge Van Graafeiland's observation was correct, and that remedies available under local law for which the Convention provides no cause of action are available to international air travelers. The most recent decision on the point is both representative and instructive. In ***Wolgel v. Mexicana Air Lines,*** 821 F.2d 442 (7th Cir.), ***cert. denied,*** ___ **U.S.** ___, 108 S. Ct. 291, 98 L. Ed.2d 251 (1987), the plaintiffs brought an action against an airline for "discriminatory bumping" which occurred on an international flight. Like the plaintiff in the instant case, the plaintiffs in *Wolgel* sought damages under a local law, §404(b) of the Federal Aviation Act. Like the defendant in the instant case, the defendant in *Wolgel* contended that the Convention provided the plaintiffs' "exclusive remedy", and that the plaintiffs' action was barred by the two-year statute of limitations contained in the Convention. The district court agreed with the defendant and dismissed the plaintiffs' action. The Court of Appeals reversed. It held that the Convention did ***not*** provide a cause of action for "discriminatory bumping"; that the Convention therefore did not preempt the plaintiffs' action in any way; and that the plaintiffs could therefore maintain their action under the local law upon which they had relied (which provided a longer statute of limitations met by the plaintiffs).

Another recent decision is even more particularly instructive on the issue presented here. In ***Abrarnson v. Japan Airlines*** Co., *Ltd.,* 739 F.2d 130 (3rd Cir. 1984), ***cert. denied,*** 470 **U.S.** 1059, 105 S. Ct. 1776, **84** L. Ed.2d 835 (1985), the plaintiff, an international air traveler, had an inflight attack of a preexisting medical condition, which a stewardess seriously aggravated by declining the plaintiff certain relief which he had requested. Like the plaintiff in the instant case, the plaintiff in ***Abrarnson*** sued the airline on alternative theories--alleging in Count I a cause of action for negligence under state law; alleging in Count II a cause of action for absolute liability under the Convention; and alleging in Count III a cause of action for punitive damages bottomed upon the stewardess's wilful misconduct. The airline defended much as Eastern has defended here, arguing that the plaintiff

had no cause of action under Article 17 of the Convention because his injuries were not caused by an "accident" within the meaning of Article 17--and that the non-remedy thus provided by the Convention was the plaintiff's "exclusive remedy", preempting the plaintiff's state law claim. The district court agreed with the defendant, and granted the defendant's motion for summary judgment.

The Court of Appeals reversed. It agreed that Article 17 of the Convention provided no cause of action to the plaintiff, but it disagreed that the non-remedy thus provided preempted the plaintiff's state law claim. After canvassing the decisional law (in a lengthy opinion which we wish we had the space to quote here, because it makes our point much better than we could ever have hoped to do), it concluded that, "[w]hen the Warsaw Convention is inapplicable to the claim raised, it does not serve as a bar to alternative theories of recovery". 739 F.2d at 135. It then reversed the defendant's judgment and remanded the case for trial of the plaintiff's state law claims.

As noted at considerable length in Abramson, there are a number of additional decisions requiring the same conclusion. We will not parse each one of them. However, one of them is so closely related to the instant case that it deserves brief elaboration. In Hill *v.* United Airlines, 550 F. Supp. 1048 (D. Kan. 1982), the plaintiffs, international air travelers, sued an airline for intentional misrepresentation, seeking both compensatory and punitive damages for false statements made by an airline employee which caused them to miss an important connecting flight vital to their business interests. The airline defended as Eastern has defended here, arguing that the Convention governed the litigation; that the Convention did not authorize actions for intentional misrepresentation; and that the plaintiffs therefore had no remedy. The district court agreed that the Convention did not provide a cause of action for intentional misrepresentation, but it disagreed with the airline's remaining contention:

> The Warsaw Convention establishes a uniform system of liability rules to govern the fundamental aspects of international air transportation litigation. . . . The Warsaw Convention, however, is not a tariff or a contract: it does not exclusively regulate the relationship between passenger and carrier on an international flight.

> ... If the convention applies, it is a treaty, and therefore preempts local law which conflicts with the convention. ... However, if the Warsaw Convention applies, it applies to limit, not eliminate, liability; and if it does not apply, it leaves liability to be established to traditional common law rules. ...
>
> ... Liability [in this case] if any, is predicated upon defendant's commission of the tort of misrepresentation, a circumstance completely outside of the Warsaw Convention. We find nothing in the Warsaw Convention to bar a lawsuit for damages as a result of the alleged intentional tort. ...

550 F. Supp. at **1054** (citations omitted). The *Hill* Court thereafter concluded that, because the Convention did not contain an independent cause of action for intentional misrepresentation, the plaintiffs could recover both compensatory and punitive damages under the local law upon which they had bottomed their action.

An additional decision not mentioned in the *Abramson* decision also deserves brief highlighting here, for the same reason that we have highlighted *Wogel, Abramson,* and *Hill.* In *In Re Mexico City Aircrash of October 31, 1979, 708* F.2d 400 (9th Cir. 1983), the plaintiffs were representatives of the estates of three flight attendants killed in a crash of one of their employer's airplanes. The airline obtained dismissal of the three wrongful death actions on the ground that the "exclusive remedy" provision of the California Workers' Compensation Law precluded recovery against it by its employees. On appeal, the Court of Appeals held that Article 17 of the Convention created an independent cause of action for wrongful death which preempted all inconsistent state law. It further held that one of the flight attendants, who was off duty at the time of the crash, was a "passenger" within the meaning of Article 17; that her representative therefore had an independent cause of action against the airline under the Convention which preempted all inconsistent state law; and that, because the "exclusive remedy" provision of the California Workers' Compensation Law was inconsistent with the Convention's cause of action, the defendant could not rely upon it as a bar to liability.

The Court also held that the two flight attendants who were on duty at the time of the crash were not "passengers" within the meaning of Article 17, and that the Convention therefore did not provide a cause of action for their deaths. As a consequence of this

conclusion, the Court held further that there was no preemption of state law; that the defendant could therefore rely upon the bar to its liability contained in the state law; and that the actions for the wrongful death of the two flight attendants who were on duty at the time of the crash could not be maintained as a result. Although it was a defendant who was relying upon state law in In ***Re Mexico City Aircrash,*** rather than a plaintiff, the neutral legal propositions upon which the Court bottomed its two different results are the same propositions upon which *Wolgel*, ***Abramson,*** and *Hill* are bottomed. And, translated to the instant case, and if followed, the four decisions (as well as the additional decisions collected in *Abramson)* would appear to require this Court to hold that, having concluded that the Convention does not provide a cause of action for mental distress alone, the Convention therefore does not preempt the plaintiff's state law claim for reckless infliction of mental distress, and the plaintiff can therefore maintain his state law action and recover both compensatory and punitive damages. 21/

Eastern's reliance upon ***Burnett v. Trans World Airlines, Inc.*, 368** F. Supp. **1152 (D.N.M. 1973),** is entirely misplaced. It is true that the ***Burnett*** Court stated that "the convention intended to narrow the otherwise broad scope of liability . . . and preclude recovery for mental anguish alone" **(368** F. **Supp.** at **1157),** but that statement must be read in the context in which it was made. In ***Burnett,*** the plaintiffs were the victims of an inflight hijacking; they therefore had no state law claims against the carrier for negligence or reckless conduct; and their complaints therefore stated *no* ***causes*** *of action* ***under state law.*** Instead, the plaintiffs bottomed their cause of action ***solely*** upon Article **17** of the Convention, contending that the carrier was absolutely liable to them for their damages.

21/ Although we have not highlighted ***Martinez Fernander v. Air France,*** 545 F.2d 279, 284 (1st Cir. **1976), *cert. denied,* 430 U.S. 950, 97 S.** Ct. **1592, 51** L. Ed.2d **800 (1977),** the Court will also find it instructive--since it holds that, where Article **17** provides no cause of action for a terrorist attack occurring after disembarkation, the plaintiffs would be left "to the remedies of local law". ***See,*** in addition, ***Fischer v. Northwest Airlines, Inc.*, 623** F. Supp. **1064 (N.D.** Ill. **1985)** (where Article **17** provided no cause of action for airline's negligent response to plaintiff's inflight heart attack, plaintiff could maintain common law negligence action).

The Burnett Court held simply that Article 17 precluded--i. e., did not authorize--the recovery of damages for mental distress alone, and that the plaintiffs therefore had *no cause of action under the Convention.*

Nowhere did the *Burnett* Court even arguably intimate that the non-remedy thus provided by Article 17 would also preclude a separate cause of action against the carrier which might have been available to the plaintiffs under local law. Neither could the *Burnett* Court have properly reached such a conclusion if the question had been presented to it--since, as we have already demonstrated at length, the federal courts of appeals have held quite to the contrary. In short, the issue presently under discussion--whether the absence of any cause of action in the Convention for mental distress alone precludes the maintenance of an available state law cause of action for reckless infliction of mental distress--was neither presented nor decided in *Burnett,* and *Burnett* is therefore simply beside the point here.

In short and in sum, Eastern's argument is correct only up to an intermediate point. Where the Convention expressly provides an independent cause of action, then it preempts all local law which is inconsistent with that cause of action. However, that proposition cannot be stretched any farther. The Convention is not "exclusive" where it provides no cause of action at all, as Eastern contends. Instead, where the Convention provides no cause of action at all to the plaintiff, then a cause of action available to the plaintiff under local law is neither inconsistent with the Warsaw Convention nor preempted by it, and it can be prosecuted without limitation. Given the unanimity of the decisional law on the point discussed above (which includes the decision of the district court below), we respectfully submit that this is the correct answer to Eastern's claim of "exclusivity", if the Court should find that the plaintiff has a valid state law claim but no cause of action under the Convention.

(2) The "legislative history".

The uniform conclusion reached in the decisional law is, in our judgment, fully supported by the "legislative history" of the Warsaw Convention provided by the verbatim

minutes of the convention at which it was debated and adopted: ***Minutes, Second International Conference OR Private Aeronautical Law, Oct. 4-12, 1929, Warsaw*** (translated by R. Horner and D. Legrez, **1975)** (hereinafter simply ***"Minutes").*** Although it was a tedious and not entirely painless process, we read every word of those minutes. It is both evident from those minutes, and sometimes express in them, that the intention of the drafters was not to write a document which entirely preempted the field, but to write a document which regulated only ***certain*** areas of international air law, leaving all unregulated areas to local law. We will have to collect a number of passages from several different places in the minutes to make this demonstration, so we ask the Court to bear with us.

The concern that the initial working draft of the Warsaw Convention did not cover the entire field first surfaced at the close of the debate upon proposed substantive amendments to the draft. The following occurred:

> THE PRESIDENT: Sirs, we have finished the general discussion on the amendments of first order, amendments of substance. Mr. Giannini has the floor.
>
> MR. GIANNINI (Italy): Sirs, this morning we have been presented with several amendments: one submitted by the Romanian Delegation, one by the Delegation from the USSR, one by the Swiss Delegation and another by the Yugoslav Delegation.
>
> I believe that all our colleagues will be in agreement with me in saying that these are questions of wording, except for the Yugoslav proposal, while there is one part which touches the very substance of the Convention.
>
> The Yugoslav Delegation is preoccupied with the fact that this convention is the first one that we do, and it declares:
>
> > As regards the Convention, the Yugoslav Delegation considers that in order to facilitate the work of national courts, one should add to said convention an article specifying:
> >
> > 'In the absence of stipulations in the present Convention the analogous provisions of the Bern International Convention of October 23, 1924, concerning the carriage of travelers and baggage by railroad must be secondarily applicable.'
>
> The consequences of this proposal are enormous, because there are so many problems which are envisaged in the Bern Convention and

which are not provided for by our Convention that I think that the subsidiary becomes the principal.

Moreover, there are such divergences between the system of our Convention and the general system of the Bern Convention that one cannot take, as subsidiary, a system which is neither analagous [sic] nor parallel.

This is why I believe that, for the moment at least, we have not yet arrived at a system which is uniform enough to envisage recourse to this subsidiary system.

I want very much to make this declaration, because I believe myself to be one of the people who is the most occupied with air law, and I believe that I am able to say that the interest of air law is to develop freely, not to be oppressed either by maritime law, by terrestrial law, or by the law of railroads.

I implore our colleagues therefore, not to insist on their proposal, because the two ways of thinking are very different.

I would like to ask the Reporter to give us his opinion.

MR. DE VOS, Reporter: The role of Reporter has never been as easy as in this circumstance. First of all, because Mr. Giannini took the floor for him, in a much better way than he would have done; then - and I'm very happy for it - I was able to discuss the Yugoslav proposal with its authors before the meeting, and I came away with the impression that the Yugoslav Delegation, in the presence of this difficulty in applying two different regimes in two matters, does not insist on its proposal.

MR. SIMOVITCH (Yugoslavia): Sirs, despite all the efforts made here by all, in order to give basic principles for decisions of national courts, one cannot provide for all cases, or specify all the details which can arise in the case of carriage.

It's for this reason that the Yugoslav Delegation, with the goal of aiding national courts, made this proposal which would permit them to take the Bern Convention as the basis of their decisions.

The Yugoslav Delegation knows that the application of this rail-road convention presents difficulties, inasmuch as this convention is not signed by some nations (England, USSR), but it makes the suggestion for the purpose of aiding the efforts of the Assembly.

THE PRESIDENT: Does someone ask the floor on this question?

...

I put the Yugoslav proposal to a vote.

(The proposal is rejected.)

Minutes, ***supra*** at **134-35.**

Immediately after the Yugoslav Delegation's proposal was debated and rejected, the Italian Delegation raised a related problem. It pointed out that the draft of the Convention did not purport to regulate carriage on a "friendly" basis, and suggested that it should--since, "if we say nothing it will doubtless always be a more serious system of liability than that of the Convention". *Minutes, supra* at **135.** This proposal was shouted down by the delegates, and the Reporter observed, "We must limit our efforts, and I fear, indeed that we cannot enter on this road". *Minutes, supra* at **136.** Undaunted, the Italian delegate insisted that local law concerning "friendly" carriage was much harsher than the Convention had proposed for commercial carriage, and he proposed that his suggestion should at least be referred to the drafting committee. *Id.* This proposal was adopted, but it apparently died in committee, because it is not mentioned again in the minutes. Thereafter, there was a brief discussion of what law should apply in the "cases of non-execution of the contract of carriage", and there was general agreement that "[i]t's the national law which governs the case". *Minutes, supra* at 172. Neither of these two exchanges satisfied the Yugoslav Delegation's problem, of course, but both of them demonstrate that it was the general understanding that, in areas not regulated by the Convention, local law would govern.

Given this apparent consensus, the Czechoslovakian Delegation proposed an alternative amendment to satisfy the Yugoslav Delegation's concern. The following occurred:

> MR. DE VOS, Reporter: We have an article proposed by the Czechoslovak Delegation as an additional article:
>
> > In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply.
>
> I want to remark that this was provided for: Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable.
>
> I believe therefore, that this provision would be of no use.
>
> MR. GIANNINI (Italy): It was withdrawn.
>
> MR. DE VOS, Reporter: There were two proposals, one from the Czechoslovak Delegation which consisted in applying national law for cases not provided for by the Convention, and then a proposal

> of the Yugoslav Delegation which concerned the application of the Bern Convention for cases not provided for by the Convention.
>
> MR. GIANNINI (Italy): Following a suggestion made by the German Delegation we are going to propose adopting for the [title of the] Convention: "Convention relating to certain rules for the unification of private aeronautical law".
>
> Given that the title indicates the special character of the Convention, the Czechoslovak Delegation no longer insists on its amendment. As to the proposal of applying secondarily the rules of the Bern Convention, it was withdrawn.
>
> THE PRESIDENT: Consequently, the proposals are withdrawn.
>
> MR. DE VOS, Reporter: There is only the wording proposal, concerning the wording of the title.

Minutes, supra at 176.

That the Convention was not an attempt to cover the entire field, but was only an effort to regulate some aspects of international air travel, was thereafter confirmed by the delegates as follows:

> MR. RIPERT (France): In the name of the French Delegation, I have the honor of presenting the following request:
>
> > The conference,
> >
> > Considering that the Warsaw Convention provides only for certain difficulties relating to air carriage and that international air navigation raises many other questions that it would be desirable to provide for by international agreements,
> >
> > Expresses the wish:
> >
> > That, through the offices of the French Government, which has taken the initiative of the convening of these conferences, that there be convened subsequently, new conferences which will pursue this work of unification.
>
> ....
>
> THE PRESIDENT: We are presented with one single proposal: That of the French Delegation. Therefore, I put to a vote the French Delegation's proposal. There is no opposition? . . . The proposal is adopted.

Minutes, supra at 182-83.

When the final draft of the Convention was ultimately read for approval, the draft

title had been amended to include the word "certain". The following then occurred:

> The first question which was presented to us was that of the drafting of the title. We have adopted the title: "Convention for the Unification of Certain Rules Relating to International Carriage by Air".
>
> This suffices to say that this Convention does not provide for the entire matter and gives satisfaction to certain delegations such as the Czechoslovak Delegation, which asked that the word "Certain" be added.

Minutes, supra at ***188.*** It will be remembered that the Czechoslovakian Delegation had accepted this amendment as an appropriate alternative to its proposed amendment--which had made express the notion that the Convention "does not provide for the entire matter", and that local law should govern all issues not expressly regulated by the Convention. This change in the title to accommodate this concern was thereafter adopted by the convention. ***Minutes, supra*** at 189.

We are left, then, with a single word in the title to the Convention--the word "Certain"--which is meant to convey exactly what the decisional law discussed above has uniformly held--that the Warsaw Convention was not intended to preempt the entire field; that it preempts inconsistent local law only in the areas which it expressly covers; and that, in the absence of any provision in the Convention on a given subject, local law should govern the respective rights and obligations of international passengers and airlines. That is a lot to extract from a single word, to be sure; but when the background which generated that single word is considered, there can be no question that that is exactly what it was intended to convey.[22/]

We therefore respectfully submit that both the decisional law and the "legislative history" of the Convention point to only one conclusion here. If the Court should determine that Article **17** of the Convention does not provide a remedy for mental distress alone, the

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22/ None of the "legislative history" quoted to the Court by Eastern even arguably requires a contrary conclusion. The quoted passages say no more than the decisional law says--that there can be no resort to local law in areas ***explicitly*** covered by the Convention. Nothing in those passages supports the notion that local law was intended to be preempted in areas ***not*** covered by the Convention.

non-remedy thus provided does not, as Eastern contends, "affirmatively preclude" resort to available local laws which provide such a remedy. Instead, the Court must conclude that the Convention was meant to regulate only "certain" areas of international air law, not all areas, and that unregulated areas were clearly intended to be governed by local law. Therefore, if the Court should conclude that the plaintiff has stated a valid state law claim for reckless infliction of mental distress, but that the plaintiff has no remedy under the Convention, it should also conclude that the Convention provides no impediment to maintenance of the plaintiff's state law claim.

b. Our second response.

As we alerted the Court at the outset, there is arguably a second way to read Article 17--that its provision for a cause of action for physical injury is meant to "affirmatively preclude" all other remedies provided by local law, such as actions for reckless infliction of mental distress--and this is essentially how Eastern has chosen to read it here. Given the unanimity of the decisional law (and the consistent "legislative history" discussed above), however, it should be clear that this reading of Article 17 is incorrect. Nevertheless, even if Article 17's silence upon the issue of recovery for mental distress alone is meant to embrace the concept nevertheless, and thereby affirmatively ***exclude*** such a recovery otherwise available under local law, the result which we seek here should be the same, but for a different reason.

Article 25 of the Warsaw Convention provides as follows:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

A conclusion that the plaintiff has stated a valid state law claim for reckless infliction of mental distress is necessarily a conclusion that, if proven, Eastern's conduct will be found equivalent to "wilful misconduct". ***See*** the decisions cited at pages **6-7**, ***supra.*** As a result, even if Article 17 can properly be read to "exclude . . . liability" in this case, as Eastern insists, Eastern cannot avail itself of the exclusion, and its liability is therefore "unlimi-

ted". That follows from the plain language of Article 25.23/ It would also appear to follow from the plain language of Article 24, since its "however founded" language clearly contemplates actions "founded" upon local law, subject to the "limits set out in this convention"--and Article 25 expressly waives those "limits" where "wilful misconduct" is proven.

Whether liability thus "unlimited" includes liability for punitive damages is an issue upon which both the Convention and its "legislative history" is silent. Indeed, the Convention makes no mention of the nature of the damages recoverable in ***any*** context, so local law always controls what damages the plaintiff may recover.24/ It therefore stands to reason that, once the "exclusion" of liability which Eastern claims to find in Article 17 is waived by proof of its "wilful misconduct", then the plaintiff is entitled to recover both compensatory and punitive damages under his state law claim for reckless infliction of mental distress.25/

There are no decisions which squarely state this proposition, but that is because (as we have previously demonstrated) Article 17's silence on any given cause of action is not to be read as an "exclusion" of liability. Instead, when Article 17 provides no cause of action to a plaintiff, the plaintiff may resort to remedies provided by local law--and if local law authorizes the recovery of punitive damages for "wilful misconduct", then punitive damages are recoverable if "wilful misconduct" is proven.26/ But if Eastern is correct that Article 17's

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23/ ***See, e. g.,*** *Butler* ***v. Aeromexico,*** 774 F.2d 429 (11th Cir. 1985); *In* ***Re Aircrash in*** *Bali,* ***Indonesia on*** *April* 22, 1974, 684 F.2d 1301 (9th Cir. 1982); ***Compania de*** *Aviacion* ***Faucett S.A. v.*** *Mulford,* 386 So.2d 300 (Fla. 3rd DCA 1980). This is the manner in which the district court initially disposed of Eastern's "exclusivity" argument below. On rehearing, however, the panel revised its opinion and adopted the position we have argued immediately above as "our first response".

24/ ***See, e. g., Harris v.*** *Polskie* ***Linie Lotnicze,*** *820* F.2d 1000 (9th Cir. 1987); *O'Rourke* ***v. Eastern Air Lines, Inc.,*** 730 F.2d 842 (2nd Cir. 1984); ***Mertens v.*** *Flying* ***Tiger Line,*** *Inc.,* 341 F.2d 851 (2nd Cir.), ***cert. denied,*** 382 U.S. 816, 86 S. Ct. 38, 15 L. Ed.2d 64 (1965); Kreindler, ***Aviation Accident Law,*** §1108, pp. 11-94 to 11-95 (1987).

25/ ***See*** *In* ***Re Aircrash in*** *Bali,* ***Indonesia*** *on* ***April 22, 1974, supra,*** note 23 (punitive damages would have been recoverable upon proof of "wilful misconduct" in Warsaw Convention case, except that state law prohibited punitive damages in wrongful death actions).

26/ ***See, e. g., Abramson v. Japan Airlines*** *Co.,* ***Ltd.,*** 739 F.2d 130 (3rd Cir. 1984), ***cert.***

failure to create a cause of action for mental distress alone was necessarily meant to "exclude" liability for such a cause of action, then Article 25 must necessarily be read to allow recovery of both compensatory and punitive damages where local law provides such a remedy, and where "wilful misconduct" is proven, because any other reading would render Article 25 essentially meaningless.27/

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denied, 470 **U.S.** 1059, 105 **S.** Ct. 1776, 84 L. Ed.2d 835 (1985); *Hill* v. ***United Airlines,*** 550 F. Supp. 1048 (D. Kan. 1982). *Cf.* ***Dalton*** v. *Delta Airlines, Inc.,* 570 F.2d 1244 (5th Cir. 1978) (international air shipper could recover compensatory and punitive damages for destruction of five greyhound dogs, where Convention provided causes of action only for damage or delay, and not for destruction, and where notice provisions of Convention were therefore inapplicable).

27/ Eastern collected several cases in the motion for rehearing which it filed below in which it purported to find contrary holdings; those decisions will undoubtedly be reargued here, so we should anticipate them briefly. We suggest simply that an examination of those cases will reveal that they provide no support whatsoever for Eastern's position. The issue in ***Highlands Insurance Co. v. Trinidad & Tobago (BWIA International) Airways*** *Corp.,* 739 F.2d 536 (11th Cir. 1984), was whether proof of "wilful misconduct" could overcome the plaintiff's failure to comply with the "notice" provisions of the Convention. The Court held that proof of "wilful misconduct" under Article 25 would relieve a plaintiff of only those provisions of the Convention which "exclude or limit" the carrier's liability, and not the "notice" provisions of the Convention. Other courts have reached the same conclusion with respect to both the "notice" and "statute of limitations" provisions of the Convention. ***See, e. g., Butler's Shoe Corp. v.*** Pan ***American World Airways, Inc.,*** 514 F.2d **1283** (5th Cir. 1975); ***Stone*** v. ***Mexicana Airlines,*** *Inc.,* 610 F.2d 699 (10th Cir. 1979). These decisions avail Eastern nothing here, for the simple reason that no "notice" or "statute of limitations" provisions are in issue in this case. The plaintiff seeks to recover damages for mental distress, and Eastern has defended by arguing that Article 17 ***excludes liability*** for those damages. If Eastern is correct, then it has relied squarely upon a provision ***excluding liability,*** and Article 25 clearly and emphatically says that proof of "wilful misconduct" will relieve the plaintiff of that provision.

Harplani v. ***Air-India, Inc.,*** 634 F. Supp. 797 (N.D. Ill. 1986), is also fully distinguishable from the instant case. In ***Harplani,*** the plaintiffs sued the carrier for improper "bumping" under both the Convention and local law. At issue was whether ***Article*** 19 of the Convention, which authorizes the recovery of damages for "delay", created a cause of action for "bumping". The district court initially ruled that the Convention provided a cause of action against the carrier for "bumping", and that the existence of this cause of action therefore preempted the available local law remedies. ***Harplani*** v. ***Air India, Inc.,*** 622 F. Supp. 69 (N.D. Ill. 1985). (This conclusion is no longer the law in the Seventh Circuit, in which the ***Harplani*** Court sits, because it was expressly disapproved by the Seventh Circuit in ***Wolgel*** v. ***Mexicana Airlines,*** 821 F.2d 442 (7th Cir.), ***cert. denied,*** ___ U.S. , 108 **S.** Ct. 291, 98 L. Ed.2d 251 (1987).)

It was not until the ***Harplani*** Court ruled that the plaintiffs' ***sole*** cause of action was under Article 19 of the Convention that the carrier sought to have the plaintiffs' claim for punitive damages stricken, and it was only then that the ***Harplani*** Court held that punitive damages were not recoverable ***under the cause of action created by Article 19 of the Convention.*** However, nothing in the Harplani Court's opinion even arguably holds that punitive damages are unavailable in a tort action for personal injury brought under Article 17--or in the reverse-circumstance presently under discussion, where the Convention does

In sum, Eastern's claim of "exclusivity"--that the absence of a cause of action for mental distress in the Warsaw Convention precludes resort to an available state law remedy for reckless infliction of mental distress--is simply wrong. It is wrong for either of two reasons, depending upon how Article 17 of the Convention is read. If Article 17 is read as the federal courts of appeals have *so* far uniformly read it (and as the Convention's "legislative history" would clearly seem to require), then the absence of a cause of action in the Convention creates no inconsistency with state law requiring its preemption in any respect, and the plaintiff may therefore maintain his state law action without limitation. If, on the other hand, as Eastern contends, the Convention was meant to preempt the field entirely and the absence of a cause of action for mental distress was meant to ***exclude*** **liability** for such damages, then proof of the plaintiff's claim for reckless infliction of mental distress will automatically overcome this exclusion of liability, since proof of the tort itself supplies the requisite proof of "wilful misconduct". For either reason, we respectfully submit that, if the Court should conclude that the plaintiff has a state law remedy for Eastern's outrageous tortious conduct, but that the plaintiff has no federal remedy under the Convention, the Court should also conclude (as the district court did) that the Convention does not preempt the plaintiff's state law action in any way.

2. If **plaintiff has both a state law remedy and a federal law remedy, the Warsaw Convention partially preempts his state law claim, and the extent of his recovery will depend upon whether he can prove "wilful misconduct".**

Fortunately, much of what we have previously argued is relevant to the alternative dispositions available to the Court, so our argument on the two remaining possibilities can assume that background, and can be brief as a result. If the Court should conclude that the plaintiff has both a state law remedy and a federal remedy, the Convention will govern to the extent that it is inconsistent with state law, but no further. Eastern will therefore be

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not create a cause of action, and where the available local law remedy provides for the recovery of punitive damages. Neither could the *Harplani* Court have properly reached such a conclusion if the question had been presented to it--since, as we have already demonstrated at length, the federal courts of appeals have held quite to the contrary.

absolutely liable for at least compensatory damages, and the plaintiff will not be required to prove "recklessness" to recover his compensatory damages. And if the plaintiff does not prove "recklessness", then he will be entitled to no punitive damages and Eastern will be entitled to the $75,000.00 per passenger limitation contained in the Convention.

On the other hand, in line with the reasoning previously set forth at length, and since the Convention is silent on the issue of punitive damages, a recovery of punitive damages under state law will not be inconsistent with anything in the Convention. Therefore, if the plaintiff proves "recklessness", he should be entitled to recover both compensatory and punitive damages. And since proof of "recklessness" will necessarily amount to proof of "wilful misconduct", Eastern will be unable to avail itself of the $75,000.00 per passenger limitation contained in the Convention. In the present procedural posture of this case, of course, the plaintiff's allegations of "recklessness" must be accepted as true, so the bottom line is that, on the pleadings at least, the Convention does not preempt the plaintiff's state law claim. The partial preemption discussed in the first paragraph of this subsection will arise only if the plaintiff fails to prove his allegations of "recklessness" to the satisfaction of the finder-of-fact.

> **3.** If the plaintiff has a federal law remedy but no state law remedy, the extent of his recovery will depend upon whether he can prove "wilful misconduct".

If the Court should conclude that the plaintiff has a federal cause of action for mental distress under Article 17 of the Convention, but that he has stated no cognizable claim under state law for reckless infliction of mental distress, then Eastern will at least be absolutely liable for the plaintiff's compensatory damages under the Convention. Whether Eastern can also be found liable for punitive damages will depend upon the reason why the state law claim was found invalid. If the Court concludes, for example, that the allegations of the plaintiff's complaint do not rise to the level of "recklessness" sufficient to support a state law claim, it will necessarily have concluded that the plaintiff cannot make the requisite showing of "wilful misconduct" required to overcome the limitations of liability con-

tained in the Convention. In that circumstance, punitive damages will be unavailable and Eastern will be entitled to the $75,000.00 per passenger limitation contained in the Convention.

If, on the other hand, the Court should conclude that Eastern's alleged conduct amounts to "recklessness" (and therefore "wilful misconduct"), but that Eastern's conduct was not sufficiently "outrageous" to support a state law cause of action for reckless infliction of mental distress, a different result would seem to be required. In line with the reasoning previously set forth at length, and since the Convention is silent on the question of punitive damages, we think that once the tortious conduct has become actionable under the Convention, punitive damages will be available under general principles of state tort law if "wilful misconduct" is proven. And, of course, in that circumstance Eastern would not be entitled to the $75,000.00 per passenger limitation contained in the Convention. Once again, however, we caution that the issue is before the Court only on the pleadings, and that the extent of the preemption effected by the Convention will depend upon the findings of fact ultimately made on remand.

V.
CONCLUSION

It is respectfully submitted that the district court's conclusion that the plaintiff's amended complaint states a cause of action under state law for reckless infliction of mental distress should be approved--and, if the district court correctly held that the complaint did not state a cause of action under the Warsaw Convention, its additional conclusion that the Convention did not preempt the plaintiff's state law claim should also be approved. However, it is additionally submitted that the district court erred in concluding that the plaintiff's amended complaint did not state a cause of action under the Warsaw Convention; that aspect of the decision should be quashed, and the cause remanded for reversal of the trial court's judgment in Eastern's favor on that ground. If the latter aspect of the district court's decision is to be quashed, the Court should hold that the plaintiff's state law claims are not preempted, for the reasons set forth in the preceding argument.

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of April, 1989, to: Terry L. Redford, Esquire, Thornton, David & Murray, P.A., 2950 S.W. 27th Avenue, Suite 100, Miami, Fla. 33133, Attorneys for Petitioner, Eastern Airlines, Inc.; and to Edward T. O'Donnell, Esquire, Mershon, Sawyer, Johnston, Dunwody & Cole, Southeast Financial Center, Suite 4500, 200 South Biscayne Blvd., Miami, Fla. 33131-2387, Attorneys for Amicus Curiae Product Liability Advisory Council.

Respectfully submitted,

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