CIVIL LIABILITY IN AIR TRANSPORTATION UNDER BRAZILIAN LAW

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I. INTRODUCTION

This Article focuses upon Brazilian case law applying Article 25[1] of the Warsaw Convention[2] and a corresponding provision in Brazilian legislation. The Warsaw Convention, which was drafted by CITEJA (International Technical Committee of Specialists in Air Law), imposed strict liability on air carriers for accidents. As a counterweight, the Convention limited the carriers' civil liability. In doing so, the drafters of the convention sought to strike an appropriate balance between two competing policies. One was the need to protect the airline passenger, whose weaker bargaining power and difficulty in proving the cause of an accident or the fault of the carrier made it very difficult to obtain compensation for airline accidents. The other was the need to promote an infant industry by placing a ceiling on compensation for accidents, thereby facilitating the organization of airlines and making investments more attractive. The Convention thus tried to achieve a balance between the interests of the user and the carrier.

The limitation on liability of airlines for air accidents is subject to an exception, contained in Article 25, for air accidents resulting from *dolus* of the carrier or its servants and agents. Although one of the purposes of the Warsaw

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[1] Article 25 of the Warsaw Convention states:

(1) 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 fault 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*.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature*, Oct. 12, 1929, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. Promulgated in Brazil by Decree No. 20.704 of Jan. 24, 1931. Brazil has also approved the Hague Protocol of 1955 amending the Warsaw Convention (Decree No. 56.463 of June 15, 1965); the Convention for the Unification of Certain Rules Relating to International Air Transportation Carried Out by Persons Other than the Contract Carrier, Guadalajara 1961 (Brazilian Decree No. 60.967 of July 7, 1967); Additional Protocols 1, 2, 3 and 4, signed in Montreal, 1975, (Legislative Decree No. 22, of May 28, 1979 and ratified July 27, 1979). Brazil never approved the Guatemala Protocol of March 8, 1971.

Convention was to create uniformity with respect to the liability of air carriers, Article 25 has had precisely the opposite result. This is because the signatory countries have interpreted Article 25 in diverse ways. Common law countries have tended to interpret Article 25 differently from civil law countries, in part because the original text in French referred to *"dol"* while the English translation referred to *"wilful misconduct."*[3] Another factor contributing to divergent interpretations of this Article was that the Convention left definition of the concept of *dolus* to local law. This has led to the signatory countries using the term in several ways, contrary to the desires of the drafters.

By 1938, an effort to improve the Convention's wording, based upon the experience of these first years of its use, was under way. CITEJA undertook the task of drafting the necessary changes.[4] Not until the Hague Protocol [5] of 1955, however, was there an effort to resolve the question by defining the concept of *dolus* as "an act or omission of the carrier or its servants and agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result."[6] This Protocol was adopted by Brazil, and by the majority of European countries, but it was rejected by the United States.[7]

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[3] During the conference, in Warsaw, when the draft was being discussed, Sir Alfred Dennis made it clear that there was no equivalent term in Anglo-Saxon law for the civil law concept of "dolus".

For, as Sir Alfred Dennis told the Warsaw Conference when they discussed the draft of what was to become Article 25, there is no equivalent in the common law for the civilian concept of *"dolus"*. Wilful misconduct differs from *dolus* because it does not require an "intention to cause damage" and, on the other hand, implies an element of wantonness or recklessness which may be, and is indeed often, absent in the case of *dolus*. Wilful misconduct appears therefore to be halfway between the civil law concept of *dolus* and "gross negligence", the latter being distinct from *dolus* by the absence of intention. Mankiewicz, "The Judicial Diversification of Uniform Private International Law" 21 *Int'l & Comp. L. Q.* 718, 737 (1972).

[4] José Ribamar Machado, "Transporte aéreo, revisão da Convenção de Varsóvia," 124 *Rev. Forense* 301-3 (1949).

[5] Promulgated by Decree No. 56.483 of June 15, 1965.

[6] Lowenfeld & Mendelsohn, "The United States and the Warsaw Convention," 80 *Harv. L. Rev.* 497, 505 (1967).

[7] In the United States, accidents ocurring under a domestic contract of carriage are governed by substantive rules that vary from state to state. Nevertheless, no state statute limits the carrier's liability. Therefore, compensation for the same accident may be decided differently. Those governed by the Warsaw Convention will have receive limited compensation, and those governed by state law may have very high awards. It is understandable why American courts, faced with a case where the Convention applies, have tended to expand liability limits through interpretation of Article 25. In *Froman v. Pan American Airways*, 15 Avi. 17,568; 414 N.Y.S.2d 528 (N.Y. Supp.), wilful misconduct was defined as an act of the carrier or its employee which was intentionally done and where the actor intended the result that came about or did the act with knowledge of what the probable consequences would be. *See also Reiner v. Alitalia Airlines*, 9 Avi. 18,228; 155 N.Y.L.J. 118-9 (N.Y. Supp. 1966) . . . The determination of wilful misconduct does not require a single act of horror but may be based upon the cumulative effect of numerous departures from required standards on the part of the defendant or any of its officers, agents or employees providing sufficient evidence for jury to find wilful misconduct. Thus, at least once the concept was correctly interpreted according to the French version of the Convention. However, since Article 25 provides that wilful misconduct be defined according to the law of the forum, one would not expect that the definition would be uniform throughout the United States. In *Goep v. American Overseas Airlines, Inc.*, 281 App. Div. 105, 117 N.Y.S.2d 276 (1st Dep't. 1952), *aff'd* 305 N.Y. 830, 114 N.E.2d

II. EARLIER BRAZILIAN AIR REGULATIONS

The first Brazilian regulation of carriage by air was approved by a 1925 decree[8], which incorporated the principles agreed to in the Paris Convention of 1919.[9] This Convention contained rules on carriage by air that recognized the complete and exclusive sovereignty of a State over the air space above its land and territorial waters.[10] In the area of civil liability, this early decree prescribed application of provisions of the Brazilian Civil Code to cases of damage caused by aircraft.

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37 (1953), *cert. denied* 346 U.S. 874 (1953), the New York Appellate Division ruled that wilful misconduct is a question of fact to be found in each particular case by the jury. Later, in *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949), the U.S. Court of Appeals for the District of Columbia approved the trial court's definition of wilful misconduct by the carrier or its employees as an act wilfully performed "with the knowledge that the performance of that the act was performed likely to result in injury to a passenger, or performed that act with reckless and wanton disregard of its probable consequences." 186 F.2d at 533. Violation of a safety regulation, if intentional and directly causing the injuries or damages, was therefore considered to be wilful misconduct.

In *Grey v. American Airlines*, 227 F.2d 282 (2d. Cir. 1955); *cert. denied* 350 U.S. 989 (1956), the U.S. Court of Appeals for the Second Circuit followed the definition approved in *American Airlines v. Ulen*, holding that wilful misconduct was not to be found in action taken by a pilot when the plane was in danger. *See also* Pekelis v. TWA, 187 F.2d 122 (2nd Cir. 1951); *Goepp v. American Overseas Airlines*, 281 App. Div. 105 (1952), *aff'd*, N.Y. 830 *cert. denied* 346 U.S. 474, where there is no wilful misconduct due to the fact that pilot failed to make two qualifications flights.

In cases involving questionable circumstances on the issue of wilful misconduct, plaintiffs have been able to recover damages unlimited by Article 25 of the Warsaw Convention. See, e.g., *LeRoy v. Sabena*, 344 F.2d 266 (2d. Cir.), where plaintiff claimed as wilful misconduct the fact that Sabena's pilot deliberately misled the Rome controller as to his position. This same accident was dealt differently by French and American courts. *See also* Koninklijke Luchtraart Maatschappik v. KLM, 292 F.2d 775 (D.C. Cir.); *cert. denied* 3886 U.S. 921 (1961); *Berner v. United Airlines*, S.D.N.Y. Civ. 142/201 (wilful misconduct as a matter of law in trial court) at Appeal 346 F.2d 532 (2d. Cir. N.Y. 1965) (The issue of wilful misconduct was considered to be for the jury and not for the judge to decide. However, prior jury verdict in favor of defendants was reinstated.) Subsequent cases continued to treat the wilful misconduct issue as a question of fact to be decided by the jury (*See In re Pago Pago Air Crash* 14 Avi, 17, 598; 419 F. Supp. 1158 (D.C. Cal. 1976)). However, most of the more recent cases involving the wilful misconduct issue concern actions based on goods or baggage claims (*See Compañia de Aviacion Faucett Sa v. Mulford*, 15 Avi 18,358; 50 2d (Fla. App. 1980); *International Mining Corp. v. Aerovias Nacionales de Colombia* 14 Avi 17,707; 393 N.Y.S.2d 405 (1977); Olshin v. El Al 15 Avi 17,463; *Dansiger v. Air France* (Fi. 16 Avi 17,261; F. Supp. (S.D.N.Y. 1979)); *Bank of Nova Scotia v. Pan Am*, 15 Avi 17,378, F. Supp. S.D.N.Y. 1981; *Kupferman v. Pakistan International Airlines* 16 Avi 17,443). The reason for this is that the burden of proof is on plaintiffs and because of the difficulty of proving allegations of wilful misconduct against carriers or their employees.

Finally, the detrimental aspects of this lenient approach should not be ignored. Judges in the United States use a less stringent standard for wilful misconduct than do judges of other member nations of the Treaty. This has prevented uniformity in litigation, and it tends to defeat one of the treaty's main purposes: limiting the carrier's liability.

[8] Decree No. 16.893 of July 22, 1925, adopted under authorization conferred by Budgetary Law No. 4.911 of February 12, 1925.

[9] J.C. Sampaio de Lacerda, 2 *Curso de Direito de Navegação — Direito Aeronáutico* (Freitas Bastos, 2d ed. 1970).

[10] Oscar Tenório, 2 Direito Internacional Privado 297 (Freitas Bastos, 9th ed. 1970).

In 1938, when the first Brazilian Air Code[11] was adopted, the 1925 Decree was revoked. The Air Code created the first specialized rules of civil liability for air accidents. This Code resulted from a draft bill drawn up by the 8th Legislative Subcommittee established in 1930, composed of Carlos da Silva Costa, Almáquio Diniz and Deodato Maia. The draft was revised by the Brazilian section of CITEJA[12] and used the norms of the Warsaw Convention as a model for the domestic rules of civil liability, incorporating limits and their exceptions in exactly the same terms as Article 25.

Changes in the concept of civil liability in Brazilian doctrine has been dealt with by a number of authors. According to Aguiar Dias,[13] redress of damages was inspired, above all, by concern for harmony and equilibrium that guides the law and is its moving spirit. In an article on recovery of damages in air law written in 1946, Aguiar Dias questioned whether liability is contractual or extra-contractual. His response was that liability was contractual, but that this position was only accepted by the carriers as seen in the fact that from then on they fought for a limitation on the amount of indemnification.[14] Fixing this limit in domestic Brazilian legislation was a direct consequence of the Warsaw Convention. In return, Brazilian law instituted a presumption of fault, permitting the passenger to make out a *prima facie* case merely by proving that the accident occurred.

As early as the Criminal Code of 1830, the penal concept of "satisfaction" has governed the principal rules for the idea of indemnification in Brazilian legislation. Later, Teixeira de Freitas, in a note to Article 799 of his *Consolidação das Leis Civis* (Consolidation of Civil Law), commented that when it revoked the Criminal Code, the Law of December 3, 1841, shifted the satisfaction of injury caused by a tort into the area of civil law.[15] He further developed this theory in his commentary on the *Nova Consolidação de Carlos de Carvalho* (New Consolidation by Carlos de Carvalho), basing civil liability upon the concept of fault, and citing examples of liability for other cases, such as liability for the collapse of buildings and works.

Those ideas and those emanating from the French Civil Code influenced Article 159 of the Brazilian Civil Code,[16] which enshrined fault as the general rule for tort liability.

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[11] Decree-Law No. 483 of June 8, 1938.

[12] The revising committee had the following members: Professor Haroldo Valladão and Filadelfo Azevedo, diplomats Trajano de Medeiros do Paço and Otavio Nascimento Brito, Appellate Judge André Faria Pereira, Judges E. Ribas Carneiro and A. Sabóia Lima, and attorneys Carlos de S. Costa, Cláudio Ganns and A. Martinho Doria and the technical consultant of the Committee, Dr. Caubi Araujo. See Sampaio de Lacerda, *supra* note 9 at 21.

[13] *Da Responsabilidade Civil* 25 (3d ed. Forense 1954).

[14] Aguiar Dias, "Da reparação dos danos no direito aéreo," in 5 *Arquivos do Min. da Justiça* 28-39 (No. 18, June 1946).

[15] Caio Mário da Silva Pereira, *Responsabilidade Civil, de acordo com a Constituição de 1988*, 11 (Forense 1990).

[16] Law No. 3.701, January 1, 1916.

> Whoever, by voluntary act or omission, negligence or imprudence, violates the rights of or causes harm to another, is obliged to redress the damage. The verification of fault and the fixing of the amount of liability shall obey the provisions of Arts. 1.518 to 1.532, and 1.537 to 1.553 of this Code.

The concept of fault can be summed up in Von Ihering's formula:

"Without fault, no indemnification."[17] This concept, established by the Napoleonic Code, was concerned with the problems of liability under the dual aspect of nonperformance of contracts and of obligations not arising from agreements, *i.e.* torts and quasi-torts.

In the classical theory of fault, one had to show a causal connection between the injury and the conduct of the person that provoked it.[18] The theory of strict liability, or the doctrine of abnormally dangerous activities, has been explained by Alvino Lima in the following terms:[19]

> It was impossible to resolve countless cases that modern civilization created or aggravated; it became absolutely necessary, for the solution of the problem of extra-contractual liability, to move away from the moral aspect, from psychological research into the state of mind of the agent, or from the possibility of foreseeability or due care, and to focus upon the problem from a standpoint not yet adequately considered, that is, from only the point of view of redress, and not the internal or subjective point of view, as in the imposition of a penalty. The problems of liability are solely those of redress of damages. The damages and their compensation should not be determined by the measure of blame, but should emerge from the causative fact of injury to a legal interest, so as to remain untainted by the competing interests, whose imbalance is evident, if we remain within the strict limits of subjective liability.

Thus the idea of fault is shunted aside and replaced with the principle of strict liability.[20] Liability stems solely and exclusively from the event, because there is a paramount necessity to protect the victim, assuring him compensation for the damage he has suffered.

Brazilian legislation has contemplated certain cases in which liability was based upon the theory of strict liability. Previously, such cases were entirely determined by statute, such as work accident cases. Within the ambit of uniform international law, the Warsaw Convention opted for strict liability of the carrier, a path followed in the 1938 Brazilian Air Code.

Later on, the Brazilian Society for Air and Space Law submitted to the government a draft of a new Brazilian Air Code. After incorporation of changes

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[17] Schuldmoment , p. 50, cited in Aguiar Dias, *supra* note 13, at 44.

[18] Eurialo de Lemos Sobral, "Alguns aspectos da responsabilidade civil no direito aeronáutico," 138 *Rev. Forense* 343-362 (1951).

[19] Cited in Aguiar Dias, *supra* note 13, at 53.

[20] Aguiar Dias, *supra* note 13, at 73.

suggested by governmental agencies, this new Air Code was adopted in 1966,[21] remaining in force until 1987, when it was replaced by a new Code of Aeronautical Law.[22]

The 1966 Air Code retained the wording of the 1938 Code, which was equivalent to Article 25 of the Warsaw Convention. Thus Article 106 of the 1966 Air Code provided: "When damage results from the *dolus* of the carrier or its servants or agents, those Articles of this Code that exclude or limit liability shall not apply." The Brazilian lawmakers synthesized the content of the two subparagraphs of Article 25 of the Convention, but evaded the question of whether fault was equivalent to *dolus*, so as to impose unlimited liability upon the air carrier.[23] Inexplicably (in our opinion) the Brazilian legislators did not incorporate into domestic cases the definition given to the concept of *dolus* by the Hague Protocol, which has been in effect in Brazil since 1965, but rather continued to follow the Convention before its amendment. It should be emphasized that, in Decree-Law 32 of 1966, this Article spoke of "non-specific *dolus*" (*dolo eventual*), but in Decree-Law No. 234 of 1967, it mentioned only *dolus*.

Sampaio Lacerda[24] noted that the Hague Protocol had modified Article 25 of the Warsaw Convention by including a definition of *dolus* that was not universally accepted, and by equating gross fault (*culpa grave*) with *dolus*, leaving the interpretation of this equivalence to the appropriate courts.

In other areas, Brazilian doctrine had equated the concept of gross fault with that of *dolus*, and case law had been doing the same. For example, workmen's compensation statutes imposed a ceiling on the amount of compensation to be paid by the employer, while relieving the victim of the burden of proving the latter's fault. Case law later held that this compensation did not exclude that available under ordinary tort law in the case of gross fault or *dolus* of the employer. In such cases, another cause of action could be brought under Article 159 of the Civil Code.[25]

Thus, under the terms of Article 106 of the Brazilian Air Code, an exception to the limit upon liability in domestic flights was almost impossible. In order to claim *dolus* (i.e., an intentional act), in an accident where a passenger died, the carrier, or his agent, would have to have desired his own death as well.

In France, on the other hand, even before the Hague Protocol of 1955, the courts, realizing that Article 25 of the Convention in its traditional form would apply only in cases of suicide, began to interpret *dolus* as the equivalent of

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[21] Decree-Law No. 32 of Nov. 18, 1966. This Code was amended in part by Law No. 234 of Feb. 28, 1967.

[22] Law No. 7.565 of 1986.

[23] Octanny Silveira da Motta, "O dolo do transportador aéreo face à Lei Internacional e ao Código Brasileiro do Ar", 356 *Rev. dos Tribunais* 46-57 (1965).

[24] *Supra* note 8, at 125.

[25] *Súmula* No. 299 do Supremo Tribunal Federal, in 1 *Jurisprudência Brasileira — Responsabilidade Civil* 2d ed., 3d tiragem, Ed. Juruá, 1987, at 59.

inexcusable fault. Later, the French Legislature adopted this understanding in Articles 321-4 of the Code of Civil and Commercial Aviation.[26]

In order to determine the necessary degree of awareness of the likelihood of damage, the French *Cour de Cassation* developed its own method. In the *Diop* case, the Court held that *awareness* meant a presumption that in certain situations it was impossible for a pilot not to have known the risk he was taking, or that damage would probably result.[27]

In Brazil, the doctrine had already anticipated the equating of gross fault to *dolus*. For Aguiar Dias, *dolus* was a conscious violation of a pre-existing duty, a violation of a rule with awareness of the result; fault is the violation of that duty without being aware of causing harm.[28] According to Silva Pereira,[29] Brazilian law did not concern itself with distinguishing between slight fault, fault or gross fault and *dolus*. The sense of fault carried with it a broad definition, including all behavior contrary to law, whether or not intentional, that was nevertheless imputable, for any reason, to the one causing the damage.

Today, the concept of *dolus* in civil law is much broader than in the past, and it can be characterized even without inquiry into whether the agent intended to cause the harm. It is sufficient to show that he proceeded with knowledge that his behavior could be injurious.[30] In gross fault, the one who has caused the damage, although he may not have wished it, has behaved as if he had so done, giving rise to the adage "*culpa lata dolo aequiparatur*". Yet Brazilian courts have strongly resisted applying this doctrine to air transport cases. Only in very recent opinions has the issue been discussed, and the decisions go both ways as far as equating fault and *dolus* are concerned.

The first case in which the issue of *dolus* was discussed by the Federal Supreme Court was Extraordinary Appeal 16.600.[31] Justice Orozimbo Nonato, the Reporter, was of the opinion that the pilot had acted with *dolus*. Even though he was warned by the control tower to move out of the flight path of the VASP airliner engaged in shuttle service, the pilot did not obey the order. As a result, he collided with the other airplane and died in the accident. The pilot violated an indisputable rule, giving ample proof of his failure to pay attention, his

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[26] In the application of Art. 25 of this Convention, inexcusable fault shall be deemed the equivalent of *dolus*. Deliberate fault is inexcusable when it involves knowledge of the risk of injury and the reckless acceptance thereof without justification. *Code de l'aviation civile*, Law 321-4, under C.Comm. art 102, cited in Browining, " Warsaw from the French Perspective: A Comparative Study of Liability Limits under the Warsaw Convention," 11 *Vand. J. Transnat'l. L.* 117, 124 n.55 (1978).

[27] Judgment of June 24, 1968, Cass. Civ., 1re., France Récueil Dalloz-Sirey, Jurisprudence 569, cited in Browning, *id.*, at 127. *Awareness* meant a presumption that the facts of the situation made it impossible for a pilot *not* to have been aware of certain risks, as well as the *mere probability* of damage.

[28] *Supra* note 13, at 261.

[29] Caio Mário da Silva Pereira, 1 *Instituições de Direito Civil* No. 114 (Forense 19).

[30] Caio Mário da Silva Pereira, *Responsabilidade Civil* No. 54 (Forense 1990).

[31] R.E. 16.600 (1966) in Eurico Paulo Valle, *Comentários ao Código Brasileiro do Ar* 156 *et seq.* (Forense 1973).

unprofessional irresponsibility, and his carelessness — in sum, his unlawful act. Hence, the court concluded that his conduct amounted to *dolus*, and awarded compensation beyond the statutory limits.[32]

In Civil Appeal 10.672, the Federal Court of Appeals,[33] in an opinion written by Judge Candido Lobo, the Reporter, decided against equating gross fault to *dolus*. This case was an action based on the death of a passenger, where the pilot, after receiving instructions from the tower to land at another airport or await further instructions, decided to attempt a landing. He failed and crashed into Morro dos Cabritos (Billygoat Hill) because of the thick fog. The Reporter held there was no *dolus*, nor even fault, because it was impossible to determine the factors that had caused the accident. Moreover, he took the position that, under the system adopted by the Brazilian Air Code fault, even if gross, is not to be equated with *dolus*. In his opinion, the Roman law principle *culpa grave dolo aequiparatur* had no place in Brazilian law unless expressly determined by statute.

Ministro M. Ribeiro, the Revisor, although concluding there was gross fault but not *dolus*, concurred with the Reporter in the result, because he also felt that equating the two was contrary to the law.

Brazilian appellate courts have considered the equivalence of the concept of gross fault and *dolus*, but the decisions have not been uniform. In some cases the opinion has been that this equivalence could be inferred by legal interpretation, while others, although recognizing the doctrine, have held that the law does not support such equation.

In a decision dealing with compensation for the loss of cargo, the Tribunal of Justice of the Federal District held that, for effects of compensation in air transport cases, gross fault was equivalent to *dolus*, and the limits of the Warsaw Convention should not be applied because an Article 25 case was involved.[34] Judge Irineu Joffily, the Reporter, stated that in theory Brazilian case law had always recognized the equivalence of gross fault and *dolus*, whenever a reckless act or omission was found. Judge L.V. Cernicchiaro, the Revisor, analyzed all aspects of the question in his opinion. He stated that civil *dolus* could not be equated with criminal *dolus*, which was the intent to cause harm. Fault, in turn, was the careless or negligent action causing injury. The equating of the two under Roman law sought to place both in the same legal sphere, so as to produce the same effect for both forms of conduct whenever the recklessness was such that it was as if the result had been desired by the actor.

In Civil Appeal 80.536, the Federal Court of Appeals[35] stated that *dolus* as used in Article 106 of the Air Code should be considered in its generic sense. Thus reparation of the injury, where non-specific *dolus* is found, must be governed by the norms of the Civil Code, as an exception to the compensation limited by the

[32] *Id.*, at 161.

[33] *Id.*, at 163.

[34] Civil Appeal 8.701, published in 282 Rev. Forense 310-2 (1982).

[35] Decision of Oct. 15, 1985, published in the Federal Diário Oficial of May 22, 1986.

tariff.[36] The First Civil Appellate Court of São Paulo,[37] in an opinion by Judge Renan Lotufo, gave a clear explanation of the impropriety of the concept of *dolus*, however without permitting *dolus* to be equated with gross fault, when he stated:

> The acceptance of the equivalence of gross fault with non- specific *dolus*, in the decision under appeal, does not have the same support as the remaining points ... In the specific case, moreover, the gross fault of the aircraft manufacturer appears to me to have been proved ... For these reasons I grant the appeal, since the specific statute only permits complete compensation in the case of *dolus*... One may strive to reform the law, but one cannot ignore it or deny its effect.

That same court,[38] in an opinion by Judge and Reporter Roberto Stucchi, again discussed the question of whether gross fault of the defendant could be equated with *dolus*. Even though it concluded that the two where not the same, throughout its arguments the Court issued opinion that reflected dissatisfaction with the existing legal rule, regretting that the law did not permit the unrestricted compensation that would have been awarded for an unlawful act. The Reporter stated:

> Nevertheless, no interpretation can go against the *mens legis*. The Brazilian Air Code has in fact maintained the principle of limitation of liability, which is innapplicable only in case of *dolus*. Where the legislator has thus provided, whether justly or unjustly, precluding any possibility of full liability in cases of non-specific *dolus*,... There is no way, using interpretation of how the law should be applied, to avoid the necessity of obeying the statutory command. Bolstering this accepted interpretation, Senator Itamar Franco submitted, Bill 111 to the Senate, on June 4, 1982 amending Article 106 of Decree-Law 32/66 by adding *dolus* or *gross fault*.

Subsequently, a few months before the new statute took effect, that same Court, with Judge Luiz de Azevedo acting as Reporter, decided a similar case in the opposite manner by permitting a separate unrestricted tort cause of action. The Court, citing the Warsaw Convention for equating gross fault and nonspecific *dolus*, stated its position in the headnote:

> The fact of having paid the amount of compensation fixed by the tariff does not affect the claim for compensation based upon another cause of action. That case deals with an amount paid by virtue of a contractual obligation; here we are discussing an unlawful act and civil liability resulting from it, as well as the corresponding redress for the damage caused. Article 106 of

[36] In RE No. 95.547, 107 RTJ 1085-97 (STF 1983), Justice Soares Munoz, the Reporter, in a Supreme Court decision involving a ship accident, pointed out the following appellate decisions that refused to limit damage recoveries: (1) Civil Appeal No. 25.525/6B, Rep. Judge Moacyr Catunda (D.J. of Mar. 20, 1970); (2) Civil Appeal No. 18.986/GB, Rep. Judge Esdras Gueiros (D.J. of Apr. 24, 1968); (3) Civil Appeal No. 24.843/GB, Rep. Judge José Nair da Silveira (D.J. of Oct. 16, 1972); and (4) *Ex officio* Appeal No. 106/AM, Rep. Judge Jarbas Nobre (D.J., Aug. 4, 1977).

[37] Civil Appeal 301.584, First Civil Appellate Court of São Paulo, published in 82 RTAC/SP 128-143 (1983).

[38] Civil Appeal 307.299, 7th Civil Chamber, decision Nov. 3, 1983, published 580 R.T. 139-143.

> Decree-Law 32/66, by referring to the *dolus of the carrier or its servants and agents*, does not exclude the possibility of non-specific *dolus*, to which gross fault may be equated. This is because, by withdrawing the qualifying adjective, the expression of the concept of *dolus* was broadened and therefore embraces all of its modalities, as well as those which are deemed its equivalent.[39]

The lengthy and carefully written opinion contains an analysis of the history of the Warsaw Convention and, in particular, of the question of *dolus versus culpa*. Not only does it cite doctrine from other countries, but it also refers to the draft law and to Brazilian doctrine that equates gross fault to *dolus*, including other areas, such as industrial health and safety legislation. The opinion emphasizes safeguards the well- being of victims, whether they are affected by conduct that directly intends to injure, or by an action that lacks that degree of care expected of someone who has a duty to be diligent. As reflected by the opinion, this is the position adopted by international conventions on civil liability resulting from air accidents Conventions to which Brazil has adhered. Finally, it mentions the duties of a judge to society when deciding cases of civil liability. In such cases, one must take effective measures to protect society against acts that may leave it defenseless or unprotected; judges cannot help being principally concerned with the compensation to which the victim is entitled.[40]

At the same time, Brazilian Legislature has begun to sense a need to change the law in this area. Senate Bill 111 of 1982, sponsored by Sen. Itamar Franco,[41] proposed to change Article 106 of the Brazilian Air Code to read:

> Art. 106. Whenever the injury results from *dolus* or *gross fault* of the carrier or its servants or agents, such provisions of this Code that exclude, reduce or limit liability shall not apply.

The statement of justification of the Bill includes a history of the limitation of liability, recalling the earliest days of commercial aviation and its risks that gave rise to limiting carrier liability. Now that technological advances have greatly increased safety within the commercial airline industry, the limitation is no longer necessary. Today, gross fault should have the equivalent effect of *dolus*, that is, it should override any limitations.[42]

In 1982, a Committee was formed (with José da Silva Pacheco as chairman) to draw up a proposed revision of the Brazilian Air Code.[43] This Committee prepared a Preliminary Draft of a Air Code, which was submitted to Congress and

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[39] Civil Appeal No. 356.909, decision of Sept. 16, 1986, 7th Chamber of First Civil Appellate Court of São Paulo, 134 *Jurisprudência Brasileira* 165-75.

[40] *Id.*

[41] Projeto de Lei, published in the Diário do Congresso Nacional, Sec. II, on June 5, 1982, at 2005.

[42] *Id.*

[43] Portaria No. 165/COJAER of Feb. 12, 1982, published in the Diário Oficial of Feb. 16, 1982. See generally Octanny Silveira da Motta, "As disposições Gerais do Código Brasileiro de Aeronáutica. Visão Crítica," 42 *Revista de Direito Civil Mobiliário, Agrário e Empresarial* 95-99 (1987).

enacted as the new Brazilian Aeronautical Code.[44] Even though Senate Bill 111 did not become law, its influence could be seen in Article 248 of the new Code, which provides:

> Art. 248. The limits on compensation as provided in this Chapter shall not be applied if one proves that the injury resulted from *dolus* or *gross fault* of the carrier or its servants and agents.

Curiously, Chairman Pacheco, referring to civil liability in an article on the Draft, failed to clarify the addition of the concept of gross fault equated to *dolus*. He mentioned only that the burden of proof of the fault or *dolus* would fall on the injured party or his successors.[45]

The Tribunal of Justice of the State of Mato Grosso do Sul recently decided a suit for damages for wrongful death in an air accident. The headnote reveals the effects of adopting the new Aeronautical Code:

> In a fatal air accident, once the gross fault of the aircraft commander of the aircraft, a servant of the carrier, has been proven, the latter must make good the damages, even if the family members of the victim have received the mandatory insurance payment. If the person causing the accident has acted with *dolus* or gross fault, compensation must be greater than that fixed by the tariff, with damages being determined under ordinary tort law. Law 7.565, in its Article 248, orders the limits on compensation to be disregarded if it is shown that the injury resulted from *dolus* or gross fault of the carrier or its servants and agents.[46]

The opinion of the Reporter analyzed Article 248 of the new legal text and concluded that its modification in relation to previous law sanctioned, by analogy, the Supreme Court doctrine enunciated in *Stimula* No. 229. This case law rule provided that in a cause of action for damages in a work accident, the statutory compensation did not exclude amounts due under ordinary tort law if there was *dolus* or gross fault by the employer. The Reporter's opinion further stated that, in the particular case under appeal, gross fault of the appellant's servant (the aircraft commander) had been proven by his attempt to land at an airport when it was completely closed to all operations because of fog. Thus, compensation due by reason of the accident could not be subjected to the statutory limit.

CONCLUSION

Given this change in the law, the question of excluding any limitation upon liability in air transportation cases will be handled in a different fashion by Brazilian courts. This change will doubtlessly affect the interpretation given by our courts to Article 25 of the Warsaw Convention. We believe that the concept of

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[44] Law No. 7.565 of Dec. 19, 1986.

[45] "Considerações sobre o Projeto de novo código Brasileiro do Ar de 1984," 298 *Rev. Forense* 433-43.

[46] Civil Appeal 541/87, Judge Rômulo Letteriello, the Reporter, decided Sept. 2, 1987, published in 134 *Jurisprudência Brasileira* 64-9.

dolus will eventually be interpreted identically, whether domestic law or the Convention is applied. Thus the legal equivalence of the concepts of *dolus* and gross fault, established by the Hague Protocol as far back as 1955, will finally be applied by Brazilian courts.

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