MJ Hood & Associates
ATTORNEYS

KTM vs Homman

Flynote: Sleutelwoorde

Aviation - Carriage of goods - Claim for damages for loss of goods carried - Limitation of carrier's liability - Registered luggage - Warsaw Convention as ratified and confirmed in South Africa by s 3 of Carriage by Air Act 17 of 1946 - Exception to limitation of liability of carrier in terms of art *22(2)(a)* of Convention - Exception operating if passenger or consignor made 'special declaration of interest in delivery at destination' and paid supplementary sum 'if the case so requires' - Declaration must clearly inform carrier of risk of increased liability -Declaration that value of goods 'at least x' sufficient - Value of 'interest in delivery at destination' meaning monetary value of receiving delivery at agreed destination - Carrier should not be allowed to relieve itself from liability by choosing never to incur liability for 'declared sum' - If additional sum not demanded by carrier, carrier liable for sum declared even if no additional sum paid - Provisions of contract of carriage (ticket conditions) relieving carrier of liability only insofar as not in conflict with provisions of Convention.

Aviation - Carriage of goods - Claim for damages for loss of goods carried - Limitation of carrier's liability - Registered luggage - Warsaw Convention as ratified and confirmed in South Africa by s 3 of Carriage by Air Act 17 of 1946 - Exception to limitation of liability of airline in terms of art 25 of Convention - Exception operating if damage resulted from act or omission of airline, its servants or agents, 'done with intent to cause damage or recklessly and with knowledge that damage would probably result' - Degree of fault required for qualification to apply - Object of art 25 to eliminate *negligence* of airline (or staff or agents) as ground for non-limited liability - 'Recklessly and with intent that damage would probably result' requiring subjective attitude that it did not really matter whether or not foreseen potential consequences materialised - 'Probably' meaning that prospect such that actor realised that if he responded reasonably, he would seriously consider evasive measures.

Headnote: Kopnota

The plaintiff (respondent), a professional hunter, bought an airline ticket to the USA from the defendant (appellant). At the airport one of the defendant's representatives had pointed out to the plaintiff that the firing mechanism of his rifle (the 'action') was a 'security item' and, after assuring the plaintiff that he would make sure that it reached its destination, wrapped it in an envelope, sealed it and loaded it in a special hold of the aircraft. The plaintiff had explained to the defendant's representative that the action was a very expensive part of the rifle, and that its value was in the region of US$10 000. The action never arrived, though the envelope it was placed in did. The plaintiff instituted action against the defendant in a magistrate's court. The defendant based its defence on arts *22(2)(a)* and 25 of the Warsaw Convention, which formed part of South African law by virtue of s 3 of the Carriage by Air Act 70 of 1946. The defendant also relied on the 2002(3)SAp819 terms of the passenger ticket it had issued to the plaintiff. In general, the Warsaw Convention (as amended, *inter alia,* by the Hague Protocol) provided that an airline is liable for damage to registered luggage during carriage by air (art 18), unless it proves that it and its agents took 'all necessary' means to avoid the harm, or that it was impossible for it or its agents to take such measures (art 20). The liability of the airline was limited to a certain sum in Swiss Francs unless the passenger 'made ... a special declaration of interest in delivery at destination' and 'paid a supplementary sum if the case so required' (art *22(2)(a))* or it is 'proved that the damage resulted from an act or omission

of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result' (art 25).

The Court held as follows in respect of the qualification contained in art *22(2)(a).* The purpose of the declaration was to overcome the liability limits and it must therefore inform the carrier clearly that it is faced with a risk of liability beyond the normal maximum so that it can take additional safety measures and charge a higher fee. The declaration did not have to be in writing, and unless the carrier insisted on more specific information, a declaration that the value was 'at least x' would satisfy the requirements up to the stated minimum value. 'Interest in delivery' meant 'the monetary value of receiving delivery at the agreed destination' (Paragraphs [10.1] - [10.3] at 825C/D - 826B). Care had to be taken to prevent the carrier relieving itself from liability by choosing not to incur liability for 'a declared sum' as intended in art *22(2)(a):* art 23 voided any contractual provision 'tending to relieve the carrier of liability or to fix a lower limit than that... laid down in this convention'. The fact that a carrier did not provide an excess valuation facility did nothing to make the passenger's case one that required a supplementary sum to cover excess value. If an additional sum was not demanded by the carrier, the carrier was liable for the sum declared (or such lower amount as the carrier could prove to be the true value) even if no additional sum was paid. The passenger had a right to make a special declaration of interest and the objects of the Convention could not be undermined by one of the parties to the carriage contract. In addition, the conditions of carriage in respect of liability were legitimate only insofar as they were not in conflict with the Convention (Paragraphs [12.3.1] - [12.3.4] at 827H - 828E).

As to the qualification contained in art 25, the Court held as follows. The provisions of art 25 prior to its amendment by the Hague Protocol (which spoke of 'wilful misconduct' on the part of the carrier) clearly required either *dolus directus* or *dolus eventualis* (Paragraph [17.3.5] at 833F/G - G). It was apparent from the wording of art 25 after its amendment that it dealt with fault, which, because of its reprehensibility, stood on the same level as wilfulness, viz that it dealt with causation going beyond mere negligence. The object was clearly to eliminate negligence on the part of the carrier (or its staff or agents) as a ground for non-limited liability, and not to cause one type of *dolus* to be inadequate. What the framers of the convention had in mind was a subjective attitude that it did not really matter whether or not the foreseen potential consequences should materialise. The word 'probable' meant that the prospect was of such strength that the actor realised that if he responded reasonably he would seriously consider avoiding measures (Paragraphs [19.3.2] - [19.5] at 834F/G - 836B).

The Court examined the facts of the case and concluded as follows. Whoever took the action or made removal possible not only willed his own behaviour, but was either deliberate about or reconciled with the probable consequence, viz that the owner would not recover his property. Whether as thief or as accomplice, the staff member must either have acted with 'intent' or 'recklessly' with respect to the consequence that the owner would probably suffer loss within the scope of art 25 (Paragraph [20.3] at 836F - G/H). It had to be inferred from the facts that the theft involved at least one person whose very task it had been to care for the luggage and the defendant was thus vicariously liable (Paragraph [22.1] at 837H -1).

The Court finally found that nothing in the terms of carriage (ticket conditions) legitimately prevented the operation of the directive of the Convention stipulating that the carrier was liable beyond the limitation contained in art 25 if any of the two qualifications discussed above applied. The qualifications both applied and the appeal fell to be dismissed with costs (Paragraphs [25.3] and [27] at 839B - B/C and C/D).

Cases Considered
Annotations

Reported cases

AA Onderiinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A): dictum at 614H -615A applied

Antwerp United Diamonds BVBA v Air Europe 1995 (3) LRC 55 referred to

Bayer Corporation v British Airways pic www.law.emory.edu/4circuit/ apr2000/991408.p.htm: referred to

Cape Coast Exploration Ltd v Scholtz 1933 AD 65: dictum at 76 - 7 applied

Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA): applied

Corocraft Ltd and Another v Pan American Airways Inc [1969] 1 All ER 82 (CA): applied

Courtner v Beaton [1993] 2 Lloyd's LR 369 (CA): referred to

Ex parte Christodolides 1959 (3) SA 838 (T): dictum at 841A - B applied

Goldman v Thai Airways International Ltd [1983] 3 All ER 693 (CA): referred to

Goodman Bros (Pty) Ltd v Rennies Group Ltd 1997 (4) SA 91 (W): dictum at 105A - B applied

Herschel v Mrupe 1954 (3) SA 464 (A): dictum at 477A - C applied

Johnson v Marshall, Sons & Co Ltd [1906] AC 409: referred to

Kruger v Coetzee 1966 (2) SA 428 (A): applied

La Concorde v Aktiebolaget Aerotransport 1965 US AvR 356 (Sweden): referred to

Lewis v Great Western Railway (1877) 3 QBD 195: referred to

Luxavia (Ry) Ltd v Gray Security Services (Pty) Ltd 2001 (4) SA 211 (W): ([2001] 2 B All SA 561) referred to

Monarch Airlines Ltd v Fothergili 1980 -1984 LRC (Comm) (HL) 215: referred to

Parity Insurance Co Ltd v Marescia and Others 1965 (3) SA 430 (A): dictum at 434C applied

Quantas Airways Ltd v SS Pharmaceutical Co Ltd and Another 1990 LRC (Comm) 261 (CA(NSW)): referred to

R v Dhlumayo 1948 (2) SA 677 (A): dictum at 705 applied

Rustenburg Platinum Mines v South African Airways [1979] 1 Lloyds LR 19 (CA): compared

S v Van Zyl 1969 (1) SA 553 (A): referred to

Siemens v Schenker [2001] NWSC 658: applied

Suisse Atlantique SociM6 d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361: compared

Westminster Bank Ltd v Imperial Airways Ltd [1936] 2 All ER 890: referred to
Wildebeest v Geldenhuys 1922 TPD 1050: applied.

2002 (3) SA p821 **Statutes Considered**

Statutes

The Carriage by Air Act 17 of 1946, Schedule arts 22(2)(aJ, 25: see *Juta's Statutes of South Africa 2000* vol 4 at 2-9 and 2-10.

Case Information

Appeal from a decision in a magistrate's court. The facts appear from the judgment of Flemming DJP.

P Lazarus for the appellant.
J L Kaplan for the respondent.

Cur adv vult.

Postea (February 5).
Judgment

Flemming DJP:

[1] Plaintiff (the respondent in this appeal) describes himself as a professional hunter. He made it his business to take people on safari in search of dangerous game. Crucial to this was his rifle, which had special qualities with a view to stopping an animal. It *inter alia* had two barrels which were so constructed that the bullets converge at about 50 metres. Both triggers could be simultaneously activated.

It consists of three components: the ‘action’, which is the firing mechanism, the barrels and the stock. The action is hand-made. After it is created, the rest of the rifle is manufactured to fit around the action. The result is that if the action only is lost, it is not possible to fill the gap with a new 'action'. In this sense, the action is irreplaceable. It is expensive. The length was 12 -15 cm, the height 3 cm and the width 4 cm. It weighed about 2 kg.

[2] Plaintiff decided to attend a conference in the United States of America and to take the rifle along for service by a reputable gunsmith. He bought a ticket from defendant for the route Johannesburg-Amsterdam-Minneapolis-Reno. All luggage was checked through to Minneapolis. The rifle never arrived. The outer envelope did.

Prior to departing from Johannesburg plaintiff went to the customs counter so that he could return to this country with his rifle and to avoid difficulties on the American side. He then checked in his luggage. The action, because of its value and sensitivity, was in plaintiff’s hand luggage. The other parts were in the suitcases destined to travel in the aircraft's hold. Security staff detected the action and stopped the luggage. Plaintiff was taken to defendant's representative, Mr Patterson. Patterson dealt with the action as a 'security item' in accordance with normal procedure. He wrapped the action in a padded envelope, folded it and sealed it with defendant's sealing tape. He placed this envelope in

another envelope which was taped and tagged with the 'baggage tag'. The package was given to Mr Spaniola of defendant's baggage staff to load it in a special section in hold number 4. Spaniola was not called as a witness. 1(1)

Patterson's conduct was inspired by the fact that the action was part of a weapon and should be dealt with as a 'security item'.

In court his attitude was that 'objectively' the action was a security item; it only 'subjectively' (to plaintiff) was a valuable item.

Patterson testified that when the security staff brought plaintiff to him and after he had explained to plaintiff that defendant could not accept the action in hand luggage, plaintiff ‘explained to me that it was valuable to him’. Plaintiff also requested him to make sure that the action gets to its destination. Patterson promised that he would do anything in (his) power to assure that it reached 'its next point'. Later he testified that he said he would make sure that plaintiff would get the action 'at the other side'.

A dispute of fact arises from Patterson's evidence, according to which no amount was mentioned. He claims that almost every time something is removed from a passenger, the passenger says that the item is valuable. Plaintiff gave the logical version that Patterson asked him what the item was whereupon plaintiff explained to him that it was a Very expensive part of the rifle . . .'. Plaintiff told Patterson that the value would be in the region of US $10 000 if it could be replaced at all. In other parts of his evidence he testified that he said that the value would be 'in excess of US $10 000’.

[3] During cross-examination, in response to an enquiry about plaintiff's concern when Patterson told him that he could not take the action with him, plaintiff testified: 'I was yes, and then I needed assurance from him that it would be handled correctly and he said it would. I told him repeatedly what this was worth not only in monetary terms but to the rifle as a whole and he assured me that it would be handled as a security item. He did not at any time say to me that it would be placed in the aircraft hold. I would never have allowed that to be done. Never. I would have taken that action ... to the South African Police desk and I would have signed it in until the return from America.' Later he testified that Patterson said '... that it would be handled correctly, he was aware of the value. I told him what its intrinsic value was in terms of to the firearm that it could not be purchased again ... and he assured me that it would be handled as a security item, it would be packaged securely and that I would get it when I landed in Minneapolis (and) I told him what the value of it was....'

[4] The common-law result

Subject to conventions, legislation and the terms of the carriage contract, defendant became obliged to replace the action with its monetary value. It failed to re-deliver an item which it had taken into possession for carriage. Alongside that contractual basis, there is sufficient reason to find delictual liability on a vicarious basis.

[5] Defences

[5.1] Defendant threw the book at plaintiff but only two complete defences raised in the plea and an alleged limit on liability remain relevant. The foundation of these defences is the Warsaw Convention ("the Convention') which became part of our law by virtue of s 3 of the Carriage by Air Act 70 of 1946. Defendant also relies on the terms of the passenger

ticket issued to plaintiff. Some facts which are relevant to applying the Convention and the contractual terms are not mentioned in this judgment because they are common cause, e.g. that the action went as 'registered' or 'checked' luggage; that the carrier flew to a Convention country.

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[5.2] Subsequent to the Warsaw Convention there were Protocols which were made part of our law (cf Government Notice R93 in the *Government Gazette* of 10 May 1974), mainly the Hague Protocol and Montreal Protocol 4 of 1975. These are also relevant to the original text on issues of interpretation insofar as they were intended not to amend but to clarify what preceded it. There is not much hesitation in imbuing the original of a statute with what is evident from clarifying legislation. *Ex parte Christodolides* 1959 (3) SA 838 (T) at 841A - B; *Parity Insurance Co Ltd v Marescia and Others* 1965 (3) SA 430 (A) at 434C; *Bayer Corporation v British Airways pic (infra).*

[5.3] A substituting Montreal Convention was signed on 28 May 1999. 2(2) It does not affect the present dispute. Plaintiffs experience played itself out between 17 and 19 January 1999.

[6.1] The pattern of legal liability

The relevant effect of the Warsaw Convention as amended is:

1. The airline is liable for damage to luggage unless a qualification applies. See art 18 read with art 23, which voids any 'provision' which tends to relieve the carrier from liability to a greater extent than is spelled out by the Convention. There are exceptions, e.g. damage caused by pilot error and contracting out of liability for damage due to an inherent defect.

2. There is no liability if the carrier proves that he as well as his agents have taken 'all necessary' measures to avoid the harm; alternatively that it was impossible for him 'or' the agents to take such measures (art 20).

3. The liability is limited to the equivalent of 17 Special Drawing Rights per kilogram 3(3) unless:

(a) a declaration of 'interest in delivery at destination' was made in accordance with art 22; or

(b) the damage resulted from intentional acts as defined in art 25.

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[6.2] Application of the Convention

Proposition 1 requires comment only to the extent that defendant's ticket conditions may be voided by art 23. The second proposition requires no attention because defendant made no attempt to discharge the *onus.* In fact, defendant accepted that its negligence caused liability to compensate plaintiff unless proposition 3 applies and locked horns on the 'extent of that negligence'. On the qualifications mentioned in proposition 3 plaintiff bore the *onus.* What did he have to prove and what did he prove?

[7] The actual wording

[7.1] The following was made law in the annexure to the Carriage by Air Act as the South African version of the Convention (words in brackets were replaced by the immediately preceding words by virtue of the Hague wording):

12(2)(a) In the carriage of registered baggage (luggage) and of cargo (goods), the liability of the carrier is limited to a sum of 250 francs per kilogram (kilogramme), unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a *special declaration* of *interest in delivery at destination* and has paid a supplementary sum *if the case so requires.* In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's actual interest in *delivery at destination.'*

Beek *Civil Aviation Legislation* vol 1 at 1029 reflects this version.

[7.2] www: austlii.edu.au/au/other/dfat/treaties gives access to the full text of the treaties (the opening abbreviation is inspired by the name Australian Legal Information Institute).

[8] The interpretation

[8.1] Courts in other jurisdictions have accepted that the Convention as an international instrument ought to have the same effect in all countries that adhere to it. Examples are *Corocraft Ltd and Another v Pan American Airways Inc* [1969] 1 All ER 82 (CA); *Siemens v Schenker* [2001] NSWSC 658, URL address:

www.austlii.edu.au/au/cases/nsw/supreme ct/2001/658.html and it can also be found by searching for the phrase special declaration of interest on www: austlii. edu.au. See also ag d.nsw.gov.au/sc/sc.nst/pages/index.

[8.2] What creates concern is that apparently some contentions raised by defendant's counsel are to be judicially pronounced upon for the first time in South Africa despite the lapse of more than eight decades. I suspect that the real explanation is poor library facilities and lack of indices.

[9] The declaration of interest

[9.1] I have underlined the three phrases in art 22 that require attention.

[9.2] The wording does not require the declaration of interest to be in writing. Counsel nevertheless urged this Court to subscribe to a view expressed by Giemulla, Schmid and towards the end of s 2 (at p 14) in the comments on art 22. The authors 4(4) argue that the original text was French and, bearing in mind that the passenger ticket, baggage check and waybill are to be in writing, and that the objects of the special declaration of interest, the requiring of a written form of declaration 'helps to clarify the legal situation'. I find the reasoning unpersuasive. As is shown by Steyn's *Uitleg van Wette* and comparison with other systems to which I have some access, the logic of interpretation of documents is not peculiar to a specific system. If a written declaration was required it would have been stated. That was done in art 26(3). The reasons of the authors are reasons of desirability and do not deny the absence of appropriate wording. The reasons at most leave the matter in doubt so that the rule rather than the limitation of the rule should apply.

[10.1] I find myself readily persuaded by the comment in the said *Giemulla* publication that the purpose of the declaration is to overcome the liability limits and accordingly must inform

the carrier clearly that he is faced with a risk of liability beyond the normal maximum so that the carrier can take additional safety measures and charge a higher fee. The word 'special' in art 22(2)(a) must have some significance. A view stated in another non-accessible book by G Miller *Liability in International Air Transport* (1977) is apparent from a photocopy of page 189, which was provided by counsel. The author states that the declaration must be made specifically to raise the carrier's liability. 5(5) The author adds that the carrier's knowledge of value which is obtained in another manner or a statement of value for purposes such as customs regulations will be inadequate. It follows that the object of the passenger's declaration must be recognisable and secondly that a monetary sum be stated. 6(6)

[10.2] But, unless the carrier insists upon more specific information, a declaration that the value is 'at least x' will satisfy those requirements up to the stated minimum value.

[10.3] The interpretation of 'interest in delivery' as meaning 'the monetary value of receiving delivery at the agreed destination' is appropriate in the context and is confirmed by its said objects. The wording is a deliberate deviation from the original wording which was similar to the translation from the original French which the British Parliament accepted 7(7) but could potentially 8(8) have referred to the value when delivered to the carrier. That may be less than the value of destination.

[11.1] That brings this matter to the issue whether any monetary figure was mentioned. Defendant's counsel also argues that the statement about value is not up to the standards which I have accepted in paragraph 10 in that it was only an 'informal' conversation with a 'mere check-in official'.

[11.2] Plaintiff’s version seems so highly probable that it is difficult to regard Patterson's evidential handling of the events as adequate to counterbalance plaintiff’s evidence. Plaintiff’s method of packing his belongings and his uncontradicted evidence about the sensitivity of the mechanism, its importance to his work and the high cost of replacement, confirm his concern that the action must be safely delivered in Minneapolis. When he was required to part with a personal possession, he would have voiced his protest. It is common cause that he did. He would state the factual reasons for his concern. It is common cause that he did. The accepted evidence of the security official who stopped the hand luggage was that plaintiff stated a specific figure as representing value in order to persuade her. Plaintiff would have tried the same arguments to overcome the decision of Patterson. It is almost unthinkable that plaintiff would recognisably have drawn the very distinction drawn by Patterson and actually express himself that value is the (subjective) 'value to him' but refrain from stating the (objective) value which the carrier was told it was involving itself in with respect of due delivery to the owner. On probabilities, plaintiff would almost certainly have stated the extent of cost of replacement to emphasise his point when requiring assurances about delivery of the action. Reading the record seems to justify the magistrate's rejection of the evidence of Patterson 'that the plaintiff did not inform him as to the actual value'.

[11.3] And if I were to be wrong about the strength of the probabilities according to the written transcript, this is a situation in which the magistrate's observation of the personalities involved and how they came across gave the trial court an advantage which ought not to be underestimated. See *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 where the sixth proposition reads:

'Even in drawing inferences the trial Judge may be in a better position than the Appellate Court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he observed at the trial.'

[11.4] The argument that there was only a 'conversation' of informal nature is without substance. Carrier and client were seeking their way through the specific business of the carrier: to carry passenger Hamman and his luggage to Minneapolis. They were sorting out the insistence of the carrier that the action may not be included in hand luggage and the passenger's insistence that his interest in safe delivery must be properly catered for. $10 000 marked the seriousness of non-delivery. Although Patterson was a final decision-taker about checking in, that was only part of his role as the person appointed by defendant to represent it in respect of the overall process of passengers and their luggage being accepted on board.

[12.1] Defendant next argues that art *22{2)(a)* does not apply because plaintiff did not pay a supplementary sum. Plaintiff had to pay such a sum as a pre-condition to escaping the limiting clause only 'if the case so requires'. There is nothing to make the case one which would require such a payment except perhaps the defendant's normal conditions of carriage. I will explain.

[12.2] Patterson's evidence was that defendant never offers an excess valuation facility; that defendant is not a carrier which offers such a facility. When asked what he would have done if a passenger told him that a (non-security) item had a specific value, he said that he had 'no idea' and that 'we at KLM do not have any special procedures for that. I would advise the passenger to get their own individual insurance if it was that.' My answer to that is that if defendant did not offer such a facility, it did nothing to make plaintiff's 'case' a case which required a supplementary sum (to cover excess value). Secondly, on defendant's argument, Patterson, while acting on behalf of defendant, did not in fact require an additional sum. His management of the situation failed to make the 'case' one which required an additional sum.

[12.3.1] Care must be taken to prevent room for defendant to relieve itself from liability as is meant in art 23 of the Convention by its own choice never to incur liability for a 'declared sum' as is meant by art *22(2)(a).* Article 23 voids any contractual provision 'tending to' 9(9) relieve the carrier of art 18 liability. It seems to apply *pro tanto* to a provision which seems innocuous but does reduce liability when applied in a specific situation.

[12.3.2] On counsel's argument a carrier can achieve non-liability or limited liability by a simple expedient: do not have a mechanism, procedure, instruction or discretion to offer a facility. To prevent conflict 10(10) with the Convention's art 23, the seventh condition of carriage will have to yield to the meaning that when faced with a special declaration of (the amount of) a passenger's interest in delivery at destination, a supplementary sum became necessary if (and to the extent to which) Patterson then in response offered a facility-coupled-with-supplementary payment. 11(11) The amount 12(12) then required becomes an amount which the (specific) case requires as is meant in art *22(2)(b).* If that 'facility' is not offered, more pertinently if an additional sum is not demanded, the carrier is liable for the sum declared (or such lower amount as the carrier may prove to be the true value) even if no additional sum is paid.

[12.3.3] If due regard is had to the obligations superimposed on the contract of air carriage by the Warsaw-Hague-Montreal regime, the passenger has a right to make a special declaration of interest and the objects of the Convention cannot be undermined by one party to the carriage contract. 13(13)

[12.3.4] Defendant's counsel submitted that art 22 'must be read with' defendant's general conditions of carriage and is the 'generic' provision of the general conditions. It is the

other way around: the conditions of carriage have legitimacy only insofar as there is no conflict with the Convention (and therefore with its art 23). Secondly, because the Convention was made law in this country, the contract with the passenger must be interpreted like any other contract which is governed by a statute. The statute must be correctly interpreted and thereafter one asks how the contract fits.

The Second Qualification- Wilfulness

[13.1] The version of art 25 which was taken up in the Carriage by Air Act, 1946 was:

'(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 default on his part as, in accordance with the law of the Court seized of the case, is *considered to be equivalent to wilful misconduct.*

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

[13.2] Since adoption of the Hague Protocol (see Government Notice 274 in the *Gazette* of 17 November 1967) the wording is:

'The limits of liability specified in art 22 shall not apply if it is proved that *the damage* resulted from an act or omission of the carrier, his servants or agents, done with *intent to cause* damage or *recklessly* and *with knowledge that damage would probably result;* provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.'

(In both articles I have underlined the main concepts.)

[14.1] The contention of defendant was that 'damage' here means damage to but not loss of an item. This contention is not based upon the wording of art 25. It builds upon an alleged contrast between arts 18 and 22. I see no reason for burdening art 25 with those contrasts. Article 25 states the bottom line: wilful causing of harm creates liability for the carrier. The precise scope of any limitation on that basic liability does not detract from the clarity 14(14) of the words in art 25, which spell out the basic principle.

[14.2] Secondly, the first and the third occurrences of the word 'damage' in art 18 covers damage caused in the event of both 'loss of' and 'damage to' registered luggage.

[14.3] In arts 21 and 25 there is no logic favouring counsel's distinction.

[14.4] Article *22{2)(b)* as taken up in Act 70 of 1946 15(15) lacks customary prepositions; the second 'or' may have been intended to be 'of'; 'effects' is used where 'affects' makes more sense. I need assistance to understand how one weighs for 'delay' or why the whole package is compensated if only two milligrammes were lost of a one ton cargo. That translation problems may not be ignored is apparent from the *Corocraft* decision, *supra.* I am not suggesting that there are no problems but that I do not find justification for deviating from the interpretation, which is evident from art 25 if one postulates that art 22 did not exist.

[15.1] Defendant is correct in submitting that theft cannot be assumed. It can be inferred.

[15.2.1] Counsel is not correct in saying that that inference must be the ‘only plausible’ inference.

[15.2.2] When the law sets standards of proof it sometimes operates as a pre-condition to the making of an order (especially an order recording a conviction in a criminal case) but it generally operates to determine what the appropriate order is if the facts do not convince towards a specific view. That relates to the *facta probanda.* Subject to legislation there is neither a civil case nor in a criminal case a burden of proof in respect of *facta probantia,* except in the sense that either party will find no support from a fact which would have operated in his favour if he fails to convince the court about the existence of that fact. Whether evidence about a specific fact has probability or improbability attached to it and if so how strongly that is the case depends upon human experience as interfered with by legislation. In this case, the *factum probandum* was whether an employee wilfully caused loss. On that issue there is an *onus* of proof. Views about who had incentive to open the envelope, who opened it, what the circumstances were, etc. are freely influenced by probabilities. Probabilities usually play the role of assisting to determine what the cogency of evidence is and what the implications of known facts are. It is at the end of the case when it must be considered whether the views held about distinct facts, proved directly or by inference and in that sense 'proved' to a greater or lesser degree, add up to the extent of justifying a finding on a *factum probandum.* The *onus* of proof comes into play only then, i.e. when the complete scene is surveyed and the question is to be answered whether the totality convinces of 16(16) a wilful act by an employee exercising that capacity.

[15.3] A second reason rests upon the fact that this is not a criminal case. The need to convince a Court about each of the *facta probanda* and thus about the appropriate order is a concept beyond precise definition because of its simplicity, because of the need to adapt, and because of the impossibility to find words which precisely define its operation. The concept is that a party's version is proved if the court is convinced that what that party contends is what did happen. Being convinced does not imply that certainty exists. Although the concept of being convinced simply refers to determining the truth about one of the *factum probanda* in the case, the Court's normal preparedness to act upon its convictions is subject to the restraint that in a criminal case a degree of certainty is required. The reasonable possibility that the innocent version represents what happened must be excluded. It is only for that reason that when the State case depends upon inferences about the end conclusion, the facts must exclude that the innocent inference is tolerable. In a civil case an end-conclusion, reached by way of inference or otherwise, is not tested according to that standard of proof. Becoming convinced that the plaintiff is correct is concededly different from being inclined and requires something more than simply recognising that there is slightly more to be said for plaintiff's version than for that of defendant. But subject to that emphasis on the need that the Court must be 'convinced', the yardstick for drawing the overall inference in favour of a plaintiff is whether, on a balance of probabilities, the inference for which plaintiff contends has convincing strength to stand out as the most acceptable and plausible version. Compare *Wildebeest v Geldenhuys* 1922 TPD 1050; *Cape Coast Exploration Ltd v Scholtz* 1933 AD 65 at 75, 76; *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H - 615A. That the action was put beyond retrieval by a wilful act of an employee acting within the course of his employment need not represent the 'only' plausible inference.

[16.1] Dealing with questions about wilfulness, intent, recklessness and gross and other negligence can be eliminated if the argument of defendant's counsel is correct that plaintiffs pleadings disentitle him from relying on anything other than negligence. As so frequently happens, attention now turns away from dealing with the dispute between the parties to what the legal representatives did or caused.

[16.2] When proceedings commenced in the Court a *quo* defendant's counsel conceded that negligence caused the loss of the action. Plaintiff's attorney responded that he would 'prove' strict liability, alternatively would avoid the limitations of the Convention by proving gross negligence. (Article 25 does not use those words, but perhaps the attorney was thinking of defendant's general conditions of carriage.) Counsel who appeared for defendant said that decision of the case would turn upon the 'degree of (the conceded negligence)' and added that defendant disputed that any conduct was 'wilful misconduct'. (The current wording of art 25 does not use those words.) Later he contended that the *onus* was on plaintiff to prove 'gross negligence or wilful misconduct' and claimed that none of the documents before Court shows reliance on wilful misconduct. He quoted from the *Rustenburg* decision, *infra,* to distinguish wilfulness from negligence. Despite all this, plaintiff's attorney did not amend the pleadings. There is no sign that he in any other way tried to widen the pleaded issues and I doubt whether he set out to prove more than gross negligence. Yet it does not lie in defendant's mouth to contend that matters would have proceeded differently if there had been proper attention to the state of pleadings. Defendant investigated wilfulness. That wilfulness was argued is evident from the pertinent attention to wilfulness in the magistrate's judgment.

[17.1] I have mentioned the need to know how the Convention is applied in overseas jurisdictions. I will, however, deal first with the South African distinction between what is wilful and what is only negligent.

[17.2] As a matter of language, a South African observer would label a marked deviation from proper attention to what is being done or is being omitted as gross negligence. He might go further and describe the behaviour as reckless if, perhaps even when the degree of negligence is not gross, the behaviour is proceeded with in the face of serious risks. The onlooker's remark will in all cases be a remark about behaviour; it is inspired by a marked chasm between what is responsible behaviour and the actual behaviour, because of the risks attendant. It is not a comment on the state of mind of the actor.

[17.3.1] To the lawyer intent is to be contrasted with negligence. There is a clear divide. Sometimes the distinction is not so easy to apply. The wilfulness or recklessness, which in criminal law and in the present context is important to the lawyer, is purely subjective. It depends on the mindset of the actor. Wilfulness is an attitude about the setting in of a result of behaviour 17(17) and not about the behaviour itself - which is always 'willed'. Thus an observer may label driving as 'reckless' if the driver travels at 250 km per hour within meters of pedestrians but the driver will not be wilful in the sense of being heedless (reckless) about harm to bystanders if he really believes that harm will not result. Perhaps his name is Schumacher.

[17.3.2] The distinction is alluded to in S *v Van Zyi* 1969 (1) SA 553 (A) at 558 - 9 and 559G. In the United States of America there is the decision in *Bayer Corporation v British Airways* (URL address: www.law.emory.edu/ 4circuit/apr2000/991408.p.htm/) and it can be found by a phrase search at www.law.emory.edu/4circuit. It was decided in the fourth circuit Court of Appeals on 17 April 2000 (CA 98-541-A), which is after 28 September 1998 when the 1975 Montreal Protocol became USA law. In British law there is the decision in *Lewis v Great Western Railway* (1877) 3 QBD 195 which at 207 includes indifference to the (wrongful) causing of harm but not to that which only ought to be foreseen. See also *Johnson v Marshali, Sons & Co Ltd* [1906] AC 409 at 411 and *Rustenburg Piatinum Mines v South African Airways* [1979] 1 Lloyd's LR 19 (CA) at 23, 24 which found wilfulness in (co-operative?) theft. 18(18)

[17.2.3] As in South African criminal law the more obvious form of wilfulness (grammatically conveyed by equating 'wilful' with 'deliberate' 19(19)) is that the behaviour is undertaken despite the subjective insight that harm is expected. The relevant harm is either desired

or accepted. The other form of legal intent *{'dolus'* or 'opset') is when the harmful consequence of the behaviour is not what the actor seeks to achieve or expects, but is foreseen as an actual (real) possibility and the relevant commission or omission is nevertheless proceeded with in the spirit of 'so be it'. The overall result in the legal system is that legal intent which can justify labelling as wilful is present when the subjective attitude exists that the specific harm is either an accepted or an acceptable consequence of the willed behaviour. If it can only be said that the particular causation of harm should have been foreseen, this is nothing more than negligence.

[17.3.3] The label 'negligent' represents a value judgment. Behaviour is negligent, gross or otherwise, when it deviates from what a reasonable man would have done. To a judge that, it is assumed, that the notional person acted reasonably in making observations and in assessing the situation. How he would have responded is the outcome of weighing, on the one hand, the seriousness of the prospect that the harm will in fact set in and the gravity of the harm and, on the other hand, the facility, cost and prospect of success of steps to prevent the harm. Causative negligence is found only if the court is convinced *(a)* that the notional person would have acted differently and *(b)* that such different behaviour would have successfully avoided the harm. *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) in continuing approval of J C van der Walt's study; cf *Herschel v Mrupe* 1954(3) SA 464 (A) at 477A - C; *Kruger v Coetzee* 1966 (2) SA 428 (A). (If the court is so convinced on the two measures, negligence is found proved even if the reason for not acting as the notional person would have is that there was deviation from what the notional person would have reasoned or would have observed or even would have informed himself of.)

[17.3.4] Nowhere in or as a result of this process is actual realisation of a consequence or an attitude about the eventuating of a consequence attributed to the actor involved by reason of what the reasonable man would have thought or would have done.

[17.3.5] Article 25 of the Warsaw Convention as quoted in para 13.1 above would have given a South African lawyer no difficulty. Limits of liability would fall away if there was legal intent: either *dolus directus* or *dolus eventualis.*

[18.1] But in another country the same result may have followed on gross negligence - and the Hague remedy for that 'aberration' may now exclude some cases of *dolus eventualis.*

[18.2.1] Delegates to the Warsaw Convention and translators had difficulty to find English words to convey French concepts *'dol'* and *'faute lourde'.* It was therefore to be left to each country to decide what precisely is on a par with *'dol'* - which was translated as 'wilful misconduct'. Despite the realisation that uniformity was needed, the reference to the law of each country allowed courts to develop lack of uniformity. 20(20) The courts of some countries limited the alternative to *dolus* (in our terms); some decided that it included gross negligence; others held that 'ordinary' negligence was the equivalent of *'faute lourde';* and the Americans 21(21) included part of *dolus eventualis* under the label 'conscious negligence' irrespective of whether it is gross or not. To South African ears the USA terminology sounds strange and carries an inherent contradiction. But not if one honestly seeks to grasp what is really meant. It also basically seeks to draw the line between what is foreseen and what ought to have been foreseen.

[18.3] The differences in outcome of the same words caused the decision by delegates to move away from legal concepts. The Hague Protocol for that reason spelled out in so many ordinary words what mental attitude the Convention had in mind. (This time the original was not in French only but also in English and Spanish.)

[19.1] I have indicated that until amended by the Hague Protocol the wording justified the conclusion in South Africa that it is sufficient to constitute the equivalent of wilful conduct 'in accordance with the law of the Court seized of the case' if there is a finding of *dolus eventualis,* i.e. if the actor is reconciled with the *possible* consequences. The question "is whether the Hague Convention with the words, as quoted in para 13.2 above truly intends that it is now only if the actor is reconciled with the *probable* consequence that art 25 makes a difference.

[19.2] The words are seemingly clear.

[19.3.1] On the other hand, what would have been sound interpretation prior to the Hague amendment seems to denote the law at the time. An assumption against change of the law normally operates. In particular, if the amendment causes a result which is out of line with the logic of our law.

[19.3.2] When attending too much to words, 22(22) results sometimes follow which are out of keeping with the real intent. It can lead to self-created problems by commencing with the proposition that nothing but wilful misconduct itself could ever have been the 'equivalent of wilful misconduct'. But to him who is desirous of grasping the intention, it is clear that the French words of art 25, especially after the Hague Protocol, 23(23) refer to fault which because of its qualities in terms of reprehensibility 24(24) stands on the same level as wilfulness and by virtue thereof brings about that the causation goes beyond negligence. Compare *Giemuila {ad* art 25 at ss 23 - 26 and 32 - 4 and para 25 at 16).

[19.3.3] Thirdly, there is a temptation to argue that the difference between 'probable' and 'possible' is closer to the philosophical than to the practical. One may observe that even a desired consequence is never certain and therefore represents only a degree of prospect while a potential consequence (a 'possibility') can hardly be relevant if it has no more than a negligible prospect to it. A prospect is often expressed and communicated with sufficient clarity as a percentage of probability, chance or possibility. The nouns are often interchangeable.

[19.4.1] In interpreting international conventions cautious use can be made of the discussions preceding the eventuating agreement. 25(25)

[19.4.2] In the issue now under discussion, such discussions clarify the indication gleaned from the history of the wording and the disparity of legal consequences. What is notable is the deliberate (but narrow) choice of delegates against negligence and also that there was no further decision to refine the extent of that move. 26(26)

[19.4.3] The object was to eliminate negligence of the carrier or its staff or agents as a ground for non-limited liability, not to cause one type of *dolus* to be inadequate.

[19.4.4] That object of the amendment in itself implies no necessary or probable reason for the creation of a sub-division between two classes of heedless behaviour in both of which the actor foresaw harm and carried on regardless. Both classes are beyond a mere reproach that someone else would have displayed more care; both rely on the subjective attitude that it does not really matter if the foreseen potential consequence should realise. There is no shade of difference in the heedlessness; the difference is in the perception about the percentage chance that the consequence will in fact result. The one class of person has legal intent if the relevant consequence is 'possible'. He is essentially morally on a par with the other class of person: him to whom the consequence is 'probable'. It may be expected that in the absence of an express admission and explanation it is an imprecise process to establish by inference whether the actor thought that the result exceeds the

consequence being possible by so much that he himself rated it as 'probable' (in some degree). Taking the *Quantas* case as an example, along what lines is a 'typical Sydney thunderstorm' (270e - *g)* a likelihood rather than a possibility which was reckoned with.

[19.4.5] Even if the Hague Protocol intended to introduce a 'rigorous standard' as is suggested in the dissenting judgment in the *Quantas* case at 283 27(27) the question remains: how vigorous?

[19.5] I conclude that 'probable' does not mean 'more likely to eventuate than not' but that the prospect is of such strength that the actor realised that if he responds like a reasonable man, he would seriously consider avoiding measures. The measure is imminence which caused him to realise that the consequence must be reckoned rather than an unmeasurable percentage calculation and balancing that against 50%.

T201 Wilfulness

[20.1] Patterson described the sealing glue of the envelope as 'a very tight glue, a very strong' glue. He agreed that the envelope which was before Court showed that someone must have deliberately opened the envelope.

[20.2] Plaintiff disputes that the removal of the action was equally deliberate. It is true that in some circumstances the fact of damage or loss may give reason for inferring wilfulness, yet also leave room for a different view with equal or greater strength. If a carrier delivers a vase to its owner in fragments, it may be that someone negligently allowed it to fall. Someone not on the staff may have pushed something heavy against it. The real cause may be cracks which developed decades ago. The aircraft may negligently or innocently have gone through an air pocket. Wilful damage is merely another possibility. The present case does not refer to damage to the action. The action was completely missing. That reduces the scope of possibilities. The opening of the envelope and the removing of the action completely from owner access or control, justifies as the more plausible and natural inference that somebody deliberately opened the envelope and took the contents.

[20.3] Secondly, it will be specious to reason that perhaps the thief thought that the owner of the action might not lose the action as a result of the 'theft'. It must be inferred that whoever took the action or made removal possible not only willed his own behaviour but was either deliberate about or reconciled with the probable consequence: the owner would not recover his property. Whether as thief or as accomplice to the thief the staff member must have acted with 'intent' or 'recklessly' with regard to the consequence that the owner would (probably) suffer loss within the scope of art 25.

[21] The relationship between the remover and defendant

[21.1] There are only two possibilities: the person who removed it either was an employee of defendant or he was not. If he was, the implications are clear. If he or she was not, the facts require further attention.

[21.2] The appropriateness of any inference depends upon the factual basis for alternatives. Either the nature of the situation or pertinent evidence must give some foundation for any specific alternative. Thus if evidence had suggested that on the day when the action was taken to the aircraft there had been an armed robbery in which items were lost, there is some factual basis for considering something other than 'theft' by an employee. If defendant had done as little as to produce evidence that the person who took the action to the aircraft suddenly resigned or was found guilty of dishonesty, there may be some foundation. In this case, defendant never explained what happened to the action or what

may have happened. It did not disclose what it knows about the loss. At the trial, defendant left the innocent version dependent upon what the imagination might produce. There was no evidence that the action reached the aircraft at Johannesburg airport. Defendant did not prove circumstances which may have allowed access to any persons other than employees charged with the process of carrying luggage. Excepting security officer Jordaan (who had no access) no one but Patterson knew that the 'security' contents of the envelope was valuable. The tape on the envelope only stated 'expedite and security cleared'. Assuming that this may have put thoughts into the heads of others, any such other person was probably staff of defendant who had been charged with loading or unloading or guarding.

[21.3] Alongside limited incentive and knowledge of valuable contents, opportunity was limited to staff or someone collaborating with staff of defendant. The hold could not be reached by any human being during flight. The theft must have taken place in the limited time while the aircraft was on the ground in one of three cities. No one but defendant's staff had access to the action once Patterson took possession of it. At each of the three airports, defendant's staff controlled access and supervised loading and unloading. In Johannesburg, in Amsterdam and in Minneapolis the action was, according to Patterson throughout, under the auspices of defendant's staff. The ‘thief must have been some staff member or someone who was an accomplice of a staff member’.

[21.4] The alternative reasoning leads to the same result. In the absence of explanatory evidence it is the natural and logical inference that a person charged with caring for a valuable item at an airport in South Africa will realise that the consequence of so behaving that an outsider has access will probably (or sometimes certainly) be that the item will disappear. Without evidential foundation for the contrary the employee so charged with carrying must have relaxed his guard heedless of that consequence.

[21.5] If it was proper to apply the lower level of interpretation to the Convention, it must be inferred that the "guarding employee' relaxed guard in co-operation or without co-operation with the thief despite the (inferred) knowledge that theft is a 'possible' consequence and that this was on an adequate level to bring art 25 of the Convention into play.

[22.1] The theft involved at least one person whose very task was to care for the luggage. *Goodman Bros (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W) at 105A - B. There was a direct link between the harm and the manner of doing (or neglecting) the task for which the person was employed. Cf *Giemulla (op cit* ad art 25 at s 7).

[22.2] Subject to the one submission counsel for appellant in the heads of argument conceded that if 'theft' by an employee is proved, it would have created vicarious liability. 28(28) There is therefore no need for additional comment.

[22.3] Defendant's counsel argued that the *Rustenburg* case determines that the necessary relationship arises only if the theft is 'pinned on to' a specific person. Such a need may arise if the circumstances permitted a theft either by an employee 'who was entrusted with the very task' of taking care of the goods (the *'Rustenburg'* case at 24) or by another

employee (or a non-employee). The evidence in this case is of its own different circumstances.

[24] The amount of plaintiffs claim

[24.1] The parties simply announced that they had agreed that 'the question of merits and liability will also be dealt with separately'. No direction in terms of Court Rule 29(4) was asked or given. The court *a quo* proceeded on the limited basis.

[24.2] The lack of definition of separations has more than once given rise to difficulties. A direction for separate hearing should do so with express reference to paragraph numbers of the summons.

[24.3] It is clear that the court a *quo* did not touch upon defendant's right to prove that the action was worth less than the amount stated in the declaration of interest in delivery. It must technically be regarded as a deferred issue whether the stated value operates as a limitation also if the loss was caused by wilful behaviour of an employee acting within the course of his relationship or whether the *full* loss can be recovered. 29(29)

[25] Defendant's terms of carriage

[25.1] Reading the ticket conditions with the 'general conditions of contract' it is clear that in view of clause 3 thereof the latter is dominant. But the Warsaw Convention operates here. Accordingly, the general conditions have features which require mention in this judgment.

[25.2] The Convention is stated to apply but the general conditions purports to create room 'where these conditions expressly provide otherwise'. It introduces the concept 'gross negligence'. At first sight that seems to blur principles but it defines gross negligence as one form of *dolus eventualis.* It refers to 'any act or omission done recklessly and with knowledge that damage would probably result'. It defines 'wilful misconduct' but not 'wilful'. The former is stated to be 'any act or omission, done with intent to cause damage'. The limit of liability will fall away not as in the Convention but as follows:

'(b) These limits of liability do not apply when it is proven that the damage resulted from an act or omission of carrier, his servants or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result, provided that in the case of such act or omission of a servant or agent, it is also proven that he was acting within the scope of his employment....

(d) Carrier is only then liable in respect of damage to items of baggage as specified in art 9, para *4(c)* of these conditions, which are included in the passenger's checked baggage, when carrier caused such damage by its wilful misconduct or gross negligence.

(g) Carrier may limit its liability for checked baggage if the same in the reasonable judgment of carrier is fragile.'

[25.3] I do not think that anything arises from these terms which legitimately prevents operation of the Convention's directive that the carrier is liable beyond the limitation of art 25 if any of the two qualifications which have been discussed in this judgment apply. Those qualifications both apply.

[26] I must record my appreciation for assistance from Ms Ruth Ward and from attorneys and counsel who made available photocopies of books to which I had no access in the Court library and elsewhere.

[27] The appeal is dismissed with costs.

Masipa J concurred.'

Appellant's Attorneys: *M J Hood & Associates.* Respondent's Attorneys: *Werksmans.*

Endnotes

1 Defendant's case therefore does not gain by evidence from Spaniola. It is not necessary to consider whether plaintiffs case gains anything because he was not called.

2 There was a Montreal Agreement which was concluded in 1966 and constitutes an agreement between the Government of the United States of America and airlines after the said country persistently (until 1998) refused to subscribe to the Hague Protocol and threatened to terminate sharing in the Warsaw Convention. See *Law of South Africa* para 673, 674. In 1975 came four Montreal Protocols of which No 4 only is now pertinent. *(Law of South Africa* para 499 fn 9 refers to a 1971 Montreal Convention which is not relevant.) The 1993 edition of *LAWSA* makes no reference to the 1975 Montreal Additional Protocol No 4. On 28 May 1999 the (new) Montreal Convention was signed by 52 countries. Giemulla *infra* in their comments on art 22 at p 4 say that the 1999 Convention 'will replace the entire Warsaw system (including all additional protocols and supplementary conventions)'.

3 Until the 1975 Montreal Protocols the Warsaw Convention mentioned the monetary equivalent of 250 Swiss francs per kilogram or gold "equivalents".

4 The authorities on which the authors rely are not available to me. Photocopies of those comments and the comments on art 25 were provided by counsel. It is apparently a supplement of August 1998 to an original book. The reference was given as Suppl 12 Kluwer Law and Taxation Publishers, January 2000.

5 Drion *Limitation of Liabilities in International Law* (1954) in n 2 to para 274 subscribes to the view that 'the declaration must be intended and understood as a contract that the carrier is liable for a higher amount'.

6 That a unilateral declaration apparently has the impact of an additional agreement must be understood in the misty arena of many negotiators from many legal systems. However, even if South African principles of the law of contract were applicable, it is not far-fetched. Liability arises because the Convention says so. The Convention says so perhaps on the basis that the declaration makes the carrier aware of the foreseeable (contemplated?) harm and so that the carrier can adjust his measures and his remuneration to compensate and reward him. A contractual element becomes more apparent if the carrier does not refuse to carry. All the more so if the passenger pays an additional amount either as a nominated figure or because of the application of a different tariff, if that is demanded. Cf *Drion* para 275 and n 2 to para 274. Absent a refusal to carry the luggage or the passenger and his luggage despite knowledge of the special declaration, the carrier's response constitutes consent to carry with an exposure to liability for the nominated value. The impact of a special declaration of interests has been described as eg an, 'agreement'. (Cf *Antwerp United Diamonds BVBA v Air Europe* 1995 (3) LRC 55 at 61D) or as effectively making the carrier an insurer *(Qantas Airways Ltd v SS Pharmaceutical Co Ltd and Another* 1990 LRC (Comm) 261 (CA (NSW)) at 276cf: (1999) Lloyd's LR. *Giemulla, ad* art 22 in n 1 at p 13

mentions an Italian case which regarded a declaration as a 'separate agreement to which the Convention does not apply'.

7 The Carriage by Air Act, 1932, referred to 'a special declaration of the value at delivery'.
8 cf Drion *op cit* p 300 at para 283.
9 The French text referred to a clause *'tendant a exone're'.*

10 *Drion (op cit* at para 226) cites two authors who disagree with his view that local laws are valid if they do not exonerate a carrier but determine a limit which is higher than the limit of the Convention. It seems incongruous with the dominant words in the last sentence of art *22(2)(a).* It becomes the Convention which determines what must be paid and once the Convention speaks on the topic, it overrides contrary local laws. *A fortiori* contractual terms designed by the carrier. See *Drion* in para 274.

11 In terms of defendant's contractual terms of carriage: if Patterson offered the facility-cum-payment the passenger must pay the 'additional charges' referred to in the general conditions of carriage or the amount required by defendant through Patterson. I quote clause 7 of defendant's contractual terms of carriage which the passenger ticket incorporated by reference to it.

'Excess value declaration and charge

(a) To the extent carrier offers an excess valuation facility, a passenger may declare a value for checked baggage in excess of the applicable liability limits. If the passenger makes such a declaration the passenger shall pay any applicable charges. More information is available at the offices of carrier and its authorised agents.

(b) Carrier will refuse to accept an excess value declaration on checked baggage when a portion of the carriage is to be provided by another carrier which does not offer the facility.'

12 *Westminster Bank Ltd v Imperial Airways Ltd* [1936] 2 All ER 890, *obiter,* and wrongly in my view refused to regard an increased tariff as a method of requiring an additional sum. The possibility of holding passengers to limited claims by refusing to accept a special declaration was left open. See at 898.

13 The *Antwerp* case (n 6 above) touches upon the role of art 22 and so does the minority judgment in the *Qantas* case, mentioned in the same note, at 275e - 276g.

14 As in all interpretation, clarity is relative. A discussion about the meaning of 'damage' appears in *Monarch Airlines Ltd v Fothergili* 1980 -1984 LRC (Comm) (HL) 215.

15 L quote art22(2)fibJ:

'22{2)(b). in the case of loss, damage or delay or part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.'

16 Whether events justified the label 'theft' is a distinct matter. Legally it is not an issue.

17 The implicitness of the will being directed at (the) damage is recognised by *Drion (op cit* para 194).

18 Counsel also referred to *La Concorde v Aktieboiaget Aerotransport* 1965 US AvR 356 (Sweden) but that it is not available to me. There is a discussion in *Law of South Africa* vol 1 para 646. *Shawcross and Beaumont* 4th ed vol 1 (re-issue) at VII/196 shows repeated accentuation of the subjective approach. The substantial majority of jurisdictions which do so entitles me not to follow a different approach. Some British Commonwealth cases at post-Hague dates still evidence the finding of wilfulness if a result is foreseen as possible but not necessarily probable. Cf *Courtner v Beaton* [1993] 2 Lloyd's LR 369 (CA); *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693 (CA). In Australia the *Qantas Airways Ltd* case, footnote 6 above. *Miller (op cit* (1977) at 206 -19). It must be remembered that whether the actor had the requisite insight and attitude is a question of fact and is not a legal issue.

19 See the sea carriage case of *Suisse Atlantique Societe dArmement Maritime SA v NV Rotterrdamsche Kolen Centrale* [1967] 1 AC 361.

20 *Giemulla* provides a review of decisions in discussing art 25.

21 *Giemulla (op cit* at s 23) when discussing art 25 mentions the concept of someone who has the temerity to proceed with his behaviour despite what he realises. The authors believe that 'wilful misconduct' also in English law includes gross negligence (cf p 5).

22 Or to technical boundaries of concepts within an own (American?) system.

23 The USA courts and others who developed the USA law necessarily did so until very recently on the basis of the pre-Hague wording and not in reliance on the Hague clarification.

24 There is no other commonality.

25 Compare *Monarch Airlines Ltd v Fothergill* 1980 -1984 LRC (Comm)(HL) 215. It is therefore to my mind relevant to note that *Giemulla,* and art 25, in para 27 says: The majority voted for the expression "acted recklessly and knew the damage would probably result", and refused the alternative proposal "acted recklessly and knew or should have known the damage would probably result".' (In regard to the purpose of the Hague Convention. *Drion (op cit* para 193) draws attention to the change from intent to cause 'the damage' to intent to cause 'damage'.)

26 The proposals and the voting are mentioned at 290g of the minority judgment on the *Quantas* case, footnote 6 above.

27 Note 6 above. At 281 an author is quoted who concludes in favour of a 'fairly high level of carelessness and temerity'. The majority judgment clearly did not subscribe to the accentuation of a high prospect of harm in fact resulting. Also in the *Antwerp* case *(supra* para 10 n 6) at 63 the Court referred to 'the very strict criteria'.

28 Counsel referred to the *Rustenburg* case and to *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (41SA211 (W) ([2001] 2 B All SA 561).

29 The question was dealt with by *Giemulla* (ad art 22 at para 9) and in the *Antwerp* case mentioned in n 6 above.