

IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA
SITTING IN ITS MARCH TERM, A.D. 2022

BEFORE HIS HONOR: FRANCIS S. KORKPOR, SR..... CHIEF JUSTICE
BEFORE HER HONOR: JAMESETTA H. WOLOKOLIE.....ASSOCIATE JUSTICE
BEFORE HER HONOR: SIE-A-NYENE G. YUOH ASSOCIATE JUSTICE
BEFORE HIS HONOR: JOSEPH N. NAGBE..... ASSOCIATE JUSTICE
BEFORE HIS HONOR: YUSSIF D. KABA.....ASSOCIATE JUSTICE

Air Maroc, Inc., by and thru its President, and Managing Director or authorized representatives, Sinkor, Monrovia Liberia..... Appellant)	
)	
Versus)	Appeal
)	
Cllr. Finley Y. Karngar, Brewerville, Montserrado County, Republic of Liberia..... Appellee)	
)	
<u>GROWING OUT OF THE CASE:</u>)	
)	
Cllr. Finley Y. Karngar, Brewerville, Montserrado County, Republic of Liberia..... Plaintiff)	
)	Action:
Versus)	Damages for Wrong
)	
Air Maroc, Inc., by and thru its President, and Managing Director or authorized representatives, Sinkor, Monrovia, Liberia..... Defendant)	

Heard: November 2, 2021

Decided: September 5, 2022

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

In this appeal, we are to determine the scope of an airline's liability under the Warsaw Convention (1929) for the loss or damage of a passenger's carryon baggage by the airline. The appellant, Air Maroc, Inc., contends that an airline liability under the Warsaw Convention for the loss of a passenger's baggage is limited to US\$20.00 per kilogram as interpreted and affirmed by this Court in *Swissair v. Kabalan*, 35 LLR 49 (1988). The appellee, Cllr. Finley Y. Karngar, on the other hand, asserts that the liability of an airline for the loss of a passenger's baggage may extend beyond the compensation limit of US\$20.00 per kilogram where there is proof of willful misconduct on the part of the airline.

On May 1, 2017, the appellee, Counsellor Finley Y. Karngar, filed an action of damages for wrong against the appellant, Air Maroc, Inc., before the Civil Law Court, Sixth Judicial Circuit, Montserrado County. In his complaint, the appellee prayed the court to adjudge the appellant liable for special damages in the amount of US\$4,185.25 (Four Thousand One Hundred Eighty-Five

United States Dollars Twenty-five Cents), and general damages in an amount not less than US\$ 1,000,000.00 (One Million United States Dollars). As the basis for his prayer for special and general damages, the appellee stated that in October 2015, he purchased a round trip ticket from the appellant to travel from Liberia to the United States of America and back to Liberia; that he travelled from Liberia to the United States of America on the first leg of the trip with no problem. The appellee stated further in his complaint that when he embarked on the return trip to Liberia, the appellant's agents at the John F. Kennedy International Airport in New York inspected his ticket and passport, weighed his checked-in and carryon baggage; thereafter, he was issued boarding passes for New York to Morocco and for Morocco to Liberia. The appellee complained that even though his carryon bag was weighed and tagged as a cabin luggage during the check-in formalities, he was later informed at the entrance of the aircraft by the flight attendants that there was not enough space in the cabin to hold his carryon bag; he was therefore requested to hand over the bag to be checked-in. According to the appellee, he was hesitant to hand over his bag to the flight attendants because it contained personal effects such as medication, clothing, cash, shoes, his vehicle key and other valuable items that he mentioned to the attendants. The flight attendants having assured him that he would receive his bag upon arrival in Morocco, the appellee said that he delivered the bag to them.

Upon the arrival of the flight in Morocco, the appellee said that he requested for his carryon bag but was told that the bag had been checked-in for his final destination-Liberia; that because he could not access his bag which contained his medication, he began to experience pain and stress in his eyes from which tears began to ooze. He became uncomfortable, stressed, embarrassed and did not peacefully enjoy the remainder of his flight from Morocco to Liberia.

Upon the flight's arrival at the Roberts International Airport in Liberia, the appellant failed to provide the carryon baggage. Thereafter, the appellant's baggage claim agent filled out a claim form on the appellee's behalf, detailing the items contained in the carryon bag and promised to report the case to the appellant's Head Office in Sinkor, Monrovia. The appellee alleged that the appellant demonstrated insensitivity as it failed to respond to his follow-up calls, emails and in person visitation at its Head Office, and denied him access to the appellant's manager on grounds that the manager does not attend to claims for missing baggage.

The appellee further stated that due to the loss of his bag, he could not use his vehicle upon arriving in Liberia as the keys were in the bag; consequently;

he had to request a ride to town, and thereafter endure two days of trekking on foot from Benson Street, Central Monrovia, to Parker Corner, Brewerville. In addition, the appellee complained, the loss of his baggage resulted to embarrassment, pain and suffering and ruined his expectation of a smooth arrival and quiet enjoyment with his colleagues, family and friends. He concluded that the appellant's conduct towards him amounts to a willful misconduct and thereby precludes the appellant from invoking the provision of the Warsaw Convention limiting its liability to US\$20.00 per Kilogram of a lost baggage.

In response to the appellee's complaint, the appellant acknowledged that the appellee travelled on its aircraft and his carryon bag went missing during the flight. The appellant however contended that the appellee's carryon bag was disallowed on the flight because it weighed more than 10 kilograms, the maximum weight allowed for a carryon baggage, and due to the excess weight, the carryon bag was treated as a checked-in baggage. The appellant contended that the appellee should have removed his medication from the carryon bag and kept it in his possession since he knew that he would have needed it at some point in time during the flight, and the appellant is not liable for the appellee's failure to exercise common sense in protecting his own health. According to the appellant, it was simply following regular airline procedure regarding search, identification and retrieval of lost baggage, and under such procedure, the passenger usually fills out a claims form to help the airline trace his/her baggage. When the airline determines that the baggage is lost, the appellant said, the airline then pays the passenger a compensation of US\$20.00 per kilogram for the lost baggage in keeping with the Warsaw Convention. In keeping with the Warsaw Convention, the appellant stated that it made an offer to compensate the appellee for his lost bag at the rate of US\$20.00 per kilo, but the appellee rejected the offer and instead elected to pursue the instant legal action. The appellant also rejected the appellee's claim that his lost bag contained cash amount of US\$500.00 (Five Hundred United States Dollars).

The appellant concluded that under the facts and circumstances of this case, the appellee's compensation should be limited to US\$ 20.00 per kilogram of the lost bag as provided under the Warsaw Convention and as affirmed by this Court in the case *Swissair v. Kabalan*, 35 LLR 49 (1988).

The appellant filed along with its answer a motion for summary judgment requesting the court to refuse jurisdiction over the case on ground that the Warsaw Convention governs the appellee's claim. The motion also stated that

the Civil Law Court lacks jurisdiction to determine an action of damages for loss of an airline passenger baggage because assuming jurisdiction in such a case would be contrary to the case *Swissair v. Kalaban* wherein the Supreme Court disposed of a loss of baggage claim without awarding damages. The appellant concluded that there being no material facts in dispute in this case, especially given the fact that it made a compensation offer to the appellee in keeping with the Warsaw Convention, summary judgment will lie as a matter of law in its favor.

The appellee filed a reply to the appellant's answer and a resistance to the motion for summary judgment. The appellee refuted the appellant's allegation that his carryon bag weighed more than ten kilograms as it was cleared at the check-in counter to carry on board and it was only at the point of entry into the plane that the appellant's agents approached him to have the bag checked in on the basis that the cabins in the plane were filled; that the appellant demonstrated insensitivity to the appellee during his follow-up communication and visit to its Head Office in Monrovia. The appellee further contended that though the Warsaw Convention governs compensation for lost baggage in air carriage, however, limiting the appellant's liability to US\$20.00 per kilogram of the lost baggage would not provide adequate relief in this case. The appellee stated that the appellant's wrongful conduct and the embarrassment, pain and suffering he endured in consequence thereof entitles him to an award of general damages. The appellee further stated that his position for the award of general damages finds support in the cases *Kesselly et al. v. SN Brussels Airlines et al* Supreme Court Opinion, October Term A.D. 2008 and *Coughlin v. Trans World Airlines Inc.*, 847 F.2d 1432, 87-5954 (11th Cir. 1988). In these cases, the appellee argued, the Courts held that an award of damages to a passenger for claims arising from lost or damaged baggage might extend beyond the ordinary compensation limit of US\$20.00 per kilogram where there is proof of willful misconduct on the part of the airline.

In his returns to the motion for summary judgment, the appellee argued that the appellant's compensation offer would have been tenable had there been no showing of willful misconduct by the appellant; that the appellant's conduct being willful in this case; the compensation offer made by it was inadequate in comparison to the injuries suffered by the appellee. The appellee stated that the holding in the case *Swissair v. Kalaban* is inapplicable to the facts and circumstances of this case, as the passenger's claim in the *Swissair* case was for shortage and damage to his goods by the airline. In this case, the appellee

argued, the claim is for the airline negligence and willful misconduct resulting to the loss of the passenger's bag.

When pleadings rested, His Honor J. Boima Kontoe, presiding by assignment over the Civil Law Court, heard argument on the motion for summary judgment and thereafter delivered a ruling denying the motion. The judge held that the Civil Law Court's general jurisdiction extends to damages suit brought against airlines by air passengers, and that the case involved mixed issues of law and facts that warranted a trial. The judge therefore ruled the case to trial on the merits.

Following the denial of the motion for summary judgment, the court conducted a bench trial, at the conclusion of which it adjudged the appellant liable to the appellee. The court held that the Warsaw Convention is the controlling law in this jurisdiction and therefore, the appellee compensation should be based on the known weight of his carryon baggage multiplied by US\$20.00; that since the appellant had made an offer of US\$1,500.00, that amount should be accepted by the appellee as compensation for his lost bag. The court however held further that the appellee suffered embarrassment and mental torture because of the loss of his bag. Accordingly, the court awarded the appellee special damages of US\$2,160.00 (United States Dollars Two Thousand One Hundred Sixty) and general damages of US\$350,000.00 (United States Dollars Three Hundred Fifty Thousand).

The appellant excepted to the court's final judgment and announced an appeal to this Court. We reproduce below the appellant's two-count bill of exceptions:

"1. That Your Honor having held that the Warsaw Convention of 1929 has been domesticated by our National Legislature to govern compensation for lost baggage while in air transit erred when Your Honor, contrary to the provision of said law, awarded Plaintiff the amount of United States Dollars Two Thousand One Hundred Sixty (US\$2,160.00) as special damages and United States Dollars Three Hundred Fifty Thousand (US\$350,000.00) as general damages; for which erroneous and prejudicial award and final judgment in respect thereto defendant excepts .

2. That assuming without admitting that the Warsaw Convention which has been domesticated and opined by the Supreme Court of Liberia as the law applicable in the event of a lost baggage while in air transit was not applicable in the instant case, the plaintiff did not prove any general damages he sustained in consequence of his lost baggage to warrant the award of general damages in the amount of United States Dollars Three Hundred Fifty Thousand (US\$350,000.00) for the loss of plaintiff's baggage being contrary to the law invoked in Liberia and not supported by evidence, is grossly erroneous and prejudicial, for which defendant excepts.

The appellant in essence, contends that the trial court acted contrary to the Warsaw convention by awarding special and general damages to the appellee, and that the appellee did not provide evidence to support the award of US\$350,000.00 (United States Dollars Three Hundred Fifty Thousand) as general damages.

The appellant contentions present the following issues for our consideration:

1. Whether in a case of loss of baggage by an airline, a court may award general damages in addition to the compensation provided for under the Warsaw Convention?
2. Whether the appellee furnished proof that the appellant or its agents' willful misconduct led to the loss of his baggage, and if so, whether the award of general damages commensurate with the evidence adduced at trial"?

Addressing the first issue, whether in a case of loss of baggage by an airline passenger, a court may award the passenger, general damages in addition to the compensation scheme provided in the Warsaw Convention, the appellant contends that the Warsaw Convention is the controlling law in a case of the loss of a passenger's baggage by an airline, and under that instrument, an airline liability for the loss of a passenger's baggage is limited to US\$20.00 per kilogram of the lost baggage. The appellant cites the case *Swissair v. Kabalan*, 35 LLR 49 (1988) in support of its contention. In that case, the contents of an airline passenger's baggage were damaged or short landed upon arrival at the Roberts International Airport. The airline offered to pay the passenger US\$20.00 per Kilogram of the lost baggage in keeping with the Warsaw Convention. The passenger accepted the payment and issued a release but with reservation. Thereafter, the passenger filed an action of damages for breach of contract before the Civil Law Court praying that the (Airline be held liable for the full value of the contents of the lost baggage. The airline responded that its liability was limited to US\$20.00 per kilogram of the lost baggage in keeping with Warsaw Convention, and that it has already made that payment to the passenger. At the end of trial in the Civil Law Court, the jury awarded the passenger special damages of US\$30,660.00 and general damages of US\$20,000.00 and the court affirmed the jury's verdict. On appeal, the Supreme Court reversed the judgment, holding that because the passenger did not declare the value of the content of the baggage to the airline and make payment therefor, the airline acted correctly in paying the passenger US\$20.00 per kilogram of the lost baggage as required by the Warsaw Convention. The appellant urges this Court to apply the holding of the *Swissair* case to the instant case and similarly hold that the appellee compensation is limited to US\$20.00 per kilogram of the lost carryon bag.

The appellee, on the other hand, concurs that the Warsaw Convention is the governing law in cases of lost baggage in air transportation. The appellee however strenuously contends that the *Swissair* case is not the controlling precedent in this case. The appellee asserts that because the appellant's willful misconduct contributed to his injury, the controlling precedent is the case *Kesselly et al v. SN Brussels*, Supreme Court Opinion, October Term, A.D. 2008. In that case, the airline passengers (a mother and her two minor kids, ages 15 months and 9 years) were travelling from the United States of America via Brussels to Liberia. In Brussels, the airline informed the passengers that, contrary to the date indicated on the passengers' tickets, the next available flight from Brussels to Liberia would be six days later. The airline promised to secure accommodation for the passengers until the day of departure of the flight from Brussels to Monrovia. The passengers were later rounded up by Belgian Police and taken to a heavily guarded security room and were mingled with strange men who smoked throughout the night. The minor passengers suffered severe cold and fever. The passengers sued the airline for damages, praying the Civil Law Court to award them One Million United States Dollars (US\$1,000,000.00). Among other defenses, the airline argued that the change in the flight schedule was a legitimate exercise of the airline's prerogative under the Geneva Convention (Article 9.1.1), and therefore, it was insulated from any liability. At the conclusion of trial, the lower court awarded the passengers Five Thousand Three Hundred Thirty-Five United States Dollars (US\$5,335.000) and Nine Hundred Thirty-Five Liberian Dollars (L\$935.00) as special damages plus Thirty Thousand United States Dollars (US\$30,000.00) as general damages. On appeal, the Supreme Court affirmed the lower court's judgment, but modified the award of general damages from Thirty Thousand United States Dollars to One Hundred Thousand United States Dollars (US\$100,000.00). The appellee craves this Court to apply the holding of *Kesselly et al. v. SN Brussels* in this case, and hold that, in addition to the compensation scheme of US\$20.00 per kilogram for the lost baggage under the Warsaw Convention, an airline may be liable in special and general damages if its conduct is a willfully negligent.

After hearing arguments by counsels of the parties and reviewing the relevant laws cited and relied on, the Court says that in the case *Kesselly et al. v. SN Brussels*, the Supreme Court looked to the Warsaw Convention itself to dispose the question presented. Signed in 1929, the Warsaw Convention governs and regulates all international carriage of persons, luggage or goods performed by aircraft for reward or a gratuitous carriage by aircraft performed by an air transport undertaking. The Liberian Legislature ratified the convention on May 2, 1942. Article 22.2 of the Convention provides:

"In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery 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 actual value to the consignor at delivery.

Under this provision of the Warsaw Convention, the liability of an airliner for a lost baggage is limited to 250 francs (or its equivalent in a national currency) per kilogram unless the passenger makes a declaration on the value of the baggage and makes payment therefor as may be required. It is in keeping with this provision that this Court in the *Swissair v. Kabalan* case determined that the compensation due a passenger for a lost baggage is US\$20.00 per kilogram in Liberia.

However, Article 25 of the Convention extends the liability of an airline beyond the limit specifically mentioned in Article 22.2 if the airline's conduct is willful and results to damages to a passenger. Article 25 (1) (2) states:

"25.1. That in keeping with Article 25 of the Warsaw Convention, the carrier shall not be entitled to avail himself of the provisions of the Warsaw Convention which exclude or limit its liability, if the damage is caused by its willful misconduct or by such default on its part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to willful misconduct.

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

In accordance with the provision of Article 25 of the Warsaw Convention cited above, an airline's liability for a damage suffered by a passenger, such as a damage to or loss of the passenger's baggage, may extend beyond the limits provided in Article 22.2, if the passenger proves the action of the airline or its agent to be a willful misconduct.

Referencing the *Swissair* case and the *Kesselly* cases cited by the parties, the passenger in the *Swissair* case sought only to recover the full value of the contents of a damaged baggage, and did not pray the court for the award of

damages on account of the negligent conduct of the airline. In the *Kesselly* case, the passengers' claim was solely on the ill treatment meted against them while in transit awaiting their next flight to their final destination. Because the two cases touched on different aspects of an airline liability under the Warsaw Convention: one on an airline liability when a passenger's baggage is damaged and the other on an airline liability when a passenger is subjected to ill treatment by the airline's agents. In the *Kesselly's* case, damages were awarded under Article 25 of the Warsaw Convention for the airlines willful misconduct towards the appellees which caused them mental anguish and distress.

What we must consider in this case is whether the appellee furnished proof that the appellant or its agents' act which lead to the loss of his carryon baggage constituted a willful misconduct, and whether the award of general damages conforms to the evidence adduced at trial.

Degrees of negligence exist and are recognized in our Jurisdiction, particularly in regards to the distinction between ordinary and gross negligence. In cases where the facts show gross negligence, it constitutes a failure to exercise the degree of care that even a careless individual would employ under the circumstances, and it can be linked to wanton, willful or reckless conduct under the facts and circumstances of the case. (57A AM Jur 2d, *Negligence*, Section 232).

At the trial of the case, the appellee presented four witnesses, including himself, who testified on his behalf. The testimonies that are relevant to the appellee's claim of willful misconduct against the appellant are as follows:

The appellee himself testified that at the John F. Kennedy International Airport in New York the appellant's agents checked and tagged his bag as a carryon bag. However, at the entrance of the aircraft the agents informed him that there was no available space in the cabin for his carryon bag; that the appellant's agents requested his carryon bag and tagged it as a check-in baggage. According to the appellee, he pleaded with the appellant's agents that he had items of personal effects in his bag that he would need while in flight but the agents promised that he would have access to the bag in transit in Casablanca. Based on that promise, the appellee stated, his fear of being detached from his bag was calmed and he turned over the bag as requested; that notwithstanding the promise, the appellant's agents failed to keep their words upon the appellee's arrival in Casablanca, Morocco and subsequently in Monrovia, Liberia.

The appellee third witness was Archibald Zubah, an airline teacher with fifteen years of teaching experience and president of the Morris Community College of Airline Studies. He testified that an airline passenger is entitled to a checked in luggage and a carryon luggage, and that the passenger retains and is the sole custodian of the carryon luggage from the point of departure to final destination. The witness stated that the passenger is responsible for the carryon luggage while the aircraft agents are solely responsible for the checked-in luggage. The witness stated further that if a carryon baggage is inspected and found to be more than the maximum weight allowed for such baggage, that is, 10 kilograms, the passenger is advised to reduce the items in the baggage, and that it is unusual to take away a passenger's carryon bag after it is scanned. According to the witness, before a passenger boards an aircraft, the booking of the aircraft is done by means of the passenger's manifest and the cabin manifest, and therefore the passenger should have access to his/her cabin baggage from the point of departure to the final destination. The witness concluded that the airline takes responsibility for the loss of a passenger's carryon baggage that was taken away from the passenger by the airline's agent, and that the airline's agent has a duty to ascertain the content of the cabin baggage in the presence of the passenger and not away from the passenger.

For its part, the appellant adduced two witnesses who testified on its behalf. The relevant portions of the witnesses' testimonies, which seek to absolve the appellant of willful misconduct under the circumstance, are as follows. The appellant first witness, Zoe Nuwoe, a commercial agent of the appellant, confirmed in her testimony that the appellee was a passenger on the appellant's aircraft from New York, United States of America via Casablanca, Morocco to Liberia, and that the appellee filed a claim that his carryon baggage was lost upon arrival in Liberia. The witness explained that if the cabin overhead of an aircraft is filled, and based on the dimension of a passenger's carryon baggage, the flight crew might take away a passenger's carryon baggage and issue him a tag. The witness explained further that under the circumstances that a baggage gets missing, payment under the Warsaw Convention, International Aviation Transport Association (IATA) regulation is US\$20.00 per kilogram calculated on the weight of a passenger's lost baggage. In this case, the appellant offered the appellee US\$1,500.00 based on documents submitted by him.

The appellant second witness, Clarence Crabbe, a Station Manager at Kenya Airways and President of the Board of Airline Representatives with over

twenty-one years of service in the aviation industry, testified that a passenger's carryon baggage may be taken away from him if the aircraft is full with passengers and carryon bags. According to witness Crabbe, it is the responsibility of the flight purser to maintain cabin safety and he may request a passenger to submit his (passenger) carryon bag for check in at which time the carryon baggage is considered as a luggage. The witness stated that when a passenger carryon baggage is taken as a luggage, the passenger might request to take out necessary valuables, such as, electronic gadgets, cash or bonds, jewelry or medication contained in the bag that the passenger may need during the flight, placing them in his pocket or in a small laptop bag. The witness further stated that when the airliner loses a passenger carryon bag, the compensation due the passenger depends on the convention used in the setting where the claim arises, and that because Liberia is a signature to the Warsaw Convention, the compensation rate is US\$20.00 per kilogram.

The testimonies of the parties reveal the following:

- 1.. The appellant does not deny that the appellee handed his carryon bag to the appellant's agents at the entrance of the aircraft on which the appellee boarded from New York, United States of America to Casablanca, Morocco. Further, the appellant also does not deny that the said bag lost while in the appellant's custody.
2. The appellant does not refute that the appellee informed its agents that his carryon bag contained items of personal effects, which will be useful to him during the course of the flight. It is also not denied that the appellee allowed the appellant's agents to take away his bag only after they promised that he would have access to it during transit in Casablanca, Morocco. The appellant's only defense is that the appellee should have removed items such as cash, medication and jewelry from the bag at the time he released it to the appellant's agents.
3. That it is also uncontested from the testimonies that airliners agents may take a passenger's bag tagged as a carryon and check it in as a luggage for reasons such as, cabin safety, the weight of the bag, etc. However, when a passenger bag is taken away from him, the responsibility for its safety is solely that of the airline or its agents.

The testimonies compel us to conclude that the appellant was derelict in securing the appellee's carryon baggage in transit, and that this dereliction was the direct and proximate cause of the loss of the appellee's carryon bag. The appellant offered no evidence that it exercised due care under the circumstance to secure the appellee's bag especially given that the appellee specifically informed the appellant's agents that he had items in the bag which he would have needed during the course of the flight.

Under our law, when the appellee delivered his carryon baggage to the appellant's agents at the entrance of the aircraft in New York, a contract of bailment was established between the parties, and pursuant to that contract the appellant was under a legal duty to deliver or cause to be delivered to the appellee the bag upon request.

This Court has held that bailment in its ordinary legal signification, imports the delivery of personal property by one person to another, in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished or kept until the bailor claims it. For a bailment to exist there must be a delivery by the bailor to the bailee and an acceptance by the bailor of the subject matter of the bailment...CFAO (*Liberia*) Ltd. v. Morgan, 35 LLR 258 (1988); *Scanship (Lib) Inc. v. Flomo*, 41 LLR 181 (2002); *Ecobank v. Kakata Holding Company, Inc.* Supreme Court Opinion, October Term, 2012.

In this case, the carryon bag was not a luggage as anticipated in the true sense of the Warsaw Convention relating to check-in luggage. As explained by the appellee's witness, Achibald Zubah, before a passenger boards an aircraft, the booking of the aircraft is done by means of a passenger's manifest and the cabin manifest, and therefore the passenger should have access to his/her cabin baggage from the point of departure to the final destination; that the airline takes responsibility for the loss of a passenger's carryon baggage when taken away from the passenger by the airline's agent, and the airline's agent has a duty to ascertain the content of the cabin baggage in the presence of the passenger and taken away from the passenger.

Carryon bags are unlike the usual check-in baggage of normally general goods, such as clothing which are given to the airlines for delivery upon the passengers' disembarking the flight. Carryon bags normally contain items valuable to passengers and these carryon bags are normally in the personal control and custody of passengers during flights. Airlines are therefore under a legal duty to exercise more than ordinary care in handling passengers' carryon bags when they are taken away from the passengers. Failure to make available passenger's carryon bag amounts to a serious misconduct.

The authoritative Black's Law Dictionary (10th edition) defines misconduct as a dereliction of duty or improper behavior, especially by someone in a position of authority or trust. 57A AM Jur 2d; *Negligence*, Section 247 provides:

"Generally, willful and wanton misconduct is something more than ordinary negligence but less than deliberate or intentional conduct. Definitions of willful or wanton conduct generally require that the defendant (1) have knowledge of existing conditions, and be conscious from such knowledge that injury will likely or probably result from his or her conduct; and (2) with reckless indifference to the consequences, consciously and intentionally do some wrongful act or omit to discharge some duty which produces the injurious result. It is the synergistic effect of the knowledge of danger, together with the choice to proceed regardless of the consequences that makes willful and wanton conduct distinguishable from mere negligence. This synergism is often considered to evince the constructive intent, deliberateness, willfulness, or state of mind that characterizes willful and wanton conduct.

In addition to the requirement that the defendant acted in reckless disregard of the consequences, for conduct to be willful and wanton it must be shown that the defendant knew, or reasonably should have known in light of the surrounding circumstances, that his or her conduct would naturally or probably result in injury. The requisite knowledge can be actual or constructive; and is judged by an objective rather than a subjective standard. That is, it is not necessary that the defendant recognizes conduct as being extremely dangerous; it is enough that he or she know, or have reason to know, of circumstances which would bring home to the realization of ordinary reasonable person the highly dangerous character of his or her conduct. The actor must be shown to have consciously realized, or it must be demonstrated that he or she should have consciously realized, that his or her conduct would in all probability, as distinguished from possibility, produce the precise result that it did produce, and that it would bring harm to another."

From the facts and circumstances of this case, the appellant did not exercise the degree of care required for the safety of the appellee carryon bag, especially given that the appellee had informed the appellant's agents of the need to have access to the contents of his bag during the flight and he was assured that his bag would be delivered to him at the transit point in Morocco. Not only was the bag not delivered to the appellee in Morocco but the bag was not delivered to the appellee at his final designation, RIA in Liberia. In many jurisdictions like ours, gross negligence is used as a standard for determination whether an award of exemplary or punitive damages should be made in a negligence action (cases). The appellant failure to exercise the degree of care expected in this case constitutes gross negligence which can be equated to a willful misconduct so as to extend the appellee's claim of damages beyond the limits provided in Article 22.2 and into the realm of Article 25 of the Warsaw Convention.

We must however decide whether the award of damages in the lower court conforms to the evidence adduced at trial.

The lower court awarded the appellee US\$1, 500.00 as compensation for his lost baggage; US\$2,160.00 as special damages and US\$350,000.00 as general damages. The general damages award of US\$350,000.00 comprised of the following:

- I. US\$ 100,000.00 as compensation for the embarrassment the appellee endured in obtaining a new checkbook since his checkbook was in the lost carryon bag.
- II. US\$100,000.00 as compensation for the embarrassment and mental torture the appellee suffered when he arrived late night at the Roberts International Airport and could not access his vehicle to drive home.
- III. US\$150,000.00 as compensation for the humiliation and frustration the appellee suffered in following up on his claim via several emails, texts and in-person visitation at the appellant's office in Monrovia.

We note that the parties agree that the Warsaw Convention is the controlling law governing the liability of an airline in a case of the loss of a passenger's baggage. Under that Convention, as affirmed and applied by this Court, an airline's liability for the loss of a passenger's baggage is limited to US\$20.00 per kilogram unless the passenger, at the time of handing over the baggage to the airliner, made a special declaration of the value at delivery and pay a supplementary sum if the case so requires.

The records in this case show that though the appellee informed the appellant's agents at the entrance of the aircraft that his carryon bag contained items of personal effects that he would need during the course of the flight, there is however, no showing that the appellee made a special declaration of the value of the items in the bag and paid a supplementary sum covering these items. Under the circumstance we hold that the appellee's recovery for special damages be limited to the appellants offer of One Thousand Five Hundred United States Dollars (US\$1,500.00).

This brings us to the general damages awarded by the trial court. As indicated above, the court awarded the appellee US\$350,000.00 as general damages for the humiliation, embarrassment and mental torture the appellee suffered due to the loss of his bag. The records show that during trial, the appellee testified that upon his arrival at the Roberts International Airport from Casablanca, Morocco, he did not have access to his vehicle, which he had parked at the airport because the vehicle's key was in 'his carryon bag; consequently, he was stranded at the airport for many hours of the night and

could not get to his home in Brewerville; that eventually he got a ride to Central Monrovia and thereafter trekked on foot for two days from Central Monrovia to his home in Brewerville, which is some miles away from Central Monrovia. The appellee further stated that upon his arrival in Liberia on November 5, 2015, he inquired from the appellant's office in Sinkor, Monrovia about his bag and was told by the staff at the office to follow up on a later date. Based upon that, the appellee said, he made many follow-ups through emails, letters and in-person, but the appellants' staff were insensitive towards him. The appellee stated that because the appellant's agents were not responsive to his many communications and visitations, his counsel wrote the appellant and requested for a conference prior to instituting the instant suit. Testifying further, the appellee said that he had to obtain a new checkbook from his local bank because his bankbook was in the missing carryon bag, and that he suffered shame and humiliation for not fulfilling his promise of giving his daughter a birthday gift as the dress he purchased for her gift was in the lost carryon bag. The appellee concluded that he was compelled to incur the following expenses due to the loss of his bag:

- a. Reprogramming and printing of new key for his vehicle, US\$ 1,100.00
- b. Vehicle rental US\$1,160.00
- c. New bank book from plaintiff's local bank US\$5.00
- d. New dress purchased for his daughter's birthday gift at US\$15.00
- Eye lubricant purchased by the plaintiff at US\$25.00

The appellee's wife who testified on his behalf essentially restated what the appellee had told her about his ordeal after his bag was not found. Adherence to the hearsay rule (see section 25.7 ILCLR) therefore bars such testimony.

We are in agreement with the trial court that the appellee endured mental anguish and distress due to the loss of his carryon bag. As the records indisputably show, the appellee firstly arrived in Brussels expecting the delivery to him of his carryon baggage, after the language was not delivered to him, he anticipated the delivery at the Roberts International Airport with the expectation that he would have access to his bag that contained the key to his vehicle parked at the airport. This expectation was unfulfilled; as a result, he had to endure the embarrassment of seeking help from others in order to drive from the airport to Monrovia. Further, the appellee could not access his eye medication resulting to extreme discomfort in his eyes, and that he held to bear the hurt of not fulfilling his promise of a birthday gift to his daughter. In addition, the appellee had to endure the difficulty of commuting from town to his home in Brewerville to Central Monrovia on a daily basis, as he did not have access to the keys of his vehicle.

The law in this jurisdiction is that damages attach as a pecuniary compensation or indemnity which may be recovered in the courts by persons who have suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another. *Intrusco Corporation v. Osseily*, 32 LLR, 558, 571; *Firestone Liberia Inc. v. G. Garlimah Kollie*, Supreme Court Opinion, March Term 2012; *Lonestar Cell Corp v. Wright* Supreme Court Opinion, March Term 2014.

We cannot however confirm the amount of general damages awarded to the appellee under the circumstance of this case. As indicated above in this Opinion, the trial judge awarded the appellee US\$100,000.00 for the embarrassment of obtaining a new checkbook; US\$100,000.00 for the mental torture of arriving late at the airport without means to get home; US\$150,000.00 for the many follow-ups to the appellant's office in Sinkor, Monrovia.

In his final judgment, the trial judge reasoned that the amount of US\$100,000.00 would compensate for the mental anguish and torture the appellee experienced in walking from the Roberts International Airport in Margibi County to his home in Brewerville, Montserrado County. However, the records do not support this conclusion. The appellee did not testify that he walked from the airport to his home. Rather, the appellee stated that he arrived at the airport late in the night and could not use his vehicle to get home because the keys were in his carryon bag; as a result, he had to endure the embarrassment of seeking help from strangers to get to Central Monrovia. Even if we were to accept as true the appellee's statement that he walked from Central Monrovia to his home in Brewerville for two days because he could not access his vehicle that would still not justify the award of US\$100,000.00 as damages under the circumstance. This Court has recognized the principle that a party must not embark on a course of action for the sole purpose of increasing the amount of loss incurred by him due to the conduct of another party. In the case *Saleh v. Montgomery*, 21 LLR 125, 131 (1972), this Court stated that it is a general rule that recovery for damages be denied where persons against whom wrongs have been committed passively suffer economic loss which could have been averted by reasonable effort, or has increased by activity such loss where prudence would require that such activity cease. We do not see it prudent for the appellant, a lawyer, to have walked two days from Central Monrovia to Brewerville when there is public transport that could have taken him in a matter of hours for a reasonable amount which he could claim.

The trial judge also awarded the appellee general damages of US\$100,000.00 and US\$150,000.00 for the humiliation suffered in obtaining a new checkbook from a local bank in Monrovia and for the many follow-up calls, emails and visitation to the appellant's office regarding his lost baggage.

We note that as a matter of common knowledge, the process of obtaining a new checkbook is a normal process associated with owning a checking account at any local bank in Liberia. This happens either when the checkbook issued to the account owner has been used, or was lost or damaged. The process for obtaining a checkbook is normally a week and entails a nominal cost to the account owner. There is no additional requirement or cost charged to an account owner because of the circumstances leading to the loss or damage of his checkbook. As the appellee himself stated in his testimony, it cost him only US\$5.00 to obtain a new checkbook from his bank. Whatever inconvenience he might have encountered in the process of obtaining a checkbook, could have been temporarily offset by his request to the bank for immediate withdrawal from his checking account at a minimum cost until his checkbook was printed and delivered and which he could have also claimed.

Furthermore, the records show that the response of the appellant to the appellee many follow-up calls and visitation was not, as the appellee allege, insensitive and intended to further expose him to embarrassment and mental anguish. The appellant's first witness testified, and that testimony was not rebutted by the appellee, that under the International Aviation Transport Association (IATA) regulation for missing items on airlines, the timeframe allowed for search of a missing item is 45 days and that the appellant's agents were duly acting in accordance with the regulation in handling the appellee's claim. More besides, when the appellant concluded its search for the appellee's bag and found that the bag was lost, it offered to the appellee US\$1,500.00 as compensation for the bag in keeping with documents presented by the appellee. While we acknowledge that there were cost and time associated by the appellee's follow-up calls and visitations and that he undoubtedly suffered hardship and anxiety in anticipation that his carryon would be delivered to him with his prized possessions therein, but same was never delivered, and for such gross negligence by the appellant, damages attached. We do not however agree with the trial judge that the quantum of damages suffered in this regard amounts to US\$150,000.00. This Court has held that general damages awarded must commensurate with the anguish and humiliation purportedly suffered. *Lonestar Corporation v. Jimmy Wright*, Supreme Court Opinion, March Term, 2014.

In view of the foregoing facts and analysis, we hereby affirm the judgment of the lower court but with modification as to the amount awarded, so that the appellant pays to the appellee special damages in the amount of One Thousand Five Hundred United States Dollars (US\$1,500.00), and general damages in the amount of Twenty Thousand United States Dollars (US\$20,000.00) for the embarrassment and mental anguish suffered by the appellee.

The Clerk of this Court is ordered to send a mandate to the trial court to resume jurisdiction and give effect to the Judgment emanating from this Opinion. Costs are ruled against the appellant. AND IT IS HEREBY SO ORDERED.

WHEN THIS CASE WAS CALLED FOR HEARING, COUNSELLOR J. JOHNNY F. MOMOH OF THE J. JOHNNY MOMOH & ASSOCIATES LEGAL CHAMBER, INC. APPEARED FOR THE APPELLANT. COUNSELLOR FINLEY Y. KARNGAR APPELLEE, APPEARED PRO SE.