WILFUL MISCONDUCT IN THE WARSAW CONVENTION: A STUMBLING BLOCK?*

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ULEN v. AMERICAN AIRLINES[1]
RITTS v. AMERICAN OVERSEAS AIRLINES[2]
GOEPP v. AMERICAN OVERSEAS AIRLINES[3]
PEKELIS v. TRANSCONTINENTAL & WESTERN AIR[4]
RASHAP v. AMERICAN AIRLINES[5]
HORABIN v. BRITISH OVERSEAS AIRWAYS CORPORATION[6]

These six cases, five American and one British, deal with and separately define "wilful misconduct". This subject which is of a very great importance has been an issue in many written works and divergent interpretations have been rendered upon it under systems of Civil Law and of Common Law.

A certain variance can even be found among the five American decisions but all of these seem to refer to wilful misconduct as a concept including the concepts of "dol" and "faute lourde" at the same time.

It appears necessary to analyze directly every single situation in which wilful misconduct is involved if we are to understand clearly its concept.

1. In *Ulen v. American Airlines* the Court of Appeals judge said referring whole-heartedly to the jury instructions at the trial:

> . . . if the carrier or its employees or agents wilfully performed any act with the knowledge that the performance of that act was likely to result in injury to a passenger, or performed that act with reckless and wanton disregard of its probable consequences, then that would constitute wilful misconduct and if the result of that wilful misconduct was injury to Mrs. Ulen then her recovery would not be limited by this sum of some eight thousand dollars . . . Now the mere violation of those [safety rules and regulations] . . . even if intentional would not necessarily constitute wilful misconduct, but if the violation was

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[1]U.S.D.C., District of Columbia, April 20, 1948; 1948 U.S.Av.R. 161. U.S. Court of Appeals, District of Columbia, September 26, 1949; 1949 U.S.Av.R. 338.

[2]U.S.D.C., Southern District of N.Y., January 17-18, 1949; 1949 U.S.Av.R. 65.

[3]State of N.Y., N.Y. County, Supreme Court, October 25, 1951 and January 7, 1952; 1951 U.S.Av.R. 527. State of N.Y., Appellate Division, 1st Dept., December 16, 1952; 1952 U.S.C.Av.R. 486.

[4]U.S.D.C., Southern District of N.Y., March 8, 1950; 1950 U.S.Av.R. 296. U.S. Court of Appeals, Second Circuit, February 15, 1951; 1951 U.S.Av.R. 1.

[5]U.S.D.C., Southern District of N.Y., October 5-13, 1955; 1955 U.S.C.Av.R. 593.

[6]United Kingdom of Great Britain and Northern Ireland, Queen's Bench Division, London, November 6, 1952; 1952 U.S.C.Av.R. 549.

> intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct and, likewise, if it was done with a wanton and reckless disregard of the consequences.

Appellant's claim of limited liability in this case was so precluded under art. 25 of the Convention which makes the carrier liable for the whole damage when the latter was caused by his wilful misconduct or by a default on his part as is considered to be equivalent to wilful misconduct.[7]

The passenger's ticket entitled Mrs. Ulen to transportation from Washington, D.C. to Mexico City, Mexico. The plane crashed a few hours after take-off close to the summit of Glade Mountain. The plaintiff was seriously injured in the accident while the pilot and the co-pilot died.

At the time of this flight there was in force a Civil Air Regulation promulgated by the Civil Aeronautics Board which read:

> No scheduled air carrier shall be flown at an altitude of less than 1,000 feet above the highest obstacle located with a horizontal distance of 5 miles from the center of the course intended to be flown . . .[8]

Indications and interrogatories answered by the air carrier showed that the plane crashed at an altitude of 3,910 feet and that the mountain, 4,080 feet high, was at most within 2 miles from the course scheduled and in fact flown by the aircraft. The defendant admitted its liability within the limits of the Warsaw Convention and showed full knowledge of its actions answering that

> the same pilot had flown this same route in the same manner several times before.

The District Court for the District of Columbia found for plaintiff and fixed the recovery beyond the limits of the Convention, applying art. 25. The defendant air carrier appealed the judgment and the Court of Appeals re-examined the entire case with regard to the carrier's wilful misconduct.

The appellant contended that its liability was limited unless it could "be successfully shown that the pilot or other agents of appellant, with malicious or felonious intent, planned to fly the plane into the mountain to the injury of its passengers". In other words, under art. 25 the carrier should be found guilty of "well-nigh criminal intent" before losing the privilege of limited liability. The plaintiff-respondent argued that a regulation had been definitely violated in the planning and executing of the flight, with full knowledge or complete disregard of its consequences; all of which certainly constituted wilful misconduct. The Court of Appeals, accepting the trial court's definition of wilful misconduct, confirmed the judgment in favour of the plaintiff-respondent beyond the limits of the Warsaw Convention.

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[7]See, for an historical account of the interpretation of art. 25 Warsaw Convention, de Juglart: Dol et faute lourde dans le transport aérien international, Juris Classeur Périodique 1952, I, 1010 and *Traité Elémentaire de Droit Aérien*, (Paris 1952), 309; Chauveau: L'accident des Açores et la responsabilité du transporteur aérien, [1952] Revue Française de Droit Aérien, 239.

[8]Effective May 7, 1943, 8 Fed. Reg. 6589.

The decision must be regarded as one of the clearest on "wilful misconduct".

The flight of an aircraft at an altitude which does not permit it to pass over the obstacles along the route flown may involve the crew's negligence. But if a regulation, the only purpose of which is safety, has been intentionally violated with knowledge that such a breach is likely to cause injury to passengers, one cannot but infer wilful misconduct on the part of a person so acting.

This misconduct existed in all its elements in the flight plan (which referred to an altitude not sufficient to pass over the mountain) as well as in the executing of the flight (no attempt whatsoever was made by the pilot to increase altitude) and considering the regulation then in force, the case fell certainly under art. 25 of the Warsaw Convention.[9]

2. The judge's instructions in *Ritts v. American Overseas Airlines* read:

> Wilful misconduct . . . covers in the court's opinion not only acts done deliberately but also acts of carelessness without regard to the consequences. It has been defined as that degree of neglect or conduct arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest. To constitute wilful injury the act which produces it must have been intentional or must have been done under such circumstances as to evidence a reckless disregard for the safety of others and a willingness to inflict the injury complained of because of that wilful disregard . . . Wilful misconduct is something entirely different from negligence and far beyond it, whether the negligence be culpable or gross; it involves either a deliberate intent to commit injury or intentional misconduct which is so reckless and wanton as to imply a willingness to commit injury or a complete disregard for the natural consequences of the act.

These words provide for two types of conduct, both within the legal concept of wilful misconduct:

(a) an act deliberately done with the intention of committing injury;

(b) an act so reckless and wanton as to imply such an intention or a complete disregard for the natural consequences of that act.

The difference between the two types can be found in the psychological attitude which determines the act of sub-paragraph (a) on one hand, and can only be inferred or entirely absent in that of sub-paragraph (b) on the other.

The distinction will be understood in its full importance in the discussion which follows.

3. In *Goepp v. American Overseas Airlines* the New York Appellate Division Court reversed the trial judgment and reduced the award for damages to the limits under the Warsaw Convention. The Appellate decision reads:

> . . . in order that an act may be characterised as wilful there must be on the part of the person or persons sought to be charged a conscious intent to do or to omit doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of

[9]Accord: Sullivan: Codification of Air Carrier Liability by International Convention, [1936] Journal of Air Law, 44.

Contra: Goedhuis: *National Airlegislations and the Warsaw Convention,* (The Hague 1937) 272.

> injury from the conduct and a disregard of the probable consequences of such conduct . . . In their excellent treatise on Air Law (2nd ed. 1951) Shawcross and Beaumont at page 345 state the meaning of the term wilful misconduct as related to the text of the Warsaw Convention as follows: "The effect of the English Authorities appears to be that in English law wilful misconduct means a deliberate act or omission which the person doing or omitting (i) knows is a breach of his duty in the circumstances; or (ii) knows is likely to cause injury to third parties; or (iii) with reckless indifference does not know or care whether it is or is not a breach of his duty or is likely to cause damage.

It is submitted that wilful misconduct can either be established by evidence or inference of the wilful intent of the person involved or by a complete disregard for the consequences of such doing or omitting. A conscious intent to cause injury or the inference of such an intention goes beyond what is usually described as gross negligence.

It is to be observed that the Shawcross-Beaumont definition considers a deliberate "breach of duty in the circumstances" as constituting wilful misconduct. We do not agree that a neglect of duty or regulation whatever it may be may of itself constitute misconduct which is wilful; on the contrary such a breach of duty must be accompanied by a knowledge of the consequences which will probably ensue. Without this realization neither the intention to harm nor a disregard for the result of the act or its omission could be inferred, and the breach of duty could not then be classified as wilful misconduct.

Briefly though vaguely it has been said that ". . . wilful misconduct means a deliberate purpose not to discharge some duty necessary to safety."[10]

It is not advisable when trying to classify human behaviour to stress the objective element (violation) and thus to neglect the subjective elements (recklessness, wantonness); this might lead to numerous but not always exact interpretations.

It is finally to be noted that the *Ritts* and *Goepp* cases involved the same air accident. It is interesting to compare the conflicting decisions, both rendered in the State of New York in 1949 and 1952. In the *Ritts* case the jury found for the defendant air carrier exempting it from liability under art. 20 (1) of the Warsaw Convention; in the *Goepp* case the verdict for plaintiff of $65,000 was reversed on appeal and the recovery was reduced to the maximum compensation as established under art. 22 of the Convention. The second Court, it is submitted, should have known of the previous decision when deciding the *Goepp* case. It is possible that a variance in the claims and the attitudes of different juries to the facts and circumstances adduced in evidence at separate trials may have brought about the conflicting verdicts..

4. The instructions to the jury given by the lower Court (the case was reversed because of the wrongful exclusion of evidence) in *Pekelis v. Transcontinental and Western Air* point out all the elements which must be found in order to establish wilful misconduct. Particular attention is given to the

[10]*Rowe v. Gatke Corporation,* 126 F (2nd) 61, 66 1942.

uninterrupted sequence which must exist between legal (proximate) cause of the event and the event itself in order to affirm that the former caused the latter.

> Wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the performance of that act. Likewise, the intentional omission of some act with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences . . . If, however, you find that the defendant or any of its employees, committed one or more acts of wilful misconduct, then you must go on to consider whether or not such wilful misconduct as you have found was the proximate or legal cause of the death of Mrs. Pekelis. Now, to be the legal cause of this result . . . the wilful misconduct must be a substantial factor in bringing about that result. Furthermore, there must also be an actual and continuous sequence connecting the act of wilful misconduct with the death of Mrs. Pekelis. I say that the wilful misconduct must be a substantial factor in bringing about the death. You will note I did not say it must be the *sole* substantial factor contributing to the death. In other words, if you find that wilful misconduct by the defendant or any of its employees was a substantial contributing factor to the death of Mrs. Pekelis, that is sufficient to sustain the plaintiff's claim, even though you may find that there were also other substantial contributing factors . . .

5. In the most recent case, *Rashap v. American Airlines,* the same clear notion of wilful misconduct has been substantially affirmed:

> Wilful ordinarily means intentional, that the act that was done was what the person doing it meant to do. But the phrase "wilful misconduct" means something more than that. It means that in addition to doing the act in question, the person must have intended to do the act, or launched on such a line of conduct with knowledge of what the consequences would be and went ahead recklessly, despite his knowledge of these conditions. So you can see that there are three elements to wilful misconduct: the first is an intent to do that act; the second is an awareness of the consequences of the act and a deliberate or reckless determination to do it regardless of the consequences; and the third is that the accident must be a result of all of the act.[11]

It is once again clear that wilful misconduct means a deliberate breach of duty (act or omission) with knowledge that injury to third parties will probably ensue or with reckless indifference of the probable consequences.

6. *Horabin v. British Overseas Airways Corporation* constitutes the first attempt made by a British court to interpret art. 25 of the Warsaw Convention embodied in the Carriage by Air Act, 1932.

It will be noticed that, under the Common Law, the notion of wilful misconduct has acquired a certain conceptual uniformity both in the United States and in the United Kingdom, though the language used may sound a little different.

The judge, giving extended and detailed instructions to the jury on the subject of wilful misconduct, pointed out that:

> In order to establish wilful misconduct the plaintiff must satisfy you that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding or, alternatively, that he did it quite recklessly, not

[11]The instructions seem to refer extensively to the charge to the jury in the *Froman* case, 1953 U.S. C. Av. R. 1.

> caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing . . . To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully or he is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be.

7. The main objections raised by the American Airlines in the *Ulen* case (the word "dol" as it appears in the original French of the Warsaw Convention is improperly translated "wilful misconduct" when its real significance is better represented by "fraud" or "deceit") referred obviously to a question which only recently has found a sound and satisfactory resolution through many international debates.

The concepts of "dol" and "faute lourde" were discussed at length at the Second International Conference on Private Air Law held at Warsaw, October 1929; the main problem there concerned the exact translation of these concepts into English. After some days of debating, the British delegate to the Conference declared:

> We have in our law the expression "wilful misconduct". I believe that it comprehends all you want to say: it includes not only acts wilfully performed, but also acts of carelessness with disregard of the consequences . . . We have in order to translate those words into English the expression "wilful misconduct" which is well known and well defined in our law.[12]

The difficult problem could be considered as solved after this clear statement: the concepts of "dol ou faute lourde" in the Roman Law systems were said to be entirely comprehended in the "wilful misconduct" of Common Law systems.

Nevertheless, many authors have pointed out the necessity of revising the Warsaw Convention since art. 25 has raised, in their opinion, great difficulties mainly for two reasons: the impossibility of translating into English the concepts of "dol ou faute équivalente au dol" and the many divergent interpretations of these words given by the courts of many countries.[13]

As a result of these comments, the I.C.A.O. Legal Committee, which had been engaged in the revision of the Convention for many years, proposed and approved (with a majority of one vote after a much heated discussion among delegates) a draft protocol, art. 25 of which read:

> The limits of liability specified in art. 22 of the Convention shall not apply if it is proved that the damage resulted from a deliberate act or omission of the carrier, his servants or agents, done with intent to cause damage; provided that, in the case of a deliberate act or omission of a servant or agent, it is also proved that he was acting in the course of his employment.[14]

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[12]II Conférence Internationale de Droit Privé Aérien, Varsovie 4-12 Octobre, 1929, 40, 140. (Author's translation from the French text).

[13]See, *inter alia,* Goedhuis: *op. cit.* 272. Beaumont: Need for Revision and Amplification of the Warsaw Convention, [1949] Journal of Air Law and Commerce, 395; Goodfellow: Dol, Wilful Misconduct and the Warsaw Convention, [1950] Interavia, 55.

[14]Draft Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw October 1929, approved by the I.C.A.O. Legal Committee at Rio de Janeiro, Aug.-Sept. 1953, I.C.A.O. Doc. 7450 — LC/136, I, XIX-XXIV.

This new formula would have brought about a fundamental change in the system relating to liability in international air transportation: the Warsaw formula ("dol ou faute équivalente au dol") would be abandoned and the air carrier would be held responsible without any limit only in case of an act on its part, or on the part of its agents and servants, which could be qualified as a criminal act.

Many authoritative commentators criticised the draft protocol severely;[15] they observed that the terms "dol ou faute lourde équivalente au dol" had fairly exact connotation in the English language and that in many cases reference had been made to "wilful misconduct" as comprehending both those concepts.[16]

Moreover, in the cases decided by the courts of different countries concerning art. 25 of the Warsaw Convention, judges have been most cautious in finding the carrier guilty of wilful misconduct as claimed by one party to the suit "pour faire sauter les limites'.

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[15]See, *inter alia,* Ambrosini: Dolo e colpa grave nella elaborazione delle convenzioni internazionali aviatorie, Nuova Rivista di Diritto Commerciale, Diritto dell-Economia, Diritto Sociale, VIII, [1955] 83; Meyer, Chambre de Commerce Internationale, Commission de Transport par Air, Réunion du 13 Janvier 1952, C.C.I. Doc. 310/55, 78.

[16]Ambrosini: *op. cit.,* 86; Radin: Law Dictionary, Oceana Publication, (New York 1955) "Dolus".

The United Kingdom enacted the Carriage by Air Act, 1932, with the purpose of giving effect to the Warsaw Convention of 1929 as part of English law. In pursuance of the power given by section 4 to extend the Act to non-international carriage, the Carriage by Air (Non-International) (United Kingdom) Order, 1952, has been enacted.

See also: La responsabilité du transporteur du chef des dommages subis par les passagers sur leurs personnes, U.D.P. Doc. 1955, ET/XXXIV, Doc. 1, Unidroit Rome, Mars 1955, page 32:

"In article 25 of the Convention, concerning cases of unlimited liability, we have set aside the assimilation of "faute lourde" to "dol", cancelling the words ". . . .or by such default etc . . ."; this change of the regime established in the Convention may be justified if it is considered that the expression "wilful misconduct" (used to translate the word "dol") comprehends also the concept of "faute lourde" in its element of reckless carelessness". (Author's translation from the French text).

See, also, Pollock: *The Law on Torts,* (London 1923), 444; McNair: *The Law of the Air,* (London 1953 (2nd Ed.)), 203-204:

"It seems clear that, before an English court will hold that there has been "wilful misconduct", the court must be satisfied that the damage was not merely the result of an accident, or even of negligence alone. The probable consequences of the wrongful act must have been in the mind of the person in question. Clearly, if he does the act knowing it to be wrongful, and intending the harmful consequences which result, he is guilty of wilful misconduct. But his behaviour will also fall under this rubric, even if he does not deliberately desire the consequences, but is merely recklessly indifferent as to whether or not they ensue. Only if the act or omission was due to complete inadvertence on his part will the court refuse to hold that there has been wilful misconduct."

Of the many American cases two only have been found in which art. 25 has been applied, and in one of them the judgment was reversed on appeal.[17] The jurisprudence in other countries (France, United Kingdom, Italy) confirms once more the extreme prudence of the courts when considering art. 25.[18] This is evidence of the fact that the courts have always found the exact rule to apply in each case, thus confirming the essential equity of the provisions of the Warsaw Convention.

The above-mentioned objections, authoritatively expressed at the Hague Conference in September 1955, resulted in the draft protocol, as approved by the I.C.A.O. Legal Committee during the Rio session, being rejected.

Many had soundly observed that, under the Rio formula, the carrier would very rarely be found liable beyond the Warsaw limits[19] as it is almost inconceivable that a crew member would commit an act or omission with the intent to injure anyone thus causing an air accident in which, in most cases, he himself would lose his life as well.

The greatest difficulty would then arise when proving the carrier's wilful misconduct (in the absurd instance given above); the burden placed upon the plaintiff would constitute a sort of "probatio diabolica" almost an impossibility to obtain from the disastrous ruins which such accidents normally yield.

In the Protocol to Amend the Warsaw Convention, signed at The Hague, September 1955, art. 25 was so modified:

> The limits of liability specified in article 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 an act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Initially art. 25 (1) of the Warsaw Convention provided:

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[17]*Supra,* footnotes 1 and 3.

[18]*France:* Courts exempted the carrier from wilful misconduct in *Soc. Nordisk Transport v. Air France,* [1953] Revue Française de Droit Aérien, 105; in *Croche Hennessy v. Air France,* [1952] Revue Française de Droit Aérien, 199; in *Del Vina v. Air France,* [1954] Revue Française de Droit Aérien, 191. The carrier was held guilty of wilful misconduct in *Gallais v. Société X,* [1954] Revue Française de Droit Aérien, 184; in *Missirian v. Air France* [1956] Revue Générale de l'Air, 67.

United Kingdom: Wilful misconduct on the part of the carrier was excluded in *Horabin v. B.O.A.C.,* [1952] 2 All E.R. 1016; 1952 U.S.C.Av.R. 549.

[19]Ambrosini: *op. cit.,* 88; Comments of the German Federal Authorities at Hague Conference, The Hague Conference, I.C.A.O. Doc., I, 88:

"According to the Additional Protocol the carrier shall incur unrestricted liability only if it can be proved that he has caused the damage with malice aforethought and with the intention to cause damage. It will hardly ever be possible to furnish such proof. Practically then no unrestricted liability on the part of the carrier will exist any longer . . . It appears therefore inacceptable that the carrier shall incur unrestricted liability only if and when proof can be furnished that he had the intention to cause damage."

> 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.

The comparison of the two texts of art. 25 shows that in the Protocol neither the word "dol" nor the phrase "faute équivalente au dol" have been used, thus avoiding any further discussion on the subject among delegates of different countries.

The words disappeared but, instead, the concepts have been incorporated in the text as clearly as possible in order to avoid further differences of interpretations under different legal systems.

The fault depriving the carrier of the benefit of a limited liability must now be reckless and accompanied with the knowledge of the probable consequences. Moreover, the case of an act intentionally performed to cause damage fits the universally accepted concept of "dol".

> Ainsi l'article 25 nouveau traduit en précisant et en limitant les contours la notion de "wilful misconduct" appliquée par les juges Anglo-Saxons, sans pour autant s'éloigner sensiblement de la jurisprudence française statuant au cours de ces dernières années sur les responsabilités impliquées par les grands sinistres aériens qui ont endeuillé l'aviation nationale.[20]

In the most recent French cases, mainly in the Paris Court of Appeals judgment February 3, 1954 (*Hennessy v. Air France*) a tendency can be found directed to confine "faute lourde" within well determined limits and boundaries; in general, a limited interpretation is given which causes the concepts of "faute lourde" and "wilful misconduct" to meet in the end. A clear equivalence of ideas has been at last accomplished through different legal systems.

The Romans considered the "culpa lata" as enacted in the Civil Law systems as equivalent to "dol" mainly for a psychological reason; the "culpa lata" being so reckless and enormous

> ... it is almost impossible to realize whether the act or omission had been only wilfully committed or done also to harm others, as in case of "dol". Hence the "dol" could be soundly suspected and taken for granted . . .[21]

When reference is made to the "impression of immorality"[22] produced by wilful misconduct, it is submitted that the Roman concept is expressed in different words; only the fault which is reckless and enormous is equivalent to

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[20]"Thus the new article 25, in defining and limiting the extent, conveys the notion of wilful misconduct as applied by the anglo-saxon judges, without significantly departing from the French jurisprudence handed down in recent years on the matter of responsibility arising from air catastrophes which have plagued national aviation." (Author's translation).

Garnault: Le Protocole de La Haye, [1956] Revue Française de Droit Aérien, 6.

[21]Ambrosini: *op. cit.*, 91.

[22]Goedhuis: *op. cit.*, 276.

"dol" because it produces the same impression of enormity which usually would result from an act or omission amounting in law to wilful misconduct.

Thus the idea of "culpa lata" is above any national legal definition and becomes a general principle common to all legal systems.

> Et ce ne serait pas une des moindres gloires du Droit Romain que de servir, aujourd'hui encore, de commune mesure, d'élément de mutuelle compréhension et d'unification, entre les divers peuples et leurs législations[23]

The ideas of "dol" and "faute lourde équivalente au dol" are perfectly combined in the concept of "wilful misconduct"; this shows that men can always agree upon general principles which are commonly acceptable, in the progressive study of law.

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[23]"And this will not be one of the least of the legacies of Roman Law, than to have it still serve today as a common measure, an element of mutual understanding and unification among different peoples and their legal systems." (Author's translation). Comment on the Paris Court of Appeals decision February 3, 1954; [1954] Revue Française de Droit Aérien, 75.