I. INTRODUCTION

It is trite to say that the world is becoming smaller, yet it is true. For all of us who travel for business or pleasure, horizons expand and widen, and as we travel from country to country, and continent to continent, the challenges for lawyers become more complex and demanding. No longer is it sufficient to understand the laws and practice competently within your own jurisdiction, be it the United States or another country. Once it was enough to do the best you could within your own system, however, it is now necessary to ensure you get the best, by considering all forums and jurisdictions which play a part in the particular case. This is all the more true when the wrongdoer is an international corporation operating throughout the world, seeking to take cover behind conventions, jurisdictions, or the weaknesses of a particular local legal system. If you are to serve those you represent, to ensure that those who commit wrongful acts against your clients are brought to justice, you must not only look to your own legal system but beyond to other forums and determine where the interests of your clients will best be served in the complex matrix of laws, countries, jurisdictions, and philosophies which may apply to any one case.

* Head of Litigation, Levy & McRae, Glasgow, Scotland; L.L.B., University of Edinburgh; B.A., University of Strathclyde.

The Board of Editors wishes to thank Professor Paul R Joseph for his help and assistance in soliciting this article for publication.
The village of Lockerbie has a population of approximately 3000 and is populated by sheep, cattle, and farmers. It is situated in southwest Scotland and is as remote from the world of international corporations, terrorism, treaties, and issues of conflicting laws as one could imagine. Yet, on December 21, 1988 at 7:03 p.m., Pan Am Flight 103 exploded over the village of Lockerbie, killing 259 passengers and crew members, eleven residents in the village, and maiming many others both physically and psychologically. Lockerbie soon became the focus of one of the world's biggest criminal investigations tracking down terrorists. The city was also the center of one of the greatest, or indeed perhaps the greatest, law suits of modern times. The families of the deceased and the injured banded together to discover the identity of the terrorists and their method for overcoming the security of the airports.

The task facing the relatives was enormous. Pan Am was an international airline, and an American corporation, experienced in dealing with claims arising out of accidents and terrorist incidents. Within hours of this tragedy, it was represented by teams of the world's finest lawyers, loss adjusters, and public relations experts. Pan Am was protected by the Warsaw Convention, which limits damages to a derisory level. Additionally, this tragedy took place in the skies over Scotland, a country with its own legal system under which damages for wrongful death are notoriously low.

Before the smoke had cleared from the wreckage and from the burning homes of Lockerbie, rumors abounded as to how such a tragedy could have taken place. Soon after, loss adjusters appeared on the scene and advised families that they should accept the Warsaw Convention limit which was generously offered for those who were prepared to sign. Some who were approached were advised to stay away from "ambulance chasing lawyers" who could do nothing for them since the Warsaw Convention limits damages.

Simultaneously, stories appeared in the press which pointed out that the airlines could do little or nothing to avoid the efforts of determined and clever terrorists who planned to, and were prepared to, circumvent airline security. We were reminded many times that Pan Am security was as good as, if not better than, any other airline in the world. For those left bereaved, and for those left injured, it became much like the Biblical story of David and Goliath. Isolated and financially weak individuals were facing the enormity of an international corporation surrounded with all the might of the international aviation insurance industry.

Unfortunately for Pan Am and their insurers, Britain was no stranger to disasters. From 1985 to 1988, Britain was the site of three major disasters. These were the Manchester air crash, which killed fifty-four...
people in 1985, the North sea crash of a chinook helicopter carrying fifty-five oil workers in 1986, and the Piper Alpha off-shore oil platform explosion which killed 165 people. The attorneys involved in these cases learned to network. They also learned that insurers pick off clients, one at a time, to divide and settle, if not to conquer. The attorneys learned to forum shop and to seek out the best courts and the best legal systems available. They learned to use what was good in our own system to assist in investigation or, in the alternative, to take the litigation somewhere else.

The legal system in Scotland moved quickly with the help of the Law Society of Scotland. Attorneys who had been involved in mass disaster cases and "foreign" litigation were quickly summoned to assist. The Lockerbie Air Disaster Group was formed.

Each attorney, whether based in Scotland, England, or elsewhere, continued to represent the interests of individual clients. The attorneys were encouraged to join the Lockerbie Air Disaster Group as a coordinating body. The Group was led by a Steering Committee consisting of lawyers experienced in international litigation. Its job was to coordinate the claims and to represent the interest of all claimants as well as to seek out, retain, and advise the best attorneys from the forum chosen for litigation. It would also be the Air Disaster Group's job to coordinate and direct the legal investigation to all claims arising out of the disaster. Within a matter of weeks of the disaster, the attorneys were in pursuit of Pan Am.

The Air Disaster Group had some important decisions to make. The attorneys needed to understand the strengths and the weaknesses in their own legal system and the choices of forum open to them. From the beginning, Pan Am posited that it could defeat any attempt to establish willful misconduct which would be necessary if we were to lift the Warsaw Convention monetary damage limits. Pan Am, and its insurers, made it plain that damages would be offered up to the Warsaw limit but not above and that this condition was not negotiable. In assessing the Scottish legal system, the attorneys found that the weaknesses considerably outnumbered the strengths. The strengths were obvious: home ground and knowing how to make the system work well. Another strength was the opportunity, both formally and informally, to follow the official investigators into the disaster area and to pick up information as soon as it was made available. More importantly, some form of official inquiry would be held under Scottish statute since the crew had died within its jurisdiction. There would have to be a Fatal Accident Inquiry or, at the very least, a Public Inquiry. The official inquiry would be brought by the Crown, who would require the inquiry to take place in open court before a judge, with the attendance of witnesses and the production of documents and exhibits.
We knew that such an inquiry would provide an opportunity for discovery of information beyond anything available in the United States. This wealth of information would give us a chance to take litigation beyond Scotland to America, the home of Pan Am. The damages available to those affected by this tragedy, whether passengers or those on the ground, would be miserably small and insignificant in Scotland, in comparison to those which might be awarded by a jury in America, provided that we could prove willful misconduct by Pan Am.

It then became necessary to seek out attorneys in the United States. Those attorneys experienced in litigating in the States view this process as the "beauty parade." Ultimately, Stuart Speiser of Speiser, Krause, Madole & Nolan of New York chose to represent those within the Lockerbie Air Disaster Group.

It was decided that the British cases, which included ground claims, would be pursued in Florida. Aaron Podhurst, a Miami attorney, handled these cases. ALERT, the company responsible for providing security to Pan Am 103, was a Florida based corporation. Since it was not an airline, ALERT did not enjoy protection under the Warsaw Convention, a clear advantage. Stuart Speiser and his team would work closely with others, notably Lee Kreindler, in the United States representing the families of passengers. Both Speiser and Kreindler have international reputations in aviation cases.

The decision was made to exhaust our opportunities by way of discovery and investigation within the Scottish legal system. A decision was also made, however, to remove any litigation from that system, which was one which would short change the widows and orphans, to the United States. The consensus among the attorneys was that realistic damages could be recovered in America, where a body of expertise in dealing with such cases existed.

In Scotland, as in England, no contingency fee system exists and litigation would deliver inconsequential damages. Furthermore, the Scottish and English system have little experience in aviation cases, in which a jury would probably not be allowed to decide an issue such as "willful misconduct." This type of issue is generally regarded as too complex and too difficult for juries and is left for judges to decide.

As a result, we have a system where widows and orphans are short-changed and where the courts are open only to those who are very wealthy and can afford to instruct attorneys. Moreover, the system is open to those who have the benefit of publicly funded litigation through a system of legal aid, which is largely restricted to people who are unemployed and have never been granted in a multi-party litigation case such as the Lockerbie disaster. In contrast, the contingency fee system in the United States has, as
a matter of fact and not of conjecture, granted greater access to the courts for those who have suffered from the wrongful acts of others.

Wrongful death litigation is expensive in the United States. Large damage settlements are not only a proper reflection of damages for those bereaved or seriously injured, but the settlements also provide an economic imperative to promote and encourage change and the improvement of safety standards. A system which allows juries to decide these issues, coupled together with the contingency fee system, provides an opportunity for those affected by such tragedies to retain skilled representation and ensures that David stands equal with Goliath.

II. THE FATAL ACCIDENT INQUIRY

The Fatal Accident Inquiry (FAI) took place between October 1, 1990, and February 13, 1991. The members of the Air Disaster Group were hard at work with the inquiries, discovery, investigation, and paper work within a few weeks of the tragedy. The FAI was an opportunity to present some of the information in our possession, to flush out information which we suspected but could not prove, and to see a preview of the defense that Pan Am would ultimately mount if we ever managed to get the matter to trial in the United States.

The FAI was successful beyond our wildest dreams. Pan Am had joined the battle but was soundly beaten. This encounter was the first of a relentless series of defeats for Pan Am. We were now in a position to show that the willful misconduct verdict returned in New York on July 10, 1992, withstood the rigors of the American appellate system and stands as a final verdict. The only the question left to resolve was the issue of damages.

III. WHAT WAS ESTABLISHED AT THE FATAL ACCIDENT INQUIRY?

We established that this disaster occurred as a result of a bomb, "an improvised explosive device," being placed within a Toshiba radio situated in a brown Samsonite suitcase. The location of the suitcase established beyond doubt the suitcase was an interline bag; namely, it had come from another carrier and had been placed on a Pan Am flight at some point in its journey. From its location, we were able to establish it could only have been loaded on the airplane at Frankfurt, Germany.

Furthermore, the baggage tags led to a precise paper trail which established that the bag in question was an interline transfer bag from Air Malta Flight 180. The unaccompanied bag was placed on Pan Am 103A, a feeder flight, and was transferred to Flight 103 at Heathrow Airport, outside London. We also established the bags transferred from Pan Am 103A were taken directly from that aircraft to Pan Am 103, and that they were not
counted or weighed. Moreover, they were not reconciled with the passenger manifest, and they were not x-rayed at Heathrow. Thus, the bag, which was loaded at Frankfurt, traveled to London and was loaded on Flight 103 without being identified as an unaccompanied bag.

Additionally, we established one of the two Libyans now being sought for the bombing was the Libyan Arab Airlines station manager at Malta who had unlimited access to the baggage area for Air Malta flights. Libyan Airlines used the same baggage tickets as Air Malta, and on December 21, 1988, the Libyan Airlines flight to Tripoli was processed at the same time and at the same counter as Air Malta Flight 180. Furthermore, the security procedures at Malta were symbolic at best.

IV. HOW DID THESE TERRORISTS OVERCOME THE MOST SOPHISTICATED AIRLINE SECURITY IN THE BUSINESS?

In May 1986, Pan Am instituted a massive marketing and advertising campaign to regain the confidence of international travelers, particularly those in America whose confidence in travel had been undermined by numerous terrorist threats. Advertisements were run in newspapers outlining Pan Am's new security system entitled "ALERT." The aim was to make Pan Am the safest airline in the world. Pan Am even charged a surcharge of $5.00 per ticket to pay for this new unparalleled security system. We discovered, however, that the funds gathered were never allocated to security but were being used by the airline, which already was in deep financial trouble.

Pan Am staged a show of guard dogs sniffing suit cases at New York's Kennedy Airport. These dogs had coats on their backs with the name ALERT. The reality, as we discovered, was that the dogs had been hired from a cat and dog home, knew nothing, and were not trained to detect explosives. The dogs were bewildered, rented for the day, and accomplished nothing more than to urinate over the suit cases.

We discovered, in September 1986, Pan Am obtained a private security report from Israeli security experts who provided advice to a number of airlines, including El Al, the Israeli state airline. The report revealed Pan Am was very exposed to terrorist attack, particularly from unaccompanied bags and plastic explosives. Pan Am relied too heavily on x-rays for screening bags and needed procedures for baggage reconciliation. Particularly in matching bags to the passenger manifest and identify any unaccompanied bags. The report warned Pan Am it had simply been good luck which had saved them from disasters.

We also discovered the man in charge of the ALERT operation in Frankfurt and responsible for the security of Pan Am flights had a criminal
record. His hiring practices had more to do with his personal orientation than with any other relevant factor. The employees responsible for operating the x-ray screeners were largely untrained. The training video was shown in English and many of the employees did not speak English.

Positive passenger baggage reconciliation was long recognized as an important element in the system designed to prevent the carriage of unaccompanied bags. Unaccompanied bags were a well-established method used by terrorists to get bombs on board airline flights. The Federal Aviation Administration (FAA) required a positive match of bags to boarding passengers in airports which were classified as extraordinary security risks airports. Frankfurt and London had been categorized by the FAA as falling into that category. Under FAA rules, once an unaccompanied bag was identified at one of the high risk locations, it could only be carried on board an aircraft if physically searched. Pan Am had abandoned this positive matching process without written approval in February 1987 at Heathrow and in July 1988 at Frankfurt. Without permission from the FAA, Pan Am had substituted what they described as an "administrative match and positive passenger control." The new administrative match and positive passenger control system was inadequate because it did not deal with interline bags. Pan Am was aware of their duty to meet the FAA Regulations. The rule was contained in their manuals as required by law, and although it was an explicit requirement, they simply abandoned it. The decision to ignore the rule was taken at the highest corporate level. To abandon this requirement and to substitute x-ray procedures was a clear indication that Pan Am's motivations were profit and cost-cutting. As a result, Pan Am exposed its passengers to risk by being unable to detect unaccompanied bags. The Lockerbie disaster would have been avoided had the FAA requirements had been followed.

V. WARNINGS

Pan Am also had another question to answer. In April 1988, the FAA warned all international airlines of intelligence reports of threats by Iran against United States targets. On November 18, 1988, Pan Am was advised by an FAA Security Bulletin that a Middle Eastern terrorist group had been found in Germany with a bomb concealed within a Toshiba radio. The alert called upon Pan Am and other airlines to activate extra vigilance and a rigorous adherence to their regulations for baggage reconciliation. Pan Am and others were warned of the difficulty of relying on x-rays which would not detect such bombs. Despite this explicit warning, Pan Am did not positively match interline bags, even worse, the ALERT security staff in Frankfurt was not made aware of this warning. Not even the personnel
using the x-ray equipment were told of this warning. They did not know, and were unaware of what to look for.

On December 7, 1988, only two weeks before the Lockerbie disaster, Pan Am was issued a Security Bulletin advising that the United States Embassy in Helsinki, Finland received a warning that a Pan Am flight from Frankfurt to the United States would be the target of a bomb. The notice became known as the “Helsinki Warning.” It referred to and reiterated the FAA’s earlier warning of a Toshiba radio bomb and again emphasized the difficulty of detection by x-ray. Once again the security personnel at Frankfurt, including ALERT’s chief of training, were not informed of the bulletin. Pan Am not only failed to increase security staff, they failed to alert the on duty security staff to the warnings. When he eventually received the Helsinki Warning, the manager at Frankfurt attempted to back date it and to suggest that he had disseminated it. He had not. His statement demonstrated blatant dishonesty.

The inquiry revealed much more both in substance and in detail, but I am sure having heard the story, it will come as no surprise to you that on July 10, 1992, the New York jury concluded that Pan Am and ALERT were guilty of willful misconduct. The fight goes on now for damages, Pan Am having unsuccessfullly tried every avenue of Appeal against the jury’s verdict. David has held his own against Goliath.

For the American legal system, it is a triumph in serving the interests of the individual over the might of the corporation and the giants of the insurance world. The attorney has excelled in his role as equalizer and champion. The judicial system has worked. The combination of jury trial and contingency fees has made it possible for litigation to be pursued in the most suitable forum, doing justice to those who deserve it.

As a footnote, once the picture of the incompetence, deceit, dishonesty, and risk-taking emerged from the Fatal Accident Inquiry, it became clear that the insurance industry should rigorously re-examine security practices at airports as executed by airlines.

VI. STANDARD IMPROVED - WHY? - THE ECONOMIC IMPERATIVE

The economic imperative is very simple. The insurance industry probably realized during the course of the Fatal Accident Inquiry that Pan Am’s chances of winning the litigation were declining by the day and the prospects for lifting of the Warsaw Convention limits were increasing. A huge pay-out was becoming a certainty. To ensure that another such pay-out would not occur, the insurance industry must make sure security practices were adopted which would prevent unaccompanied interline bags from getting on board planes which they insured. It was the insurance
industry and not the government that pushed for improvements. The
insurance industry ultimately has the power to compel the passage of and
compliance with these safety measures. The threat of large damage awards
made these efforts imperative.

Those who seek to attack the American system do so in part
because of large damage awards. In all of the arguments made to date, little
has been said concerning the benefits that flow from such awards. The
contingency fee system is criticized for making lawyers rich. Little is said
of the huge risk which lawyers take in becoming involved in such cases. It
was the contingency fee system which made available to the families
affected by the Lockerbie air disaster a team of world-class attorneys able,
and the resources necessary, to take on the might of Pan Am’s top-class,
blue-chip team. Would it be right that Pan Am and the insurers could
bring together the very best teams of attorneys to represent their interests
while those who find themselves facing tragedy through no fault of their
own are to be denied representation at the same level? Without jury awards
and contingency fees, and both are essential, it is doubtful whether the
result so far achieved would have been realized. It would not have been
achieved in Piper Alpha. I am aware of the proposed legislative changes
seeking to interfere, control, and restrict the system. My advice would be,
“Don’t fix what is not broken.”