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The Warsaw Convention's Damages Limitations

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"THE CONVENTION for the Unification of Certain Rules Relating to International Transportation by Air," [1] popularly known as the *Warsaw Convention,* regulates the conditions of international transportation by air with respect to the documents used for such transportation and the liability of the carrier. This paper relates particularly to the limitations this treaty places on the rights of passengers and their dependents to recover damages for personal injury or death.

The *Warsaw Convention* is the result of international conferences on private air law held in Paris in 1926, and in Warsaw in 1929. During this period air transportation was in its infancy. In 1927, Colonel Lindberg flew the Atlantic, and Commander Byrd also took off from Roosevelt Field for Paris, the announced purpose of this flight being to gather meteorological and navigational data to serve in the development of future commercial flying across the Atlantic. The following year Amelia Earhart was the first woman to fly the Atlantic. All of these events were considered to be outstanding.

The era of the *Warsaw Convention* saw a growing rivalry between lighter-than-air and heavier-than-air craft, and there were many who thought that travel on lighter-than-air craft would be the transportation mode of the future. Lighter-than-air craft were flying the Atlantic. The *GRAF ZEPPELIN,* a lighter-than-air ship, carried the first passenger and freight load across the Atlantic. Lt. Commander Charles E. Rosendahl, the master of the *LOS ANGELES,* which at that time was our largest dirigible, said: "The big ships of the future will be equipped to carry five airplanes. This means that the planes can discharge passengers and mail, and then rejoin the ship without inter-

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[1] 49 Stat. part II, p. 3000. The treaty is printed both in the original French and English in the Statutes at Large.

rupting a long distance voyage." [2] In a book written as late as 1930, John Goldstrom said: "Although the building of airships has not kept pace with the mass production of airplanes, plans for transoceanic and transcontinental services employing great dirigibles are going forward on both sides of the Atlantic, principally in the United States, in Germany and in England." [3]

Some of our present-day airlines were in existence in 1929, but they were not the large airlines of today. *Air France,* although founded in 1919, had never accomplished much more than service linking France with England and Africa. The Belgian line, *Sabena,* covered only Europe and the Belgian Congo. *KLM* made only short flights of 200 or 250 miles. The *British Overseas Airlines* was in existence, but its routes were short.

In our country, only *Pan American* engaged in international business. Its flights were from Havana, Cuba, and Key West, Florida. *Pan American,* starting its expansion program with amphibians and flying boats, opened a number of additional routes. At many ports, however, the termini were simply old barges with small waiting rooms and supplies of gas and oil. At others, a seaplane ramp served for terminal facilities.

Not until 1930 were express and passengers carried by planes at night. The best planes in that period had only a top speed of 150 miles an hour, with a cruising speed of 125 miles an hour.

In the United States, only 52,934 passengers were carried over air transport lines during 1928. In the same year Germany led Europe and the world in the volume of passenger traffic over scheduled airways, with a total of only 111,000 passengers.

While the *Warsaw Convention* was being formulated, international air transportation did not include the long transoceanic trips we have today. An international trip by air included flights over the English Channel between London and Paris, a distance of 225 miles; between Paris and Zurich, 310 miles; between London and Brussels, 199 miles; and between London and Cologne, 320 miles. Due to the small size of some of the European countries, most plane travel was international in character because a plane could not fly any distance without crossing an international border.

The hazards of early air transportation made difficult the securing of sufficient private capital to finance large undertakings.

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[2] Goldstrom, Narrative History of Aviation, 272 (1930).

[3] Ibid.

One disaster might sweep away the capital investment that had required years of prudent saving to acquire. There was a general uncertainty on the part of potential operators regarding the extent of the traffic available. There was a lack of a definitive legal status and of a body of basic air laws, and a slowness in the development of insurance facilities.

Many of the foreign countries were then aiding civil aviation by subsidies; and municipal governments were providing fields and their maintenance. The United States did not subsidize civil aviation directly, but the American government spent more than $13,000,000 to develop the air mail, and spent millions more to provide lighted runways and other facilities.

To encourage air traffic and to aid the infant industry in securing capital, the countries of the world gave to the airlines the *Warsaw Convention.* In this treaty, provisions were made for tickets and baggage checks, air transportation waybills, and other benefits. But the principal gift was the limitation of the carrier's liability for personal injury and death of passengers and for damage or loss to goods transported.

As to the transportation of checked baggage and of goods, the treaty provided that the liability of the carrier usually would be limited to the sum of 250 francs.[4] As to the liability for the injury or death of passengers, it provided that liability should be limited to 125,000 francs[5]—a large figure, but amounting to only $8291.87 or $8300.00 in round figures. The treaty, also, enabled the airlines to expand their routes and to enlarge their companies.

The provision in the treaty providing for a presumption of liability follows the continental law, since most of the countries that helped formulate the treaty had such laws and still do. But limitation of liability of carriers for personal injury and death

[4] Warsaw Convention, Article 22 (2). See also, Kreindler, Detours Around the Warsaw Convention, in, Belli, 1956 Trial & Tort Trends.

[5] Warsaw Convention, Article 22 (1). Article 25 of the Convention provides that the carrier shall not be entitled to avail itself of the provisions which exclude or limit its liability, if the damage is caused by its wilful misconduct. However, during 27 years of the treaty, wilful misconduct has been proven in but two cases. Wilful misconduct is wilful performance of an act by the carrier or its employees, or agents, with knowledge that the performance of the act is likely to result in injury to a passenger, or performance of an act with reckless and wanton disregard of its probable consequences. Mere violation of safety regulations, even if intentional, will not necessarily constitute wilful misconduct, but an intentional violation with knowledge that the violation is likely to cause injury to a passenger would be wilful misconduct. American Airlines v. Ulen, 186 F. 2d 529, 1949 U. S. Av. R. 338 (D. C., D. C., 1949).

usually is considered against public policy in the United States.[6]

A good reason why the *Warsaw Convention* is so continental and so un-American is that Americans had no part in formulating it. Neither at the *International Conference on Private Air Law* held in Paris in 1926, nor at the *International Conferences* held at Warsaw in 1929, when the treaty was completed, was the United States officially represented.[7] It was not until 1933 that Americans became interested, when our own airlines, then coming into existence, saw a grand opportunity to limit their liability to pay damages for loss of goods or for injury and death. A letter dated November, 1933, from the Commerce Department to the Secretary of State stated: " . . . The Aeronautics Branch has made a study of the Treaty drafted and approved at Warsaw and has *contacted a number of American air transportation operators on the subject.* All United States operators conducting international air transport services strongly favor adherence to the Convention by the United States. In addition to this, a number of airline executives whose lines do not carry on an international service have expressed the view it would be desirable for the United States to participate in the Convention. The Aeronautical Chamber of Commerce of America, the trade association organization representing ninety per cent of all United States transport operators and one hundred per cent of those operating internationally, strongly favors participation in the Convention. No airline operating at the present time has indicated opposition to adherence to the Convention by the United States. . . ."

The State Department transmitted its approval of the treaty to the President with a statement that "The principle of limitation of liability would lessen litigation and prove an aid in the development of international air transportation as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates and eventually reduce the operating expenses of the carrier." [8] The Senate ratified the *Convention* on June 15, 1934, except as to government-owned or operated aircraft.

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[6] Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872 (Ky., 1876); Curtis-Wright Flying Service v. Close, 66 F. 2d 710 (C. C. A. 3, 1933).

[7] 20 Amer. Bar Asso. J., 755 (1934).

[8] Sen. Doc. Exec. G., 73d Cong., 2d Sess. 1934; 1934 U. S. Av. R., 242-3.

It would appear that requests of the traveling public to be heard on the matter were denied.[9]

Over a decade has now passed since this treaty was adopted, and the airlines have grown. They are no longer in their infancy. *Pan American,* which started in 1927, operating between Key West and Havana, a route of only ninety miles, is the largest air transportation system in the world. Its routes reach five continents and more than fifty countries. Many other airlines operating foreign and domestic routes have been organized in this country. During 1956, 38.5 million passengers were carried by our airlines, while international travel increased to 3.4 million passengers. Traffic over the North Atlantic produced the surprising statistics in July of one airplane taking off every 17 minutes, for a total of 2,559 crossings in that month.[10]

With an average of 750,000 employees per month, aircraft manufacturing industries ranked second only to the automobile industry as the nation's largest employer.[11]

As a common carrier business, the air transportation industry is greater than either shipping or railroads. In June, 1955, 57,259 persons flew to Europe, while only 50,947 went by ship. During 1955, the domestic airlines totaled 19.8 billion revenue passenger miles; the railroads, only 6.4 billion. In international travel, the 11,472 passengers carried during the year 1929 increased to 3,415,000 in 1955.[12]

No longer confronted with the difficulty of securing capital, the airlines now are able to finance themselves and enjoy, additionally, a demand for airline stock. For example, *Pan American* stock, of par value of $1.00, sold last year as high as $28.00 a share. *United Airline* stock, of par value of $10.00 a share, sold last year for as high as $44.00 a share. Airline stocks are paying

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9 See, U. S. Treaty Series, 876; 49 Stat. (Pt. 2) 3000; Vol. IV, JAG Bull. No. 3, p. 93.

In February 1934, the necessity for the painstaking study of the problems involved in the liability restrictions of the Warsaw Convention was recognized and strongly urged upon the State Department by the New York County Lawyers Association. See Statement in Support of Resolution Disapproving Ratification by the United States of the Warsaw Convention relative to Rules of International Transportation by Air, 2 B. A. Pam., N. Y. City, L. A. (Feb. 15, 1934) pp. 1-12. Sherman, The Social Impact of the Warsaw Convention, 83-4. And see for a contemporary note, Hotchkiss, Law of Aviation, 2, 10 (2d ed. 1938).

10 Aircraft Year Book for 1955, Aircraft Industries Asso., p. 83.

11 Ibid.

12 CAA Statistical Handbook of Civil Aviation, 65 (1956).

dividends. On its $10.00 par value stock, *United* last year paid a dividend of $1.50 a share. *Pan American,* on its $1.00 par value stock, paid a dividend of 80 cents a share. *Trans World Airline,* although it paid no cash dividend, paid a stock dividend of ten percent. There is no need now for the limitations of the *Warsaw Convention* which were given to the airlines in order to encourage the building of the industry. Domestic airlines have no need for such limitations as are contained in this treaty, and those in international transportation can also get along without it.

Attorneys for the airlines say that the basic principles of the *Warsaw Convention* are two: [13]

(a) Passengers and shippers who suffer injury and damage in international air transportation shall not be required to establish negligence on the part of the carrier in order to recover; and

(b) In return the carrier's liability is limited.

From the reading of the *Convention* in its entirety such statements appear unwarranted. Article 17 of the *Convention*[14] states that the carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by the passenger, if the accident which caused the damages so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. But on the other hand, Article 20[15] provides that the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage, or that it was impossible to avoid the damage, or that it was impossible for him or them to take such measures. We therefore have in the *Convention* no more than our own doctrine of *res ipsa loquitur.* In a plane crash most of our courts hold that there is an inference of negligence on the part of the carrier; and the carrier then submits his case to rebut the presumption by the same type of evidence required by Article 20.

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[13] For example, see report of the ABA Committee on Aviation Insurance Law, 1955 Proceedings, p. 325.

[14] The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft, or in the course of any of the operations of embarking or disembarking. Warsaw Convention, Article 17.

[15] (1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Warsaw Convention, Article 20.

In most countries there is a presumption of negligence, the treaty being only declaratory of the law as it then existed in the countries that drafted it. Under the Italian civil law, and in other countries where the civil law applies, instead of the burden of proof being on the plaintiff to establish the negligence of the defendant by a preponderance of the evidence, the converse is true. The French civil code states: "Every act whatever of an individual which causes injury to another obliges the one, because of whom it has occurred to make up for it." Also: "Every one is responsible for the injury which he causes not only owing to his own act, but owing to his negligence or his imprudence." [16]

The United States, in adopting this *Convention,* well understood that it contained only a presumption of liability. In a letter dated March 31, 1934, recommending to the President the adoption of the treaty, the Secretary of State said that the effect of Article 17 of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident causing injury or death of a passenger, subject to certain defenses allowed the aerial carrier under the *Convention.* The burden, therefore, is upon the carrier to show that the injury or death has not been the result of his negligence or that of his agents. The letter continues by saying that this rule has been adopted in some jurisdictions of this country in aircraft accident cases under the theory of *res ipsa loquitur.*[17]

Defenders of the *Warsaw Convention* claim that without it our citizens could recover only pitiful awards as damages under the laws of certain foreign countries.[18] The damages that may be recovered under the *Convention* nevertheless are grossly inadequate, and the allowable compensation in such countries could be little less. In a case in which a passenger or his dependents have suffered a compensatory loss of fifty to a hundred thousand dollars, the little difference between the amount allowed by the *Convention* and a smaller amount recoverable in some foreign country would be insignificant. The benefits from the

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[16] Cohen, Negligence Law in Europe. 361 Ins. L. J. 82 (Feb. 1953).

[17] Sen. Doc. Exec. G., 73d Cong., 2d Sess. 1934; 1934 U. S. Av. R. pp. 242-3.

[18] A statement was made at the 67th meeting of the Air Coordinating Committee, Legal Division, held December 13, 1956, that the limitations of recovery in the following countries are (equivalent in dollars) Belgium 5,000; Brazil 5,406; Denmark 2,645; Germany 7,460; Italy 256; Luxembourg 7,500; Mexico 8,670; Netherlands 3,289; New Zealand 13,964; Sweden 3,509; Costa Rica 3,561; Guatemala 5,000. The author does not vouch for these statistics, as he is aware of recoveries of damages in negligence cases made in much larger amounts in some of these countries.

larger awards that could generally be recovered in most countries for injuries caused by a wrongful act of the carrier, but for the limitation, should greatly exceed any benefits derived from the *Convention.*

Not only do we have in the *Warsaw Convention* a presumption which we would have without the *Convention,* but also, in Article 21,[19] the *Convention* throws in the doctrine of contributory negligence. By the terms of the *Convention,* if the carrier can show that the passenger was in any way at fault, it is relieved of all or part of its liability. In carrier cases, contributory negligence may arise in many ways. For example, the passenger may have forgotten to strap himself into the seat,[20] or he may have been walking around when he should have been in his seat, or he may have been negligent in disembarking too hastily from the plane.

In the safeguarding of passengers, the courts have charged carriers of passengers with the highest degree of care. This rule is founded upon the carrier's assuming almost absolute control of the body and the movements of the passenger and the passengers' committing themselves to the watchfulness of the carrier's servants.[21] But this protection is lessened by placing a limit on the compensation that the carrier shall pay for his negligence. If he had to pay full damages for a passenger's injury or death, would not the carrier be more cautious than if the accident were to cost him only $8291.87? To say that the carrier must exercise the highest degree of care for the passenger's safety, and at the same time permit the carrier to escape by paying only $8291.87 for the passenger's injury or death, is absurd.

It may be argued, and usually is, that the aircraft is in control of a crew who will exercise care for their own safety. But many plane accidents are not due to the fault of the crew. Bad equipment, and a lack of care in other respects may cause accidents.

The only laws in the United States limiting recovery of damages in tort actions are the statutes in a few of our states providing limitations on the recovery of damages for wrongful

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[19] If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability. Warsaw Convention, Article 21.

[20] Chutter v. K. L. M. Royal Dutch Airlines, 1955 U. S. Av. R. 250, 132 F. Supp. 611 (D. C., N. Y., 1955).

[21] Louisville & N. R. Co. v. Marlin, 135 Tenn. 435, 186 S. W. 595 (1916), cited in 13 C. J. S., Carriers, p. 1257, n. 75. See cases and discussion in Fixel, Law of Aviation, Sec. 377 (3rd ed., 1948).

death. Before 1846, when the English statute, commonly known as "Lord Campbell's Act," [22] was enacted, there was no provision for a recovery of damages for loss of life. The English act provided for such recovery, and served as a model for similar acts in most of the states of this country. The first death statute in this country was enacted in 1847.[23] Although Lord Campbell's Act did not so provide, some states placed a limit on the amount of damages recoverable. This limit, commonly $10,000, in some states was less; in other states, a higher amount.

That the legislatures of our states placed a limitation of recovery in these death statutes will not seem strange if it is recalled that during the middle 1800's the railroad industry was in its infancy, this country's first railroad starting in 1826.[24] A review of the early reported cases reveals that nearly all the cases were against the railroads. Given like protection, the airlines fared much better with their $8291.97 than the railroads with $10,000. Statistics show that the purchasing power of the dollar in 1850 would be $5.20[25] as compared with the purchasing power of the dollar in 1956, and the $10,000 limit in purchasing power, therefore, amounted to $52,000. The needs of the individual were not so great in 1850: he had no automobiles, no radio or television, no movies or the many other things we are accustomed to today. In 1850, a person came home, lit his oil lamp, read or talked with his family, put the cat out, and went to bed. For this reason, compared with the purchasing power of the dollar and the greater needs of the individual now as compared with earlier periods, a $10,000 limitation which aided the railroads in 1850 would be equal to $100,000 today.

Many of these death statutes limiting the amount of the recovery of damages have been amended during recent years, allowing far more liberal recoveries of damages, or omitting the limitation entirely. During the past five or ten years, fifteen of these statutes have been amended, there now being 37 death statutes providing for recovery of damages in unlimited

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[22] 9 and 10 Vict., c. 93.

[23] The New York Act.

[24] A short quarry line built at Quincy, Mass., in 1826, followed by the building of the first track of the Baltimore and Ohio Railroad in 1828, began the railway system of the United States.

[25] Based upon an estimate made by Edward F. Brayer, Chief Statistician, Bureau of Employees' Compensation, from cost of living index of the Bureau of Labor Statistics, U. S. Department of Labor.

amounts.[26] The Alaska statute, recently amended, provides a limitation of $50,000.

Advocates of the airlines usually refer to the workmen's compensation laws of this country as a defense of limited liability. This is an unfounded comparison. Workmen's compensation statutes are based on the employer-employee relationship and are not intended to recompense for a wrong, their purpose being to provide adequate medical and hospital treatment and a means of support—a substitute for wages—during the period of disability.[27] Thus payments under the compensation acts are generally made weekly or monthly during disability.

Workmen's compensation is supplemented by other grants by the employer, and numerous forms of fringe benefits.[28] Most organizations have health and welfare programs. There is also group life insurance, often containing death and dismemberment provisions; group accident and sickness insurance, indemnifying for wage loss; and sick leave plans. Many of these supplemental benefits are paid for non-occupational injuries or sickness as well.

A man suffering disability from an accident has sustained a real loss. The wife and children who lose their husband and father have lost his support and services, and such a loss is a far greater catastrophe to the family than to the airline. As the fundamental principle or theory on which damages are based is just compensation or indemnity for the loss or injury sustained, when injury is caused by the fault or neglect of another, and where the injured person himself was not at fault, a man should be paid in full for the loss of his right to live out his life free from pain and suffering, with his mind and body intact; and for the loss of earnings of which he is deprived by the injury. Where the individual health, safety and welfare are sacrificed or neglected, the state must suffer. This subject is one in which the public has a direct interest, as it affects the common welfare.[29]

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[26] For statutory limitations in all states see Oleck, Digest of Negligence Laws, in Markham's Negligence Counsel (1956-7 ed.).

[27] Cudahy Packing Co. v. Parramore, 263 U. S. 418, 44 S. Ct. 153 (1923).

[28] See, Larson, Workmen's Compensation (curr. sup. ed.).

[29] New York Central R. R. v. White, 243 U. S. 188, 206, 61 L. Ed. 667 (1917); Maucher v. Chi. R. I. & P. Ry., 100 Nebr. 237, 159 N. W. 422, 426 (1916).

No longer in their infancy, the airlines do not have difficulty in securing capital. As the airlines, both international and domestic, are operating at a profit, they should not expect to be entitled to pile up these profits at the expense of injured persons, widows and orphans. As between injured persons, widows and orphans, and the airlines, the latter should bear the burden of injury and death caused by their wrongful acts.

A protocol to amend the *Warsaw Convention,* completed at The Hague on September 28, 1955, becomes effective when ratified by thirty states. This protocol has not as yet been ratified by the United States, but no doubt will be. An improvement in many ways over the *Convention* of 1929, the protocol still has a provision limiting the right of passengers to recover for personal injury or death.

Although the limitation has been increased to about $16,600, and contains a unique provision allowing for the addition of court costs and expenses incurred by the plaintiff, except where the carrier has offered in writing to pay at least the amount of damages awarded within a period of six months from the date of the occurrence causing the damage, the amount of damages which a passenger or his dependents may recover will still be inadequate. In past cases the damages suffered, even from non-fatal injuries, have far exceeded the amount of this limitation. Comparing the value of the dollar in 1929 with its value today ($8300 now approximates $13,446), the increase in the limitation of recovery does little more than place the amount of allowable recovery today where it was during the year 1929, when the treaty was completed.

Forty-four countries of the world and their dependencies and possessions have either ratified or adhered to the *Warsaw Convention.* It is not likely that all of these countries will adopt the protocol. A considerable number may not. Only one country has approved of the protocol as of this date. Suppose thirty or more countries do ratify the protocol, but not the entire forty-four. We then have this situation: As to some countries the *Convention* does not apply at all. As to others the *Convention* applies, but not the amendment. As to others both the *Convention* and the protocol apply. This adds to the confusion already existing in transportation by air.