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Mark Wilcox Roberts

An Extension of the Warsaw Convention's Protection: *Julius Young Jewelry Mfg. Co. v. Delta Airlines*

Ever since the United States adopted the Warsaw Convention in the early 1930's, American air carriers have enjoyed limited liability for personal injury and property loss claims which arose in the course of international air transportation.[1] Although the Convention has since been interpreted to include carriers' employees as well as the carriers themselves,[2] doubt remained as to whether the treaty's protections also embraced the agents of a carrier participating in international air carriage.

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[1] The treaty, officially known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11 (1929) [hereinafter cited as Warsaw Convention], was the result of conferences held in Paris in 1925 and Warsaw in 1929, as well as interim work done by the Comite International Technique D'Experts Juridique Aeriens (CITEJA). Although the United States was not an official party to the conferences, it proclaimed adherence to the Warsaw Convention in 1934, following the advice and consent of the Senate. 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 1934 U.S. Av. Rep. 245.

The Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, art. 1(1).

International transportation, for purposes of the Convention, means "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the . . . transshipment, are situated . . . within the territories of two High Contracting Parties." Warsaw Convention, art. 1(2).

The original liability limits for personal injuries, set at approximately 125,000 French francs, or $8,300, in article 22 of the Convention, were raised to $75,000 by the Montreal Agreement of 1965, Agreement CAB 18900, approved by Exec. Order No. 23,680, 31 Fed. Reg. 7302 (1966). The liability for property loss, originally converting into approximately $16 per kilo in article 22, has since been adjusted due to the devaluation of the dollar. Currently, the liability ceiling for property loss may not fall below $10,000 per passenger, $400 per passenger for unchecked baggage, and $20 per kilo for checked baggage and goods. CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974). To avoid the baggage loss limitations, the consignor may make a special declaration of value when the package is handed over to the carrier, paying a supplementary sum if required. Warsaw Convention, art. 22(2).

To offset the grant of limited liability to the carriers for claims arising out of international air transportation, article 22 of the original Convention shifted the burden of proof to the carrier to establish that it had not been negligent. After the passage of the Montreal Agreement, however, the carrier was forced to waive all its defenses under article 22, thus accepting strict liability for carriage-related injuries. (Given the frequent use of the common law doctrine of res ipsa loquitor to shift the burden of proof to the carrier due to difficulties inherent in gathering proof of negligence in aviation accident cases, the concessions by the carriers noted above may be more symbolic than real. *See generally* Rhyne, *International Law and Air Transportation*, 47 MICH. L. REV. 41, 54-61 (1948)).

For an excellent discussion of the Warsaw Convention and the Montreal Agreement, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

[2] Reed v. Wiser, 555 F.2d 1079, 1092 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

Recently, the case of *Julius Young Jewelry Mfg. Co. v. Delta Airlines*[3] determined that an independent contractor who provided flight-related ground services for the carrier was so protected. While the decision established the proposition that a carrier's agent may be covered by the Warsaw Convention, the *Julius Young* holding did not absolutely extend the Convention's protection to all agents of international carriers. Consequently, the court's opinion still leaves great uncertainty as to the availability of the Convention's protection to other agents in different factual situations.

On April 16, 1977, cases containing $55,000 worth of jewelry samples were checked as regular baggage by plaintiff's representative in connection with international air transportation from Nassau, Bahamas to Bermuda, with an intermediate stop at JFK International Airport in New York. Somewhere in the course of the baggage transfer from defendant Delta Airlines to the connecting Eastern Airlines flight at JFK, the jewelry cases were lost. Defendant Allied Aviation Services was the independent contractor employed by Delta and other airlines to handle baggage transfers between connecting flights at Kennedy Airport.

In the subsequent suit for damages brought by plaintiff against Delta and Allied Aviation, the Supreme Court, New York County, permitted Allied to claim the protection of the liability limitations of the Warsaw Convention for baggage loss.[4] The plaintiff's potential recovery was thus reduced from the $55,000 sought to $1,338 under the recovery formula of the Convention.[5]

The Supreme Court of New York, Appellate Division, sustained the motion to reduce the plaintiff's *ad damnum* clause. Judge Kupferman, for the court, concluded that the liability limitations of the Warsaw Convention did indeed extend to the agent of an international air carrier where the services rendered were closely associated with the carrier's enterprise and could or would have otherwise been provided by the carrier's own employees.[6] In the unanimous decision, the court determined that permitting the claimant to sue the carrier's agents without limit as a substitute for the protected carrier would frustrate the treaty's fundamental goals of promoting and protecting international aviation by fixing the airlines' costs at a definite level, and of establishing uniform liability rules to promote quick and efficient adjudication of claims.[7] Implicit in the holding is the belief that the standard practice of indemnification between carriers and their servants for liabilities incurred in the course of

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[3] 67 A.D.2d 148, 414 N.Y.S.2d 528 (App. Div. 1979).

[4] The carrier's right to claim limited liability, absent proof that it had engaged in willful misconduct, was not involved.

[5] *See* Warsaw Convention, *supra* note 1, art. 22.

[6] 67 A.D.2d at 151, 414 N.Y.S.2d at 530.

[7] *Id.* The court added that the order would be modified if the plaintiffs were able to produce evidence of defendants' willful misconduct or other default which would defeat the liability limitations, as provided by article 25 of the Warsaw Convention. *Id.*

employment would result in the carrier indirectly paying the entire amount of the claim if the servant was not protected.[8] The opinion also suggests that no reason exists to discriminate against those airlines who employ outside agents to perform some of their services.

The foundation of the court's decision, the Warsaw Convention, was formulated in the late 1920's and early 1930's when international air transportation was just getting off the ground. In its attempt to protect the young and economically unstable international air carriers from being financially ruined by a single air disaster and to enable them to obtain liability insurance at reasonable rates,[9] the Warsaw Convention set the carriers' maximum liability for personal injuries, absent wilful misconduct, at $8,300.[10] At this time the treaty did not expressly include carriers' servants or agents, although they were briefly mentioned.[11]

This omission suggested a manner in which injured passengers, shippers and their personal representatives could avoid what many felt were unreasonably low ceilings on recovery set by the treaty.[12] By suing a servant of the carrier who was not explicitly protected by the Convention rather than the carrier itself, the full amount of the claim might be recovered. As an indemnification agreement usually existed between the pilot or other servant and the carrier, the primary purpose of the treaty was thus effectively circumvented.[13] Although it possessed limited liability itself, the carrier could end up absorbing the full expense of the claim.[14]

Concerned about the increasingly inadequate liability ceilings and the attempts to frustrate them, the signatory countries revised the Warsaw Convention with the Hague Protocol of 1955.[15] In addition to raising the liability limits slightly, the Protocol clarified the ambiguous issue of the employees' and agents' liability under the Convention by an

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[8] *See* 555 F.2d 1079; 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12.02[3] (rev. ed. 1978).

[9] 1 L. KREINDLER, *supra* note 8, § 11.01[2].

[10] Warsaw Convention, *supra* note 2, art. 22.

[11] The only mention of the agent in the Warsaw Convention is in article 25(2) which states that the carrier may not claim the benefit of the liability limitations if such damage is caused by the willful misconduct of the carrier or "any agent of the carrier acting within the scope of his employment."

[12] The Convention generated considerable discussion and criticism after it was passed. *See, e.g.*, Rhyne, *supra* note 1, at 57 ("[A] recovery of $8,291.87 is in many instances just too meager to be equitable."). *See also* Lowenfeld & Mendelsohn, *supra* note 1, at 502; authorities cited *supra* note 1.

[13] H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 157 (1954).

[14] Even if the claimant did not have a strong case against the employer, the uncertainty of whether servants were embraced by the convention's coverage and the resulting existence of an individual against whom the claimant could sue without limitation as to liability could force the carrier to settle many cases in excess of Warsaw Convention limits rather than suffer expensive and vexatious litigation. *See generally* Beaumont, *The Warsaw Convention of 1929, As Amended By The Protocol Signed At The Hague, on September 28, 1955*, 22 J. AIR L. & COM. 414, 419 (1955).

[15] The text of the Hague Protocol is reprinted with the original Warsaw Convention in HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 87TH CONG., 1ST SESS., AIR LAWS AND TREATIES OF THE WORLD 1332-70 (Comm. Print 1961).

amended Article 25A. This article provides that a servant or agent of a carrier, if acting within the scope of his employment, may "avail himself of the limits of liability which that carrier himself is entitled to invoke . . . ."[16]

The United States, however, regarding the revised liability limits as still grossly inadequate,[17] rejected the Hague Protocol, even though it had no apparent objections to the contents of the new Article 25A.[18] Because a separate agreement raising the carriers' liability limits to more acceptable levels was later reached by the United States and the other Convention members,[19] the Hague Protocol and its language clarifying the agents' position was never resubmitted to the Senate.

Due to this continuing failure of the American version of the treaty, unmodified by the Hague Protocol, to clearly define those parties it is designed to protect, the U.S. courts have been uncertain as to the applicability of the Convention to the carriers' employees and agents.[20] The question of whether the treaty included the carriers' own employees for the purposes of limited liability was finally settled by the case of *Reed v. Wiser* in 1977.[21] In *Reed*, the representatives of those passengers killed in a plane crash off the coast of Greece attempted to side-step the Warsaw Convention's liability limits by suing the carrier's corporate executives on a theory of negligence in allowing the plane to crash. In holding that the defendants, as employees of the carrier, were entitled to assert the defense of limited liability, the Second Circuit concentrated its analysis upon the legislative history of the Convention in order to discover and implement the primary purposes for its enactment.

The *Reed* opinion viewed the express inclusion of the carriers' servants and agents in the Hague Protocol not as a substantive change in

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[16] *Id.* at 1353.

[17] The new proposed limit was $16,600, while the United States had urged a liability limit closer to $100,000.

[18] *See* Hague Protocol to Warsaw Convention: Hearings Before the Committee on Foreign Relations, 89th Cong., 1st Sess. 19 (1965) (statement of Najeeb Halaby, Administrator of the Federal Aviation Agency) (*quoted in* 555 F.2d at 1086 (1977)).

[19] A decade after the Hague meetings and just one day before an official denunciation (i.e., a unilateral withdrawal) of the Warsaw Convention was to go into effect, the United States enacted a compromise agreement, the Montreal Agreement of 1965, *supra* note 1, which set the ceiling at $75,000 with absolute liability for the carrier. *See* Lowenfeld & Mendelsohn, *supra* note 1, at 563-96.

A subsequent agreement, the Guatemala Protocol of 1971, I.C.A.O. Doc. 8932, would raise the Montreal limits to $100,000, but this has never been acted upon by Congress.

[20] In 1949, Wanderer v. Sabena, 1949 U.S. AV. REP. 25, declared without explanation that agents employed to perform the carriage did fall within the Convention. *Id.* at 26. This decision was affirmed in 1955 by Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611 (S.D.N.Y. 1957), which drew an analogy to similar practices in maritime law. *Id.* at 613. However, Pierre v. Eastern Air Lines, 152 F. Supp. 486 (D.C.N.J. 1957), without citing either the *Wanderer* or *Chutter* decisions, reasoned that the agent's liability was unaffected by the Warsaw Convention, since the Hague Protocol had not yet been adopted. *Id.* at 489. *See also* Hoffman v. British Overseas Airways Corp., 9 AV. L. REP. (CCH) 17,180 (N.Y. Sup. Ct. 1964); Stratton v. Trans Canada Air Lines, 27 D.L.R.2d 670 (B.C.S. Ct. 1961).

[21] 555 F.2d at 1079.

the Convention, but rather as a clarification of the drafters' original intentions.[22] The discussions surrounding the Hague meetings indicated to the court that the original treaty meant to embrace servants and agents despite its ambiguous wording.[23] Even though the United States had failed to ratify the revised wording contained in the Protocol, the *Reed* court felt that U.S. courts should adopt that broader interpretation of the Convention.[24] Recognizing the modern day pressure by servants against their employers for indemnification for claims likely to be asserted against them, the court concluded that an unrestricted suit against an employee—who would later be reimbursed by the carrier for the amount of the claim—would undermine the treaty's purposes.[25] To implement the Convention's goals of limiting the carriers' obligations and of establishing a uniform body of international aviation tort law, the court found that the treaty must protect the community of persons actually performing the carriers' functions, not just the carriers as corporate entities.[26]

Resting heavily upon the analysis of the Convention in *Reed v. Wiser*, the court in *Julius Young* asserted that the protections of the Convention also extended to those agents closely associated with the carriers. Nevertheless, this broad holding that the Convention applies to an agent "performing functions the carrier could or would, as here, otherwise perform itself"[27] leaves considerable uncertainty as to the extent of the Convention's protection of agents in other factual contexts. The Appellate Division failed to clarify this issue by explaining in more detail when the identity between the carrier and its agents is sufficient to warrant the protection of the Convention.

By examining and applying the evident purposes of the Warsaw Convention, the *Julius Young* court, like the court in *Reed*, interprets the otherwise ambiguous language of the instrument to carry out the treaty's basic objectives.[28] Among the major goals of the Warsaw Convention, the drafters gave primary importance to the need to limit the international carriers' potential liability for aviation accidents. According to the delegates at the Hague meetings, the purpose of extending limited liability to servants and agents was "to prevent the breaking of the carriers' limit by means of the device of suing the servant or agent in circumstances where the latter might be under a right to be indemnified by the carrier."[29]

This rationale certainly covers the facts in the *Reed* case where in-

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[22] *Id.* at 1087.
[23] *Id.* at 1083.
[24] *Id.* at 1090.
[25] *Id.* at 1089-1090.
[26] *Id.* at 1092.
[27] 67 A.D.2d at 151, 414 N.Y.S.2d at 530.
[28] *Id.* at 529.
[29] 1 CONFERENCE ON PRIVATE INTERNATIONAL AIR LAW 360 (1955) (statement by the Australian delegate Mr. Poulton).

demnification between the airline and its employees is a modern necessity of doing business.[30] There is no evidence, however, that a similar hold-harmless agreement existed between the carrier and the defendant in *Julius Young*. Nor is there any indication of what economic effect, if any, the agent's unlimited versus limited liability would have upon the carrier's ability to operate its business. Moreover, since the economic risk involved in handling baggage transfers is far less substantial than that taken by the international carrier itself, who is subject to enormous liability for a single accident, the argument that the agent's liability needs to be limited because he is involved in an inherently risky business is less compelling.[31] Consequently, *Julius Young* may fall somewhat outside of both the rationale of the *Reed* case and the objective the delegates at the Hague attempted to achieve by specifically offering the carriers' employees and agents the defense of limited liability.

While undue hardship upon the carrier or agent may not have compelled the determination of limited liability on these facts, the court's holding seems to anticipate that there will be instances where a substantial economic backlash against the carrier will result in holding the agent liable without limit. Conferring limited liability on those agents who are performing tasks the carrier itself would otherwise have to perform as a part of the carriage activity presumes that economic repercussions against the carrier are likely to result when the agent is closely associated with the transportation activities mentioned in Articles 17 and 18 of the Convention.[32] Noting that baggage is an activity so closely associated with the carriage activity that the Convention expressly allows a passenger to avoid the liability limits by paying a higher fee,[33] the court implies that it is not practical to differentiate between the agent and employee where the functions performed are so similar. A contrary holding in *Julius Young* would make it more difficult to extend the benefits of the limited liability provisions of the Convention to an agent perhaps less explicitly involved in the carriage enterprise but where the potential economic effects might be more acutely felt.[34]

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[30] *See* 555 F.2d at 1090.

[31] The magnitude of the risks involved is demonstrated by the fact that the *Reed* case alone involved claims of $8,600,000 on behalf of nine out of seventy-nine passengers on board. 555 F.2d at 1090 n.15.

[32] The actual carriage, the operations of embarking or disembarking or the handling of goods during the period in which they are in charge of the carrier are examples. Warsaw Convention, *supra* note 1, arts. 17, 18.

[33] Warsaw Convention, *supra* note 1, art. 22(2). However, the mere fact that the plaintiff could have declared an increased value should have no effect on whether the agent should be granted limited liability, contrary to the statement of the court. 67 A.D.2d at 151, 414 N.Y.S.2d at 530. *See* H. DRION, *supra* note 13, at 162.

[34] For example, an airline might employ an independent security company rather than employ its own personnel to handle security on its international flights. The employment contract might well include a hold-harmless clause against the carrier. If a mid-air disaster occurs, e.g., a terrorist's bomb explodes, the security officer (or his estate) would be the likely target of suits by passengers' representatives. Although the security officer is less directly engaged in the carriage than the person who handles baggage, the economic impact upon the carrier would be

Possibly the *Julius Young* holding violates the rule against judicial amendment of treaties, since agents are not expressly included in the treaty. Yet, to give effect to its evident purposes, a broad meaning of the treaty does appear to be justified.[35] The modern day practicality or, indeed, necessity of granting indemnification protection and of employing independent agents for the performance of carriage-related services suggests that the treaty should be read in its broader context. The Convention should not discriminate between the carrier who employs outside personnel and the one who does not.

A forceful argument can also be made that the current realities of improved safety records and financial stability of the international airline industry demonstrates that international air carriers no longer need preferential treatment, i.e., that the treaty is obsolete.[36] Rather than supporting this view by interpreting the Warsaw Convention as narrowly as possible in order to limit its effect, the court's decision reflects the policy that treaty revocation is a matter only for Congress. Until the Convention is legally terminated, the court is obliged to carry out its goals.[37]

The Appellate Division reinforced its holding by stressing the Convention's parallel goal of establishing a "uniform body of world-wide liability rules to govern international aviation to aid recovery by users."[38] This goal is consistent with the view that the Warsaw Convention establishes the exclusive relief available to the injured parties in international air transportation.[39] In addition, the interest in a uniform application of the law among the courts probably strengthened the Appellate Division's inclination to follow the Second Circuit's findings in *Reed v. Wiser*.[40]

Although the court does not urge uniformity for uniformity's sake, allowing the benefits of the Warsaw Convention's liability limitations to

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staggering. It seems unfair to punish this carrier just because it employs independent agents, especially since security specialists might be generally more effective than the carrier's own employees.

[35] *See* 12 SUFFOLK L. REV. 117, 120 (1978) (quoting The Amiable Isabella, 19 U.S. (6 Wheat) 1, 71 (1821)) "[T]o alter, amend, or add to any treaty . . . would be on our part a usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty."

[36] A treaty may be construed liberally "to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." Bacardi Corp. of America v. Domenech, 311 U.S. 150, 163 (1940). *See also* Eck v. United Arab Airlines, Inc., 360 F.2d 804 (2d Cir. 1966).

[37] *See* 555 F.2d at 1093.

[38] 67 A.D.2d at 150, 414 N.Y.S.2d at 529.

[39] *See, e.g.*, Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971 (S.D.N.Y. 1977); Butz v. British Airways, 421 F. Supp. 126 (E.D. Pa. 1976); Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238 (S.D.N.Y. 1975); Chandler v. Jet Air Freight, Inc., 54 Ill. App. 3d 1005, 370 N.E.2d 95 (1977).

[40] There is a substantial interest in uniformity of application of the law on this issue. As a state court, the Appellate Division in *Julius Young* should pay strict attention to a federal court's interpretation of federal law (which includes treaties) absent significant reasons for holding otherwise. Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977); Leppo v. Trans World Airlines, Inc., 56 A.D.2d 813, 392 N.Y.S.2d 660 (1977).

inure to the benefit of the carriers' agents has the effect of promoting both of the major goals of the treaty. A contrary result could exacerbate the intrinsic complications already involved in the settlement of international aviation accident claims.[41]

Carried to its logical conclusion, such an interest in uniformity implies that in addition to the benefits of limited liability all of the rights which attach to the carrier under the Convention should be conferred upon those of its agents engaged in the carrier's enterprise. The extension of all of the provisions of the Warsaw Convention to agents may, however, ultimately deny the injured party virtually any recovery at all, as in the case of *Hoffman v. British Overseas Airways Corp.*[42] In that case, the New York operator of the portable stairway used by the carrier to load passengers attempted to claim the benefit of the jurisdictional provisions of Article 28 of the Convention in a suit by a passenger for personal injuries.[43] This claim would have limited the plaintiff's available forums to London and Paris. Because it was a New York corporation not subject to service in either of those forums, the court determined that the Warsaw Convention could not apply to the agent, as it would essentially deny the plaintiff any feasible opportunity for relief.[44] Rather than indicate a wholesale rejection of the Convention's applicability to agents, this decision simply shows that some differences still exist between the carrier and the agent such that an agent's coverage under the Convention will not exactly mirror that of the carrier.[45]

After the *Julius Young* decision, fairness may suggest that the agent should not be able to claim the benefits of the Warsaw Convention unless it is also willing to bear all of the burdens of identity with the carrier's enterprise. Nonetheless, the problems created by forcing the local agent to consent to Warsaw Convention jurisdiction in distant countries may outweigh any benefits achieved by the uniform application of the treaty to the carriers' agents.[46] Of course, only the limited liability provisions of the Convention were at issue in *Julius Young*, so the court was not forced to interpret the applicability of other provisions to the carriers' agents. Because the Warsaw and Hague discussions about the carriers' servants

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[41] 555 F.2d at 1091. An illustration of the complexity of the administration of these claims is In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (Cal. 1975), which involved 203 suits by 337 decedents from 24 countries and 12 states against the manufacturer of an American-built plane, owned by Turkish Air Lines, which crashed soon after take-off in France.

[42] [1964] 9 Av. Cas. (CCH) 17,180.

[43] Article 28 of the Warsaw Convention, *supra* note 1, requires that actions for damages be brought "in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business or has an establishment by which the contract has been made . . . ."

[44] [1964] 9 Av. Cas. (CCH) at 17,181.

[45] The court noted that it made its decision "irrespective of whether the restrictions embodied in other provisions of the Warsaw Convention inure to the benefit of defendant . . . ." *Id.*

[46] This is in addition to the agent's likely claim that imposition of Warsaw Convention jurisdiction may deprive him of property without due process of law.

and agents were limited to the subject of limited liability, later courts may restrict the agents' inclusion under the Convention to those issues directly related to limited liability.

The question remains as to how broadly later courts will construe the court's protection of agents "performing functions the carrier could or would, as here, otherwise perform itself."[47] The decision does not imply that limited liability should attach to all agents and industries which are connected with international air transportation. Although Article 24 of the Convention says that any action for damages suffered in the course of international air carriage can only be brought subject to the provisions of the Convention, the Convention only protects the carrier's enterprise, thus excluding manufacturers, airport operators, air traffic controllers, and others similarly involved in air transportation.[48] That the activities described by Articles 17 and 18 of the Convention (which indicate when the carrier is liable) all deal with the actual processing and transporting of passengers and their property implies that only those agents physically serving passengers and their property should be covered by the Convention.[49]

Here a distinction exists between the carrier's own servant and the agent. A carrier's own employees are a part of the enterprise no matter how far removed they are from the actual transportation process, and they thus will be included under the Convention, according to *Reed v. Wiser*.[50] But an agent, to establish his inclusion under the Warsaw Convention, may have to be closely associated with the actual physical handling of passengers and their property. Another important consideration in assessing whether or not the agent's activity is closely associated with the carrier's enterprise is whether an indemnification agreement exists between the carrier and agent such that the carrier would indirectly bear the cost of the entire claim.

Both of these factors also suggest that the carrier exercises some degree of control and supervision over the agent. A carrier probably would not want to expose himself to indirect liability for an agent's conduct through the mechanism of indemnification, unless he possesses sufficient control over the agent to assure that the agent will perform his duties responsibly. In addition, the closer the agent's activities are to the actual transportation, the greater control the carrier is likely to exercise. Thus, a pure independent contractor, over whom the carrier has no control, should not be covered by the Convention.[51]

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[47] 67 A.D.2d at 151, 414 N.Y.S.2d at 530.

[48] 1 L. KREINDLER, *supra* note 8, at § 11.05[7].

[49] Compare those cases cited in note 17, *supra*.

[50] The employee is not protected merely because his employment by the carrier makes it easier to see that he is closely associated with the transportation activity. An employee who is potentially subject to these suits will most likely demand indemnification for liabilities incurred in the course of employment as a condition of his taking the employment.

[51] *See* RESTATEMENT (SECOND) AGENCY § 2 (1958).

Any consideration of privity of contract between the carrier, the agent and the claimant, however, which the court in *Julius Young* considers,[52] is irrelevant to this issue. The identity between the carrier and its agent is not based upon the common law of contracts, but is a legal creation of the treaty.[53] It exists only insofar as it promotes the Convention's goals of limiting the liability of carriers and of establishing uniformity in international aviation accident recovery rules.[54]

Much as the interest in uniformity and judicial comity may have reinforced the court's holding in *Julius Young*,[55] these concerns intimate that this interpretation of the Warsaw Convention will be followed by other courts. Whether one agrees or disagrees with the decision probably depends upon one's opinion on the right of international air carriers themselves to possess limited liability for aviation accidents. The extension of limited liability to the carrier's agents engaged in the carrier's transportation activity is unlikely to significantly lower costs to passengers, and it may even make the agents less careful in the execution of their duties.

By making full recovery from the carrier more difficult, decisions like *Julius Young Jewelry Co. v. Delta Airlines* may breed more litigation against air controllers, manufacturers and other members of the air transportation industries who do not have the benefit of limited liability. A better solution to the entire problem would be to raise the liability ceilings of the international carriers to a level more in keeping with these inflationary times.

—MARK WILCOX ROBERTS

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[52] 67 A.D.2d at 151, 414 N.Y.S.2d at 530.

[53] H. DRION, *supra* note 13, at 162.

[54] *Id.*

[55] *See* note 33 *supra*.