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The Continuing Attacks by American Courts on the Warsaw Convention

I. The Warsaw Convention[1]

The Warsaw Convention, adopted in Warsaw, Poland, in 1929, provided for uniformity of documentation such as airline tickets and waybills, and also for limitation of potential liability of air carriers in the event of accidents by airplanes in international travel.

The limitation of the carrier's liability for personal injury or death, to each victim or his family, was set at 125,000 gold francs which is equivalent to $8,291.87. The Hague Protocol,[2] which entered into force August 1, 1963, modified the Warsaw Convention by doubling the maximum liability of airlines in international travel to $16,582. This Protocol was not ratified by the United States but would nevertheless apply to a United States citizen whose flight originates and terminates in countries both of which are signatories to the Hague Protocol, when there is no agreed stopping place in the United States.

On May 13, 1966, the Civil Aeronautics Board of the United States approved the Montreal Interim Agreement.[3] The signatories thereto were a number of international airlines having landing privileges in the United States. The Agreement raised the maximum liability to $75,000 when the international flight originates or terminates in the United States or the United States is an agreed stopping place. The Agreement also provided that the potential liability of the air carriers is regardless of fault; *i.e.*, a carrier would be potentially liable for injury or death in international air travel up to a maximum of $75,000, whether or not it could be proved

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[1]49 Stat. 3000-3026, 137 L.N.T.S. 11. The treaty is officially known as "Convention for the Unification of Certain Rules Relating to International Transportation by Air."

[2]The Protocol was concluded at The Hague, Netherlands on September 28, 1955.

[3]The Agreement was brought about mainly by the efforts of the International Air Transport Association (IATA). For events and negotiations leading to the Montreal Agreement, *see* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 HARVARD LAW REVIEW 497 (1967).

negligent.[4] Neither the Hague Protocol nor the Montreal Interim Agreement altered the provisions of the Warsaw Convention relating to willful misconduct. In such case the international carrier would be liable for full damages to the victim or his personal representative.

II. Attacks on the Convention by American Courts

The first major attack on the Warsaw Convention by American courts was *Mertens v. Flying Tiger Line, Inc.*,[5] decided February 16, 1965, by the United States Court of Appeals for the Second Circuit. Plaintiff's decedent, Lieutenant Frederic T. Mertens, boarded an airplane under military orders at Travis Air Force Base, San Francisco, to accompany certain material loaded on the plane, to Tachikawa Air Force Base, Tokyo, Japan. The plane, owned and operated by Flying Tiger Line, Inc., had been chartered by the United States for the transportation of military cargo and personnel to military destinations.

While the aircraft, with plaintiff's decedent aboard, was parked on the ramp about ready to take off, a ticket was delivered to Lieutenant Mertens. The ticket contained a statement concerning limitation of liability which was printed in such a manner as to be virtually unnoticeable and unreadable.

Article 3(2) of the Warsaw Convention states:

> The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

The plaintiff argued that no passenger ticket was delivered to the decedent Mertens or, in the alternative, even if the ticket was in fact delivered to the decedent, it was never adequately delivered to him as required by Article 3(2).

The court stated that, with proper delivery of a ticket containing a properly printed statement of limitation of liability, a passenger would have reasonable opportunity to take measures to protect himself against the limitation of liability. Examples of such self-protective measures, the court said, would be deciding not to take a flight, entering into a special contract with the carrier, or taking out additional insurance for a flight. The court further stated that under all of the circumstances, it could not be said that

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[4]The United States in September, 1969, in Montreal submitted a proposal to the Legal Committee of the International Civil Aviation Organization to establish a $100,000 maximum on absolute liability.

[5]341 F.2d 851.

Lieutenant Mertens had a reasonable opportunity to take any measures to protect himself against the limitation of liability, regardless of the fact that the measures available to him might have been circumscribed because he was a military courier. This decision then avoided the limitations of the Convention because delivery of a ticket containing a statement as to limited liability was not made until *after* the passenger boarded the plane, and also because the limitation statement was printed in such a manner as to be both unnoticeable and unreadable.

Eight months later, on October 25, 1965, *Warren v. Flying Tiger Line, Inc.*[6] was decided by the United States Court of Appeals for the Ninth Circuit. The United States Military Air Transport Service (MATS), pursuant to a contract, arranged for Flying Tiger to provide air transportation for servicemen from Travis Air Force Base in California to Tan Son Nhut Air Base in Saigon, Vietnam. At the foot of the ramp, just *before* boarding the plane, each pasenger was given a boarding ticket. On the front of the ticket it was stated that the transportation was "... subject to the rules relating to liability established by the Convention ...." On the back of the tickets there appeared conditions referring to the Convention. The trial court found it would be difficult to read the fine print on the back of the tickets without a magnifying glass.

Flight insurance had been available in the Travis Air Force Base terminal, and also in the terminal at Honolulu, where the plane made a three-hour stop. After leaving Honolulu, the plane stopped at Wake Island and Guam, and then took off for Clark Air Force Base in Manila, P.I. which it never reached. The plane has not been seen nor heard from since.

In its decision, the appellate court referred to Article 3(2) of the Convention (quoted above) providing that if the carrier accepts a passenger without a passenger ticket having been delivered, it would not be permitted to avail itself of the Convention provisions which exclude or limit its liability. The court also referred to Article 3(1) which reads:

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
> (a) The place and date of issue;
> (b) The place of departure and destination;
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
> (d) The name and address of the carrier or carriers;
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

[6]352 F.2d 494.

Article 3(1)(e) was interpreted by the court to mean that the purpose of such statement is to notify passengers of the applicability of the Convention, thus giving them an opportunity to take steps to protect against the limitation of liability. The court stated the most common self-protective measure to be the procurement of additional flight insurance, but held:

> None of the passengers were afforded a reasonable opportunity of even reading the ticket, much less obtaining additional insurance, before they were accepted by boarding the plane. The passengers were thereby deprived of a right which was intended to be afforded them as concomitant to the carrier's right to limit its liability.

Citing *Mertens,* the court went on to say that it was immaterial that the passengers could have purchased additional flight insurance at Honolulu, an intermediate stop on the flight. *Warren* and *Mertens* are much the same. The main factual difference is that in *Mertens,* the passenger was already on the plane which was about ready to take off, when a ticket was delivered to him; in *Warren,* the tickets were given to the passengers just before they boarded the plane.

In this sense, the *Warren* case went a step further in avoiding the limitation provisions of the Convention, since the passengers were given tickets before boarding the plane and not afterward. Nevertheless, the airline was not permitted to avail itself of the limitation provisions because the delivery of the tickets did not take place sufficiently in advance of boarding to permit the passengers to read their tickets or purchase additional flight insurance.

It may be that after the decision of *Mertens,* Flying Tiger sought unsuccessfully to protect itself by issuing tickets to passengers *before* boarding its planes. The opinion of the court in *Warren* (p. 497) states that the "stewardesses were given written instructions by Flying Tiger not to allow any passenger to board the plane without a boarding ticket."

In an additional sense, the *Warren* case went further than *Mertens,* since, in *Warren,* the passengers could have purchased flight insurance in Honolulu after having had an opportunity to examine their tickets during the trip from Travis Air Force Base to Honolulu, assuming that they could make out and understand the printed matter thereon concerning the Convention. Nevertheless, the court held the Convention inapplicable and the plaintiffs prevailed.

Fourteen months after the Warren decision, the United States Court of Appeals for the Second Circuit handed down its decision in *Lisi v. Alitalia-Line Aere Italiana, S.p.A.*[7] on December 16, 1966. Defendant Ali-

[7]253 F.Supp. 237, *aff'd* 370 F.2d 508; *certiorari granted* 389 U.S. 926; *judgments aff'd* by an equally divided court in 20 L.ed. 2d 27 (1968); *rehearing denied* 20 L.ed. 2d 671 (1968).

talia's airplane crashed in Ireland en route from Rome to New York. The passengers had received their tickets three to thirty-six days before departure. Hence there was adequate time to read the tickets, including any statement or conditions thereon relevant to the Warsaw Convention.

On the front of the ticket, in exceedingly small print, was the message: "Each passenger should carefully examine this ticket, particularly the Conditions on Page 4." The trial judge characterized this notice to passengers as so "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, [as to be] both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed."

The appellate court ruled that the passengers were entitled to reasonable notice of the Convention's limitation-of-liability provisions, and that even though the required notice appeared on the tickets, and the tickets were delivered sufficiently in advance of departure, the notice was virtually invisible.

Thus, *Lisi* differed from *Mertens* and *Warren* by denying the limitation provisions of the Convention only because notice of these provisions did not appear clearly and legibly. Previously, *Mertens* and *Warren* denied the limitation provisions because of lack of proper and timely delivery of tickets containing notice of limitation of liability. *Mertens* and *Warren* did mention the question of legibility of the notice, but only in passing, their decision being based essentially on the question of delivery. *Lisi* did not question delivery at all, but denied limitations for lack of clarity of the notice.

The next and latest case attacking the Warsaw Convention was decided in the Circuit for Cook County (Chicago), Illinois on November 7, 1968, in the case of *Burdell et al. v. Canadian Pacific Airlines, Ltd. et al.*[8] On March 4, 1966, plaintiffs' decedent, Frank Burdell, was aboard a plane owned by defendant Canadian Pacific Airlines en route from Hong Kong to Tokyo. The plane crashed at Tokyo Airport while attempting to land in a thick fog.

Suit was brought in the Circuit Court of Cook County. Canadian Pacific moved to dismiss the action, alleging lack of jurisdiction over the subject matter and, alternatively, because of improper venue.

The court held for plaintiffs, reasoning that Article 28 of the Convention restricting the forum for bringing suit to Singapore, Hong Kong or Canada

[8]No. 66 L 10799. The case was settled on appeal for $215,000.

was in effect a limitation of liability; and that the defendant failed to comply with the requirements of the Convention regarding the ticket, citing *Lisi.* The court also held that the Warsaw Convention was inapplicable, as Singapore was the decedent's destination and Singapore was not an adherent to the Warsaw Convention.

The court followed with a bombshell holding the Warsaw Convention unconstitutional in regard to the plaintiffs because it was in derogation of their rights under the due-process and equal-protection clauses of the United States Constitution. The holding of unconstitutionality was based on two grounds. First, the court held that it would be unconstitutional to deny plaintiffs the right to bring their action against the defendant airline in a duly constituted court of the United States which would otherwise have jurisdiction. Secondly, the court held that it would be unconstitutional to limit the damages, in this case to the family of a father, husband and wage-earner, to $8,291, regardless of the degree of the true, uncontested, pecuniary losses. The $16,582 of the Hague Protocol and the $75,000 of the Montreal Interim Agreement would, in any event, be inapplicable because of the facts:

> The Court further finds that the provisions of the Warsaw Convention Treaty which would restrict damages in this case to approximately $8,300 are unconstitutional and therefore not enforceable because they violate the due process and equal protection clauses of the United States Constitution. The Court finds that such provisions are arbitrary, irresponsible, capricious and indefensible as applied to this case, in that such provisions would attempt to impose a damage limitation of considerably less than the undisputed pecuniary losses and damages involved in this case. Such unjustifiable, preferential treatment of airlines is unconstitutional.

Hence, the *Burdell* decision initiated a new attack upon the Warsaw Convention, that of unconstitutionality. Under this decision, the rationale of non-delivery and illegibility of the *Mertens, Warren,* and *Lisi* decisions are no longer needed to defeat limitation of liability. A new tool of unconstitutionality to defeat limitations was provided to fit the situation in which there was proper and adequate delivery and legibility of a ticket containing the required statement.

III. A Critique and Suggested Arrangement

The recent history of American adjudications relating to the Warsaw Convention shows the tendency of the courts to refuse strict construction of the Convention provisions when inadequate awards would result for injuries and death in international air travel.

The injustices in air law relating to personal injuries and death in international travel are primarily due to the limitation provisions of the Warsaw Convention upon which the Hague Protocol and Montreal Interim

Agreement have been engrafted. Obviously, an award of $8,291 under the Warsaw Convention, or of $16,582 under the Hague Protocol to, for example, a surviving wife and four children is inadequate; and for that matter so would be $75,000 under the Montreal Interim Agreement, even without regard to the legal fees and costs involved.

However, in the case of the Montreal Interim Agreement, there has been added a new, extremely valuable benefit to those injured, that of liability without fault. Regardless of fault or negligence, under the Montreal Interim Agreement an air carrier is liable up to $75,000 upon the showing of injury or death of a passenger. Considering the pitfalls of lawsuits and the difficulties of proving negligence, the problem of establishing liability in a typical negligence action is greater to a plaintiff than is the problem of an inadequate verdict. Hence, the provisions of the Montreal Interim Agreement, it is submitted, represent real progress.

But much more needs to be done. Clearly, the limit of $75,000 is far below a reasonable limitation even with the condition of absolute liability. After all, a plaintiff would not automatically receive the limitation figure. His compensation would be only *up* to the limitation figure. A doubling or tripling of the present limitation of $75,000 would seem to be reasonable. Whatever the amount, some reasonable figure would need to be set, and for those for whom an award of even double or triple the present figure would be inadequate, commercial flight insurance would be available.

In any event, the most important aspect of the Montreal Interim Agreement remains that of absolute liability, and the limitation figure must ultimately be redetermined by reasonable men to be as fair as possible to both the carrier and the passenger in the context of the public policy of encouraging the growth of, and investment in, the international air travel industry.

Aside from the matter of inadequate awards, there are numerous inconsistencies in the present law of air injury and death. The eminent American expert in this field, John J. Kennelly, has devoted most of a chapter in his newly published *Litigation And Trial Of Air Crash Cases*[9] to these problems.

If, for instance, a passenger were killed on a flight from New York to Chile, his surviving family could sue for unlimited damages because Chile is a non-signatory nation to the Warsaw Convention. If, on the other hand, the flight were to Argentina, the $75,000 limitation would apply, because Argentina is an adherent to the Warsaw Convention, and there was a contact with the United States where the flight originated.

[9]Chapter 7—*International Air Travel Damage Limitations*

In the event that the same passenger had purchased a ticket in London for a flight to Paris and was killed thereon, his surviving family could sue for only $16,582, because both the United Kingdom and France are signatories to the Hague Protocol and the flight had no contact with the United States. Had this same passenger been killed on a flight originating outside the United States, from one country to another both signatories to the Warsaw Convention but not the Hague Protocol, his surviving family would be limited to a recovery of $8,291.

These inconsistencies are compounded by the factor of negligence. If, in the latter example, the airline was negligent, the limitation would nevertheless still be $8,291. However, an international flight having a contact with the United States would have a limitation of $75,000, even if the airline were not negligent as long as it was a signatory to the Montreal Interim Agreement. Everything considered, it would seem that the fairest arrangement is that of the Montreal Interim Agreement, absolute liability combined with a reasonable limitation.

It is recognized that juries and judges may differ among themselves as to findings of fact in the same situation. Hence, without the applicability of absolute liability, a plaintiff could be denied any award whatever by a jury-finding of no negligence. Much of the rationale of the doctrine of absolute liability is embodied in the workmen's compensation laws throughout the United States; and there is increasing call for application of the doctrine of liability without fault in automobile accident cases. This principle of absolute liability with reasonable limitations should not be restricted to international air travel, but should serve as a basis for intranational air travel as well.

Regarding the constitutionality of the suggested arrangement, it is submitted that analogous arrangements are deeply imbedded in American maritime law. As to absolute liability of an airline, there is some similarity to the doctrine of unseaworthiness in admiralty. Under the latter doctrine, a shipowner is absolutely liable to a seaman for his injuries brought about by the unseaworthiness of a ship without regard to the possible negligence *vel non* of a shipowner. Thus, even without negligence on the part of the shipowner, he is absolutely liable for a seaman's injuries brought about by a ship's unseaworthiness. In *Seas Shipping Co. v. Sieracki,*[10] the Supreme Court of the United States explained the philosophy of this doctrine to be that the shipowner, and not the seaman, is in a position to distribute the cost of a seaman's injuries to the shipping community which receives the

[10]328 U.S. 85, *rehig. den.* 328 U.S. 878.

seaman's services, and this community should carry and distribute the cost of the injuries.[11]

As to limited liability, there has been in effect since before the Civil War, specifically March 3, 1851, the "Limitation of Shipowners' Liability Act."[12] Section 183 thereof provides generally that the liability of a shipowner for personal injuries and damage to property, done or incurred without the privity or knowledge of the shipowner, shall not exceed the value of the interest of the shipowner in the vessel and her freight then pending.

The constitutionality of this section was upheld by the Supreme Court as an exercise by Congress of the power to regulate commerce.[13] A prime purpose of Section 183 is to encourage investments in shipbuilding and the promotion of the employment of vessels in commerce, quite similar to one of the purposes of the Warsaw Convention. Further, there is an interesting similarity between the "willful-misconduct" provision of the Warsaw Convention, and the "privity-or-knowledge" provision of the Shipowners' Liability Act. Violation of either provision provides for unlimited liability of the airline or shipowner as the case may be. The availability of limitations in maritime proceedings surely constitutes an adequate precedent for limited liability of airlines.

It is submitted that since the philosophy and rationale of the suggested arrangement of absolute liability with limitations has so long been part of American maritime law, an eventual final determination of the constitutionality of similar concepts in air law would result in a holding of their validity.

[11]For additional cases in this field *see* the annotation commencing 98 L. ed. 160. While it remains necessary, to be entitled to recovery, to show unseaworthiness, once shown it creates a conclusive presumption of fault without proof of causative negligence.

[12]46 U.S.C. 181 *et seq.*

[13]Old Dominion S.S. Co. v. Gilmore, 207 U.S. 398 (1907); Providence & N.Y. S.S. Co. v. Hill Mfg., 109 U.S. 578 (1883).