AVIATION LAW: INTERNATIONAL AIR TRAVEL—A BRIEF DIAGNOSIS AND PROGNOSIS

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The law relating to air travel is marked by mystery, confusion and inconsistency little known in other areas of the law. Laymen and many lawyers and judges not attuned to the peculiarities of aviation law would regard as stranger than fiction the inequalities and injustices often found in awards for injury or death in aviation cases. There are many different laws which may determine the liability of airlines and aircraft manufacturers, as well as damages obtainable by survivors of air crash victims. Even though passengers are flying in the same aircraft, have paid the same fare, and the losses suffered are equal, recoverable damages in the event of a crash may vary enormously.

It is hoped that this article will expose some of the myths and injustices concerning aviation litigation arising out of international air travel. To this end, the author will attempt not only to outline briefly the current state of the law of international air travel, but also to critically dissect those provisions of this law which are incompatible with fundamental concepts of justice.

I. INTERNATIONAL AIR TRAVEL AND SOME LIMITATIONS UPON THE RIGHTS OF PASSENGERS

A. The Monetary Limitations

In certain types of international air travel, the Warsaw Con-

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Shortly before this article went to press, the author completed a trial before a Chicago, Illinois jury which rendered a unanimous verdict of $5,000,000 for a single death. The death occurred in domestic air travel. Demonstrative of the absurdity of treaty-imposed limitations is the fact that if the decedent's ultimate ticketed destination had been, for example, London, the negligent airline's responsibility might have been limited to only $75,000.

vention,[1] Hague Protocol,[2] or the Montreal Interim Agreement[3] may limit the liability of an international air carrier for injury or death.

The Warsaw Convention was initially adoped in Warsaw, Poland, in 1929, and the United States adhered to it in 1934.[4] However, there may be a question whether there ever was *legal* adherence to it by the United States.[5] This treaty originally limited damages recoverable from airlines which negligently caused death or injury during air travel to $8,291.87 (now about $9,000) where the *ticketed* nations of origin *and* destination were adherents to the treaty.[6]

The Hague Protocol modifies the Warsaw Convention by increasing the maximum liability of airlines to $16,582 for international air travel where the ticketed countries of origin and destination are adherents to the Hague Protocol.[7] The Hague Protocol was not ratified by the United States; however, it may apply to all passengers regardless of citizenship, since its application de-

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done at Warsaw* Oct. 12, 1929, 49 Stat. 3000. T.S. No. 876 (1929) [hereinafter cited as Warsaw Convention].

2. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *done at the Hague* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter cited as Hague Protocol].

3. Agreement C.A.B. 18900, approved C.A.B. Order No. E23680, Docket 17325, May 13, 1966, 44 CAB REP. 819 (1966) [hereinafter cited as Montreal Interim Agreement].

The Montreal Agreement is a private accord originally involving eleven American and seventeen foreign air carriers. Stephen, *The Montreal Conference and International Aviation Liability Limitations*, 33 J. AIR L. & COM. 557 n.15 (1967), and now is subscribed to by approximately 100 air carriers. 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES, 117-18 (1968) [hereinafter cited as KENNELLY].

This agreement is not a treaty or agreement between governments, although C.A.B. approval was required in accordance with 49 U.S.C. § 1382 (1963) which states:

> (a) Every air carrier shall file with the Board . . . every contract or agreement . . . affecting air transportation . . . between such air carrier, and any other air carrier, foreign air carrier, or other carrier. . . .
>
> (b) The Board shall by order disapprove any such contract or agreement, . . . that it finds to be adverse to the public interest, ...

The entire text of the agreement is reprinted in KENNELLY, *supra* at 111-13.

4. *See* 49 Stat. 3000 (1934).

5. This issue will be more fully developed *infra*.

6. *See* Warsaw Convention, *supra* note 1, art. 1(2), 22; KENNELLY, *supra* note 3, at 80.

7. Article XI of the Hague Protocol covers the monetary limitations; article I(2) defines "international carriage" for the purposes of the Warsaw Convention; *see* art. XVIII.

pends solely upon ticketed places of origin and ultimate destination.[8]

The Montreal Interim Agreement modifies the Warsaw Convention by prescribing a $75,000 maximum liability upon airlines, regardless of fault, whenever the ticketed air travel, otherwise covered by the Warsaw Convention, provides for a "contact" with the United States.[9] In other words, this Agreement applies whenever any place in the United States constitutes a *ticketed* point of origin, ultimate destination or agreed stopping place.

These limitations of monetary liability apply to *airlines only*. Manufacturers and other potential defendants are not similarly insulated.[10] Moreover, these treaties, while purporting to apply only to international air travel, have been held to apply to purely domestic flights, if the ticketed nations of origin and ultimate destination are adherents to one of them.[11]

B. Hypothetical Cases

In July, 1971, the Annual Convention of the American Bar Association was held in London. Approximately 10,000 American lawyers and judges flew there to attend it. How many of these lawyers and judges realized that if they were killed during *any* portion of their flight to London the recovery of their families against the airline, even if its negligence were admitted, might be limited to at most $75,000 per death, regardless of the extent of provable damages? The following hypothetical cases provide specific examples of injustices which flow from the application of this body of law.

Case No. 1. Assume Judge Jones, 40, from Chicago, Illinois, has a wife and five children, and earns $40,000 per year. He is killed while flying nonstop from Chicago to London, due to the admitted negligence of the airline. What remedy against the airline has the family of the wrongfully killed judge? The widow and children of Judge Jones, by virtue of the Montreal Interim Agreement might be limited to a maximum recovery of $75,000

8. S. EXEC. H, 86th Cong., 1st Sess. (1959); S. EXEC. REP. No. 3, 89th Cong., 1st Sess. (1965).

9. Montreal Interim Agreement, note 3, *supra*; KENNELLY, *supra* note 3, at 111.

10. *See generally* Warsaw Convention, note 1, *supra*; Hague Protocol, note 2, *supra*; Montreal Interim Agreement, note 3, *supra*.

11. Manufacturers Hanover Trust Co. v. American Airlines, 43 Misc. 2d 856, 252 N.Y.S.2d 517, (Sup. Ct. 1964). *See* note 13, *infra*.

against the negligent airline, although the provable pecuniary damages might be more than $1,000,000.[12]

Case No 2. Assume that Smith, a lawyer from Minneapolis, Minnesota, with the same income and number of dependents as Judge Jones obtains a series of tickets from his travel agent to fly from Minneapolis to Chicago on a domestic Ozark Air Lines flight. From Chicago he plans to fly to London on BOAC, an international carrier. While Smith is flying on the domestic flight from Minneapolis to Chicago, the plane crashes due to the airline's negligence. Smith survives, but is rendered a quadriplegic, requiring lifelong hospitalization. What is his remedy against the admittedly negligent domestic carrier, Ozark Air Lines? As in the case of Judge Jones, his maximum recovery against the negligent carrier might be limited to $75,000 by the Montreal Interim Agreement, even though he was not on a flight bound for London, his ultimate ticketed destination, but rather on a purely domestic flight between two states within the United States.[13]

Case No. 3. Suppose Williams, a Chicago lawyer with the same income and number of dependents as Jones and Smith, flies safely to London, but then decides to fly from London to Rome. While in Rome, Williams purchases a new ticket to fly to Athens. Williams is killed due to the airline's negligence while enroute from Rome to Athens on board an Alitalia Airlines plane. What are the rights of his widow and five children against Alitalia Airlines? The family of Williams could be limited to a maximum recovery of approximately $16,600 from the negligent airline by the terms of The Hague Protocol.[14]

The provision of this Protocol which limits the recovery of Williams' survivors is indefensible. Most people who fly to Europe visit various countries, just as foreign travelers who visit the United States generally do not confine their visits to a single state. Few American travelers are familiar with the pitfalls

12. Montreal Interim Agreement, note 3, *supra.*

13. *Id.* Felsenfeld v. Societie Anonyme Belge D'Exploitation de la Navigation Aerlenne, 8 AV. L. REP. ¶ 17,199 (N.Y. City Ct. 1962); Grein v. Imperial Airways, Ltd., [1935] 53 K.B. 51 [reproduced in [1936] U.S. Av. 184-250].

Even though the Minneapolis to Chicago flight is purely domestic, Smith's ultimate ticketed destination is foreign. The Minneapolis to Chicago leg of the journey is "International Transportation" as defined in the Warsaw Convention, article 1(2)-(3); KENNELLY, *supra* note 3, at 80.

14. *See* note 7, *supra.*

which exist for their families if they purchase *new* tickets while in Europe and are killed while on flights between European countries. Not only are recoverable damages against negligent airlines severely restricted, either to approximately $9,000 or $16,600,[15] but there is also the possibility of uncollectable airtrip insurance policies which travelers purchase at airports before their departure.[16]

In Williams' case it must be noted that while in Rome he decided to fly on Alitalia Airlines only to Athens. Williams' new ticket, acquired in Rome for his Rome to Athens trip, would not have involved a "contact" with the United States, and thus, his trip would not have come within the purview of the Montreal Interim Agreement. Consequently, since Italy and Greece are adherents to the Hague Protocol,[17] his family's recovery would be limited by its provisions to $16,600.

Case No. 4. Suppose Williams' partner, Brown, also from Chicago and with the same earnings and number of dependents, decides while in London to fly to Rome. In Rome he decides to fly with Williams on the Alitalia Airlines flight to Athens. At the same time, he obtains a ticket for a further flight to Iran on Iranian Airlines. Brown is killed with Williams during the Rome to Athens flight. What are the rights of Brown's survivors against the negligent Alitalia Airlines?

Unlike Williams' family in the preceding case, Brown's family would not be limited to $16,600 by the Hague Protocol because fortuitously and illogically, Brown's *final* ticketed destination was Iran. Iran is not a signatory to either the Hague Protocol or the Warsaw Convention.[18] Thus, no treaty would apply to Brown's family; they could recover all provable damages without any arbitrary treaty-imposed limitation. Contrary to the Williams death case, suit could be filed by Brown's estate against Alitalia Airlines anywhere in the United States where Alitalia

15. The $9000 figure applies to nations which are adherents to the Warsaw Convention only. Warsaw Convention, *supra* note 1, art. 22. The $16,600 figure applies to adherents of the Hague Protocol. Hague Protocol, *supra* note 2, art. XI. In either case these limitations apply only where the ticketed nation of origin or ultimate destination is an adherent to one or both of the treaties. *See* Warsaw Convention, *supra* note 1, art. 1(2)-(3); Hague Protocol, *supra* note 2, art. XVIII.

16. *See, e.g.*, First Nat'l Bank v. Fidelity and Casualty Co., 428 F.2d 499 (7th Cir. 1970).

17. *See* 478 U.N.T.S. 373, 401.

18. *See* DEP'T OF STATE, TREATIES IN FORCE 302 (1974).

Airlines has "minimum contacts."[19]

The choice of forum could be significant if the crash occurred on land.[20] If suit were filed in Illinois, Brown's estate could elect to base the action upon the Illinois Wrongful Death Act.[21] If the death occurred on the "high seas" and if, for example, Brown had been flying on an American carrier's aircraft, instead of Alitalia Airlines, his estate's remedy could be based upon the federal Death on the High Seas Act,[22] and suit could be filed in either state or federal court.[23]

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19. International Shoe Co. v. Washington, 326 U.S. 310 (1945); Federal Insurance Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), *aff'd* 473 F.2d 909 (4th Cir. 1973). The United States Courts have jurisdiction over foreign air lines which have "minimum contacts" within the United States. Scott v. Middle East Airlines Co., 240 F. Supp. 1 (S.D.N.Y. 1965). *See also* Benjamin v. Delta Air Lines, Inc., 12 AV. L. REP. ¶ 17,286 (N.D. Ill. 1971), wherein tickets for the defendant airline were available only through other air lines' independent ticket agents by means of inter-line agreements. The court held that sufficient minimum contacts existed, even though defendant had no offices or employees in the forum state.

For application of the minimum contacts doctrine to typical long-arm statutes, see *Cook Associates, Inc. v. Colonial Broach and Machine Co.*, 14 Ill. App. 3d 965, 304 N.E.2d 27 (1973); *Colony Press, Inc. v. M.J. Fleeman*, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1974). Both cases illustrate application of ILL. REV. STAT. ch. 110, ¶ 17 (1973).

20. Choice of forum would be important in determining provable damages. Only two states still retain a specific dollar limitation on wrongful death actions: Kansas, $50,000 (K.S.A. 60-1903 (Cum. Supp. 1973)); West Virginia, $110,000 (15 W.Va. Code Ann. § 55-7-6 (Cum. Sup. 1973)). However, the criteria for assessing damages are far from uniform. For example, in *Compania Dominicana de Aviacion v. Knapp*, 251 So. 2d 18 (Fla. Ct. App. 1971), a judgment of $1,800,000 was affirmed in the death of a 16-year old boy. Had this same action been brought under the laws of the state of Maine, damages would have been limited to a mere $10,000. The Maine death statute, 18 M.R.S.A. § 2552 (Cum. Supp. 1975), restricts damages for the death of an unemancipated child to $10,000.

21. ILL. REV. STAT. ch. 20 §§ 1-2 (1973). *See* Ingersoll v. Klein, 46 Ill. 2d 42, 262, N.E.2d 593 (1970).

22. 46 U.S.C. §§ 761-68 (1970).

23. *Cf.* McGovern v. Philadelphia and Reading Co., 235 U.S. 389 (1914). An *alien* killed on an American aircraft which crashes on the high seas is entitled to the protection of the Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1970). Following equal protection principles espoused in *McGovern*, the family of a foreigner wrongfully killed on the high seas while a passenger of an American air carrier should get the benefits of the statute. Suit may be instituted in either state or federal court. Field, *Jurisdiction of Federal Courts, A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969); Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U.CHI. L. REV. 1 (1968), and *Part II*, 36 U. CHI. L. REV. 268 (1969); Ledet v. United Aircraft Corp., 10 N.Y.2d 258, 176 N.E.2d 820, 219 N.Y.S.2d 245 (1961); Leroy v. United Air Lines, Inc., 11

By contrast, in an action filed by Williams' survivors in Illinois, Alitalia Airlines would contend that suit could not be properly filed anywhere in the United States because of the restrictive venue provisions of the Hague Protocol,[24] and that suit would have to be instituted by Williams' estate in Italy or Greece. Additionally, if Williams' estate alleged wilful misconduct of the airline or inadequate warnings on the ticket and that therefore the limited damages provision of $16,600 should not apply,[25] Alitalia Airlines would make a motion to dismiss for lack of jurisdiction.[26]

These examples demonstrate only a few of the indefensible injustices and incongruities which now exist in respect to international aviation law. Illustrations of other such absurdities are almost endless. One final hypothetical case in this vein will be posed.

Case No. 5. Suppose that a sheik from Iran, having a multimillion-dollar yearly income is enroute from New York to Tehran via London, and an American girl is aboard the same TWA jetliner. She is ticketed to fly from New York to London to visit a relative and then to return to New York. The TWA aircraft crashes in the Atlantic Ocean, due to the negligence of TWA. The sheik is killed and the American child is permanently paralyzed and blinded.

What are the rights of the sheik's estate in contrast to the rights of the girl against the admittedly negligent airline? The Warsaw Convention is not applicable to the claim of the sheik's estate against TWA because his ultimate ticketed destination was Iran, a non-adherent to the Warsaw Convention. The criterion for damages regarding the claim of the sheik's estate would be the Death on the High Seas Act,[27] because his death occurred on the

AV. L. REP. ¶ 17,919 (Cir. Ct., Cook Co., Ill. 1970). *Cf.* M. NORRIS, THE LAW OF SEAMEN 775 (2d ed. 1970); Note, *Admiralty: Death on the High Seas by Wrongful Act; Concurrent Jurisdiction of State Courts,* 47 CORNELL L.Q. 632, 637 (1962).

24. *See* Warsaw Convention, *supra* note 1, art. 28. The venue limitations in this article apply as well to the Hague Protocol. *See* Hague Protocol, *supra* note 2, art. XIX.

25. These issues will be treated more fully *infra.*

26. *See, e.g.,* Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971); Pardonnet v. Flying Tiger Air Line, Inc., 233 F. Supp. 683 (N.D. Ill. 1964); Pitman v. Pan American World Airways, Inc., 223 F. Supp. 887 (E.D. Pa. 1963); Spencer v. Northwest Orient Airlines, Inc., 201 F. Supp. 504 (S.D.N.Y. 1962).

27. 46 U.S.C. §§ 761-68 (1970).

high seas while he was aboard a United States air carrier. His family would probably be able to recover many millions of dollars.[28]

By contrast, the paralyzed and blinded American child would be limited to a mere $75,000 against TWA despite her need for permanent hospitalization and care, not to speak of a lifetime of disability and pain. How can this possibly be equated with anyone's concept of justice?

Theoretically, the Warsaw Convention, almost half a century old, and the Hague Protocol, more than twenty years old, are intended to bind the more than two billion inhabitants in the world and their heirs who become fare-paying passengers on any carrier or charter aircraft if the passenger's *ticketed* nations of origin and ultimate destination are adherents to either or both treaties on the date of the accident. It makes no difference that the nation of the passenger's citizenship is not an adherent.[29]

Another factor to consider is that on most tickets the required warnings are printed in English. Efforts are made by some airlines to print tickets which have warnings in the language of the flag carrier. However, this hardly supplies a solution because many travelers are children or illiterate adults. Moreover, the passengers speak hundreds of languages. Yet they are presumed to be able to read and understand the warnings on their tickets which even for an English-speaking lawyer are almost unintelligible. All passengers—babies, blind people, and illiterates—are theoretically bound by the restrictive warnings on the tickets concerning the venue and damage limitations.

C. Additional Limitations and Issues

Because of limitations of space, several other problems inherent in this type of litigation will be alluded to, but not completely

28. Although originally it was assumed that article 17 did not create a cause of action, there is authority that the Convention, *per se*, creates a cause of action. *See generally* briefs filed by *amici curiae* in *Lisi v. Alitalia Airlines*, 390 U.S. 455 (1968). Intervening *amicus curiae*, the United Kingdom, took the position that the effect of the *Lisi* decision would be to remove the restriction on liability if the Warsaw Convention *limitation* provisions were held *not* to apply because of wilful misconduct, non-delivery of tickets, or inadequacy of tickets. *See* Brief for United Kingdom as Amicus Curiae at 8, Lisi v. Alitalia Airlines 390 U.S. 455 (1968); Petition for Certiorari to the 2d Cir. at 8, 370 F.2d 508 (2d Cir. 1966); Tompkins, *Limitation of Liability by Treaty and Statute*, 36 J. AIR L. & COM. 421 (1970).

29. Warsaw Convention, *supra* note 1, art. 1(2); KENNELLY, *supra* note 3, at 80-81; Hague Protocol, *supra* note 2, art. I(2), XVIII.

analyzed. Where can suit be brought? Both the Warsaw Convention and the Hague Protocol severely restrict the rights of the passenger or his estate. Suit may be brought only in the territory of one of the "High Contracting Parties," or in a court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made, or at the place of destination.[30] Thus, if an American citizen purchases a ticket in Rome to fly Alitalia Airlines from Rome to Athens and is killed on the trip, the airline would contend that his family could not bring suit in the United States.

What law applies regarding discovery and requisite proof of liability? In 1944, a treaty was adopted which deals with preservation of wreckage, participation by government investigators from the nation of the aircraft's manufacture, and other aspects of accident investigation.[31] The implementation of this treaty is not easy if, for example, litigation of a Moscow Airport crash is involved.[32]

What is the measure of damages if one of these treaties is applicable but the damage limitation provisions in a particular case can be avoided by proof of wilful misconduct of the air carrier or inadequacy of the warning on the ticket? The law of the United States in respect to the warning requirements of the Warsaw Convention is a plethora of confusion and contradiction, and contains far too many uncertainties and pitfalls to be easily and uniformly applied.[33] It is too much to expect a half-century old

30. Warsaw Convention, *supra* note 1, art. 28.

31. Convention on International Civil Aviation, *open for signature* Dec. 22, 1944, 61 Stat. 1180, T.I.A.S. No. 1591. *See* art. 26 of this Convention.

32. The U.S.S.R. is an adherent to this treaty. *See* DEP'T OF STATE, TREATIES IN FORCE 304 (1974).

33. The following cases uphold the sufficiency of ticket warnings: American Smelting and Refining Co. v. Phillipine Air Lines, Inc., 4 Av. L. REP. ¶ 17,413 (N.Y. Sup. Ct. 1954), *aff'd*, 285 App. Div. 1119, 141 N.Y.S.2d 818 (1954), *aff'd*, 1 N.Y.2d 866, 136 N.E.2d 14, 153 N.Y.S.2d 900 (1956); Kraus v. K.L.M. Royal Dutch Air Lines, 92 N.Y.S.2d 315 (Sup. Ct. 1949); Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, Froman v. Pan American Airways, 349 U.S. 947 (1955).

Compare the above to cases finding ticket warnings insufficient: Eck v. United Arab Airlines Inc., 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965); Lisi v. Alitalia Linee Aeree Italiane, S.P.A., 253 F. Supp. 237

treaty, conceived in an entirely different era, to work in view of the burgeoning population of this planet and the vast increase in international air travel. How can anything be more absurd than to hand a ticket printed in English to a citizen of Mozambique who speaks only Swahili, and then limit his damages to $9,000 because he could or should have read and understood the warnings?

II. THE WARSAW CONVENTION

In 1934, the State Department transmitted its approval of the Warsaw Treaty to the President; the President submitted the Treaty to the Senate. On June 15, 1934, *without debate, committee hearing, or report*, the Senate gave its advice and consent by voice vote.[34] The United States deposited an instrument of adherence on July 31, 1934, and the President proclaimed the Treaty ninety days later.[35] Thus, although the United States had nothing to do with the formulation of the Convention and had "adhered" rather than "ratified," it was almost a charter member.

A. An Example of the Incongruity of the Warsaw Convention

This author has been appointed by the United States District Court for the Northern District of California, in connection with litigation pending there regarding the 1974 DC-10 Turkish Airlines crash at Orly Airport, Paris,[36] to brief the issue of whether the Warsaw Treaty actually became a treaty of the United States and, if so, whether its venue and damage limitation provisions are unconstitutional.

There is nothing complicated about the facts relating to this, the worst of all aircraft disasters. A cargo door on the aircraft opened causing decompression, loss of control and the aircraft's crash which killed 334 passengers. The passengers were from twenty different countries; some were illiterate; they spoke many different languages.

(S.D.N.Y. 1966) *aff'd by an equally divided court, sub nom.* Alitalia Linee v. Lisi, 390 U.S. 455 (1968), *reh. denied*, 391 U.S. 929 (1968).

34. 78 CONG. REC. 11,582 (1934).

35. *See* 49 Stat. 3000 (1934). *See also* Address by John J. Kennelly at Southern Methodist University Air Law Symposium, Mar. 18, 1971.

36. *In re* Paris Air Crash of March 3, 1974, MDL No. 172 (pending C.D. Cal.).

Although the manufacturer, McDonnell-Douglas, had prescribed specific safety modifications for the cargo door, it had not installed them on the aircraft by the time of the mishap.

Counsel for most of the litigants will undoubtedly focus their attacks upon McDonnell-Douglas because under the Warsaw Convention and Hague Protocol the manufacturer is not granted any insulation either as to place of suit or extent of liability for full provable damages. The theory of recovery in all these cases has been negligence and strict liability. In some cases the United States is being sued for alleged negligent certification.

But what of Turkish Airlines? A great many other DC-10s, which did not have the cargo door safety modifications have safely flown trillions of miles. Turkish Airlines had apparently entrusted the closing and locking of the door to an inexperienced Paris airport employee. The airline, of course, had a non-delegable duty to see that its aircraft was airworthy and that the cargo door was properly closed and locked.[37]

Assuming that a jury were to find Turkish Airlines negligent but not guilty of wilful misconduct, it would seem strange to McDonnell-Douglas stockholders and American taxpayers that the manufacturer and United States Government may be liable in a United States court for *full* unlimited damages to estates of foreign citizens who were killed on a foreign air carrier's aircraft in a foreign country. The foreign carrier may escape with only minimal payments.[38]

Furthermore, if the California federal district court applies California law to the rights of the airline and McDonnell-Douglas, *vis-à-vis* each other, Turkish Airlines could recover from

37. DeVito v. United Airlines, 98 F. Supp. 88 (E.D.N.Y. 1951). *See also* 8 AM. JUR. 2d *Aviation* § 68; *cf.* Koenig v. 399 Corporation, 97 Ill. App. 2d 345, 240 N.E.2d 164 (1968); Cintrone v. Hertz Truck Leasing, 46 N.J. 434, 212 A.2d 769 (1965); Booth Steamship Co. v. Meier & Oclhaf Co., 262 F.2d 310 (2d Cir. 1958); Curtis v. Rochester & Syracuse Railroad Co., 18 N.Y. 534 (1859).

38. Warsaw Convention, *supra* note 1, art. 22 (1)-(4); KENNELLY, *supra* note 3, at 88-89.

Thus, if a claim on behalf of one passenger's estate was adjudicated to be worth $2,000,000, and assuming that the Warsaw Convention applies to such case, and that the carrier, manufacturer and the United States Government are held liable, the following sums would be paid:

(a)	Turkish Airlines	$ 9,000.00
(b)	United States (taxpayers)	$ 995,500.00
(c)	McDonnell-Douglas	$ 995,500.00
	Total	$2,000,000.00

the manufacturer all payments it made for passenger claims, *even* if the manufacturer were held not negligent, but liable on the basis of strict liability.[39] Such liability may be imposed although the manufacturer exercised reasonable care.[40]

The facts of the Paris Airport disaster are remarkably simple and basically indisputable, yet resolving each separate claim will be like attempting to tattoo soap bubbles. For example, does the doctrine of strict liability apply to McDonnell-Douglas? Which jurisdiction's law applies to passengers' claims to which neither the Warsaw Convention nor the Hague Protocol applies because passengers' tickets specified their places of origin as non-signatory countries? What law of damages applies to the cases in which treaty limitations might be held applicable except that tickets did not contain suitable warnings? May a federal court deny counsel his right to separately try his own case?

B. Did the United States Ever Adhere to the Warsaw Convention?

Not relevant to all the Turkish Airline cases, but relevant to cases involving American passengers, is the issue of whether the Warsaw Convention was ever legally adhered to by the United States. A close examination of the mechanics relating to the alleged accession demonstrates that there is a serious question whether it was legally ratified by the United States as required by the United States Constitution.[41]

All international undertakings of the President are not "treaties" within the meaning of article II, section 2 of the Constitution.[42] In 1965 the President unilaterally stated that he would "denounce" the Warsaw Convention, thereby taking the position that he had the power to denounce the treaty without the advice and consent of the Senate. The power of treaty termination is not expressly granted to any branch of the government. The Constitution provides only that, "He [the Presi-

39. *See* Southern Pacific Co. v. Unarco Industries, Inc., 42 Cal. App. 3d 142, 116 Cal. Rptr. 847 (1974); Ruiz v. Minnesota Mining and Manufacturing Co., 15 Cal. App. 3d 463, 93 Cal. Rptr. 270 (1971); Lewis v. American Hoist & Derrick Co., 20 Cal. App. 3d 570, 97 Cal. Rptr. 798 (1971).

40. *But cf.* Lindsay v. McDonnell-Douglas, 460 F.2d 631 (8th Cir. 1972).

41. U.S. CONST., art. II, § 2, cl. 2.

42. Starkist Foods, Inc. v. United States, 169 F. Supp. 268 (Ct. Cl. 1958), *aff'd*, 275 F.2d 472 (C.C.P.A. 1959).

dent] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . ."[43] The power of termination, denunciation or abrogation has generally been viewed as necessarily implicit in the power to "make" treaties.[44]

It is less clear whether this implied power of termination rests exclusively with the President, or must be exercised in accordance with congressional authorization[45] or with advice and consent of the Senate.[46]

The contention has been made, but not yet resolved, that the Warsaw Convention constituted, on behalf of the United States, a mere declaration of policy. The Convention was "signed at Warsaw by the respective Plenipotentiaries of certain countries . . . and left open for signature until January 31, 1930 . . . ."[47] However, the United States *never* signed it.[48] The question whether the Warsaw Convention is a "treaty," and if so, whether it is constitutional, will probably reach the United States Supreme Court in the Turkish Airlines litigation or in cases with similar issues arising out of recent international air crashes at Pago Pago,[49] Moscow,[50] New Del-

43. U.S. CONST., art. II, § 2, cl. 2.

44. The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920), *cert. denied*, 254 U.S. 643 (1920); Taft, *The Boundaries Between the Executive, the Legislative and Judicial Branches of Government*, 25 YALE L.J. 599 (1916); S. CRANDALL, TREATIES—THEIR MAKING AND ENFORCEMENT 461 (2d ed. 1916); W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 561 (2d ed. 1929); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922).

45. Van Der Weyde v. Ocean Transport Co., Ltd., 297 U.S. 114 (1936).

46. E. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 423-25 (1952); Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879 (1958); Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643 (1937); 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 319-42 (1943); Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT'L L. 33 (1921).

47. 49 Stat. 3000 (1934).

48. *See generally* 49 Stat. 3000 (1934); DEP'T OF STATE, TREATIES IN FORCE 302 (1974).

49. *In re* Air Crash Disaster, Pago Pago, American Samoa, Jan. 30, 1974, MDL No. 176 (pending C.D. Cal.).

50. Gerbic v. Japan Air Lines, No. 73 L 1767 (Cir. Ct. Cook Co., Ill., filed Feb. 5, 1973); Rodriguez v. Japan Air Lines, No. 73 L 8951 (Cir. Ct. Cook Co., Ill., filed June 13, 1973); Sackheim v. Japan Air Lines, No. 72 L 16885, (Cir. Ct. Cook Co., Ill., filed Dec. 14, 1972).

hi,[51] and London,[52] which caused the deaths of a great number of American passengers. American courts have heretofore assumed that the treaty was legally adhered to by the United States because until recently the validity of the method of adherence was never questioned. Not until 1967 was the constitutionality of the Warsaw Convention attacked on a denial of due process theory.[53]

C. *The Constitutionality of the Warsaw Convention's Venue and Damage Limitations*

Assuming that the Warsaw Convention did become a treaty of the United States, the determination of the constitutionality of the venue and damage limitation provisions requires an inquiry into its history. In critically evaluating the seemingly precipitate action of the Senate, it must be remembered that in 1934 economic conditions throughout the world were disastrous. There was no capital for prudent investment and certainly little or none for fledgling international air carriers. There was scant international air transportation at that time, and the very few airlines which engaged in such transportation flew in four and six-passenger planes on short European trips, such as from The Hague to Paris. The accident rate at that time was eighty times greater than at present.[54] Any justifications for extending preferential treatment to international airlines have long disappeared, if indeed the aforementioned conditions provided any.

At the present time, the validity of the damage and venue provisions of the Warsaw Convention has not been ruled on by any federal or state court of appellate jurisdiction. However, an Illinois trial court has done so in *Burdell v. Canadian Pacific Airlines.*[55]

That case involved the death of an Illinois citizen, Burdell, who was temporarily living in Singapore with his family where

51. Marquadt v. Japan Air Lines, No. 73 L 6103 (Cir. Ct. Cook Co., Ill., filed Apr. 24, 1973); Weatherly v. Japan Air Lines, No. 72 L 9265 (Cir. Ct. Cook Co., Ill., filed July 18, 1972).

52. Sabini v. British European Airways Corp., No. 72 L 14039 (Cir. Ct. Cook Co., Ill., filed Oct. 20, 1972); Clarizio v. British European Airways Corp., No. 73 L 5997 (Cir. Ct. Cook Co., Ill., filed Apr. 23, 1973).

53. *See* KENNELLY, *supra* note 3, at 25-40.

54. Kennelly, *The Warsaw Convention Treaty*, 13 TRIAL LAWYER'S GUIDE 35, 39 (1969).

55. 10 AV. L. REP. ¶ 18,151 (Cir. Ct. Cook Co., Ill. 1968); 11 AV. L. REP. ¶ 17,351 (Cir. Ct. Cook Co., Ill. 1969).

he was employed in a branch of an Illinois company. Burdell was ticketed to fly on various airlines from Singapore to Bangkok to Hong Kong and then Tokyo. Burdell's Canadian Pacific Airlines jetliner crashed while attempting to land at Tokyo International Airport. Burdell left surviving his widow and three children.

The airline contended that suit could not be brought in Illinois, although Canadian Pacific Airlines unquestionably was engaged in business in Illinois. The airline asserted that suit had to be brought in Singapore, Hong Kong, or Tokyo because of the venue provisions of the Warsaw Convention. It further contended that, in any event, the family of Burdell was limited to a *maximum* recovery of $8,291 because of the Convention. Both the plaintiff's and the airline's attorneys had requested that the court rule upon all issues, including the constitutionality of the damage and venue provisions of the Convention.

The court ruled that the venue and damage limitation provisions of the Warsaw Convention were unconstitutional.[56] The court also held that, apart from its unconstitutionality, the Warsaw Treaty limitation did not apply to the case because the tickets supplied to Burdell had not contained adequate warnings of damage and venue limitations and also because the ticketed country of origin of the air trip was Singapore. Malaysia had previously adhered to the Convention, but Singapore, a new city-state which succeeded Malaysia, had not deposited any instruments of adherence. The court ruled that Singapore was not bound by its predecessor sovereign's adherence.[57]

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56. Burdell v. Canadian Pacific Airlines, 10 AV. L. REP. ¶ 18,158-60 (Cir. Ct. Cook Co., Ill. 1968).

57. Burdell v. Canadian Pacific Airlines, 11 AV. L. REP. ¶ 17,354 (Cir. Ct. Cook Co., Ill. 1969).

Article 38(2) of the Warsaw Convention provides that adherence shall be effected only by "a notification address to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof." The mere fact that a precedent sovereign of a developing nation may have acceded to the Warsaw Convention does not automatically mean that the new sovereign automatically did. O'Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT'L L. 84 (1962); Jones, *State Succession in the Matter of Treaties*, 24 BRIT. Y.B. INT'L L. 360 (1947).

In any case in which the ticketed nations of origin or destination are claimed by the airline to have been signatories, it may be important to make further inquiry directly to the appropriate authorities in Warsaw, Poland, where declarations of adherence are classified and stored. Burdell v. Canadian Pacific Airlines,

In *Burdell*, the court also ruled that the treaty's preferential treatment of airlines discriminated against passengers, aircraft manufacturers and the United States government, all of whom might be held liable in any number of cases.[58] The manufacturer might be liable if the aircraft did not meet prescribed strict liability standards or if it had been negligently designed or manufactured;[59] the United States government might be liable if it had negligently certified the plane or committed air traffic control errors.[60] Thus, if a verdict had been rendered in *Burdell* in the exact amount of the subsequent settlement, and if the manufacturer, McDonnell-Douglas Aircraft Company, had been held liable along with the airline, the manufacturer would have had to pay all sums in excess of the $8,291 Convention limitation, whereas the much more negligent airline would have had to pay only $8,291.

After the opinion was published, the airline requested the court to withdraw its ruling concerning unconstitutionality because of the court's ruling that the ticketed nation of origin, Singapore, had not legally adhered to the treaty. The court granted the airline's motion, stating, however, that it was still persuaded that the Warsaw Convention damage and venue limitation provisions were unconstitutional.[61] Neither ruling was appealed by the airline, and the case was settled for about twenty-five times the then existing Warsaw Convention limit of $8,291.

This decision, although that of a trial court, has received national recognition and approval by constitutional scholars. It is of considerable significance in light of two recent decisions, one from the Supreme Court, *Moragne v. States Marine Lines*,[62] the other from the Fifth Circuit Court of Appeals, *Hornsby v. The Fish Meal Co.*[63] The holdings in *Moragne* and *Hornsby* eradicate

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10 AV. L. REP. ¶ 18,151 (Cir. Ct., Cook Co., Ill. 1968); 11 AV. L. REP. ¶ 17,351 (Cir. Ct., Cook Co., Ill. 1969).

58. *See* note 65, *infra*.

59. Kennelly, *Aviation Accidents—Liability of Manufacturers*, 18 TRIAL LAWYER'S GUIDE 158 (1974).

60. Rapp v. Eastern Airlines, Inc., 264 F. Supp. 673 (E.D. Pa. 1967); *see* Kennelly, *Claims and Suits for Aviation Accidents Under the Federal Tort Claims Act*, 16 TRIAL LAWYER'S GUIDE 1 (1972).

61. Burdell v. Canadian Pacific Airlines, 11 AV. L. REP. ¶ 17,354 (Cir. Ct. Cook Co., Ill. 1969).

62. 398 U.S. 375 (1970).

63. 431 F.2d 865 (5th Cir. 1970).

any constitutional basis for statutes or treaties which deny fair recovery for the wrongful killing of a human being.

Professor Arthur John Keefe, in commenting on the *Burdell* decision, said:

> It is a dreadful thing to have to say, but, in truth, decisions such as *Kilberg, Pearson, Long* and *Scott* lack the simplicity and honesty of Judge Bua's ruling in *Burdell.* Here at last is a Judge who faces up to the real problem, the constitutionality of outrageous, discriminatory, out-of-date, rotten laws.[64]

In plain words, the Warsaw Convention and the Hague Protocol grant enormous preferential treatment with respect to liability for damages for negligence in international air transportation to airlines *only.* The more than 30,000 aircraft and component part manufacturers, the more than 1,000,000 private aircraft owners and operators, the United States government and all other potential defendants are exposed to unlimited liability. The *Burdell* opinion refers to the absurdity of this preferential treatment as applied to that case.[65]

It would seem that the time has come for the courts to once and for all judicially terminate the life of a forty-year-old treaty which is morally, economically and constitutionally indefensible, not only from the standpoint of passengers and their families, but also because of the obvious discrimination against manufacturers,

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64. Keef, *In Praise of Joseph Story, Swift v. Tyson and "The" True National Common Cause*, 18 AM. U.L. REV. 316, 356 (1969).

65. Burdell v. Canadian Pacific Airlines, 10 AV. L. REP. ¶ 18,151, 161 (Cir. Ct. Cook Co., Ill. 1968). This court stated:

> 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. The Court finds that such preferential discrimination to airlines does not apply to manufacturers or even to the United States Government. As pointed out by the plaintiffs, this could result in an absurd situation in which, in this case, Douglas Aircraft Company, if liable under either the strict liability rule or because of common law negligence, might be required to pay damages of $591,700, if a verdict of a jury were $600,000. Canadian Pacific Airlines, which might be considered much more negligent and at fault than this defendant manufacturer, would be permitted to escape with the nominal payment of approximately $8,300. The Government enjoys no immunity or restriction of liability. Thus, in a similar situation involving the Government as an additional defendant, the United States Government would be required to pay damages similar, comparatively to that of the manufacturer. The Court considers that there is no basis for this unequal and discriminatory treatment of common carrier airlines, engaged in international travel, and that there is no legal or rational basis for this discriminatory treatment.

those connected with the aircraft industry and taxpayers of the United States.

III. THE HAGUE PROTOCOL

In 1955, certain nations which had adhered to the Warsaw Convention became dissatisfied with its arbitrary damage limitations.[66] As a result, a treaty was formulated at The Hague which became effective in 1963 for the particular nations which ratified it. However, the United States never ratified the Hague Protocol because the increase in the monetary limitation was so nominal.[67]

The Hague Protocol increases the Warsaw Convention damage limitation from the sum of $8,291 to a mere $16,582.[68] Although the United States has not ratified the Hague Protocol, it still applies to United States citizens since the criterion is not citizenship, but ticketed points of origin and ultimate destination.[69]

IV. METHODS OF AVOIDING LIMITING PROVISIONS OF THE WARSAW CONVENTION

There are three ways to avoid the Warsaw Convention damages limitation provisions, apart from its alleged unconstitutionality: 1. Prove that the air carrier was guilty of wilful misconduct.[70] 2. Prove that tickets were not delivered to the passengers.[71] 3. Prove that tickets delivered to the passengers did not contain adequate warnings of Warsaw Convention limitations.[72]

A. Wilful Misconduct

The original Warsaw Convention was written in French. The French wording of article 25[73] has been translated to mean

66. 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 552 (1968).

67. S. EXEC. H, 86th Cong., 1st Sess. (1959).

68. *See* text and note 7, *supra*. 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 589 (1968).

69. Hague Protocol, *supra* note 2, art. XVIII.

70. Sand, *Air Carrier's Limitation of Liability and Air Passenger's Accident Compensation Under the Warsaw Convention*, 28 J. AIR L. & COM. 260 (1962); KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961).

71. Mertens v. Flying Tiger Line, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Warren v. Flying Tiger Line, 352 F.2d 494 (9th Cir. 1965); Warsaw Convention, *supra* note 1, art. 3.

72. Lisi v. Alitalia Airlines, 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

73. [Q]ui excluent ou limitent sa responsabilité si le dommage provient

"wilful misconduct."[74] There is considerable doubt, however, whether the usually accepted translation is accurate. Some students of the French language believe that these words mean gross negligence or bad conduct. In any event, even wilful and wanton misconduct, which is generally defined as a higher degree of wrong than mere negligence or gross negligence,[75] does not require an actual intent to harm, but only a disregard of probable consequences.[76] Realization of a one percent chance that an aircraft will crash as a result of a certain act or omission is sufficient to make the carrier's conduct "wilful misconduct" in the sense of article 25.[77]

Dean Prosser recognized that "wilfull misconduct" has been the subject of varying definitions.[78] The lack of a universal definition or standard makes wilful misconduct susceptible to the "oh my God" type of reasoning. If the judge or jury, while listening to a witness recount the facts of an accident, find themselves saying "oh my God, you didn't," then the conduct is wilful and wanton.[79] There are various definitions of the French terms but in substance they involve a disregard of consequences which will lead to obvious danger.[80]

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de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considerée comme équivalente au dol.

Warsaw Convention, *supra* note 1, art. 25(1), at 3006.

74. Actually the original French text did not employ the language synonomous with "wilful misconduct." However, the English text of the Warsaw Convention contains those words, and most courts have employed this translation, although inaccurate. Warsaw Convention, *supra* note 1, art. 25(1), at 3020. *See* Kennelly, *Anomalies in the Present Law Concerning Aviation Disasters and Comments Regarding the Proposed Guatemalan Protocol,* 15 TRIAL LAWYER'S GUIDE 116 (1971).

75. Carden v. Evans, 243 Ark. 233, 419 S.W.2d 295 (1967); Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966); Sheldon v. City of Burlingame, 146 Cal. App. 2d 30, 303 P.2d 344 (1956); McCarthy's Case, 314 Mass. 610, 51 N.E.2d 113 (1943); Meek v. Fowler, 3 Cal. 2d 420, 45 P.2d 194 (1935).

76. Jarvis v. Herrin City Park District, 6 Ill. App. 3d 516, 285 N.E.2d 564 (1972); Fuller v. Chambers, 142 Cal. App. 2d 377, 298 P.2d 125 (1956); Grey v. American Airlines, 227 F.2d 282 (2d Cir. 1955); Schulz v. Fible, 71 Ohio App. 353, 48 N.E.2d 899 (1943); Browne v. Fernandez, 140 Cal. App. 689, 36 P.2d 122 (1934); Meyer v. Hart, 110 Conn. 244, 147 A. 678 (1929).

77. H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 233 (1954).

78. W. PROSSER, LAW OF TORTS 150-52 (2d ed. 1955).

79. Burrell, *A New Approach to the Problem of Willful and Wanton Misconduct,* [1949] INS. L. J. 716, 723.

80. KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961).

B. *Delivery of Tickets to Passengers*[81]

Situations sometimes occur where tickets are not delivered to passengers, or where delivery takes place after the passenger is aboard the aircraft. In *Warren v. Flying Tiger Line*,[82] the passengers were given "boarding tickets" or "passes" at the foot of the ramp leading to the aircraft. The court in that case ruled that the delivery was not made sufficiently in advance so that passengers would have ample opportunity to take self-protective measures. These measures could include purchasing insurance or electing not to take the trip at all, in light of the restrictive damage provisions. The carrier was barred by article 3(2) from availing itself of the Convention's liability limitations.[83]

Non-delivery of tickets may also occur in respect to servicemen who are flying on military-chartered airlines. In such cases, servicemen usually only receive boarding passes. Also, regular fare passengers flying in group tours often are not issued tickets because the travel directors handle all ticketing.[84]

C. *Inadequate Warning on Tickets*

In *Lisi v. Alitalia Airlines*[85] the court held that the notice requirements of the Warsaw Convention were not met by language on an airline ticket which was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else."[86] The Second Circuit Court of Ap-

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81. Article 3(2) of the Warsaw Convention provides that the carrier must deliver a passenger's ticket and that:

> [I]f the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Warsaw Convention, *supra* note 1, at 3015.

82. 352 F.2d 494 (9th Cir. 1965).

83. *See* note 77, *supra*.

84. In litigation growing out of the 1966 jetliner crash at Mt. Fuji, Japan, proof was made that 56 of the deceased passengers were flying as part of a tour. They never actually received tickets, and for this and other reasons the Warsaw Convention damage limitations were not applicable. *See generally* Brief for Plaintiff at 31-32, Vanderwall v. British Overseas Airways Corp., No. 66 L 4429 (Cir. Ct. Cook Co., Ill. 1968) [copy on file at CALIF. W. INT'L L.J.].

85. 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 307 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

86. Millikin Trust v. Iberia Lineas Aeras de España, S.A., 11 AV. L. REP. ¶ 17,331 (Sup. Ct., N.Y. Co., N.Y. 1969).

The Civil Aeronautics Board did not profess to be codifying or *in any way* determining what size type or warning is required by the Warsaw Convention.

peals concurred with this finding, and added that "even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon."[87] The airlines are now attempting to pull themselves up by their own bootstraps by "agreeing upon" a new form of ticket.[88]

D. Foresight and Knowledge

There may be a fourth and even more effective means of avoiding the liability limitations of the Warsaw Convention. Armed with correct information, a sophisticated air traveler making an international flight can buy a ticket which has as its *final* destination any nonsignatory nation, and thus escape all limitations. Such a traveler can easily obtain a refund for the unused final portion of his ticket. Unsophisticated air travelers, however, are severely penalized by the provisions of the Warsaw Convention and Hague Protocol.

V. THE MONTREAL INTERIM AGREEMENT

The Warsaw Convention provides that a higher liability figure with respect to the transportation of passengers may be agreed to by the carrier.[89] Approximately fifty years have elapsed since the Warsaw Convention was drafted, during which time the airlines have grown from fledgling companies to giants. Yet not until 1966 did a single international air carrier see fit to raise the limitation even though the treaty contains explicit provisions authorizing airlines to do so.

After almost thirty years of purported adherence to the Warsaw Convention, and after the death of Senator Capehart's son during an international flight, many members of the Senate finally became aware of the indefensibility of the damage limitations it imposes.[90] These senators threatened to denounce the treaty.

Regardless of the Montreal Agreement, this author believes that the court may not declare the ticket sufficient as a matter of law. The court and jury must determine as a factual issue whether the tickets fulfilled the requirements of article 3 of the Convention as defined in *Lisi* with respect to size of print, color contrast, clarity and so forth.

87. Lisi v. Alitalia Airlines, 370 F.2d 508, 514 n.10 (2d Cir. 1966).

88. *See* Montreal Interim Agreement, note 3, *supra*.

89. Warsaw Convention, *supra* note 1, art. 22(1).

90. The airline attempted to limit the recovery of Capehart's survivors to a mere $8,291.

Subsequently, the United States government served notice of denunciation of the Warsaw Convention to become effective on May 15, 1966.[91]

Shortly before the denunciation became effective, the International Air Transport Association (IATA) brought about an inter-carrier arrangement which requested air carriers having landing privileges in the United States to sign an agreement which increased the limitation of liability of the signatory airlines to $75,000 per passenger, regardless of negligence.[92] However, this increase was to apply only to flights in which the tickets provide a "contact" with some place in the United States, either as a point of origin, ultimate destination or intermediate stopping place.[93] No attempt was made to provide any insulation or protection for manufacturers, the United States government or any of the other potential defendants.[94]

Thus, faced with the government's denunciation of the extremely low damage limits imposed upon the passenger public by the Warsaw Convention, the air carriers agreed *among themselves* to increase and limit their liability to a maximum of $75,000, applicable primarily to Americans.

The Montreal Agreement has hardly proved popular with the passenger public of other countries since they ultimately have had to pay for the greater awards to American citizens.[95] Despite the obvious preference for American passengers, economic pressures arising from fear of total withdrawal by the United States from the Warsaw Convention induced most carriers to sign the Agreement. On May 13, 1966, the Civil Aeronautics Board approved this interim agreement.[96] On May 14, 1966, the United States obsequiously withdrew its notice of denunciation of the Warsaw Convention and surrendered to the power and self-interest of IATA.[97]

The Interim Agreement is not "interim" and is not a treaty.

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91. *See* 44 CAB REP. 819-20 (1966); 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 552-53 (1968).

92. *See* 44 CAB REP. 819-20 (1966); 31 Fed. Reg. 7302 (1966); KENNELLY, *supra* note 3, at 111-13.

93. Montreal Interim Agreement, note 3, *supra.*

94. *See generally id.*

95. *See* Address by John J. Kennelly before the Royal Aeronautical Society, Nov. 4, 1970, at London England [copy on file at CALIF. W. INT'L L.J.].

96. C.A.B. Order No. E23680, 44 CAB REP. 819 (1966).

97. Dept. State Release No. 111, at 1, May 14, 1966.

It is merely an agreement which binds only those carriers who signed it. Any carrier may withdraw without any reason.[98]

It is amazing that the Civil Aeronautics Board had the temerity to "approve" this agreement, which attempts to bind not only 200 million United States citizens but also the two billion citizens of more than two hundred nations throughout the world.

VI. A PROGNOSIS ON THE LAW RELATING TO INTERNATIONAL AIR TRAVEL

The international airlines are currently working with the State Department for United States adherence to the Guatemala Protocol,[99] an amendment to the Warsaw Convention. An amazing facet of this proposed amendment is that airlines are to receive insulation from all damages in excess of $100,000, even though the airline is reckless or guilty of wilful and wanton misconduct.[100]

Proponents of the Guatemala Protocol including the State Department seek to induce the Senate to approve the Protocol on the grounds that United States citizens will receive an additional $220,000 resulting in an aggregate sum of $320,000.[101] However, it is important to note that more than $100,000 of such additional benefits will be the result of compulsory insurance coverage for which all American passengers will indirectly pay.[102]

No objective person can justify the immunization of international airlines from liability when aircraft manufacturers, noncommercial pilots and owners and the United States government remain subject to unlimited liability. The Guatemala Protocol hardly supplies a semblence of reform; the cure is worse than the sickness.

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98. *See generally* Montreal Interim Agreement, note 3, *supra.*

99. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, *done at Guatemala City* March 8, 1971 [reproduced in 10 INT'L LEGAL MATERIALS 613 (1971)].

100. *Id.*, art. VIII.

101. The Protocol limit is fixed at $100,000 in the 1971 draft of the document. Due to fluctuations in the value of gold, that limit is now equivalent to $120,000. Additionally, United States citizens will have the benefit of a compensation fund which will provide up to $200,000 more to a passenger whose damages exceed the $100,000 limit. See, Landry, *Yes or No on the Guatemala Protocol*, 10 THE FORUM 727, 733-35 (1975).

102. *Id.* at 735-36.

The world has been catapulted from the horse and buggy era into an age of conventional jetliners, supersonic transports and space travel. The laws applicable to aviation transportation simply have not kept up with these rapid changes. The state of the law is such that one author has devised a computer to determine which possible treaty applies to a given set of facts in the almost endless number of trips which could be taken in international air travel. The program takes into account the hundreds of sovereign cities and states, the rapidly developing new nations of the world and the proliferation of subsidized international airlines.[103]

Clearly such a state is unjustifiable in the law of aviation travel. It has arisen because lawyers have attempted to engraft upon an outmoded, unworkable and anachronistic treaty which no longer should control the rights of more than two billion people.

The immediate implementation of completely new and dynamic concepts is urgently required to protect the interests of the passenger public and the aircraft industry. Those who remain rigid in their points of view seeking special treatment for their particular interests should realize that changes are necessary to promote the economic well-being of the *entire* aircraft industry and just treatment for injured passengers and survivors of deceased passengers. Clearly something must be done to avoid application of fifteenth century tort law and a fifty-year-old treaty to subsonic, supersonic, hypersonic or space travel.

Recognizably, these comments are somewhat controversial. It is hoped, however, that they will illuminate a complex and often misunderstood subject, and will contribute toward reducing polarization of views. Ultimately, perhaps, these remarks will result in beneficial measures that are fair to all.

Some lawyers oppose any change. But lawyers opposing meaningful reform in the law of international air travel are like doctors opposing penicillin and dentists opposing fluoride. The time will certainly arrive when regardless of nationality, passengers can quickly receive reasonable damages for loss incurred in air travel.

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103. *See* Note, *Computer Application to Law—International Aviation Liability Analysis—Warsaw, Hague, Montreal Flight*, 35 J. AIR L. & COM. 249 (1969).