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THE WARSAW CONVENTION: A NEW LOOK AT JURISDICTION
UNDER ARTICLES 17 AND 28 AND THE PROBLEM OF
MANUFACTURERS' LIABILITY

David H. Barnes
Mark G. Gebo
Thomas D. Myers

Almost half a century ago, delegates from developed nations throughout the world drafted the Warsaw Convention, a landmark multinational treaty which laid the ground rules for passenger recovery against air carriers resulting from damage sustained on international flights. In its day, the Convention resolved many of the transnational difficulties facing the budding air transportation industry, including the possibly disastrous effects of a single, large crash,¹ the lack of uniform international standards,² the need for ensuring comparable treatment for similarly situated passengers, and the potentially serious problem of jurisdiction.³ Furthermore, it performed a valuable function in lending an element of predictability and certainty to air carriers' risks. In recent decades, however, the realities of international air travel and legal concepts of jurisdiction and tort liability have undergone radical transformation, turning the Warsaw Convention into a relic of a bygone era. Several attempts have been made to deal with the situation, and some agreements have superseded portions of the Convention which were particularly deficient, but much revision must still be done. This Comment explores three selected areas of current concern: the Convention's coverage of embarking and disembarking passengers under Article 17, jurisdiction of manufacturers' contribution actions under Article 28(1), and the general problem of limiting the liability of aircraft manufacturers under strict liability suits. Proposals for resolution of the problems will be made in each case, but the underlying difficulty—the fact that the Warsaw Convention was drafted against a factual and legal background which no longer exists—must be resolved by a redrafting of the entire Convention rather than by piecemeal legal patchwork.

1. H. DRION, *LIMITATIONS OF LIABILITY IN INTERNATIONAL AIR LAW* 14-20 (1954).

2. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498-99 (1967).

3. Mennell & Simone, *United States Policy and the Warsaw Convention*, 2 WASHBURN L.J. 219, 222-23 (1963).

I

INTERNATIONAL AGREEMENTS

A. THE WARSAW CONVENTION

In 1929, representatives from many of the "air nations" throughout the world met in Warsaw, Poland, to conclude the multinational agreement known as the Warsaw Convention.⁴ Among the important innovations which surfaced in Warsaw were the contractualization of the passenger-carrier relationship,⁵ the imposition of a liability ceiling of \$8,291 per passenger claim for personal injury or wrongful death brought against an international air carrier,⁶ and sharply defined jurisdictional requirements for suits against an airline.⁷

At the time the Convention was concluded, these formulae seemed to provide the panacea the aviation community needed. \$8,300 was a very satisfactory personal injury settlement for a defendant in the early 1930's.⁸ The fixed limit was small enough to induce the airlines to settle quickly and often at the full amount, and speedy settlements all but eliminated costly and protracted litigation. Furthermore, air carriers often avoided the adverse publicity that the news media brought to such trials.⁹ The United States, as a global pacesetter in aviation, succeeded

4. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (effective Oct. 29, 1934) [hereinafter cited as the Warsaw Convention]. There was a five-year lag between the drafting of the Convention and United States adherence, which reflected considerable debate over its provisions. See D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1937); Boyle, *The Warsaw Convention*, 8 THE FORUM (ABA) 268 (1972); Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 AIR L. REV. 25 (1936); Lowenfeld & Mendelsohn, *supra* note 2; Orr, *The Warsaw Convention*, 31 VA. L. REV. 423 (1945); Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1 (1936).

5. Warsaw Convention, art. 3. This Article required that the carrier deliver the passenger a ticket specifying contract terms and provided that "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." For a discussion of the contractual relationship, see Reilly, *The Warsaw Ticket to Judicial Treaty Revision—Will We Do it Again?*, 43 ST. JOHNS L. REV. 396 (1969).

6. Warsaw Convention, art. 22.

7. *Id.*, art. 28(1). Cases concerning this jurisdictional provision include *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); *Aanestad v. Air Canada, Ltd.*, 390 F. Supp. 1165 (C.D. Calif. 1975); *Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266 (D. Neb. 1975); *Varkonyi v. S.A. Empresa De Viacao, et al. (VARIG)*, 71 Misc. 2d 607, 336 N.Y.S.2d 193 (Sup. Ct. N.Y. Co. 1972). For a lengthy discussion of this provision, see part III *infra*.

8. Lowenfeld & Mendelsohn, *supra* note 2, at 499.

9. DRION, *supra* note 1, at 37-40.

in justifying this somewhat artificial "insulation of the airlines" as a necessary step in bolstering an infant industry.¹⁰

B. THE HAGUE PROTOCOL

Some twenty-five years after Warsaw, the signatories of the original treaty convened at The Hague to re-examine the impact and liability limits of their original accord.¹¹ There was considerable sentiment that the Warsaw Treaty had not kept pace with the changing demands of international air law. By the late nineteen-fifties \$8,300 had become unrealistically low as a settlement in much crash litigation.¹² It represented perhaps only a fraction of what otherwise might have been fairly allowable damages in a personal injury or wrongful death action arising from an air carrier's negligence under domestic law.¹³

The delegates at The Hague responded with a treaty that effectively doubled the potential liability of air carriers in international travel.

10. Annot., 6 A.L.R.3d 1272, 1277 (1964). The Convention, one commentator has said, was an attempt "to create an international convention which would be of great aid and assistance to a new but increasingly important form of international transportation." Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929*, 14 J. AIR L. & COM. 37, 39 (1947).

11. The Hague Protocol, ICAO Doc. 7686-LC/140-1 & 2 (1955) [hereinafter cited as the Hague Protocol]. For a convenient text of the Hague Protocol and the Convention which it amended, see CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIALS 324-66 (1963). See Mennell & Simone, *supra* note 3, at 500-09. Ass'n of the Bar of the City of New York, Comm. on Aeronautics, *Report on the Warsaw Convention as Amended by the Hague Protocol*, in 26 J. AIR L. & COM. 255 (1959); Calkins, *Grand Canyon, Warsaw and the Hague Protocol*, 23 J. AIR L. & COM. 253 (1956).

12. Earlier in the decade the celebrated Jane Froman case, reported *sub nom.* Ross v. Pan American World Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert. denied*, 349 U.S. 947 (1955), brought the controversial \$8,291 Warsaw limit under international scrutiny. The plaintiff, a popular entertainer, sustained serious personal injury and incurred huge medical expenses resulting from an air crash in Portugal. Despite the irreparable damage to her career, she was limited to an \$8,291 recovery against the airline. She apparently fell short of proving willful misconduct on the part of the air carrier, which is the only escape from the Convention's liability limits. See Warsaw Convention, art. 25(2). Discussions of this Article and its application include Acosta, *Willful Misconduct Under the Warsaw Convention: Recent Trends and Developments*, 19 U. MIAMI L. REV. 575 (1965); Strock, *Warsaw Convention—Article 25—"Wilful Misconduct,"* 32 J. AIR L. & COM. 291 (1966).

13. It has been stated that, through the use of established actuarial principles, economic loss caused by death can be reasonably determined. Under this method, "an \$8,300 or \$75,000 limitation of damages against a commercial air carrier for negligent operation of an airplane could be less than half of one percent of the easily calculable present value of the certain economic loss, using the most conservative of evaluations." Kennelly, *Aviation Accidents—Liability of Manufacturers—Part 1*, 18 TR. LAWYER'S GUIDE 158, 166 (1974).

Unfortunately, the response to these readjustments was not as favorable as that to the original Convention. First, it seemed that even a \$16,000 recovery no longer induced plaintiffs to quick settlements.¹⁴ Second, competing domestic carriers and ground-haul industries began to voice their complaints that the original justification for liability limits, that of protecting an "infant industry," had outlived its usefulness.¹⁵ More importantly, the somewhat mildly inflated liability rate structure that emerged from the Protocol evidenced a serious short-sightedness by the draftsmen. Inroads in the area of products liability were well established by this time,¹⁶ and it easily could have been foreseen that suits directly against airline manufacturers would produce problems that the Protocol was ill-equipped to handle.¹⁷

C. THE MONTREAL AGREEMENT

By the mid 1960's the conflict over air carrier liability limits had reached peak levels. Considerable opposition had arisen in the United States to the deficient Hague Protocol.¹⁸ In November of 1965 the Department of State deposited a formal notice of denunciation of both the Convention and the Protocol, to take effect within half a year unless a new agreement for a \$75,000 liability limit was concluded, coupled with "a reasonable prospect of an international agreement . . . in the area of \$100,000 per passenger."¹⁹ A convention was convened in Montreal the following spring, which resulted in no solution, but an interim agreement was eventually concluded with the airlines setting the level of

14. Lowenfeld & Mendelsohn, *supra* note 2, at 510.

15. By the mid 1950's our international airlines composed a healthy and rapidly expanding industry. In 1954 Trans World Airlines reported \$10.3 million net earnings on gross revenues of \$203.7 million, TRANS WORLD AIRLINES, 1954 ANNUAL REPORT, and Pan American reported net earnings of \$10.4 million on a gross revenue of \$218.9 million, PAN AMERICAN WORLD AIRWAYS, 1954 ANNUAL REPORT.

16. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1910).

17. This backward-looking critique is not really unfair, since the Protocol's weaknesses were readily discoverable at the time of its drafting. The rights and liabilities of manufacturers might well have been treated in the document had the products liability issue been squarely addressed. It was simply naive to believe that the "protection of an infant industry" argument would hold water after twenty-five years.

18. For a discussion of American opposition to the Hague Protocol, see Lowenfeld & Mendelsohn, *supra* note 2, at 510-12, 533-52. See also, *Hearings on the Hague Protocol to the Warsaw Convention Before the Senate Foreign Relations Comm.*, 89th Cong., 1st Sess. (1965); Hildred, *Air Carrier's Liability: Significance of the Warsaw Convention and Events Leading up to the Montreal Agreement*, 33 J. AIR L. & COM. 521 (1967).

19. 53 DEP'T STATE BULL. 923 (1965). See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

liability at \$75,000 and making the carrier absolutely liable.²⁰

Practically speaking, the results of Montreal proved to be no less myopic than those of The Hague Protocol. The new limits were restricted to cases where the air travel had a "contact" with the United States.²¹ Such an arbitrary determination of risk has been sharply criticized.²² Concern for the aircraft manufacturers' potential liability and uniformity of risk were abandoned in favor of a "rush job" aimed at a handful of American travelers who happened to have purchased tickets on flights with the necessary United States contacts.

D. RECENT DEVELOPMENTS

An attempt at codifying the Montreal Agreement in treaty form was made in the 1971 Guatemala Protocol,²³ which raised the liability limit to \$100,000 with periodic increases and also established strict liability. The new agreement, however, precluded any additional recovery based on willful misconduct or violation of the Convention's notice requirements. The Protocol is so structured that it will not become effective without United States' approval, and the likelihood of this is slim at best.²⁴

Recent decades have seen the provisions and underlying rationales of all these agreements begin to crumble. Aircraft manufacturers, who were conspicuously unrepresented at Warsaw, often face jurisdictional bars²⁵ to crossclaims against carriers for contribution or indemnity.²⁶ Litigation arising from an interpretation of Article 17 has drawn close scrutiny in an effort to pinpoint the time at which the Warsaw provi-

20. The Montreal Agreement, C.A.B. Order No. 22,984, 31 Fed. Reg. 7302 (1966) [hereinafter cited as the Montreal Agreement].

21. See Kennelly, *supra* note 13. This represents the significant concession for which the foreign air carriers were willing to endorse the Montreal Agreement. The new \$75,000 limit was to be enforceable against carriers only when some point in the United States was the ticketed point of departure, destination, or agreed stopover of an international flight.

22. *Id.* From the passenger's or manufacturer's point of view, there is no difference whatsoever in the risks of a London to Montreal run compared to a Paris to New York flight. Yet the London-Montreal run is subject to the Hague Protocol limits while the Paris-New York flight is governed by the Montreal Agreement. It is unclear why carrier liability should vary by as much as \$58,000 per passenger.

23. The Guatemala Protocol, ICAO Doc. 8932 (1971), reprinted in 10 INT'L LEGAL MAT. 613 (1971).

24. See Boyle, *The Guatemala Protocol*, 6 AKRON L. REV. 123 (1973); Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 War Convention*, 38 J. AIR L. & COM. 519 (1972).

25. See part III *infra*.

26. See part IV *infra*.

sions attach and terminate with respect to any international flight.²⁷

To illustrate the numerous controversies surrounding Warsaw and the subsequent conventions, we posit the following hypothetical. Radar and Vector are two attorneys residing in New York. While attending an American Bar Association convention in Montreal, they secure tickets from a local travel agent for an upcoming trip. Together they board an ill-fated flight in New York—Radar bound for Boston and Vector for London by way of Boston—on an aircraft owned and operated by a United States carrier. Subsequent sections will explore a variety of legal problems that commonly arise depending on the location and circumstance of the tragedy. The basic distinction to be made is that Radar, bound only to Boston, is considered to be a domestic passenger and hence not subject to the provisions of the Warsaw, Hague, or Montreal agreements. Vector, who may well have occupied the adjoining seat, is recognized to be on an international flight²⁸ (albeit the domestic segment), and is subject to the Convention limitations outlined above.

II

EMBARKING AND DISEMBARKING: THE PARAMETERS OF THE WARSAW CONVENTION

Mark G. Gebo

The Warsaw Convention has often been faulted for its limitation on passenger recovery for personal injuries,²⁹ but recently another aspect of the personal injury recovery has been the subject of increasing attention. This is the question of how far the Convention extends to cover injuries to passengers embarking and disembarking at air terminals. It is unclear whether the Convention was intended to apply to these cases.

The governing Convention provision as to personal injury actions is Article 17, which states that:

27. See part II *infra*.

28. Warsaw Convention, art. 1(2) defines international flight as:

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 transportation . . . , are either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another power, even though that power is not a party to this convention.

Article 1(3) makes it clear that this definition of international flight applies even to transportation to be performed by successive carriers.

29. This critique, of course, has led to the Hague Protocol and Montreal Agreement Amendments described in part I *supra*. See generally DRON, *supra* note 1; Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929*, 14 J. AIR L. & COM. 37 (1947).

The carrier shall be liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the injury so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.³⁰

The final phrase of this section, at the time the Convention was drafted, was seen as a time/space consideration, limiting the presumption of carrier liability to only those places and times when the passenger would be exposed to risks peculiar to air travel.³¹ In the early years of the Convention, this interpretation provoked discussion among scholars.³² One school of thought felt that the geographic limitation was to apply solely to the ramp or other similar device for entering and leaving the plane,³³ but the weight of authority favored the view that the Convention covered not only passengers on the ramp, but those upon the traffic apron as well.³⁴ Under this view, "embarking or disembarking" covered the process of getting the passenger from the terminal to the plane and back again. The phrase was not to cover any accidents occurring within the terminal. This line of reasoning was followed in three United States cases involving the disembarking issue,³⁵ where the courts held that a

30. Warsaw Convention, art. 17. This Article does not create a cause of action, but merely defines the limits of the Warsaw Convention's coverage, limiting the liability of air carriers. Domestic law establishes the cause of action. *Husserl v. Swiss Air Transport*, 351 F. Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), 388 F. Supp. 1238, 1247 (S.D.N.Y. 1975); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 392, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974); *Herman v. Trans World Airlines, Inc.*, 40 App. Div. 2d 850, 337 N.Y.S.2d 827 (2d Dep't 1972).

For the early history of the cause of action under the Warsaw Convention, see *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957); *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1955); *Wyman v. Pan American World Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. N.Y. Co. 1943), *aff'd*, 48 N.Y.S.2d 459 (1st Dep't 1944). See also *Calkins, The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217 (1959); 13 COLUM. J. TRANSNAT'L L. 452 (1974); 4 GA. J. INT'L & COMP. L. 481 (1974); 39 J. AIR L. & COM. 433 (1973); 39 J. AIR L. & COM. 445 (1973); 36 MOD. L. REV. 303 (1973).

31. GOEDHUIS, *supra* note 4, at 187-90; Sullivan, *Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. COM. 1, 20-21 (1936).

32. No early cases dealt with the Article 17 phrase "operations of embarking or disembarking." Indeed, the first reported decision was in a 1962 German case. See note 35 *infra*.

33. See FIFTH INTERNATIONAL CONFERENCE ON AIR NAVIGATION 1173 (1930).

34. GOEDHUIS, *supra* note 4, at 192-97; Sullivan, *supra* note 31, at 21.

35. *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Felismina v. Trans World Airlines, Inc.*, 13 Av. Cas. 17,145 (S.D.N.Y. 1974); *Klein v. KLM Royal Dutch Airlines*, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (2d Dep't 1974). Two foreign cases are of significance: *Mache v. Air France*, [1967] *Revue Francaise de Droit Aerien* 345 (Cour d'Appel de Rouen 1967); *Blumenfeld v. BEA*, 11 Z.L.W. 78 (1962).

passenger who left the aircraft and was safely within the terminal building had disembarked for purposes of Article 17 of the Convention. For accidents occurring within the terminal the carrier was to be liable under domestic law alone.³⁶

Recently, serious doubt has been cast on this traditional reasoning by two federal court cases³⁷ which have concerned the embarking, rather than the disembarking, end of the journey. These two cases have taken dramatically different approaches to the issue, producing an undesirable conflict which could lead to forum shopping.³⁸ This conflict becomes even more significant in light of the proliferation of litigation which will probably follow airport bombings such as that at the LaGuardia Airport in New York City in December 1975.³⁹ Therefore, these decisions must be closely analyzed.

To aid in analyzing the two cases, posit our hypothetical lawyers Radar and Vector at LaGuardia on that fateful night. Our travelers had purchased their tickets in Montreal to take the same flight from New York to Boston, Vector to continue on to London. We change the hypothetical here to make Vector's ticket read New York to Boston to London and back again to New York.⁴⁰ After looking at the two cases, this section of the Comment will explore the question of who should bear the risk, based on certain policy considerations. Then the discussion will determine how our voyagers fare under the present law and in what direction, if any, the law should develop.

A. THE DAY AND EVANGELINOS DECISIONS

Both *Day v. Trans World Airlines, Inc.*⁴¹ and *Evangelinos v. Trans*

36. *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971).

37. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *aff'g*, 393 F. Supp. 217 (S.D.N.Y. 1975); *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975).

38. Davidson, *Factors Influencing Choice of Forum in Aircraft Disaster Litigation*, 23 FED. INS. COUN. Q. 23 (1972). Factors cited in this article include the presence or absence of *res ipsa loquitur*, guest statutes, vicarious liability, conflict of laws rules, and liability limits.

39. TIME, Jan. 12, 1976, at 8.

40. The effect of this is to give Vector's trip jurisdiction under Article 28 of the Warsaw Convention, since the ultimate destination is within the United States. This is not absolutely necessary, however, since the Montreal Agreement gives Warsaw jurisdiction if the ticketed point of departure is within the United States. See *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 789 (2d Cir. 1971); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); *Aanestad v. Air Canada, Ltd.*, 390 F. Supp. 1165 (C.D. Calif. 1975); *Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266 (D. Neb. 1975); *Varkonyi v. S.A. Empresa De Viacao, et al. (VARIG)*, 71 Misc. 2d 607, 336 N.Y.S.2d 193 (Sup. Ct. N.Y. Co. 1972). For a more detailed discussion of jurisdiction questions, see part III *infra*.

41. 528 F.2d 31 (2d Cir. 1975).

*World Airlines, Inc.*⁴² arose from the same TWA flight in 1973 from Athens, Greece, to New York City.⁴³ The plaintiffs were in line awaiting a security screening in the transit lounge of the Hellenikon Airport in Athens after having presented their tickets, checked their baggage, and received their boarding passes. Two terrorists, and perhaps more, threw grenades into the crowded area where the plaintiffs were waiting in line, and continued their assault by firing sporadic barrages into the boarding area. The terrorists took thirty-two passengers as hostages. After two tense hours of negotiation an agreement was reached, but not before forty TWA passengers had been wounded and three had died. The plaintiffs in *Day* represented one dead and two wounded passengers, and the plaintiffs in *Evangelinos* represented wounded passengers only.⁴⁴ In both cases the defendant argued that the plaintiffs were not within any of the "operations of embarking" when the injuries occurred, and, therefore, that the Warsaw Convention was inapplicable. On the issue of carrier liability under the Convention, the cases came out differently; the *Day* court awarding summary judgment to the plaintiff;⁴⁵ the *Evangelinos* court, to the defendant.⁴⁶

1. *The Day Case*

The Second Circuit in *Day* refused to follow the restrictiveness of the disembarking cases;⁴⁷ indeed, much of the opinion is based on original treaty interpretation relying only at a minimum on prior Warsaw Convention decisions. Beginning with the proposition that "the language employed in Article 17 must be the logical starting point," the court established that incidents within a terminal building were not expressly excluded by the phrase "in the course of any of the operations of embarking," and found that the draftsmen "looked to whether the passenger's actions were a part of the operation of embarking."⁴⁸ Asserting that "Article 17 does not define the period of time before passengers enter

42. 396 F. Supp. 95 (W.D. Pa. 1975).

43. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 96 (W.D. Pa. 1975). While the *Day* passengers' tickets were from Athens to New York City, the *Evangelinos* plaintiffs were booked through to Pittsburgh by way of New York City. This difference is insignificant except in terms of jurisdiction.

44. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 96 (W.D. Pa. 1975); *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 219 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975).

45. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975).

46. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 103 (W.D. Pa. 1975).

47. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34, n.8 (2d Cir. 1975). *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) is the only disembarking case even mentioned. The court also ignored the *Evangelinos* embarking case.

48. 528 F.2d at 33.

the interior of the airplane," it turned to the legislative history and policy considerations to determine when the operation of embarking commences.⁴⁹ The court first recited the several steps that the plaintiffs had already taken and determined that they "were not free agents." In addition, the court expressed a general feeling that Article 17 should be interpreted broadly to afford "protection to the plaintiffs under the Warsaw liability umbrella." This position was taken to be consistent with "modern theories of cost allocation,"⁵⁰ to foster "the goal of accident prevention,"⁵¹ and to give the passengers the administrative convenience of absolute liability, thus saving the plaintiffs from incurring the additional expense and delay of having to sue the airport in a foreign forum, under foreign law, and possibly having to prove fault if the Convention was held to be inapplicable.⁵²

The defendant insisted upon a more restrictive interpretation, but the court, after examining the minutes of the Warsaw Convention, concluded otherwise. The originally proposed version of Article 17, it found, was clearly intended to cover the passenger from the moment he entered the terminal until he left; the Article was reworded only "to allow courts to take into account the facts of each case."⁵³

The Second Circuit also examined the expectations of the contracting parties as to the purpose served by Article 17, and recognized that these "expectations can . . . change over time."⁵⁴ Looking at the Montreal Agreement and its history,⁵⁵ the court concluded that "the protection of passengers ranks high among the goals which the Warsaw signatories now look to the Convention to serve," and felt that the rigid location-based rule advocated by TWA would "ill serve" the goal of creating "a system of liability rules that would cover all hazards of air travel." Therefore, it approved of the "tripartite test based on activity (what the plaintiffs were doing), control (at whose direction) and location" used by the District Court in applying Article 17.⁵⁶

49. *Id.*

50. The considerations here are primarily insurance-oriented. See Mendelsohn, *Another View on the Adequate Award in International Aviation Accidents*, [1967] *INS. L.J.* 197.

51. The factors involved are that the airlines are in a better position to assess the various risks, devise their own procedures to minimize the danger, and place pressure on airport management to take preventive measures.

52. This is not the only alternative open to the plaintiffs if the Convention does not apply. See notes 68-69 *infra* and accompanying text.

53. 528 F.2d at 35.

54. *Id.* at 36.

55. For a brief history of the Montreal Agreement, see notes 18-22 *supra* and accompanying text.

56. 528 F.2d at 33. For the District Court opinion, see *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 223 (S.D.N.Y. 1975).

2. *The Evangelinos Case*

Several months after the District Court opinion in *Day*, a contrary decision on virtually identical facts was rendered in the *Evangelinos* case. That decision, like *Day*, claimed to implement the intentions of the Convention's draftsmen, but the court took a more conservative approach to interpretation and said that the bounds of Article 17 were to be "determined from an examination of the 'four corners of the treaty'."⁵⁷ After specifically refusing to analogize to domestic law,⁵⁸ as the lower court had done in *Day*,⁵⁹ the court turned to the legislative history of the Warsaw Convention and observed that

the delegates had little trouble agreeing that liability should attach inside the terminal building in the case of goods and baggage, but there was extensive debate on that principle as regards passengers.⁶⁰

It found that the embarking and disembarking test was susceptible to two interpretations according to the delegates: it could be viewed in a broad sense, in which the passenger would be covered walking from the terminal to the plane and back again, or in a more narrow sense, in which only the "getting on board and alightment" was covered. Moreover, it was "apparent" to the *Evangelinos* court that the embarking and disembarking phrase was intended to define "geographical limits rather than an activity." Therefore, the court determined that even under the most expansive sense of the phrase the plaintiffs in *Evangelinos* were not within the limits of the Convention as envisioned by its draftsmen.⁶¹

The *Evangelinos* court found "great difficulty" with the District Court decision in *Day* because it extended "the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond . . . the contemplation of the parties." It criticized the "step approach" by which *Day* looked to activity rather than geographic area, noting that many of the same steps required to embark are also essential to disembarkation and that the *Day* court had distinguished the disembarking cases. Approving the logic and rationale of those disembarking cases, the *Evangelinos* court felt itself constrained to disagree with *Day*.⁶²

57. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 99 (W.D. Pa. 1975).

58. *Id.* at 100.

59. *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 223 (S.D.N.Y. 1975).

60. 396 F. Supp. at 100.

61. *Id.* at 101-102.

62. *Id.* at 102-103.

B. POLICY ANALYSIS: WHO SHOULD BEAR THE RISK

Consider our two hypothetical travelers, Radar and Vector. They have arrived at LaGuardia, obtained boarding passes and performed all other required duties, and are currently at their gate awaiting an electronic search. Just as their turn to go through the metal detector arrives, an unexplained explosion takes place and they both are injured. When they sufficiently recover, they will want to know from where they can seek reimbursement for their injuries. There are several possible sources: the airline, the airport, the police performing the search, and the tortfeasor (as in the case of the terrorist). Alternatively, Radar and Vector may have to bear the entire burden of their injuries themselves. These alternatives will be scrutinized in inverse order of their desirability.

If at all possible, Radar and Vector would like to avoid incurring the full cost of their injuries. Society sometimes places risks of injury on the individual without recourse to others,⁶³ but these cases usually involve minimal risks which result in no great hardship to the individual.⁶⁴ Here, by contrast, the potential damage is very high. Most passengers do not obtain insurance.⁶⁵ The naive passenger's expectations are that it is the duty of either the airport or the airlines to have insurance in the event of an accident. Only the very sophisticated air traveler will know affirmatively who bears the burden of insuring the risk.⁶⁶ For these reasons, it is highly unfair to place the burden of so high a loss on the average passenger.

The terrorist tortfeasor may also prove to be a poor individual upon whom to place the risk. Assuming he can be found, the likelihood of his having insurance to cover this type of risk is low, and without it his ability to pay a sizeable tort recovery will usually be severely limited.⁶⁷

63. *Wallace v. Shoreham Hotel Corporation*, 49 A.2d 81 (Mun. Ct. App. D.C. 1946).

64. *Id.* at 83.

65. DRON, *supra* note 1, at 22-28; see also Mendelsohn, *supra* note 50.

66. Kennelly, *Aviation Law: International Air Travel—A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 178, 180-82 (1975). The sophisticated passenger could avoid all liability limits simply by making the ultimate destination of his journey a nation that does not adhere to the Warsaw Convention. Therefore, if Vector's tickets read New York to Boston to London to New York to Iran, he could avoid all liability limits. Once Vector arrived safely back in New York he could cancel the unused portion of his ticket. Another way in which Vector could be protected would be for him to buy two tickets, one from New York to Boston and a second from Boston to London to New York. Since the ticket determines whether the passenger is engaged in international travel, see Warsaw Convention, art. 1(2), Vector would not be subject to international air law limits for an accident occurring prior to take-off at New York.

67. The terrorist stands in a position similar to that of the politically motivated hijacker. For discussions of the latter, see S. AGRAWALA, AIRCRAFT HIJACKING AND INTERNATIONAL LAW (1973); R. TURIE, C. FRIEL, R. SHELDON, & J. MATTHEWS, DESCRIPTIVE STUDY

The problem is complicated in international travel by the difficulty of obtaining jurisdiction over a foreign national,⁶⁸ and even if jurisdiction can be established, the subsequent problem of having to enforce a judgment abroad is immense.⁶⁹ Therefore this person is an undesirable candidate to sue.

It is conceivable that Radar and Vector may try to sue the police who conducted the security search, but this approach is unlikely to succeed.⁷⁰ In response to the hijacking dilemma of the 1960's there was a good deal of legislative activity, including three international agreements⁷¹ which place a duty on all ratifying countries to provide security of this type at their airports. The police in carrying out this duty are therefore exercising a governmental function and are virtually immune from suit.⁷²

A third party upon whom liability for terminal incidents might be placed is the airport owner. As in the case of the tortfeasor, there are problems of jurisdiction and enforcement when a foreign airport is involved. Even where the terminal is located within the United States, there are complications presented by the fact that airport owners are

OF AIRCRAFT HIJACKING (1972); Evans, *Aircraft Hijacking: What is Being Done*, 67 AM. J. INT'L L. 641 (1973).

68. However, modern long-arm statutes can be extremely helpful in establishing jurisdiction. The New York statute, for example, allows state courts to exercise jurisdiction over nondomiciliaries if the person "[c]ommits a tortious act without the state causing injury to a person or property within the state" if the person has other economic contacts in New York. N.Y. C.P.L.R. § 302(a)(3) (McKinney 1970). There is also a second jurisdictional avenue, under the old "doing business" test. *Id.* § 301. See *Bryant v. Finnish Airlines*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

69. For a discussion of the problems involved in suing in a foreign forum, see Davidson, *supra* note 38.

70. See Abramovsky, *The Constitutionality of the Anti-Hijacking Security System*, 22 BUFF. L. REV. 123 (1973); Andrews, *Screening Travelers at the Airport to Prevent Hijackings: A New Challenge for the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 657, 662 (1974).

71. Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature, Sept. 14, 1963, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768 (effective Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, done, Dec. 16, 1970, [1971] 2 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971); Convention to Discourage Acts of Violence Against Civil Aviation, done, Sept. 23, 1971, [1973] 1 U.S.T. 564, T.I.A.S. No. 7570 (effective Jan. 26, 1973). See also AGRAWALA, *supra* note 67; TURIE, *et al.*, *supra* note 67; Denaro, *In Flight Crimes, The Toyoko Convention, and Federal Judicial Jurisdiction*, 35 J. AIR L. & COM. 171 (1969); Evans, *supra* note 67; Fitzgerald, *Recent Proposals for Concerted Action Against States in Respect of Unlawful Interference with International Civil Aviation*, 40 J. AIR L. & COM. 161 (1974); Franck & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69 (1974); A *Symposium on the Unlawful Seizure of Aircraft: Approaches to the Legal Problems*, 37 J. AIR L. & COM. 161 (1971).

72. See Andrews, *supra* note 70; 21 N.Y.L.F. 108 (1975).

often municipal corporations whose susceptibility to suit depends upon their articles of incorporation.⁷³ If the articles state that they are exercising a governmental function, as is the case under the Uniform Airports Act,⁷⁴ then the passenger may not be able to sue at all.⁷⁵ Nevertheless, the airport owner should not be forgotten as a possible defendant; a secondary level suit against the airport might yield some recovery where there is an inability to prove fault or collect judgment from a more primary source.

The primary source of liability for injuries at airport terminals has been the air carrier,⁷⁶ but such liability has usually been restricted to accidents occurring within those areas under the carrier's control.⁷⁷ The carrier usually has absolute control over the areas it leases, including the

73. L. KREINDLER, AVIATION ACCIDENT LAW § 9.01[2] (rev. ed. 1972), states:

The traditional rule has been that a municipality is immune from liability in tort while performing a 'governmental function,' but is not . . . when acting in its 'proprietary' capacity.

See Logan, *The Liability of Airport Proprietors*, 1 J. AIR L. & COM. 263 (1930); Marx, *Governmental Tort Liability for Operation of Airports*, 26 J. AIR L. & COM. 173 (1959).

74. The Uniform Airports Act was withdrawn by the Commissioners on Uniform State Laws in 1943, but was enacted in several states before that time. See, e.g., GA. CODE § 11-201 *et seq.* (1973); LA. REV. STAT. § 2:131 *et seq.* (1973); MINN. STAT. ANN. § 360.031 *et seq.* (1965); S.C. CODE LAWS § 2-101 *et seq.* (1962); UTAH CODE ANN. § 2-2-3 *et seq.* (1971).

75. This is particularly true if the accident occurs in an area which the carrier leases from the city. See *Polara v. Trans World Airlines, Inc.*, 284 F.2d 34 (2d Cir. 1960), holding that the municipality was not liable for an injury caused by a passenger tripping over a chain put up by the carrier lessee in a passageway; *Eastern Airlines, Inc. v. Dixon*, 310 So.2d 336 (Fla. Dist. Ct. 1975), absolving the lessor from liability for an accident which occurred on the baggage conveyor belt behind the lessee's ticket counter. It is less clear when the city exercises a great deal of control over a common area. See *Crowell v. Eastern Airlines, Inc.*, 240 N. Car. 20, 81 S.E.2d 178 (1954), allowing the carrier to seek an indemnity against the city for an accident in a passageway the city has agreed to maintain; *Caroway v. Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (Ga. Ct. App. 1952), allowing the city to be sued for failure to warn a passenger who slipped and fell on a freshly waxed floor in a common lobby.

76. KREINDLER, *supra* note 73, at §§ 3.07 & 3.10[19].

77. The dividing line between lessor (airport) and lessee (airline) liability is not always clear. For example:

The fact that an airport owner or operator may be liable and responsible for maintaining a passageway to the terminal in good condition does not relieve the airline of liability. The airline and the airport owner may be jointly liable for an unsafe condition in that passageway or even at the terminal itself.

KREINDLER, *supra* note 73, at § 3.12[8]. See generally the cases cited in note 75 *supra*; *Knoxville v. Bailey*, 222 F.2d 520 (6th Cir. 1955), holding the carrier liable for an accident occurring on the station premises but in an area over which it had no control; *Gray v. Delta Airlines, Inc.*, 127 Ga. App. 45, 46-47, 192 S.E.2d 521, 522 (1972), holding that "[w]here the lessee has exclusive control of the premises, the lessor has no duty to inspect or any liability for defective construction or installation not made under his direction," quoting *Horton v. Ammons*, 125 Ga. App. 69, 186 S.E.2d 469 (1971).

physical appurtenances.⁷⁸ Furthermore, the airline is best able to prevent structural defects, provide security against the tortious acts of third parties, and obtain insurance to distribute the costs of protection.⁷⁹

C. THE HYPOTHETICAL AIRLINE PASSENGERS UNDER PRESENT LAW

Assuming that Radar and Vector decide to sue the carrier, they will want to know the likelihood of recovery. Therefore, a brief look at their status under current law is necessary. Since Radar and Vector are in virtually identical positions, it is important to see if they are treated equally, thus satisfying the principle of equal protection of the laws.⁸⁰

Radar, a domestic passenger, must look to domestic law.⁸¹ Under the traditional United States rules, an air carrier is held only to a standard of ordinary care as respects most air terminal accidents;⁸² the doctrine of *res ipsa loquitur* is applied only to in-flight accidents.⁸³ This rule is subject to an exception, however, for accidents occurring during the time when a passenger is "boarding" or "alighting" from the aircraft.⁸⁴

78. 127 Ga. App. 45, 192 S.E.2d 521 (1972); *Green v. TACA International Airlines*, 304 So.2d 357, 361 (La. 1974).

79. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34 (2d Cir. 1975); *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974). See also 69 AM. J. INT'L L. 415 (1975); 16 HARV. INT'L L.J. 440 (1975); 6 LAW & POLICY IN INT'L BUS. 1167 (1974). The practical requirement that the carrier obtain insurance not only ensures passenger protection, but also reduces per passenger costs by reducing administrative costs. In addition, insurance companies are better able to gauge the collective risk of the carrier than the individual risks of passengers. See Mendelsohn, *supra* note 50. Other sources which discuss insurance aspects of the problem include DRION, *supra* note 1, at 20-28; Boyle, *supra* note 4; Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Agreement and the Possibility of Denunciation of the Convention*, 33 J. AIR L. & COM. 663 (1967); Davis, *Aviation Insurance Exclusions*, 37 J. AIR L. & COM. 337 (1971); Hagglund & Arthur, *Coverage Problems in Aviation Insurance Policies*, 23 FED. INS. COUNS. Q. 4 (Summer 1973); Whitehead, *The Role of the Insurance Company in Air Safety*, 34 J. AIR L. & COM. 450 (1968). See also 23 FED. INS. COUNS. Q. 65 (Fall 1972).

80. See Haskell, *The Warsaw System and the United States Constitution Revisited*, 39 J. AIR L. & COM. 483, 510-16 (1973).

81. The status of a passenger is determined by his flight ticket. Warsaw Convention, art. 3. Radar should have no trouble establishing jurisdiction in New York under the long-arm statute, see note 68 *supra*, since the accident happened there and he is a New York resident.

82. *Polara v. Trans World Airlines, Inc.*, 284 F.2d 34, 38 (2d Cir. 1960); *Marshall v. United Airlines, Inc.*, 35 Cal. App. 3d 84, 87, 110 Cal. Rptr. 416, 418 (1973); *Delta Airlines, Inc. v. Millirons*, 87 Ga. App. 334, 342, 73 S.E.2d 598, 603 (1953); *Cronin v. Delta Airlines, Inc.*, 19 Ill. App. 3d 1073, 1077, 313 N.E.2d 245, 248 (1974); *Crowell v. Eastern Airlines, Inc.*, 240 N. Car. 20, 31, 81 S.E.2d 178, 187 (1954).

83. *Smith v. Pennsylvania Central Airlines Corp.*, 76 F. Supp. 940 (1948); Annot., 6 A.L.R.2d 528, 529-33 (1948); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951).

84. *Brown v. American Airlines, Inc.*, 244 F.2d 128 (5th Cir. 1957); *Delta Airlines, Inc.*

Generally, these terms have been used to describe the area of the ramp or similar device,⁸⁵ thus yielding an even more restrictive result than that resulting from the narrow interpretation of "embarking or disembarking" under some Warsaw Convention cases.⁸⁶ Under this legal regime, Radar would have to prove a violation of the duty of ordinary care in order to recover. This task would be virtually impossible in the case of a terrorist bombing,⁸⁷ but in the more common case of slip and fall accidents⁸⁸ negligence could be shown and, barring contributory negligence, Radar in that case would surely recover.

A growing, and perhaps majority view, is that the carrier owes a high standard of care to the passenger throughout the entire passenger-carrier relationship.⁸⁹ To determine if this relationship exists a five-prong test⁹⁰ is used: (1) control of the passenger by the carrier, (2) control of the place of the accident by the carrier, (3) an intent by the passenger to use the conveyance, (4) that the accident take place within a reasonable time before boarding or after alighting, and (5) notice to the carrier that the passenger intends to take passage.⁹¹ In many respects this test is similar to the tripartite test for Warsaw Convention purposes of activity, control, and location offered by the Second Circuit in *Day*.⁹² In a jurisdiction following the five-prong test approach, Radar's proof would be easier, although the terrorist bombing case would still present difficult problems. Since the high standard of care pertains even to prevention of criminal acts by third parties, however,⁹³ Radar could conceiv-

v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1953); Annot., 61 A.L.R.2d 1113 (1958).

85. Federal Ins. Co. v. Bonilla Colon, 392 F.2d 662, 665 (1st Cir. 1968); Weller v. Northwest Airlines, Inc., 239 Minn. 298, 58 N.W.2d 739 (1954). Cases on carrier defenses include Rubio v. Southern Air Transport, 388 F. Supp. 1021 (D.P.R. 1975) (assumption of the risk); Honka v. Eastern Airlines, Inc., 327 F. Supp. 251 (S.D. Fla. 1971) (contributory negligence).

86. See *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975) and cases cited in note 35 *supra*.

87. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34 (2d Cir. 1975).

88. See 33 J. AIR L. & COM. 171 (1967).

89. *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 617 (7th Cir. 1974); *Garrett v. American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964); *Tolson v. Pan American World Airways, Inc.*, 399 F. Supp. 335 (S.D. Tex. 1975); *Eastern Airlines, Inc. v. Dixon*, 310 So.2d 336 (Fla. Dist. Ct. 1975). See also Annot., 3 A.L.R.3d 938 (1964); 33 J. AIR L. & COM. 171 (1967); 40 J. AIR L. & COM. 723 (1974); 60 IOWA L. REV. 710 (1975).

90. This test was first clearly articulated in *Zorotovich v. Washington Toll Bridge Authority*, 80 Wash.2d 106, 491 P.2d 1295 (1971).

91. *Suarez v. Trans World Airlines, Inc.*, 498 F.2d 612, 616 (7th Cir. 1974).

92. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975). See note 56 *supra* and accompanying text.

93. *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 223 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975).

ably win even the terrorist case.

Vector's case is more complicated. Since his flight ticket runs New York-Boston-London-New York, he is an international passenger under Article 1(2) of the Warsaw Convention. The ultimate destination of his flight is New York, thus establishing jurisdiction within the United States for purposes of Article 28.⁹⁴ Assuming that the suit could be brought in either the Western District of Pennsylvania or the Southern District of New York,⁹⁵ and that Vector suffered bodily injury in an accident within the purview of Article 17,⁹⁶ the remaining questions are the amount of damage and whether Vector was within the "course of any of the operations of embarking."

With the *Day* and *Evangelinos* opinions as precedents in the jurisdictions we have selected, the answer to the embarking question is easy. In the New York court Vector would clearly be considered within the "operations of embarking" since he meets the activity, control and location tests outlined in *Day*,⁹⁷ and would win on the issue of carrier liability since the Montreal Agreement imposes liability without fault in cases where the Warsaw Convention applies.⁹⁸ However, he will be limited to a maximum of \$75,000 damages under the Warsaw Convention as modified by the Montreal Agreement,⁹⁹ even though his actual damages may exceed that amount several fold.¹⁰⁰

In the Pennsylvania court, Vector would lose on the issue of liability under the Warsaw Convention since he does not fall within the geographic limits of "embarking or disembarking" outlined in the *Evangelinos* decision.¹⁰¹ Thus, the Warsaw Convention would be inapplicable and Vector would be left to his remedies under domestic law.¹⁰²

94. See note 40 *supra*. See also McCormick, *Exclusive Federal Jurisdiction over Aviation via International Treaties*, 6 AMR L. REV. 13 (1935); 5 VAND. J. TRANSNAT'L L. 554 (1972). This topic is discussed in depth in part III *infra*.

95. Determination of the proper United States court is, of course, a matter of domestic law. Vergara v. Aeroflot "Soviet Airlines", 390 F. Supp. 1266 (D. Neb. 1975).

96. Husserl v. Swiss Air Transport, 351 F. Supp. 702 (S.D.N.Y. 1972).

97. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975). See note 56 *supra* and accompanying text.

98. Montreal Agreement.

99. *Id.*

100. One commentator has compiled a table of damage recoveries in non-Warsaw cases which illustrates that many plaintiffs every year recover damages in excess of the \$75,000 maximum allowed under the Montreal Agreement. KREINDLER, *supra* note 73, at § 12B.02[6].

101. *Evangelinos v. Trans World Airlines, Inc.*, 396 F. Supp. 95, 101-102 (W.D. Pa. 1975). See also *Husserl v. Swiss Air Transport*, 388 F. Supp. 1238, 1243-46 (S.D.N.Y. 1972).

102. *MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971).

Essentially he would be in the same position as Radar, and could recover damages in some jurisdictions to the full extent of his injuries.¹⁰³

The different treatment of Radar and Vector, and the differing treatment of Vector in New York and Pennsylvania, is undesirable and may lead to forum shopping¹⁰⁴ and deceptive ticketing practices by sophisticated passengers.¹⁰⁵ Moreover, the present State of the law under the "embarking or disembarking" provision of the Warsaw Convention leaves the passenger, and ultimately the courts, in a state of uncertainty when a case such as Vector's arises. Therefore, the *Day* and *Evangelinos* opinions must be examined with an eye toward resolving the conflict.

D. *Day* AND *Evangelinos*: A CRITIQUE

An analysis of these two cases must begin with an interpretation of the language of Article 17.¹⁰⁶ First, the structure of Article 17 must be examined. The words "death," "wounding" and "bodily injury" are the first grouping and define the types of damage the Convention seeks to cover.¹⁰⁷ The word "accident" is in the next significant part of Article 17 and describes the injury-causing activity contemplated by the draftsmen.¹⁰⁸ The last phrase is "on board the aircraft or in the course of any of the operations of embarking or disembarking." Clearly the words "on board the aircraft" denote a geographic limitation. Since the phrase "embarking or disembarking" is grouped with "on board" and is stated as an alternative for "on board," it should also be a geographic limitation.¹⁰⁹ However, the words "any of the operations of . . ." tend to make

103. This would be the result in jurisdictions which follow the "modern" approach outlined in the cases cited in notes 90-91 *supra*.

104. See note 38 *supra* and accompanying text.

105. Kennelly, *supra* note 66, at 178-86. See also text accompanying note 66 *supra*.

106. For the complete text of Article 17, see text accompanying note 30 *supra*.

107. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 403, 314 N.E.2d 848, 856, 385 N.Y.S.2d 97, 112 (1974). See also *Husserl v. Swiss Air Transport*, 388 F. Supp. 1245, 1247 (S.D.N.Y. 1975).

[A] concomitant of the purpose to limit liability was a purpose to facilitate recovery by injured passengers Given the total lack of expression and the absence of a meaningful basis for inference regarding the types of injury not comprehended by Articles 17, 18 and 19, I conclude that causes of action based on such types of injury should be governed exclusively by the substantive law which would be applicable if the treaty did not exist [t]his court believes that the purpose could more appropriately be effected by construing the types of injury enumerated expansively to comprehend as many types of injury as possible

108. See note 30 *supra* and accompanying text.

109. The court in the *Day* case seemed to recognize this fact when it made "location" one part of its three-prong test. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975).

this connection ambiguous.¹¹⁰ Nevertheless, for the moment the assumption will be made that, although this language renders uncertain the meaning of the Article, it does not preclude either the *Day* or *Evangelinos* interpretation.

The resolution of this ambiguity may be found in an examination of the intent of the signatories as to the overall purpose of the Warsaw Convention. The modern rationale for the Convention has been the protection of passengers from the risks of air travel, but the traditional reasoning behind the Convention was in large part the protection of the airline industry.¹¹¹ The Montreal Agreement does show a greater sensitivity to the passengers' interests,¹¹² but the fact remains that the international air carrier is the party who is ultimately benefitted by the limitations on liability. Even if we assume that the purpose of the Convention is passenger protection, the *Evangelinos* reasoning, which allows the passenger to recover in the full amount of his injuries under domestic law,¹¹³ may be preferable. Ultimately, the *Day* interpretation can be justified only as a means of giving passengers in the particular fact situation there presented—a terrorist raid at a foreign airport—recovery in a local forum.

The legislative history of the Warsaw Convention and the early commentaries indicate that the *Evangelinos* interpretation of "embarking or disembarking" as a geographic test is correct. In support of the opposite conclusion, the Second Circuit in *Day* cites the minutes of the Convention as upholding a flexible test for determining the parameters of embarking.¹¹⁴ Indeed there is little doubt that the draftsmen, in using the language "in the course of any of the operations of embarking or disembarking," intended to be flexible; the conflict lies in the type of test envisioned in these words. Commentators contemporary with the Convention indicated that the words were intended to refer to any intermediate stops where the passengers might be asked to temporarily leave the plane or transfer to another craft.¹¹⁵ This would be consistent with

110. This may arise from a problem of translating the original French text of the Convention.

111. DRON, *supra* note 1, at 1-7; GOEDHUIS, *supra* note 4; Sullivan, *supra* note 31, at 1-20.

112. The Montreal Agreement, however, can be interpreted primarily as a stopgap measure to protect carriers from the imminent end of the protection afforded by liability limits due to the denunciation of the Warsaw Convention by the United States.

113. See notes 89-93 *supra* and accompanying text.

114. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975).

115. GOEDHUIS, *supra* note 4, at 196. The Convention was also drafted prior to the universal use of boarding gates and departure lounges, and airports operated various boarding schemes. The flexibility in Article 17 may well have also been designed to cover these various boarding procedures, and not operations within the airport. *Id.* at 196-97.

the *Evangelinos* geographic interpretation, and in fact the commentators¹¹⁶ and cases on disembarking¹¹⁷ were unchallenged in the United States until the *Day* decision.¹¹⁸

Not only is *Evangelinos* consistent with the intentions of the draftsmen and prior authority, but arguably it is preferable on another ground as well. While the Warsaw Convention has been successful in terms of establishing uniform ticketing procedures, limiting jurisdiction, and in dealing with baggage claims, it has been widely criticized for not providing adequate protection for the passenger.¹¹⁹ The original rationale for limiting carrier liability is by and large outmoded.¹²⁰ Moreover, it is increasingly recognized that the Convention unfairly discriminates against both domestic carriers not insulated by such limits and international passengers who, unlike their domestic counterparts, cannot recover to the full extent of their injuries. By taking a more restrictive view of "embarking or disembarking," the *Evangelinos* court successfully limits the application of the objectionable part of the Warsaw Convention,¹²¹ leaving the passenger to his remedy at domestic law. The plaintiff loses the benefit of the absolute liability provisions of the Montreal Agreement, and is left with domestic law concepts of fault. In most situations, although perhaps not in the *Day* case,¹²² there will be juris-

116. See, e.g., GOEDHUIS, *supra* note 4, at 196-97; Sullivan, *supra* note 31, at 21.

117. These cases are cited in note 35 *supra*.

118. Indeed, the only prior authority supporting the *Day* interpretation was a German case, *Blumenfeld v. BEA*, 11 Z.L.W. 78 (1972). Foreign authority, however, is far from uniform. See *Mache v. Air France*, 21 *Revue Francaise de Droit Aerien* 345 (Cour d'appel de Rouen 1967). The decision in *Day* seems to be one peculiar to its fact pattern, i.e. a terrorist attack.

119. Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 *BUFF. L. REV.* 339 (1972); Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 *J. AIR L. & COM.* 624 (1967); Mendelsohn, *supra* note 50; Mennell & Simone, *United States Policy and the Warsaw Convention*, 2 *WASHBURN L.J.* 219 (1963); Parker, *supra* note 29; Tompkins, *Limitation of Liability by Treaty and Statute*, 36 *J. AIR L. & COM.* 421 (1970).

120. DRION, *supra* note 1, at 12-13, lists eight factors which could serve ultimately as a rationale for limiting liability, and finds only the policies of litigation avoidance and the passenger insurance against the risk to be sound.

121. This technique is not unlike the public international law doctrine of *rebus sic stantibus*, which renders treaties of no force and effect when the essential conditions upon which they were based are no longer present. Vienna Convention on the Law of Treaties, U.N. DOC. A/CONF. 39/27, *opened for signature*, May 23, 1969, art. 62, *reprinted in* 63 *AM. J. INT'L L.* 875 (1969) and 8 *INT'L LEGAL MAT.* 679 (1969). See Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 *AM. J. INT'L L.* 51 (1974); Bullington, *International Treaties and the Clause "Rebus Sic Stantibus"*, 76 *U. PA. L. REV.* 153 (1967); Note, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 *U. CHI. L. REV.* 580 (1967); Editorial Comment, 36 *AM. J. INT'L L.* 89 (1942).

122. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975).

diction in this country and the plaintiff will not be relegated to a foreign forum. Moreover, the task of establishing breach of duty is made easier by the modern trend of applying a high standard of care to the airline throughout the entire passenger-carrier relationship.¹²³ Even the terrorist bombing situations are covered when this high standard is extended to protect passengers against the criminal acts of third parties.

In the final analysis, neither the Second Circuit in *Day* nor the District Court in *Evangelinos* provides a satisfactory solution. In attempting to solve the problem of unfair liability limits in a treaty, a court is really engaging in an executive function.¹²⁴ Ideally, the executive should deal with this problem by excising the objectionable limitations on personal injury recovery from the Warsaw Convention. As a practical matter, however, this is unlikely since limitations on personal injury recovery are long established in the field of international air law and airlines and manufacturers provide strong lobbies against the elimination of such limits. An increase of such limitations is the most likely reform, but even this will take time. Until then, the best we can hope for is that the conflicting decisions of the Second Circuit in *Day* and the District Court in *Evangelinos* will be resolved, ensuring adequate and equal treatment of international passengers and their domestic law counterparts. Such an objective can be achieved by adopting the District Court decision in *Evangelinos*.

III

JURISDICTION OVER A MANUFACTURER'S CONTRIBUTION ACTION UNDER ARTICLE 28(1) OF THE WARSAW CONVENTION

David H. Barnes

When an American passenger is killed or injured in the crash of an international air carrier, Article 28(1) of the Warsaw Convention often prevents the passenger or his representative¹²⁵ from bringing an action against the carrier in a domestic court, even where the court would otherwise have in personam and subject matter jurisdiction.

Suing the carrier in the foreign forums available under the Convention

123. See notes 89-93 *supra* and accompanying text.

124. See generally, Whitehead, *Still Another View of the Warsaw Convention*, 33 J. AIR L. & COM. 651 (1967).

125. The passenger's action would be a negligence action against the carrier for his own injuries; if the passenger dies in the accident, his representative would bring a wrongful death action.

may prove expensive and will often force the passenger to deal with unfamiliar foreign law. In such a situation, a plaintiff-passenger may forego his action against the carrier and sue the plane's manufacturer in a domestic court. This would be a likely course of action for two reasons: first, obtaining in personam jurisdiction over the manufacturer will usually pose no problem since the manufacturer will often be doing business in the state; and second, the rapid recent growth of strict products liability will greatly increase the plaintiff's chances of success.¹²⁶

The manufacturer, believing that the carrier is wholly or partially responsible for the passenger's injury or death, could then bring an action for contribution¹²⁷ against the carrier in the same domestic court. In opposition to such a suit, the carrier has an argument that, just as Article 28(1) prevents a passenger from suing the carrier in a domestic court, it should bar the manufacturer's attempt to utilize the same forum.

The issue with which this section will deal is whether the domestic court can entertain the manufacturer's action for contribution without undermining the policies behind Article 28(1). Additional policy considerations bearing on this issue will also be discussed. Due to the increasingly mobile nature of the American populace,¹²⁸ the likelihood that this fact situation will arise is not remote, and because of the vast sums of money involved in litigation following aircraft disasters, the disposition of this issue will have significant monetary consequences.

A. THE OPERATION OF ARTICLE 28(1)

1. *Article 28(1)'s Four Contacts*

Article 28(1) of the Warsaw Convention¹²⁹ offers the plaintiff four

126. These factors, in fact, would encourage a plaintiff-passenger or his representative to sue the manufacturer even when he could sue the carrier in an American court.

127. Contribution among joint tortfeasors was barred at common law, *see Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799) and W. PROSSER, *LAW OF TORTS* 305 (4th Ed. 1971), but actions for contribution are permitted by modern statutes such as N.Y. C.P.L.R. § 1401 (McKinney 1974) which reads in pertinent part: "[T]wo or more persons who are subject to liability for damages for the same personal injury . . . or wrongful death, may claim contribution among them . . ."

128. As an increasing number of international flights involve American citizens or some contact with the United States, a better understanding of Warsaw Convention jurisdiction is called for. *See McKenry, Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 216-17 (1963).

129. Article 28(1) of the Warsaw Convention reads:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the

possible forums. The first available forum is the domicile of the carrier, which has been uniformly construed to mean the carrier's place of incorporation.¹³⁰ Secondly, an action may be brought in the jurisdiction in which the carrier's principal place of business is located. It has been held that a carrier has only one principal place of business in the world for purposes of Article 28(1) forum selection.¹³¹ The third forum available to the plaintiff is the carrier's place of business through which the flight contract was made.¹³² Finally, a plaintiff-passenger may sue in a court of the jurisdiction which is the destination of his flight. For purposes of forum selection, such a destination has been held to be the passenger's "ultimate" destination rather than the destination of a particular phase of the flight.¹³³

2. *The Policies Behind Article 28(1)*

An understanding of the policies behind Article 28(1) is crucial to our analysis. Examination of these policies shows that Article 28(1) was part of the attempt to implement the general Convention policies of limited carrier liability and uniformity.

The principal reason for limiting the forums available to plaintiffs was the fear of Convention delegates that carriers would be subjected to numerous suits in remote places,¹³⁴ possibly in jurisdictions that would

domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

This provision is from the official English translation of the official French text. For a brief but informative treatment of the Convention's history, see C. RHYNE, *AVIATION ACCIDENT LAW* 252 (1947). See also Section I.A. *supra*.

130. *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 851 (2d Cir. 1965); *Pardonnet v. Flying Tiger Lines, Inc.*, 233 F. Supp. 683 (N.D. Ill. 1964); *Pitman v. Pan American World Airways, Inc.*, 223 F. Supp. 887 (E.D. Pa. 1963). For a general discussion of Article 28(1)'s four forums, see *Annot.*, 6 A.L.R.3d 1272, 1275-76 (1964).

131. *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 809 n.9 (2d Cir. 1966); *Nudo v. SABENA*, 207 F. Supp. 191 (E.D. Pa. 1962). *But see Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 63, 203 N.E.2d 640, 644, 255 N.Y.S.2d 249, 255 (1964) (Desmond, J., concurring); Note, *Warsaw Convention—Jurisdiction Under Article 28*, 13 VA. J. INT'L L. 94, 99-100 (1972), suggesting that an airline should be deemed to have a principal place of business in every jurisdiction in which it does business.

132. Problems of interpretation have arisen under this part of the Article when a ticket agent other than the defendant carrier has sold the passenger his ticket. See *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964); *Berner v. United Airlines, Inc.*, 3 App. Div. 2d 9, 157 N.Y.S.2d 884, *aff'd without opinion* 3 N.Y.2d 1003, 147 N.E.2d 732, 170 N.Y.S.2d 340 (1956).

133. *Vergara v. Aeroflot "Soviet Airlines"*, 390 F. Supp. 1266 (D. Neb. 1975); *Felsenfeld v. Societe Anonyme Belge D'Exploitation*, 234 N.Y.S.2d 351 (City Civ. Ct. Kings Co. 1962).

134. See *Mankiewicz, supra* note 24, at 555.

not apply the liability limits set by the Convention.¹³⁵ Accordingly, Article 28(1) requires suit to be brought in the courts of a signatory nation. A second reason for limiting the number of available forums was the desire of parties to the Convention that suits be brought in forums convenient for defendant carriers. If suits were permitted where carriers usually did no business, carriers would have to deal with strange foreign laws and incur significant travel expenses.¹³⁶ To prevent such inconvenience, all of the Article 28(1) forums require at least a minimal amount of carrier presence¹³⁷ and the Article rejects the place of the accident as an acceptable forum.¹³⁸ Finally, Article 28(1) reinforces the Convention policy of uniformity by providing a choice of law rule which must be applied by all countries adhering to the Convention. By limiting and defining the forums available to plaintiffs the Article assures litigants of a measure of predictability and certainty that would be lacking if the plaintiff had the option of bringing suit in any forum having jurisdiction over the carrier. The carrier thus has advance notice of the forums in which it is amenable to suit.

3. *Preclusion of Jurisdiction in the Plaintiff's Domicile*

In providing a limited number of forums for an action against an international air carrier, Article 28(1) often precludes an action in the plaintiff's own country. The preclusive nature of Article 28(1) can best be demonstrated by examining the hypothetical set out in the first section of this Comment. Vector, an American citizen, buys a ticket in Montreal for a BOAC flight from New York to London via Boston. After the plane crashes between Boston and London, killing Vector, Vector's spouse, also an American citizen, attempts to commence a wrongful death action against BOAC in a domestic court. In such a case, none of Article 28(1)'s four contacts fall within the United States. The carrier's place of incorporation is England, the carrier's principal place of business is in England, the flight contract was made in Canada, and the passenger's destination was England. In such situations American courts have uniformly held that they have no jurisdiction over actions against the carrier.¹³⁹

135. *Id.* at 538; *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59-60, 203 N.E.2d 640, 642, 255 N.Y.S.2d 249, 252 (1964).

136. *Cha*, *supra* note 4, at 60.

137. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 61, 203 N.E.2d 640, 643, 255 N.Y.S.2d 249, 253 (1964).

138. *Cha*, *supra* note 4, at 60. Transcripts of Convention debates eliminating the place of the accident as a possible forum are reprinted in Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217, 229-31 (1959).

139. *Biggs v. Alitalia—Linee Aeree Italiane*, S. p. A., 10 Av. Cas. 18,354 (E.D.N.Y.).

The workings of Article 28(1) were recently examined and explained by the Court of Appeals for the Second Circuit in *Smith v. Canadian Pacific Airways, Ltd.*¹⁴⁰ In that case the plaintiff, an American citizen, bought a ticket in Vancouver for a flight to Tokyo on the defendant Canadian corporation's airline. The plane crashed and the plaintiff was injured. His attempt to bring an action in the Southern District of New York was thwarted even though the District Court had diversity subject matter jurisdiction and in personam jurisdiction over the defendant carrier, who was doing business in New York. This result was mandated because the defendant was domiciled in Canada, which was also its principal place of business, the flight contract was made in Canada, and the destination of the flight was Japan. Said the court:

We hold that in a Warsaw Convention case there are two levels of judicial power that must be examined to determine whether the suit may be maintained. The first level, on which this opinion turns, is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States court . . . to hear a Warsaw Convention case—jurisdiction in the domestic law sense

. . . .

. . . If treaty jurisdiction under the Constitution does not lie, federal jurisdiction . . . which permits cases arising *under* United States treaties, clearly cannot be established.¹⁴¹

The Second Circuit thus saw Article 28(1) as a limitation on a court's subject matter jurisdiction.¹⁴²

In precluding a plaintiff's action in his own domicile, Article 28(1) has indirectly served as a means of limiting the carrier's liability,¹⁴³ since some plaintiffs will forego an action rather than pursue it in a foreign court. There is some evidence that this method of limiting the carrier's liability was not intended to supplement the dollar limitation that the

1969); *Varkonyi v. VARIG*, 71 Misc. 2d 607, 336 N.Y.S.2d 193 (Sup. Ct. 1972); *Bowen v. Port of New York Authority*, 8 Av. Cas. 18,043 (N.Y. Sup. Ct. 1964); *Galli v. Re-Al Brazilian International Airlines*, 29 Misc. 2d 494, 211 N.Y.S.2d 208 (Sup. Ct. 1961); *McKenry*, *supra* note 128, at 216-17.

140. 452 F.2d 798 (2d Cir. 1971). For critiques of this decision, see Note, *Jurisdiction Under Article 28*, *supra* note 131, at 99.

141. *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800, 802 (2d Cir. 1971) (emphasis in original).

142. *Id.* at 802. This is analogous to the situation where a federal court with in personam jurisdiction over the defendant is forced to dismiss the action for lack of subject matter jurisdiction, despite the presence of a federal question or diversity of citizenship, because of the failure to meet the jurisdictional amount requirement.

143. Note, *Burdell v. Canadian Pacific Airlines*, 63 AM. J. INT'L L. 339, 340 (1969).

Convention provides.¹⁴⁴ At the time of the inception of Article 28(1) it was thought to provide benefits to passengers that would be unavailable without the Convention, or at least to be helpful in the most typical case where the passenger buys a round trip ticket in his own domicile.¹⁴⁵

In sum, Article 28(1) was a part of the Warsaw Convention's attempt to protect the young international air carrier industry. This protection was accomplished by insuring that actions would be brought in forums that would put into effect the Convention's dollar limitation on the carrier's liability and by guaranteeing suits would be brought in forums not inconvenient to the carrier. That Article 28(1) would have the practical effect of denying some plaintiffs their day in court, thus *totally* eliminating the carrier's liability, was a result neither intended nor anticipated by members of the Convention.

B. JURISDICTION OF DOMESTIC COURTS OVER A MANUFACTURER'S CONTRIBUTION ACTION

1. Article 28(1) Policy Considerations

Underlying the Warsaw Convention is the idea that limitations should be placed on the liability of international air carriers towards their passengers. Since the struggling new airline business of 1929 is now a multi-billion dollar industry, many commentators believe that international air carriers are no longer entitled to any special treatment.¹⁴⁶ If a domestic court adopts this approach, which involves the rejection of the entire Convention, it will have no difficulty in entertaining a manufacturer's contribution action so long as it has in personam jurisdiction over the defendant carrier.

144. Parker, *supra* note 29, at 40; 32 J. AIR L. & COM. 285, 286 (1966); 5 TEXAS INT'L L.F. 299, 300 (1969); 5 VAND. J. TRANSNAT'L L. 554, 558 (1972). Some commentators have expressed the view that Article 28(1) allowed too many forums for suits against international air carriers. GOEDHUIS, *supra* note 4, at 287. *But see* L. KREINDLER, AIRCRAFT LITIGATION 59 (3d ed. 1972): "It's no joke. All of these things are designed to hurt passengers and help airlines."

145. Lowenfeld & Mendelsohn, *supra* note 2, at 523.

146. Article 28(1) has been criticized on this ground by several authors. *See, e.g.*, Lowenfeld, *Some Comments on Burdell v. Canadian Pacific Airlines*, 3 VAND. J. TRANSNAT'L L. 47, 50 (1969); 5 VAND. J. TRANSNAT'L L. 554, 558 (1972). In one case, *Burdell v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. 18,151, *revised*, 11 Av. Cas. 17,351 (Ill. Cir. Ct. 1968), the court found Article 28(1), as it worked in that case, unconstitutional:

The Court finds that the Warsaw Convention Treaty provisions which would restrict the right of the plaintiffs to bring this action against defendant airline in a duly constituted court of the United States which would otherwise have jurisdiction, are unconstitutional and therefore, unenforceable.

10 Av. Cas. at 18,160.

Even if a domestic court rejects this "radical" approach to the Convention, however, it may still be able to entertain a manufacturer's suit for contribution without undermining the policies behind Article 28(1). Central to the Warsaw Convention is the idea that limitations should be placed on the liability of international air carriers, and Article 28(1) effectuates this policy by requiring passengers to sue in forums that will apply the Warsaw limits. However, if the carrier is being sued by the manufacturer for contribution it is not clear if these limits will apply, even if the action is brought in a court of a signatory nation. The treaty itself says nothing on this issue, a silence which is not surprising in light of the only recent developments of contribution and strict products liability.

If a manufacturer may recover in excess of the Warsaw limits in a contribution suit against a carrier, the Convention policy of limiting carrier liability may be severely undermined. A passenger, for example, could avoid a suit against the carrier by suing the manufacturer on a strict liability theory and recovering a judgment greatly in excess of the Warsaw limits. The manufacturer, not being bound by these limits, could then bring an action for contribution against the carrier and recover most of the amount originally paid to the passenger. Thus, in effect, the carrier would be paying the passenger damages greatly in excess of the limitations established by the Convention. Because this result directly conflicts with the Convention's goal of limited carrier liability, it would seem to be the better view to limit the manufacturer's recovery to the Convention amount. If the manufacturer's recovery is so limited, there would be no harm in allowing him to bring his contribution action in a domestic forum, in spite of the absence of Article 28(1) contacts, since the American court would be bound to apply the Convention.

If a manufacturer's recovery against a carrier is not limited to the Warsaw amount, however, any factor that facilitates a contribution suit works contrary to Convention policy by subjecting the carrier to liability in excess of the treaty limits. One major factor facilitating a contribution suit would be the provision of a domestic forum for such actions, despite the unavailability of such a forum under Article 28(1). This would increase the likelihood of contribution suits, and could provide the manufacturer with a cause of action unavailable under the laws of the forums mandated by Article 28(1).

A second major policy of Article 28(1) is that suit should be brought in a forum that will be both convenient and fair to the carrier. Because the carrier would be doing business in the state in question and would be subject to jurisdiction of the domestic court on actions arising outside the Convention, the carrier would certainly not be prejudiced if the

manufacturer should bring his contribution action in the same domestic forum.

Article 28(1) is also an attempt to provide a uniform method of choosing forums for Warsaw actions. If a particular domestic court were free to entertain a manufacturer's action against a carrier in a forum not listed in Article 28(1), the uniformity that the Article is designed to foster would certainly be diminished. This consideration also works the other way, however, since a denial of a domestic forum for the manufacturer may indirectly result in a similar deterioration of uniformity. Many domestic courts may want to entertain the manufacturer's action and yet adhere to the Convention, so it is possible that such courts would give Article 28(1) new and varied interpretations, undermining the uniformity the Article was designed to promote. Although this situation has not yet arisen in the context of a manufacturer's action for contribution, courts have reacted in this manner when Article 28(1) would prevent a passenger from suing a carrier in a court of his own domicile. For example, reasoning backwards from their conclusion that a passenger should be able to sue a carrier in a court of his own country if the court has in personam jurisdiction over the defendant carrier, some authorities have suggested that a carrier may have not only a single worldwide principal place of business, but also may have a principal place of business for Article 28(1) purposes in any country in which it does business.¹⁴⁷ Others have construed the "carrier's place of business through which the contract has been made" to include ticket sales made by travel agents as well as by competitors of the defendant carrier.¹⁴⁸ Difficulties have also resulted from the application of Article 28(1) to our federal system, principal among them being the dispute as to whether Article 28(1) is a venue or jurisdictional provision.¹⁴⁹ The above interpretations all indicate that the decisions interpreting Article 28(1) have been anything but uniform,¹⁵⁰ and this lack of uniformity is the result of attempts to avoid the inequitable result of keeping a passenger from using the courts of his domicile. It would seem that courts would

147. See *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 63, 203 N.E.2d 640, 644, 255 N.Y.S.2d 249, 255 (1964) (Desmond, J., concurring); Note, *Jurisdiction Under Article 28*, *supra* Note 131, at 99-100.

148. See cases cited in note 132 *supra*.

149. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964); Note, *Suit for Damages Suffered in International Flight Requires Establishment of "Treaty" Jurisdiction*, 13 HARV. INT'L L.J. 518, 527 (1972).

150. Lowenfeld & Mendelsohn, *supra* note 2, at 526; 5 VAND. J. TRANSNAT'L L. 554, 559 (1972). This lack of uniformity has been explained as a result of the vague and flexible language that must necessarily be included in documents that must be translated into many different languages. See 22 CORNELL L.Q. 561, 565 (1937).

be equally willing to juggle statutory language to make sure that domestic manufacturers will be able to bring their contribution actions in domestic forums.

In summary, it would not violate the policies behind the Article to permit a manufacturer to bring a contribution suit against the carrier in a domestic forum, provided the court has in personam jurisdiction over the carrier. If the manufacturer could not recover in excess of the limits set by the Convention, the carrier's limited liability would remain unaffected. Since the court already has in personam jurisdiction over the carrier, furthermore, the defendant airline can hardly criticize the forum as being inconvenient or unfair. While entertaining such an action may decrease uniformity, failure to make such a forum available may lead in the same direction. In such a situation, the uniformity the Convention's draftsmen desired can be obtained only by amending Article 28(1) to include the manufacturer's domicile as an acceptable forum.

2. Other Considerations

The most persuasive argument for denying the manufacturer access to a domestic forum when such a forum is not warranted by Article 28(1) is that by entertaining such an action the court would be violating an American treaty obligation. Under the Constitution¹⁵¹ the Warsaw Convention is the supreme law of the land and courts, both state and federal, must implement its provisions.¹⁵² Furthermore, as one writer has said:

. . . Public Policy of a state will not interfere with the enforcement of treaty provisions. The public policy of a state is, of course, subordinate to the requirements of the Constitution, so in the enforcement of treaty provisions no questions arise in this regard.¹⁵³

151. U.S. CONST. art. VI, cl. 2.

152. *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971); Orr, *The Warsaw Convention*, 31 VA. L. REV. 423, 435 (1945). For the view that parts of the Convention are subordinate to, and in violation of, the Constitution, see *Burdell v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. 18,151, *revised*, 11 Av. Cas. 17,351 (Ill. Cir. Ct. 1968). For an extensive treatment of this viewpoint, see generally W. COWLES, *TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW* (1941). For criticism of the *Burdell* approach, see Hay, *Comments on Burdell v. Canadian Pacific Airlines and the Constitutionality of the Warsaw Convention*, 58 ILL. B.J. 26, 34-35 (1969); Lowenfeld, *supra* note 146; 63 AM. J. INT'L L. 339 (1969); 5 TEXAS INT'L L.F. 299 (1969).

153. Orr, *supra* note 152, at 436. In support of this statement the author cited *United State v. Belmont*, 301 U.S. 324, 327 (1936):

We do not pause to inquire whether there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

Thus, it can be argued forcefully that a court should give Article 28(1) its literal interpretation, regardless of policy reasons or other considerations that would call for the court to entertain the manufacturer's action.

A manufacturer who is denied a domestic forum for his contribution suit may find it inconvenient or impossible to bring such an action in one of Article 28(1)'s foreign forums. First, the manufacturer who is unable to sue in his own country will have to incur the expense of traveling to, and residing in, the foreign jurisdiction called for by Article 28(1). Second, if he is forced to sue abroad, the manufacturer's fate will be determined by law unfamiliar to the manufacturer and his attorney.¹⁵⁴ The laws of the available foreign forums may in fact bar contribution actions altogether. Third, forcing the manufacturer to bring suit in a jurisdiction distant from his place of business may create problems of proof for the parties to the action. For instance, if the manufacturer's manufacturing techniques are in issue, as they may very well be in a negligence action, the time and expense involved in collecting relevant evidence will increase as the litigation moves further from the manufacturer's place of business.

The preclusive nature of Article 28(1) is in sharp contrast to the broad scope of jurisdiction exercised by American courts. Under the due process clause of the Fourteenth Amendment, state and federal courts can generally entertain actions involving persons and associations who do business within the state, at least with regard to claims related to the in-state activity.¹⁵⁵ Any airline flying to and from the United States clearly does business at the place of the American airport, and therefore any case involving such a trip could be litigated somewhere in the United States, regardless of the final destination and the place of accident.¹⁵⁶ For example, under New York's "doing business" test,¹⁵⁷ a carrier's use of Kennedy Airport or any office in New York would be enough in-state activity to give the New York federal and state courts jurisdiction regardless of whether the ticket was purchased in New York or whether the claim arose from in-state activity.¹⁵⁸ Under New York's

154. McKenry, *supra* note 128, at 229; 5 VAND. J. TRANSNAT'L L. 554, 559 (1972). The unfamiliarity may extend to procedural law as well as substantive law. According to Article 28(2) of the Warsaw Convention, a court hearing a Warsaw case will follow its own procedure.

155. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

156. *Lowenfeld & Mendelsohn*, *supra* note 2, at 576.

157. N.Y. C.P.L.R. § 301 (McKinney 1963).

158. *Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

“transacting business” test,¹⁵⁹ the New York courts may have jurisdiction over claims related to in-state activity even when the carrier has neither flights to, nor offices in, New York.¹⁶⁰ Under these principles it is obvious that a court of a state such as New York would be able to entertain a manufacturer’s contribution action if it were not for Article 28(1). The existence of such a conflict not only casts doubt on the jurisdictional bases of Article 28(1), but may also lead domestic courts to ignore or manipulate the Article, thus undermining the uniformity the Convention was designed to promote.

Strong support for the position that a domestic court with in personam jurisdiction over the carrier should be able to entertain a manufacturer’s action for contribution against the carrier, despite the absence of Article 28(1) contacts, may be found in the recent, but as yet unenacted, Guatemala City proposal to amend Article 28(1).¹⁶¹ This proposal would permit actions to be brought in the courts of a signatory nation which is the domicile or permanent residence of a passenger, if the carrier has a place of business within the same jurisdiction.¹⁶² In effect, this proposal is saying that courts within the domicile of a plaintiff are acceptable forums as long as the plaintiff’s country adheres to the Convention and the defendant carrier is doing business within that country.¹⁶³ An American manufacturer’s contribution suit would meet these two conditions, and thus an American court following this most recent thinking on the subject should entertain the manufacturer’s action.

If a manufacturer seeking contribution from a carrier is denied a domestic forum, this works contrary to the policies which lie behind contribution. The law of the available foreign forums or the practical difficulties of suing abroad may effectively deny the manufacturer the opportunity to seek contribution and thus force him to shoulder all of

159. N.Y. C.P.L.R. § 302 (McKinney 1963).

160. *Scott v. Middle East Airlines Co.*, S.A. 240 F. Supp. 1 (S.D.N.Y. 1965); *Gordon v. Branniff Airways, Inc.*, 55 Misc. 2d 125, 284 N.Y.S.2d 437 (Dist. Ct. 1967).

161. The Guatemala Protocol, ICAO Doc. 8932 (1971), reprinted in 10 INT’L LEGAL MAT. 613 (1971). For a brief history of the proposal, see notes 23-24 *supra* and accompanying text. An explanation of the American position at Guatemala may be found in *Varkonyi v. VARIG*, 71 Misc. 2d 607, 611, 336 N.Y.S.2d 193, 197 (Sup. Ct. 1972). The official text of the Protocol reads in part as follows:

[An action for damages] may be brought . . . in the territory of one of the High Contracting Parties, before the court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.

162. See Note, *Suit for Damages Suffered in International Flight Requires Establishment of “Treaty” Jurisdiction*, *supra* note 149, at 524.

163. *Id.*

any recovery a passenger might secure, despite the fact that the carrier may have been solely or partially responsible for the passenger's injury or death. This result directly conflicts with the policies behind contribution; the loss is not shared by the wrongdoers according to their relative fault.¹⁶⁴ Instead, loss allocation is often dependent on where the plaintiff purchased his ticket, or other chance factors.¹⁶⁵ A less shocking, but still inequitable, allocation of the burden would occur if a manufacturer wins his action in a foreign forum only to find that his recovery is significantly diminished by expenses that he would not have incurred had he been able to bring his action in a domestic court. The same problem would result if the manufacturer were forced to bring his action in a foreign court which barred recoveries over a certain amount. In both of these situations the manufacturer may be bearing a disproportionately large share of the burden. In addition, if American courts allowed the passenger to sue the manufacturer in a domestic forum and forced the manufacturer to sue the carrier abroad, they would run counter to judicial economy interests of settling all matters arising out of the same transaction in one proceeding. Finally, giving the carrier effective immunity from suits by both the passenger and the manufacturer undermines the deterrence rationale behind contribution law. A failure to place the loss on a party having the ability to both spread the loss over a large segment of society and to obtain insurance against such accidents would be a violation of traditional tort policies.¹⁶⁶

In summary, it appears that domestic courts should allow an airplane manufacturer to maintain a contribution suit against an international air carrier if the former is held liable to a passenger injured on an international flight. This undermines neither the policies of the Warsaw Convention itself nor those of Article 28(1). Balanced against these policy arguments, moreover, is the stronger argument that Article 28(1) is a treaty obligation imposed on all domestic courts by the Constitution, to which these forums must adhere in all circumstances.¹⁶⁷ Thus, while it is clear on policy grounds that the law should be changed to permit manufacturers' contribution suits in domestic forums, this change

164. *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972).

165. PROSSER, *supra* note 127, at 307.

166. *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 150, 282 N.E.2d 288, 293, 331 N.Y.S.2d 382, 388 (1972).

167. See text accompanying notes 153-54 *supra*. For views of courts faced with a conflict between a statute's policy and its literal interpretation, see *Guisseppi v. Walling*, 144 F.2d 608, 623 (2d Cir. 1944) (Hand, J., concurring); *Matter of Capone v. Weaver*, 6 N.Y.2d 307, 309, 160 N.E.2d 602, 603, 189 N.Y.S.2d 833, 835 (1959); *Matter of River Brand Rice Mills v. Latrobe Brewing Co.*, 305 N.Y. 36, 43-44, 110 N.E.2d 545, 548-49 (1953).

should be accomplished by amendment to, or withdrawal from,¹⁶⁸ the Warsaw Convention, and not by judicial fiat.

IV

REALIGNING AIRCRAFT MANUFACTURERS' LIABILITY

Thomas D. Myers

Whatever the virtues of the Warsaw Convention and the Hague and Montreal amendments, they could hardly be termed the allies of aircraft manufacturers. These manufacturers, along with component parts makers, are part of a highly regulated industry with unique legal problems. Their products traverse domestic and international boundaries, simultaneously transporting persons from literally dozens of jurisdictions. An accident involving such a product presents obvious litigation problems. Two of the most serious dilemmas plaguing aircraft manufacturers are (1) the agreements' discriminatory liability limits, which insulate air carriers from heavy damages and thereby shift the major burden to the manufacturers, and (2) the difficulty of sustaining third-party contribution or indemnity claims in litigation based on strict products liability.¹⁶⁹ The scope of the problem appears to be increasing in geometric proportions. Jet travel is reaching nations never before served, and the size of the modern "jumbos" unfortunately forbodes disasters involving hundreds of people.¹⁷⁰

Previous sections of this Comment have dealt with the relatively technical questions of when Warsaw consequences attach and where jurisdiction of possible contribution actions may lie. This section will deal

168. Denouncing the Warsaw Convention, the United States came very close to withdrawal in 1965 but then withdrew the statement when the Montreal Agreement became imminent. See note 19 *supra* and accompanying text.

169. One of the central queries of this section is whether aircraft manufacturers, if sued by an injured passenger on a theory of strict products liability, should be entitled to indemnity or contribution against third-party purchasers or users. Traditionally, courts have held in the negative. *Orlove v. Philippine Air Lines*, 257 F.2d 384 (2d Cir. 1958); *Schipper v. Lockheed Aircraft Corp.*, 278 F. Supp. 743 (S.D.N.Y. 1968); *Maryland v. Capital Airlines, Inc.*, 280 F. Supp. 648 (S.D.N.Y. 1964); *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974); *Burke v. Sky Climber, Inc.*, 13 Ill. App. 3d 498, 301 N.E.2d 41 (1973).

Some evidence exists, however, that the trend may be reversing. *Kuziw v. Lake Engineering Co.*, 385 F. Supp. 827 (N.D. Ill. 1974); *Goldstein v. Compudyne Corp.*, 262 F. Supp. 524 (S.D.N.Y. 1966); *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

170. The crash of a Turkish Airlines DC-10 outside Paris on March 3, 1974, for example, claimed the lives of all 346 passengers and crew on board. *N.Y. Times*, Mar. 4, 1974, at 1, col. 8.

with the broader issue of what can be done to counteract the discriminatory effect of the Warsaw Convention and its progeny, which place the airlines in a sheltered position and expose the manufacturers to unparalleled liability.

A. RECENT DEVELOPMENTS IN THE LAW

At the time the Warsaw scheme was conceived, common law requirements of privity of contract usually barred passengers from recovering damages directly from the aircraft manufacturer.¹⁷¹ One result, as we have seen,¹⁷² was that manufacturers went unrepresented in Warsaw. Subsequent debate engaged airline, passenger and government alike in a search for liability dollar figures that reflected the economic realities of the 1960's and 1970's.¹⁷³ In the nearly fifty years since Warsaw, however, three significant changes in American jurisprudence have occurred which suggest that the debate over dollar limitations may no longer be Warsaw's greatest problem.

First, the passage of the Federal Tort Claims Act¹⁷⁴ has made it possible for plaintiff passengers to sue and recover from the United States Government for the negligence of Air Traffic Controllers when such negligence is a contributing factor in an air crash. Second, the common law rule prohibiting contribution among joint tortfeasors¹⁷⁵ has been substantially modified,¹⁷⁶ creating complex legal problems as to shared liability between air carrier, government, and aircraft manufacturer. Third, and certainly most significant, has been the evolution of an entirely new branch of law—strict products liability. Essentially, it is the arrival of this principle, unknown and unforeseen forty years ago, that has placed aircraft manufacturers, parts manufacturers and others down the line of production in a delicate and vulnerable position.¹⁷⁷

171. The "privity of contract" requirements first enunciated in *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. 1842), formed a cornerstone of American tort law that remained well preserved for nearly one hundred years.

172. See note 25 *supra* and accompanying text.

173. For a history of the amendments to the Warsaw Convention raising its liability limitations, see section I.B.-D. *supra*.

174. Federal Tort Claims Act of 1946, ch. 753, tit. IV, 60 Stat. 812 (codified in scattered sections of 28 U.S.C.).

175. *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799). See generally Boblen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

176. Most modification has been by state statutes, enacted in most jurisdictions, which permit contribution. See, e.g., the New York statute cited in note 127 *supra*. The statutes are described in W. PROSSER, *LAW OF TORTS* 307-10 (4th ed. 1971).

177. The strict products liability doctrine is only the present "phase" of an evolution in tort law. Under the common law, injury was usually borne by the one suffering it unless

Strict products liability wields the constant threat that the manufacturer will be held liable for huge sums above the treaty limitations even under circumstances where his negligence is concededly small in relation to that of the air carrier.¹⁷⁸

A manufacturer's responsibility may encompass the defective work of the thousands of component parts makers from whom he purchases equipment.¹⁷⁹ It may include the duty to "redesign" long after parts or aircraft have been on the market,¹⁸⁰ and may even extend to a "duty to

special reason could be found for shifting the burden. A policy justification was advanced in favor of encouraging industrial development. With the doctrine of negligence came standards of "due care," "reasonableness," and the development of a contractual relationship between buyers and sellers. Warranty law carried this a step further, negating the "fault" concept and relying instead upon a pure contractual relationship, express or implied. See UNIFORM COMMERCIAL CODE §§ 2-314, 2-315. More recently, strict liability has placed more stringent demands on manufacturers to ensure that their products are not "unreasonably dangerous" (*Greenman v. Yuba Power Products*, 59 Cal.2d 57, 377 P.2d 897 (1962)), or "defective" (*Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963)). See also RESTATEMENT (SECOND) OF TORTS § 402A (1965):

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

As the title "strict liability" suggests, the effect of this doctrine has been to preclude quantifying negligence between joint tortfeasors and hence substantially to prohibit contribution or indemnity. Have we come full cycle back to *Merryweather v. Nixan*? See note 206 *infra* and accompanying text.

178. This is the essence of the indemnity and contribution arguments taken up below. Without some apportionment of damages an aircraft manufacturer, perhaps only five percent negligent in a particular accident, could be held liable for unlimited damages while the third-party air carrier, hypothetically ninety-five percent negligent, might well enjoy the benefits of treaty protection. For an exception to this rule, see Article 25 of the Warsaw Convention, on willful misconduct.

179. In *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1964), an implied warranty of fitness was found to run to and in favor of the plaintiff passenger against the defendant manufacturer, but not against the component parts maker for a defective altimeter. In *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961), an aircraft manufacturer was found liable (1) for buying and installing a defective component part from a third party, and (2) for its own negligence in installing a defective component or failing to warn of known defects.

180. *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir.), *cert. denied*, 346 U.S. 959 (1969); *Noel v. United Aircraft Corp.*, 359 F.2d 671 (3d Cir. 1966).

warn" purchasers of operating limitations years after the initial sale.¹⁸¹ Thus, our hypothetical Radars and Vectors are no longer limited to suits solely against the air carrier. Even a slight suspicion of negligence or the possibility of a strict liability claim will mean that modern plaintiffs will join aircraft manufacturers and component parts makers as defendants.

Consider the impact of these developments when applied to our hypothetical—the crash of a modern day jumbo jet carrying upwards of 350 people.¹⁸² An accident between Boston and London would fall within the purview of the Montreal Agreement, limiting the air carrier's possible liability to a maximum \$75,000 per person or a total of \$26,250,000, only slightly more than the cost of the aircraft.¹⁸³ If the hypothetical fatal flight had no "contact" with the United States, passengers could well be limited under the Hague Protocol to a maximum \$16,582 each against the air carrier, or even as little as \$8,291 under the original Warsaw guidelines. Given these recovery limitations, plaintiffs might well turn to aircraft manufacturers for additional compensation. It is not unrealistic to predict that each passenger could be awarded a substantial verdict in the \$500,000 to \$1,000,000 range. This would place a potential burden on the aircraft manufacturers for the balance—\$105,000,000 to \$300,000,000 for a single crash. Needless to say, none of the major manufacturers are in a position to afford such a disaster.¹⁸⁴

The problem extends well beyond the ongoing rift between manufacturer and air carrier. The Government may also be liable for the negligence of Air Traffic Controllers.¹⁸⁵ Component parts manufacturers, the general aviation community, competing bus, rail, and sea-going lines, and even sister domestic airlines are also unable to claim protection such as that the Warsaw Convention offers international air carriers.

181. In *Tayam v. Executive Aero, Inc.*, 166 N.W.2d 584 (Minn. 1969), Mooney Aircraft Co.'s negligent failure to warn of operating procedures reasonably held to be within the contemplation of the manufacturer constituted a breach of duty—even five years after the sale of the aircraft.

182. The hypothetical is set forth in full in section I.D. *supra*.

183. On November 12, 1975, a DC-10 was destroyed as the result of bird strikes and the ensuing fire while on take-off at Kennedy Airport in New York. The loss was reported at \$20 million. *N.Y. Times*, Nov. 13, 1975, at 82, col. 1.

184. Boeing Aircraft Corporation, for example, reported net earnings in 1974 of \$72.4 million. BOEING AIRCRAFT CORP., 1974 ANNUAL REPORT. Lockheed Aircraft reported net earnings over the same period of \$23.2 million. LOCKHEED AIRCRAFT CORP., 1974 ANNUAL REPORT. The financial portrait of foreign international air carriers is considerably worse. During the late 1960's, as many as one out of four were reported operating at a net loss. Stephens, *The Montreal Conference and International Aviation Liability Limitations*, 33 *J. AIR L. & COM.* 554, 580 (1967).

185. See note 174 *supra* and accompanying text.

Finally, there are more than 40,000 component parts manufacturers and companies in aviation-related industries which, like the "end manufacturer," could be held liable under strict liability without the protection of Warsaw.¹⁸⁶

Not only are the ultimate risks very high, but manufacturers complain that they are "easy" targets. In air crash litigation, contributory negligence by a passenger plaintiff is unusual.¹⁸⁷ *Res ipsa loquitur* thus becomes an attractive alternative, shifting the burden of proof to defendant manufacturer and air carrier.¹⁸⁸

B. ALTERNATIVE SOLUTIONS

1. Raising Warsaw Liability Limitations

One obvious suggestion for bringing the liability of aircraft manufacturers and component parts makers more in line with that of the air carriers has been to raise the maximum liability of the carriers. From the point of view of the manufacturers, this move would be analogous to raising the "deductible" payment on an insurance policy. Manufac-

186. One commentator has written:

[T]here are approximately 40,000 manufacturers and component-part makers involved in the production of aircraft. Each of these aircraft manufacturers and makers of component parts is liable *without* any limitation whatever in the event it breaches its duty of "strict liability," which renders a manufacturer liable even though the manufacturer exercised "reasonable care" in the design and manufacture of the aircraft and parts.

Kennelly, *Aviation Accidents*, 18 TR. LAWYER'S GUIDE 158, 167 (1974).

187. The Warsaw Convention explicitly provides for cases in which contributory negligence may be a factor:

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Warsaw Convention, art. 21.

188. The doctrine of *res ipsa loquitur* is ideally suited for the passenger plaintiff who boards an aircraft, takes his assigned seat, obeys the seatbelt and no smoking signs, and is subsequently injured. First announced in *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863), the doctrine normally involves three essential elements: (1) the act or event must be of such a nature that it would not normally happen without someone's negligence; (2) it must not be caused by any instrumentality within the claimant's control; (3) there must not have been any contributory act or negligence on the part of the plaintiff. See Maloney, *Current Trends in Aviation Products Liability Law*, 1971 INS. L.J. 53. To explore the effect that the *Dole* doctrine (see notes 226-32 *infra* and accompanying text) has had on *res ipsa loquitur*, see *DeWitt Properties Associates, Inc. v. City of New York*, 47 App. Div. 2d 300, 366 N.Y.S.2d 634 (1975). One expert adds that in the unusual, but not unknown, cases of in-flight structural failure, especially where unusual turbulence, maneuvering or loading is *not* involved, the summary judgment procedure should be encouraged. Kennelly, *supra* note 186, at 218.

urers might still be liable for substantially more than the carriers in the case of a mass disaster, but a \$100,000 or \$150,000 carrier liability would protect manufacturers against a considerable volume of crash litigation. Although not all losses are initially absorbed by air carriers, this policy would reduce a manufacturer's liability where guilt is shared.¹⁸⁹ Both United States airlines and their Western European competitors have witnessed a significant increase in the amounts recovered in personal injury and wrongful death actions.¹⁹⁰ The overall safety record of the major carriers has made insurance available to them at considerably lower rates than in previous years, and thus they are better prepared to shoulder an increased potential liability without directly increasing their operational costs.

On the other hand, too many factors suggest that an increase of liability limitations alone would not be a satisfactory solution. The most significant criticism is that this approach would fail to address the fundamental problem that one sector of the aviation community, the international air carrier, is artificially insulated from potential large-scale liability.¹⁹¹ In addition, a uniform increasing of liability limitations would ignore the very dramatic discrepancies in living standards between signatories of the Warsaw, Hague and Montreal agreements. The effect would be to discourage states where recoveries rarely reach these limits from participating in these international agreements. Increased limitations, furthermore, may be relevant only to that fraction of the world's population which travels internationally by air—those who arguably need coverage in excess of \$75,000. Poorer air passengers should not be made to pay the price of satisfying the products liability problem. As

189. Representatives of the International Civil Aviation Organization (I.C.A.O.), meeting in Guatemala, recently recommended important modifications to the Montreal Agreement. See notes 23-24 *supra* and accompanying text. The proposed Guatemala Protocol would create an "absolute liability" on the air carrier of \$100,000 with the exception of cases involving contributory negligence. Beyond the \$100,000, it is suggested that separate "national systems" provide additional compensation under special circumstances.

At least two major problems are evident in such a proposal: (1) it continues the discriminatory practice of protecting air carriers from large verdicts while manufacturers, the general aviation public, and other members of a larger aviation community bear the risks, and (2) it ignores important constitutional questions. See note 191 *infra*.

The Guatemala proposal has received a cool reception in the Congress and appears permanently tabled.

190. See note 100 *supra*.

191. Recently, plaintiffs have challenged the constitutionality of limiting, by treaty or statute, an individual's fair recovery in personal injury and wrongful death actions. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Hornsby v. Fish Meal Co.*, 431 F.2d 865 (5th Cir. 1970). On the validity of this argument as it relates to the Warsaw Convention, see Engstrom, *The Constitution and the Warsaw Convention—Are They Reconcilable?*, 6 THE FORUM (ABA) 25, 32-37 (1970).

one commentator has said, "not everywhere should peasants have to pay for the King's dinner."¹⁹² Finally, this solution would have a direct impact upon raising the cost of insurance and passenger fares.

In short, changing the liability structure for air carriers to effect some relief for manufacturers would be a rather indirect and inefficient solution. It would ignore the current problem of disparate treatment, discourage participation in international conventions, and benefit only a few individuals while forcing thousands to pay higher fares.

2. *Parallel Limitations for Aircraft Manufacturers*

A second alternative to the aviation industry's liability dilemma lies in a proposal to establish liability limitations for the aircraft manufacturer similar to those presently covering air carriers.¹⁹³ This option would remedy many of the shortcomings of the preceding proposal, but would fail to adequately safeguard passenger interests. This conclusion can be seen if the proposal is analyzed in light of the four policy considerations essential to any acceptable solution: (1) equity in risk distribution, (2) freedom from unusual economic hardship, (3) fairness of recovery to passengers and related constitutional questions, and (4) uniformity of recovery for domestic and international travelers similarly situated.

Consider each of these policy elements in turn. Under the first, it is clear that a \$75,000 liability limitation for manufacturers would redress the inequities of risk-bearing between airlines and manufacturers,¹⁹⁴ but the proposal fails to look beyond the narrow manufacturer-air carrier conflict. Component parts manufacturers and the federal government, both of whom might also be liable,¹⁹⁵ deserve and will probably demand similar protection. Limitations, if they are to exist at all, must be designed to offer uniform security to all targets of aviation crash litigation. The second policy element concerns relief of the various parties from undue hardships. The proposal of establishing liability limitations for manufacturers also encounters difficulty under this branch of the analysis. An effective argument can be made that the manufacturer, like the air carrier, faces unique risks in marketing today's jumbo jets.¹⁹⁶

192. 33 J. AIR L. & COM. 542, 546 (1967) (remarks of R.H. Mankiewicz, during special discussion session on the Montreal Agreement).

193. A program initially articulated by aircraft manufacturers, this proposal has experienced considerable disfavor as a result of its limited scope.

194. This inequity is described in notes 177-84 *supra* and accompanying text.

195. See notes 185-86 *supra* and accompanying text.

196. The threat of mass disaster, see, e.g., note 170 *supra*, poses a unique transportation industry problem. For estimates of the possible liability from a single crash, see note 184 *supra* and Kennelly, *supra* note 13, at 168.

Warsaw-type limitations, at best, could reduce only a fraction of their potential liability, since the presence of large aircraft on domestic "non-Warsaw" routes is as commonplace as on the international runs.¹⁹⁷ The most serious objections to this proposal stem from the third and fourth policy concerns. Studies prepared in advance of the Guatemala convention of 1971¹⁹⁸ indicate that recoveries for wrongful death in non-Warsaw cases were averaging well in excess of \$100,000;¹⁹⁹ if there were a limitation on the amount a plaintiff might recover from the manufacturer as well as the air carrier, there would be a total destruction of any uniform treatment of national and international air passengers such as Radar and Vector in our hypothetical. Such discrimination is without foundation unless the risks of domestic air travel can be shown to be appreciably greater than those of international flight. In addition, any new limitations at this moment would come at a time when the right to restrict recovery in wrongful death actions is under constitutional attack.²⁰⁰

3. *Eliminating All Liability Limitations*

Perhaps the most attractive solution would be the elimination of all liability limitations.²⁰¹ This proposal would clearly offer the cleanest and most thorough solution to the aircraft manufacturers' principal dilemma—the problem of discriminatory protection—and would promise a suitable balance of passenger, air carrier, and manufacturer interests. Critics of this suggestion have argued that an elimination of liability limitations would portend a return to protracted and expensive litigation by reducing the air carrier's incentive to settle before trial.²⁰² In all likelihood the volume of litigation would indeed reflect a modest upturn, but the costs involved surely would be outdistanced by the merits of a "free market" liability system.

Apart from this criticism, the proposal has several distinct advantages, not the least of which would be removal of the artificial insulation

197. The routes with which these "heavy" jets (Lockheed L-1011, Douglas DC-10 and Boeing 747) are associated have little to do with international boundaries. They are primarily assigned to high density runs and are as likely to be used in the "Northeast corridor" as on transatlantic flights.

198. This convention drafted the Guatemala Protocol. See note 23 *supra* and accompanying text.

199. See note 100 *supra*.

200. See note 191 *supra*.

201. Kennelly, *supra* note 13, at 158; Kreindler, *The Guatemala Protocol*, 6 AKRON L. REV. 131 (1973); Kreindler, *Warsaw Convention Symposium*, 33 J. AIR L. & COM. 542, 551-52 (1967); Editorial, N.Y. Times, Oct. 23, 1965, at 30, col. 2.

202. DRON, *supra* note 1, at 37-40; Boyle, *A Response to Lee Kreindler*, 6 AKRON L. REV. 141, 142 (1973).

currently protecting one branch of the industry. Not only would manufacturers be brought to an even par with air carriers, but component parts makers, the federal government, and the dozens of competing transportation facilities and domestic airlines who face similar risks would be equally treated. Such a radical departure from the Warsaw line of aviation agreements need not jeopardize the valuable baggage, ticketing and jurisdictional contributions made by the agreements.

Whether or not this major policy shift is forthcoming will depend on additional political and practical considerations. The United States has played the dominant role in finalizing each of the international aviation agreements of import today. A diplomatic finesse of no small magnitude would be required to return this country to a free market liability system, and the move would fly in the face of the worldwide trend toward state ownership and management of air travel.²⁰³

If and when such a necessary move occurs, its success will depend largely on the manufacturers' ability to shift liability freely by means of contribution or indemnity, when appropriate, onto the principal tortfeasor. This may be the manufacturers' most serious dilemma.

C. CONTRIBUTION AND INDEMNITY

The old tort maxim "no contribution among joint tortfeasors,"²⁰⁴ which has lately fallen into disrepute,²⁰⁵ has retained its punch in plaguing aircraft manufacturers. Manufacturers who place a defective product in the stream of commerce have been barred from contribution or indemnity against purchasers or users whose concurrent negligence may have played a significant role in creating the cause of action.²⁰⁶ Establishing a basis for the manufacturers' right to indemnity or contribution, therefore, is the essence of the solution to our problem.

Several different criteria are commonly used to determine the applicability of contribution or indemnity in negligence litigation, and most

203. WORLD AVIATION DIRECTORY 165-77 (Dean ed. Winter 1971-72).

204. *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799) was the case through which this doctrine was first enunciated. See note 175 *supra*. Its underlying rationale is that no relief should be granted a joint tortfeasor when the injury for which the relief is asked arose from his own negligence.

205. The "no contribution" rule has been mitigated substantially with the passage of comparative negligence statutes in many states. As one commentator has said, "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone . . . while the other goes scot free . . ." PROSSER, *supra* note 127, at 307.

206. *Orlove v. Philippine Air Lines*, 257 F.2d 384 (2d Cir. 1958); *Schipper v. Lockheed Aircraft Corp.*, 278 F. Supp. 743 (S.D.N.Y. 1968); *Maryland v. Capital Airlines, Inc.*, 280 F. Supp. 648 (S.D.N.Y. 1964); see also Annot., 28 A.L.R.3d 943, 950-53 (1969).

of these have found relevance with respect to products liability cases as well. The "active-passive" negligence test which allows a "passively negligent" tortfeasor to recover indemnity from an "actively negligent" tortfeasor²⁰⁷ is finding wide-spread application in products liability.²⁰⁸ Similarly, the existence of a duty owed by one joint tortfeasor to another,²⁰⁹ the indemnitee's possible liability to third persons,²¹⁰ and the constructive, derivative or vicarious nature of this liability²¹¹ all may influence the court in assessing the applicability of contribution or indemnity.

The straight "active-passive" negligence test has received explicit endorsement in nearly a dozen states and the District of Columbia,²¹² but the extent to which those states are or will be willing to apply an analogous active-passive test to strict products liability situations remains in issue. Obviously, a fundamental incongruity exists between the two situations. While the active-passive test normally turns upon quantitative degrees of negligence, the strict products liability analysis hinges upon an absolute duty or level of performance. The two need not be mutually exclusive, however, as an examination of a number of recent cases will demonstrate. There has been considerable change in this field, and the jurisdictions are by no means in agreement on the question. Many courts have been willing to listen to novel argument.

A few states have adopted very rigid rules negating any active-passive negligence test. In *McClish v. Niagara Machine & Tool Works*,²¹³ for example, a Federal District Court in Indiana reaffirmed a longstanding

207. The "active-passive" negligence test permits indemnity by one joint tortfeasor against another where the former party establishes that the latter was the actual agency through which the injury was sustained. *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974). For a discussion of the law in the individual states, see Annot., 28 A.L.R.3d 943, 950-53 (1969).

208. See, e.g., *Allied Mut. Cas. Corp. v. General Motors Corp.*, 279 F.2d 455 (10th Cir. 1960); *Reese v. Chicago, B. & Q. R. Co.*, 55 Ill.2d 356, 303 N.E.2d 382 (1973); *Lewis v. Amchen Products, Inc.*, 510 S.W.2d 46 (Mo. Ct. App. 1974). See also Annot., 28 A.L.R.3d 943, 950-53 (1969).

209. See, e.g., *Chamberlain v. Carborundum Co.*, 485 F.2d 31 (3d Cir. 1973); see also Annot., 28 A.L.R.3d 943, 953-54 (1969).

210. See, e.g., *Aetna Freight Lines, Inc. v. R.C. Tway Co.*, 352 S.W.2d 372 (Ky. 1961); *Roughan v. Boston & L. Block Co.*, 161 Mass. 24, 36 N.E. 461 (1894); see also Annot., 28 A.L.R.3d 943, 955-57 (1969).

211. See, e.g., *Pelkey v. State Sales, Inc.*, 210 F. Supp. 924 (E.D. Mich. 1962); *Cohen v. Wasserman*, 28 Misc. 2d 58, 208 N.Y.S.2d 865 (Sup. Ct. 1960); see also Annot., 28 A.L.R.3d 943, 954-55 (1969).

212. These states include Illinois, Iowa, Kentucky, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Oregon and Texas. Annot., 28 A.L.R.3d 943, 950 (1969).

213. 266 F. Supp. 987 (S.D. Ind. 1967).

holding that "any distinction between 'active' and 'passive' negligence has been specifically repudiated . . ." ²¹⁴ The right of indemnity was denied in the absence of an express or implied contract right, with the lone exception of indemnity for one whose liability to another party was either constructive or derivative. ²¹⁵ Other courts, while holding that recovery is available to a passively negligent manufacturer against an actively negligent seller or user, have established strict criteria for bringing such third-party claims. In *Scala v. American Laundry*, ²¹⁶ a New York court held a third-party complaint for indemnity properly dismissed solely because the original complaint charged the manufacturers with active negligence. More recently, this very restrictive view has been qualified in favor of the manufacturer. ²¹⁷ Other states, while accepting the active-passive doctrine, make additional provisions for joint tortfeasors in *pari delicto*, denying to both any right to indemnity but leaving open the possibility of contribution. ²¹⁸

A considerable number of decisions have been handed down in a variety of jurisdictions to confirm the now well-established active-passive negligence philosophy. In the Federal District Courts, ²¹⁹ Federal Courts of Appeals, ²²⁰ and most recently in the state courts, ²²¹ decisions have reiterated the contention that the creation of a defect in the process of manufacture necessarily implies "active" negligence which bars indemnity actions against third-party dealers or users. The fact that a manufacturer is held liable under a strict products liability formula implies that some "guilt" has been established against him; the fact that the court does not label this "fault" or "negligence" in certain instances should be immaterial. By analogy, there is little reason why we should not compare the "guilt" of manufacturers with that of air carriers or subsequent users even if one is based on strict liability and the other on negligence.

This analysis is supported by at least two decisions. In the 1969 deci-

214. *Id.* at 991. The quotation was taken from *Indiana Harbor Belt R.R. Co. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942).

215. *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987, 991 (S.D. Ind. 1967).

216. 233 N.Y.S.2d 875 (Sup. Ct. 1962).

217. In *Campbell v. Joslyn Mfg. & Supply Co.*, 65 Ill. App. 2d 344, 212 N.E.2d 512 (1965), the active or passive negligence of the plaintiff was held to be a factual question for the jury and hence the third-party complaint for indemnity was not dismissable on motion.

218. *Degen v. Bayman*, 86 S.D. 598, 200 N.W.2d 134 (1972).

219. *Schipper v. Lockheed Aircraft Corp.*, 278 F. Supp. 743 (S.D.N.Y. 1968); *Maryland v. Capital Air Lines, Inc.*, 280 F. Supp. 648 (S.D.N.Y. 1964).

220. *Orlove v. Philippine Airlines*, 257 F.2d 384 (2d Cir. 1958).

221. *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974); *Burke v. Sky Climber, Inc.*, 13 Ill. App. 3d 498, 301 N.E.2d 41 (1973).

sion of *Lopez v. Brackett Stripping Co.*,²²² an Illinois Federal District Court reiterated the position that indemnity would be denied manufacturers whose alleged wrongdoing constituted "active" negligence but attempted to equate the manufacturer's strict liability for marketing a defective book trimming machine and his active negligence in doing so. The court found that a judgment based on strict liability would "necessarily be a finding that [the manufacturer's] product was defective when it left its control" and therefore could not "characterize a judgment of that kind as a finding of only passive, secondary or merely technical negligence so as to allow an action for indemnity"²²³ The clear implication is that such liability is tantamount, for purposes of contribution or indemnity, to an act of active negligence. Even more persuasive is the 1966 decision in the Southern District of New York in *Goldstein v. Compudyne Corp.*²²⁴ In that opinion, Judge MacMahon pointed out that the defendant manufacturer would be entitled to indemnity under New York substantive law if it could demonstrate that, despite the defective condition of manufacturer's product at the time of sale, the third-party employer-purchaser knew of the defect, disregarded it, and used the instrument in spite of the known danger. In a subsequent case citing *Goldstein*, an Illinois federal court noted that "it is clear to the Court that the fact that a manufacturer is sued on theory of strict liability for a defective product does not preclude a third-party action against plaintiff's employer"²²⁵

A small revolution occurred at the state level when the New York Court of Appeals handed down its 1972 decision in *Dole v. Dow Chemical Co.*²²⁶ Realizing the practical difficulties in measuring "degree[s] of differential culpability"²²⁷ and cognizant of mounting criticism of the active-passive basis of apportioning liability between defendants, the court abandoned the doctrine completely.²²⁸ Subsequent decisions were

222. 303 F. Supp. 669 (N.D. Ill. 1969).

223. *Id.* at 670.

224. 45 F.R.D. 467 (S.D.N.Y. 1968).

225. *Kuziw v. Lake Engineering Co.*, 385 F. Supp. 827, 830 (N.D. Ill. 1974). In distinguishing *Burke v. Sky Climber, Inc.*, 13 Ill. App. 3d 498, 301 N.E.2d 41 (1973), the court in *Kuziw* noted that its case involved a situation where the third-party defendants, through alterations, had "actively" created a defective baling machine. Hence, without particular deference to the doctrine of strict liability, the court sought to place liability on the party who created the "putatively dangerous condition which [was] the sole proximate cause of the plaintiff's injury." 385 F. Supp. at 830.

226. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

227. *Id.* at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

228. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92. The court also noted that the question of apportioning responsibility is one of fact. The New York State legislature has recently codified the rule of *Dole* in the following provision:

quick to cite *Dole*, testing the limitations of the court's ruling. In *Walsh v. Ford Motor Co.*,²²⁹ for example, a third-party counterclaim by a defendant automobile dealer against the manufacturing company was sustained and liability apportioned on a claim of implied warranty as well as negligence. Apportionment in cases involving strict liability was not so readily recognized, but would clearly seem to follow from the drift of recent opinions.²³⁰ A leading case in the *Dole* revolution is *Kelly v. Diesel Constr. Co.*,²³¹ in which the New York Court of Appeals unanimously concluded that neither logic nor policy could support a rule barring indemnity from the actual wrongdoer. Recognizing that all the parties are inevitably covered by insurance, the court sought to distribute the judgment in accordance with the degrees of fault, thus permitting a defendant, adjudged strictly liable, to recover from third parties who might be proven the actual wrongdoers.²³² The applicability of the *Kelly* position to air crash litigation is probably only a matter of time, but the extent to which other jurisdictions will adopt and develop a similar approach remains in question.

A number of policy considerations support the applicability of indemnity actions to aircraft manufacturer suits. Indemnity against the air carrier would preclude the possibility of the latter's insulation from liability, especially under circumstances of often-admitted or gross negligence, and thus would foster an important element of deterrence to the airlines. It would also bring the manufacturer and air carrier onto an even plane, both with respect to one another and vis à vis the passenger plaintiff, making it possible to litigate disputes between manufacturer and air carrier at the same time as the primary action.

. . . [T]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

N.Y. C.P.L.R. § 1401 (McKinney Supp. 1975-76). The codification avoids the use of the word "tortfeasor," suggesting the applicability of the doctrine regardless of the nature of the tort. For a discussion of related procedural problems, see N.Y. C.P.L.R. § 1007 (McKinney Supp. 1975-76). Earlier cases suggesting the *Dole* approach include *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952) and cases cited in 42 C.J.S. *Indemnity* § 27 (1944).

229. 70 Misc.2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. 1972). For a federal court treatment of the indemnity for implied warranty problem, see *Coans v. Washington Mirror Works, Inc.*, 344 F. Supp. 653 (S.D.N.Y. 1972).

230. See, e.g., *Rubel v. Stackrow*, 72 Misc.2d 734, 340 N.Y.S.2d 691 (Sup. Ct. 1973), indicating that the *Dole* rationale may be extended to an action based on an alleged willful violation of a strict liability statute.

231. 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974).

232. *Id.* at 7, 315 N.E.2d at 753, 358 N.Y.S.2d at 688-89.

In summary, it is clear that something must be done to permit aircraft manufacturers, who are now exposed to virtually unlimited liability by virtue of strict products liability actions by passengers, to achieve a position equitable with that of the Warsaw-protected airlines. Among the alternatives for realigning possible liability, proposals for the elimination of the discriminatory liability limits and full right of contribution or indemnity between the two tortfeasors appear the most attractive. A simple increase of the current Montreal limitations or institution of similar liability protection for manufacturers would fail to resolve the serious inequities which separate the treatment of Radar and Vector. Such solutions could only intensify the debate over the constitutionality of limiting, by treaty or statute, a passenger's fair recovery for injury or wrongful death. Whichever alternative is opted, the aircraft manufacturer anxiously awaits an end to the discriminatory practices that have singled him out as the industry's principal risk-bearer.

CONCLUSION

When delegates to the Warsaw Convention drafted their original agreement in 1929, they resolved many of the international difficulties facing the then-budding aviation industry. The Convention standardized international practice for many of the rudimentary aspects of aviation procedure, resolved difficult problems of jurisdiction, and placed what many considered to be necessary limitations on the liability of struggling airlines in negligence suits brought by passengers. As the years passed, however, developments in the aviation industry confronted the Convention with legal, political, and economic problems which the original Warsaw delegates never anticipated. Negligence and wrongful death recoveries mushroomed in size and the "infant industry" rationale for airline protection dissipated, forcing the Hague Protocol, Montreal Agreement, and proposed Guatemala Protocol to increase the liability limitation many-fold. Other revolutions have occurred as well: contribution between joint tortfeasors, long barred at common law, is now becoming widely accepted in this country, and strict products liability has grown at a phenomenal pace, exposing the aircraft and components manufacturers to liability traditionally shouldered only by the airline. Furthermore, a sharp rise in the incidence of terrorism directed at the aviation community has created jurisdiction and liability problems unheard of only a few years ago. Not even the Hague, Montreal, and Guatemala agreements have been able to handle these new threats to traditional Warsaw Convention provisions.

This Comment has focused on three of the problems spawned by these recent developments. Section I explored the scope of "embarking or disembarking" under Article 17 of the Convention and determined that

a narrow construction of that Article would allow passengers' actions in airport terrorism cases to be governed by domestic law, thus freeing their recoveries from low Warsaw limitations. Section II examined the way in which Article 28(1) works to prevent domestic courts from entertaining suits for contribution by manufacturers against carriers, and concluded that the terms, although not the policies, of Article 28(1) should bar such actions. Finally, Section III dealt with the effect that contribution and indemnity have on the liability of aircraft manufacturers and found that, among the various alternatives proposed, the best solutions would be to eliminate present Convention liability limitations and extend the right of indemnity or contribution to manufacturers without regard to the particular nature of the wrong.

The individual sections of this Comment, then, have largely attempted to examine the issues raised by recent legal developments in light of the original Convention framework. Practical solutions necessarily must be found outside this structure, however, since the problems generated by these developments are not addressed, let alone solved, by the Convention. Clearly, profound changes are needed in the laws governing international air travel. As the interests of passengers, carriers, and manufacturers conflict, it will be difficult to find solutions which appeal to all the parties. In addition, there will be conflicts among the nations adhering to the Convention. The United States' pro-passenger bias stands in stark contrast to the desire of other nations to protect their developing infant carriers. At best, international agreement on the fundamental issue of limited carrier liability will be difficult, and will require all countries to compromise their positions. Thus, it is possible that the United States may not be able to obtain the uniformity which will flow from an international agreement without assenting to some form of limited carrier liability. While the process of balancing these divergent interests will not be easy, and cannot hope to have results which fully satisfy all interested parties, the need for change in this area is paramount. Unless it attracts the early concern of all interested parties, issues of modern legal and political importance will continue to be governed by a document drafted before such issues even arose.