

# Warsaw, Hague, the 88th Congress and Limited Damages in International Air Crashes

Daniel Karlin

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

## Recommended Citation

Daniel Karlin, *Warsaw, Hague, the 88th Congress and Limited Damages in International Air Crashes*, 12 DePaul L. Rev. 59 (1962)  
Available at: <https://via.library.depaul.edu/law-review/vol12/iss1/4>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [wsullivan@depaul.edu](mailto:wsullivan@depaul.edu), [c.mcclure@depaul.edu](mailto:c.mcclure@depaul.edu).

# WARSAW, HAGUE, THE 88TH CONGRESS AND LIMITED DAMAGES IN INTERNATIONAL AIR CRASHES

DANIEL KARLIN

**F**OR some twenty-eight years, the United States adherence to the Warsaw Convention has resulted in tragic consequence to the families of passengers who have met their death while in international air transportation, as well as to the persons severely injured as a result of air crashes, bound by the terms of the Convention.

The incidence of unjust return for these catastrophes arises by reason of the limitation of liability insofar as the air carrier is concerned under the terms of the Warsaw Convention in that it restricts the maximum amount of recovery to approximately \$8,300.00 in United States currency, unless willful misconduct on the part of the carrier can be proven.

Recently, the Interagency Group on International Aviation reported to the State Department its recommendations in connection with the Warsaw Convention. The State Department has tentatively approved these recommendations and has asked for Congressional implementation thereof. The two basic related recommendations made are:

(1) ratification of the Hague Protocol which (upon ratification by a sufficient number of states) would raise the liability of carriers in international aviation from the present limit of \$8,300 to a new limit of \$16,600; and

(2) enactment of complementary legislation which would require United States flag carriers operating in international air transportation to provide all passengers with automatic accident insurance in the amount of \$50,000 for the benefit of each passenger killed and up to \$50,000 for each passenger injured in an accident, in addition to the amount of recovery provided for in the Hague Protocol.<sup>1</sup>

If there is validity to these amending concepts, it arises out of the fact that with the exception of only one governmental agency participating in the recommendations, all of the agencies concur in the ac-

<sup>1</sup> 47 Dep't. State Bull, No. 1210, 362 (1962).

---

Mr. Karlin is a graduate of DePaul University College of Law, vice-chairman of the post admission education committee of the Chicago Bar Association, a lecturer on negligence law, and member of the aviation section of the N.A.C.C.A. Bar Association.

knowledge that neither the Warsaw Convention nor the Hague Protocol provided a sufficient return for death and injury. The agency that did not concur was the department of commerce.

It further acknowledges by virtue of another recommendation<sup>2</sup> that for the first time the travelling public should be fully informed of the existence of the limitation. While the proposed amendments do not, in the writer's opinion, establish a realistic basis for the carrier's liability and constitute under the treaty power an abrogation of the right to full damages in the event of the carrier's negligence, the obligation of disclosure satisfies a moral responsibility the air lines have heretofore avoided.

It is to the question of the moral and legal validity of these recommendations, as well as to the Warsaw Convention itself, that this article is directed. It appears essential, therefore, that to properly evaluate that question, one must look to the historical basis for the doctrines involved.

How then, in a nation whose law holds repugnant and against its public policy a common carrier's contract limiting its liability for negligence resulting in injury or death, did this come about?

It started in 1925 at the meeting in Paris. It culminated in 1929 at the meeting in Warsaw. During the four years that it took to finalize the agreement, the United States was not involved in any of the discussions, although at the first conference and some of the others including Warsaw, we were represented by observers.<sup>3</sup> It was the effort and the product of European aviation and government interest, and it is important to look to the alleged causes for calling this conference in the first instance.

Oddly enough, when the first meeting was called at the request of the French Government, international air transportation was limited in Europe to flights between Europe and Africa with the prime passenger traffic being on a French airline. Only one United States airline could be said to be also so engaged and the extent of its international operation was Cuba as its furthest point. Going back to 1925, the European air industry was just beginning to envisage long international flights. Germany was looking to the extension of its lighter-than-air dirigible production and France was expanding its heavier-

<sup>2</sup> *Id.* at 364.

<sup>3</sup> *Ide, The History and Accomplishments of the International Technical Committee of Aerial Legal Experts*, 3 J. AIR LAW 27 (1932).

than-air commerce. The Atlantic had not as yet been crossed by either medium. Although the fact of one-way flight was accomplished in 1927 and 1928, it was not until 1928 that the Graf Zeppelin completed the first round trip from Germany to America and return. The times, therefore, were one of conflict in air transport ideology; would the future of flight be lighter-than-air or heavier-than-air? Whichever it was to be, it becomes obvious in retrospection that the contemplation of air expansion was to be hazardous both financially and in operation, and so to the European signators to the convention, limitation of liability, monetary and otherwise, was the prime consideration. A major crash at that time could constitute the loss or diminishing use of capital or the necessity for additional government subsidy. Insurance covering the airlines was not then the industry it is today, and necessarily the hazards of travel at that time viewed with the limitation of passenger volume made the risk to the underwriter a serious handicap in the acquisition to the air carrier of sufficient coverage. It was obviously to the advantage of these governments, and the airlines represented thereby, to find the means for extension of their interests through the Convention; and if passenger traffic had to be subservient to the needs of the industry, these governments were willing to take the necessary steps in that direction.

That the intent was open and notorious cannot be questioned. The convention was not called for the unification of rules of air transport as such, but primarily for the limiting factor. The original text presented by the French Government to the first meeting of the committee at its direction called for a conference and I quote, "For fixing the liability of air carriers and for the limitation of that liability in the matter of air transport."<sup>4</sup> This purpose did not change from the first meeting through the final conference. The motivating force in the convention was the committee appointed which was the International Committee of Legal Air Experts who over the years required to complete their work met on various occasions in Paris, Brussels, Madrid and Warsaw. Notwithstanding the fact that we had no part in formulating the articles of Warsaw, we adhered to the same in 1934 by presidential proclamation and senate ratification.<sup>5</sup> Subsequent to our adherence, we were represented at further conferences eventually

<sup>4</sup> Minutes, *2nd International Conference on Private Air Law*, Warsaw, Oct. 4-12, p. 159 (1929).

<sup>5</sup> 49 Stat. 3000 (1929); 73d Cong., 2d Sess., 78 Cong. Rec. 11577 (1934) (ratification).

leading to the formulation of the International Civil Aviation Organization of which we are now a member, and to our participation in the formulation of the Hague Protocol, which was consummated in 1955 as an amendatory process to Warsaw.

Since both the Convention and the Protocol apply to international transportation, it should be clear to the reader that it is not the flight that controls but the contract of carriage.

Article 1 of the Convention defines international flights. It states:

International transportation is any transportation in which according to the contract, the place of departure and the place of destination, whether or not there be a break in the transportation are situated either within the territories of two High Contracting Parties or within the territory of a single contracting party, if there is an agreed stopping place within the territory of another power even though that party is not a party to the convention. It follows that transportation within the single territory without such a stopping place is not deemed international.

By way of illustration, it becomes apparent that in the event a passenger purchases a through ticket from Chicago to Paris, France, by way of New York, his international transportation commences the moments he boards at Chicago. If on that flight, an accident occurs in New York within the continental limits of this country, that passenger would be bound by the terms of the Warsaw Convention or the Hague Protocol, if ratified, and would be limited to the maximum under either of those documents. The injustice that is immediately seen in this connection, is that, insofar as the other passengers on the plane may be concerned, since their tickets are for domestic flight, they could recover unlimited damages for death or injury.

It becomes manifest, therefore, that the State Department recommendations would seek to find an answer which, while it does not obviate the wide distinction in amount of recovery, at least would tend to give the international passenger on U.S. flag carriers only the compulsory insurance coverage in excess of the Convention and Protocol.

It would appear that in order to do this, both the ratification of the Hague Protocol and the enactment of legislation for automatic insurance would necessarily be accomplished at one and the same time. While it would appear that this is contemplated, and if not accomplished would not satisfy the recommendations, it becomes apparent that, while the Protocol may be readily adopted by the advice and consent of the Senate, it would take the joint action of both houses

of Congress to effect the automatic insurance provision. For this reason, it is not inconceivable that the Protocol would be ratified and the automatic insurance legislation be ineffective by way of defeat in passage, lengthy tabling, or even, if adopted, find itself declared invalid by reason of a possible constitutional violation. Should this situation find itself subsequently true, then the travelling public on U.S. flag carriers together with the non-covered foreign carrier remain faced with the gross inadequacy of the Convention and/or the Protocol.

Another factor that becomes involved in connection with the automatic insurance recommendation is the dilemma that the United States flag carriers will face in that the premium consideration for life and accident insurance would be substantially greater than that which would be obtained on a public liability basis and would constitute a heavier burden in their competition for passenger traffic against foreign flag carriers. It is unique that both the IGIA and the tentative State Department recommendations have seen fit to offer the automatic insurance legislation as an answer to the defects in Warsaw and Hague, when for some long time one of the considerations advanced for the retention of the Warsaw Convention has been that the United States flag carriers would greatly suffer competitively if they were not covered under the Convention only to the same extent other foreign carriers would be.

Statistically, the problem becomes more complex. For the year ending May 31, 1961, in the Trans-Atlantic air traffic passage 62.8 per cent of the passengers were carried by foreign flag carriers.<sup>6</sup>

When one compares these figures with relation to the total number of United States citizens departing for European countries which for the year ending June 30, 1960, totalled 797,211 as opposed to 254,000 visitors to the United States from these countries, it becomes obvious that approximately two-thirds of our flying public utilized foreign flag carriers.<sup>7</sup>

Assuming that the complimentary legislation for automatic insurance was in effect, it would apply to only approximately one-third of our citizens, leaving two-thirds of the citizens in international transportation subject to the limitation of the Protocol alone. The denial of equality in this situation is again in the balance.

While the limitation under Warsaw was drastic, it is none the less

<sup>6</sup> F.A.A., *Report of Task Force on Int'l. Aviation Goals*, p. 108 (1961).

<sup>7</sup> *Id.* at 110.

so under the Protocol, for if one is to consider the present value of the dollar, the purchasing power of the Protocol recovery today is no greater than the limitation under Warsaw was at the time of our adherence.

Realizing the implications of international agreements and the difficulties that may be incurred in denunciation thereof, it nevertheless must follow that if we are to retain our adherence to the Convention or to ratify the Protocol, we must do so on the basis of a consistency of purpose and the recognition of a need therefor. If there is need for our conduct in retention of the concept of limitation, it must be found in one of the reasons heretofore expressed as an argument justifying the provisions of those doctrines. Let us see if we can assess their validity.

The comparison of aviation limitation with admiralty doctrine cannot be said to be a sound one. The historical contrasts do not meet or do the concepts of limitation find themselves compatible. The doctrine of limitation in admiralty law does not apply as to negligence and unseaworthiness known or imputed to the owner, and the limitations which are apparent to that law are not as consistent in application to the overall limitation of Warsaw. In addition, our Congress has consistently sought to improve the rights of passengers in connection with inequities found therein by passage of the Death on the High Seas Act, which is unlimited except insofar as some territorial state water may be concerned; Congress has also increased the amount of recovery in the event of total loss of the ship and has declared by statute<sup>8</sup> that any stipulation limiting liability for negligence as to death or injury is invalid. We have declared in one situation that public policy denies the right of limitation and have, by virtue of adherence to a convention, enforced the limitation in another. The relationship thus seems to be one of contrast and not analogy. By virtue of this statute, a recent decision in *Hawthorne v. Holland American Lines*<sup>9</sup> established the rule that contractually relieving liability if the passenger was guilty of contributory negligence was invalid. Yet Article 21 of the Convention reserves this defense to the carrier.

The argument for the need to protect the development of the aviation industry certainly has no basis in fact today with relation to

<sup>8</sup> 46 U.S.C. § 1183 (1958).

<sup>9</sup> 160 F. Supp. 836 (D. Mass. 1958).

the rights of its passengers. In reviewing this facet, as well as the other arguments, Mr. H. Drion states:

The idea that aviation would be impossible without limitation of liability is flatly contradicted by the facts. Though USA law has no limitation of liability of air carrier or aircraft operator, neither with respect to passenger or cargo claims nor to surface damage, there is no country in the world where civil aviation has developed to a comparative level. And not only does American law not know of special limitations of liability for the protection of aviation, but the claims awarded there against carriers and operators are avowedly higher than anywhere else.<sup>10</sup>

It is not necessary to extend on this statement.

To the extent that the theory has been advanced that the limitation is necessary to allow the aviation interest to avoid bearing catastrophic risks alone, it seems sufficient to state that this burden is not peculiar to aviation. In a nation whose law places a greater legal burden on hazardous industries, it appears rather credulous to utilize the hazard to minimize the burden.

Another seriously projected argument and one relied upon in our original adherence to the Warsaw Convention is that the industry must be placed in a desirable position to obtain insurance. The implication of this contention has little merit when viewed with the present answer provided to solve the problem. Assuming that automatic insurance could be provided as recommended, it is still contended that the burden of securing additional adequate coverage for the flight can be resolved in the action of the passenger providing his own coverage which he may purchase at the airport.

It is appreciated that the damages recoverable may well be in serious or catastrophic occurrence in excess of maximum-self-passenger coverage, but the truth of this probability lends greater emphasis to the inequity of limitation and it seems a strange rule which would impose the burden of protection from wrong upon the victim thereof. To adopt such a rule is inconsistent with the realities of passenger traffic. The airlines are not seeking select classes of passengers, nor should the redress of wrong be predicated on the averages of death or injury cost. There is a colloquial axiom in casualty damages: "You take your plaintiff as you find him." If the extension of private air transport looks to the commercial Mach 2 run in flight all over the world, it should be prepared to accept the cost of catastrophe as well as it may expect the expansion of profit. Certainly, in the confines of domestic traffic,

<sup>10</sup> Drion, *Limitations of Liability in International Air Law* (The Hague 1954).

which far exceeds international flight, there has been a consistency of adequate underwriting for the payment of domestic accident claims.

The concept behind the passenger's purchase of life insurance seems to have its basis on the theory that the individual, whose wrongful death or injury brings larger damages, is deriving benefit at the expense of the passenger whose death or injury results in smaller damages. There is an incongruity arising out of the automatic insurance recommendation in connection with this balancing of benefits in that the measure of coverage would be inconsistent as the passenger whose death would result in smaller damage would receive the same as the one allegedly entitled to greater damages.

As to the position that the limitation is valid in that it arises out of a system of liability imposed on the carrier, thereby granting to the plaintiff a presumption of negligence, it would appear that under the present acceptance of the doctrine of *res ipsa loquitur*, the presumption would exist without the benefit of the allegation that it arises from the Convention.

The writer could not help but be impressed with the argument that the limitation lessens litigation by facilitating quick settlement. The theory is neither new nor justifiable particularly in view of the inadequacy of payment. It was advanced in 1934 at the time of our original adherence as well as it is today.

It is enough to say that the proponents of the limitation utilize it frequently. In an article appearing in the *Journal of Air Law and Commerce*, the following statement appears:

For the *average* passenger claimant in international air transport the Warsaw-Hague provisions [which you know now will be \$16,584] permits a new recovery that makes available more compensation more readily than is true in other personal injury situations. The social interest in getting reasonable compensation to the average claimants promptly is so great that several proposals to improve the compensation for personal injury and death in automobile accident cases, for example, have recommended that if a scheme were devised which would expedite and assure reasonable compensation, a limit of liability as low as \$6,500 per person is justifiable.<sup>11</sup>

The article urging the adoption of the Hague Protocol was written by Mr. Paul Reiber, then assistant to the General Council, Air Transport Association of America.

As to the concept that unification in international transport is neces-

<sup>11</sup> Reiber, *Ratification of the Hague Protocol; Its Relation to the Uniform International Air Carrier Liability Law Achieved by the Warsaw Convention*, 23 J. AIR L. & COM. 272 (1956).

sary, it would seem that, with the varying standards of the world, a monetary limitation in an international air convention has its justification only in self-interest and has no ethical basis in connection with the diversity of social economic passenger needs in the 107 jurisdictions within which it now operates.

To the extent that argument has been projected that we will fail in our international commitments if we denounce Warsaw and fail to ratify the Protocol, it is difficult to accept a course of conduct which mitigates the rights of man on the basis of foreign relations. It would seem that, if the theory behind the limitation provokes an injustice upon the citizenship of this country, we should accept the leadership in that connection.

It is of interest that the chairman of our delegation to the Hague Conference has expressed the theory that the concept of Warsaw and Hague be extended to domestic air transportation in this country. In an article, he had this to say:

The Grand Canyon accident serves to underscore the need to put our legal house in order in the domestic air transport liability field. The rules presently applicable to airline passenger injury and death claims promote injustice, foster unnecessary litigation and increase costs of making reparation when accidents arise. The Warsaw Convention, as amended by The Hague Protocol, is a good approach to this problem, and while the limits of liability set forth therein may be too low for domestic use, in its basic approach it is believed best for the traveling public and for air transportation.<sup>12</sup>

This proposal invades not only a severe legal problem but points out that the emphasis on Warsaw-Hague acceptance may relate less to the question of treaty commitment than to the retention and extension of the doctrine of limitation. This seems to be particularly so when one realizes that neither Warsaw or Hague are true diplomatic treaties in the sense that we know them, but are primarily designed to the protection of private aviation interest.

In the event that we are to withdraw from the Convention and do not accept the Protocol, it is true that in some cases we shall be faced with the fact that in some countries the limitation may be less than that of the Protocol. The problem, however, does not seem to be as severe when viewed in contemplation of the total number of countries involved in the Convention since, according to a tabulation by the International Civil Aviation Secretariat, there were only thirteen of the

<sup>12</sup> Calkins, *Grand Canyon, Warsaw, and The Hague Protocol*, J. AIR L. & COM. 271 (1956).

forty-five nations under Warsaw whose death limits are less than what the Protocol will afford.<sup>13</sup>

It would seem more realistic that the protection from limitation should extend to the greater portion of the flying public and that some way be found to satisfy the inequity in connection with those situations wherein a problem may result by way of comity as to these thirteen countries.

It is as inconsistent to place the validity of Warsaw or Hague on the premise that these countries are below the limit of Hague as it would be to impose a total limitation on domestic travel, because a few of our states still retain the archaic concept of limited damages under their wrongful death statutes.

So far as the question of comity may be involved, it would not be presumptuous to assume that our Courts might, in unconscionable limitations, declare the public policy in avoidance thereof. It is difficult, either legally or morally, to find a rationalization for confirming a death limit as to one of our citizens in connection with the limitation imposed in Italy which restricts the amount of damages for death to 160,000 lira convertible to \$256.00 in United States currency. One realizes that this invades the fine concept of conflicts but if we are to accept a change in concept, let it be to grant the right rather than to take it.

Parenthetically, the writer notes that the Russian Government, in adopting its new Civil Air Code, has without the consent of the signators to the Convention provided that its Courts may, in their discretion, allow for the payment of the award under Warsaw in periodic sums.<sup>14</sup>

If one looks for additional justification of the denunciation of the Convention, perhaps an answer may be found in the fact that under a Protocol to the Convention, as well as is contained in the Hague

<sup>13</sup> I.C.A.O., Document 7450-LC Vol. II, Annex VI, Appendix 7, 9th Session of the Legal Commerce (Rio de Janeiro 1953).\*

Belgium .....	\$5,000.00	Netherlands .....	\$ 3,289.00
Brazil .....	5,405.41	New Zealand .....	13,964.00
Denmark .....	2,645.00	Poland .....	10,000 zlotys*
Germany .....	7,460.00	Sweden .....	3,509.00
Italy .....	256.00	Costa Rica .....	3,561.88
Luxembourg .....	7,500.00	Guatemala .....	5,000.00
Mexico .....	8,670.00		

\* United States convertible unknown.

<sup>14</sup> 108 Cong. Rec. A3861 (May 23, 1962). See: Pearson v. Northeast Airlines, United States Court of Appeals (2d Cir.) 1962) Docket Number 27305.

Protocol, the United States Government has exempted its own aircraft from the limitation. It follows that under the Federal Tort Claims Act, the United States Government is subject to the payment of unlimited damages in the event of liability arising out of the crash of one of its planes.<sup>15</sup> It is somewhat of a paradox that notwithstanding this, by virtue of its adherence to the Convention, it condones the benefit of limitation upon private carriers in competitive profit enterprise.

While the space of this article does not allow for a discussion of the cases in which Warsaw has been involved, or the question of the constitutional problems inherent thereto, it would seem that a rationalization of Warsaw and Hague should include some of the changes that have been adopted in the Hague Protocol which do not appear in the recommendations, for the increase to \$16,600.00 by the Hague Protocol has not come without cost to the claimant. In that document the conference has expressly taken away the right to sue the members of the crew individually and thereby avoid the limitation by reason of the fact that a decision heretofore adopted by our Courts has held that the crew was not covered under the provisions of the Convention and that unlimited damages could be recovered, if it was held to be negligent.<sup>16</sup>

In the same document, they have restricted the definition of wilful misconduct to the severe interpretation that our Courts have heretofore given it. With relation to the theory of wilful misconduct under Warsaw, in some of the foreign jurisdictions it was held that gross negligence was sufficient to avoid the limitation. In the now famous *Frohman* case<sup>17</sup> the Court adopted the theory that "wilful" means "intentional" and was extended even more strongly in the case of *KLM v. Tuller*,<sup>18</sup> where the Court approved the interpretation that wilful misconduct was "a deliberate purpose not to discharge some

<sup>15</sup> *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Pa. 1960).

<sup>16</sup> *Pierre v. Eastern Air Lines*, 153 F. Supp. 486 (D. N.J. 1957).

<sup>17</sup> *Frohman v. Pan American Airways* (1953), U.S. and Canadian Aviation Reports I at page 6, "Wilful ordinarily means intentional. The act that was done was what the person doing it intended to do. But the phrase 'wilful misconduct' means something more than that. It means that in addition to doing the act in question, the actor must have intended the result that came about or must have launched on such a line of conduct with knowledge of what the consequence probably would be, and gone ahead recklessly despite his knowledge of these conditions."

<sup>18</sup> 292 F. 2d 775 (D.C. Cir. 1961).

duty necessary to safety.”<sup>19</sup> It is more than apparent that under this article, the possibilities of recovery under the wilful misconduct provision of the Hague Protocol<sup>20</sup> will be now universally improbable, particularly when one realizes that the doctrine has been sustained in this country in only two cases.<sup>21</sup>

These are the problems that face the Eighty-Eighth Congress. If, through its actions, the Warsaw Convention be denounced and the Hague Protocol be not ratified, it shall have presumptively expressed thereby the right of justice.

In a recent publication by the Federal Aviation Agency known as “Project Horizon,” its chapter on safety ends with these words:

For a nation devoted to Human Values, no effort should be spared in seeking, elusive though it may appear to be, the absolute in Air Safety.

May I paraphrase this hope for the future? That no effort should be spared in seeking, not elusive that it may be, a just return to the human values involved in the loss of life and crippling injury, arising out of the abridgment of that safety. As a nation devoted to human values, we should do no less.

<sup>19</sup> *Id.* at 781.

<sup>20</sup> Article 25, Hague Protocol.

<sup>21</sup> *K.L.M. Royal Dutch Airlines Holland v. Tuller*, 292 F. 2d 775 (D.C. Cir. 1961); *Ulen v. American Air Lines*, 186 F. 2d 529 (D.C. Cir. 1949).