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PROBLEMS REGARDING AVIATION LITIGATION

JOHN J. KENNELLY*

In July, 1971, the Annual Convention of the American Bar Association will be held in London. It is estimated that at least 10,000 American lawyers and judges, many accompanied by their wives, will fly to London this summer for the convention.

How many of these lawyers and judges realize that if they and their wives are killed or permanently injured, during any portion of their flights to London, the recovery may be limited to $75,000 per death or injury insofar as the airline is concerned, regardless of the extent of provable damages, and whether or not the airline's negligence is undisputable?

Here are specific examples:

(a.) Assume Judge Jones, from Chicago, Illinois, is 40 years of age, has a wife and 5 children, and is earning $40,000 per year. He is killed while flying from Chicago to London due to the negligence of the airline. What remedy has the family of the wrongfully killed Judge?

(b.) Assume lawyer Smith, from Des Moines, Iowa, also age 40, also earning $40,000 per year, and also having a wife and 5 children, arranges with his travel agent to fly from Des Moines to Chicago, and thence to London. While Smith is flying on an apparently domestic airline from Des Moines to Chicago, the plane crashes. He is severely injured and rendered a quadriplegic, requiring life-long hospitalization. What is the remedy of lawyer Smith against an admittedly negligent domestic airline?

(c.) Suppose Chicago lawyer Williams, who is also age 40, earns

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$40,000 a year, and has a wife and 5 minor children, flies safely to London, but then, due to inclement weather, he decides, while in London, to fly from London to Rome, and while in Rome decides to fly to Athens. He is killed while en route from Rome to Athens. Prior to his departure from Chicago, after purchasing his Chicago-London-Chicago ticket, he purchased $150,000 in insurance either through the use of a machine or from a sales girl at the airport. In either case, an envelope was provided for immediate mailing, and he put the policy in the envelope and mailed it to his wife. What are the rights of his widow and 5 children, both against the indisputably negligent airline which was flying from Rome to Athens when he was killed, and against the insurance company?

These are the answers:

(a.) The widow and children of Judge Jones might be limited to a maximum recovery of $75,000 against the negligent airline, although the provable pecuniary damages alone easily exceed $500,000.¹

(b.) As to Des Moines lawyer Smith, who was rendered a quadraplegic while flying from Des Moines to Chicago on a domestic carrier, his maximum recovery likewise might be limited to $75,000. This might be true even though the airline admits its negligence.²

(c.) The family of attorney Williams might be limited to a maximum recovery of $16,600 against the airline. They might well receive nothing from the insurance company.³

Damages for either injury or death in international air travel recoverable against airlines, even though admittedly negligent, may be limited:

(1.) The Warsaw Convention Treaty,⁴ initially adopted in Warsaw, Poland, in 1929, limits damages to $8,291.87 for negligence. This treaty is applicable to most international air travel except where there is a "contact" with the United States.

1. The Montreal Interim Agreement provides a limit of $75,000.
2. Id.
3. The Hague Protocol provides a limit of $16,582.
4. Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929. Adherence by the United States was declared June 27, 1934. 49 Stat. 3000 et seq. (1934); T.S. 876 (effective October 29, 1934). Hereinafter this Treaty will be referred to by its popularly accepted description, the Warsaw Convention.
(2.) The Warsaw Convention Treaty was modified by an “Agreement” approved by the United States Civil Aeronautics Board on May 15, 1966. This “Interim Agreement” prescribed a $75,000 maximum liability, regardless of fault, whenever the air travel has a “contact” with the United States, namely, whenever any place in the United States constitutes the ticketed point of origin, destination, or agreed stopping place.

(3.) The Hague Protocol is a treaty concluded in 1955, entered into force on August 1, 1963, which modifies the Warsaw Convention by increasing the maximum liability of airlines in international travel to $16,582. The Hague Protocol was not ratified by the United States. The Hague Protocol, however, may apply to American citizens who are flying between signatories to this particular treaty, even though the United States did not ratify the treaty.

The limitation of monetary liability is applicable to airlines only. Manufacturers or any other defendant are not so limited.

THE WARSAW TREATY

The history of the Warsaw conference is bizarre. In a meeting at Warsaw, Poland, in 1929, in which the United States did not even officially participate, some “diplomats” convened. They drafted a “treaty” which purported to limit forever the recovery of families of victims of airplane crashes to 125,000 gold francs (now $8,291.87, then much less) against airlines for negligent operation during “international travel,” regardless of the age of the victim, earnings, degree of dependency, or any other applicable criterion of damages. A passenger negligently killed in an airplane crash could be the husband of a sick wife, and the father of minor children; some of whom could be paralyzed or mentally ill, and all totally dependent upon him. Nevertheless, his family would still be drastically limited in their recovery of damages against the airline, in spite of its fault. The victim could be a leading neurosurgeon, lawyer, businessman, or judge. No matter what the proof was of the extent of pecuniary loss to his family, the recovery against the negligent airline would be severely limited, if the original terms of the Warsaw Treaty applied. If the Hague

5. C.A.B. Order No. E23680, at 2, Docket 17325, Agreement C.A.B.
Protocol applied, as it would to a flight between Rome and Athens, the limitation would be only $16,582; if the 1966 Montreal Interim Agreement were applicable (assuming the flight had a “contact” with the United States, as it would in a flight between Chicago and London), the limitation of the negligent airline’s liability to $75,000 would similarly be grossly inadequate, for it might not cover two years pecuniary loss.

The Warsaw Convention was the result of two international conferences, one held in Paris in 1925, the other in Warsaw in 1929, and of the work done by the Interim Comité International Technique d’Experts Juridique Aériens (CITEJA), created by the Paris Conference. Civil aviation at that time was still in its infancy. The total airline operations in the five-year period 1925 to 1929—in domestic as well as foreign travel—were only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles. This compares with the vastly improved safety rate of 0.55 fatalities per 100 million passenger miles in 1965. The larger airlines could carry a few passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot had a cruising speed of about 120 miles per hour and a range of 550 miles.7 It is difficult to believe that this group of people who met in Poland in 1929 could formulate a document which would unilaterally become a treaty upon adherence by any nation, so as to constitute an everlasting restriction upon the basic rights of the passenger public, when over forty years later international flight has become commonplace.

The project of the Conference was twofold. First, since aviation was obviously going to link many lands with different languages, customs, and legal systems, it was desirable to establish at the outset a certain degree of uniformity. The Convention achieved this almost completely as to documentation—tickets, waybills, and the like. The second goal was to limit the potential liability of the carrier in case of accidents. The Convention established internationally the rule that carriers are liable for damages sustained by a passenger in the course of a flight, or while embarking or disembarking, but limited this liability to 125,000 “Poincaré francs”—then $4,898 and now approxi-

mately 8300 United States dollars. This dollar equivalent has been in effect since the United States devaluation in 1933, but the limit was low even in 1929. But it was expected that such a limit, applied uniformly on international flights, would enable airlines to attract capital during their infancy.

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

In critically evaluating the seemingly precipitate action of the Senate, it must be remembered that, in 1933, economic conditions throughout the world were disastrous. There was virtually no international air transportation at that time and the very few who engaged in such transportation flew in four and six-passenger planes on short European trips, such as from Paris to London. The accident rate was eighty times greater than at present. There was no capital for any industries, let alone airlines. It is clear that in our present jet age, all of the "reasons" for extending preferential treatment to airlines have not only long disappeared, but the opposite is also now the fact.

Article 22 provides that a higher limitation of liability with respect to the transportation of passengers than that stipulated in the Convention may be agreed upon between the carrier and the passenger. Almost forty years have elapsed since the Warsaw Convention Treaty was drafted, while the airlines have grown from fledgling companies to financial giants, some of whose stock prices have risen over 1,000% even in recent years despite the present recession. Yet not a single international air carrier saw fit to raise the limitation one cent over the $8,291 for approximately thirty-five years until 1966.

8. 78 Cong. Rec. 11,582 (1934).
10. Id. at 3019.
although the Warsaw Convention contained explicit provisions authorizing such increases by airlines. And when some airlines finally "contracted" among themselves to limit their own liability to $75,000 per passenger, they restricted this increase to such international flights as had a contact with the United States.11

THE HAGUE PROTOCOL

The Hague Protocol is a treaty originally formulated at The Hague, Netherlands, in September of 1955. This treaty became effective August 1, 1963; however, the United States has never adhered to it.12 Insofar as the damage limitation is concerned, The Hague Protocol increased the Warsaw Convention limitation 100%, from $8,291 to $16,582. Although the United States has not ratified The Hague Protocol, as above noted, its provisions still apply to United States citizens, as well as to citizens of other nations who are engaged in certain types of international air travel. In plain language, if an American citizen's contract of carriage (ticket) specifies as the origin and ultimate destination of an international flight two countries, both of which are signatories to The Hague Protocol, the limitation of damages recoverable against a negligent airline may be $16,582 for any injury or death.

An exception to both the Warsaw Convention and The Hague Protocol is provided for by the Interim Agreement entered into by certain airlines, which became effective in May of 1966.13 Even though the United States is not a party to The Hague Protocol, its restrictive damage limitation provisions may apply to United States citizens traveling abroad between Hague Protocol signatory countries. It is important to note that the damage limitation provisions of both the Warsaw Convention and The Hague Protocol are based upon the existing contract of carriage: namely, the form of the ticket; not the citizenship of the passengers nor necessarily the actual originating point of the accident flight, nor the actual destination point of the passenger involved in a fatal accident. What counts is not the point of origin or the point of destination relating to the actual

accident flight, but where the entire ticketed trip originated and where the entire ticketed trip was intended to terminate.

THE WARSAW CONVENTION AND THE HAGUE PROTOCOL AS MODIFIED BY THE MONTREAL "INTERIM AGREEMENT" OF MAY 13, 1966

For many years before 1966, not only the United States but also other nations were becoming increasingly dissatisfied with the arbitrarily established minimal monetary limitation of damages prescribed by the Warsaw Convention. On September 28, 1955, The Hague Protocol was drafted. It became effective August 1, 1963, as to those nations which ratified it. The Hague Protocol increased the Warsaw Convention limitation from $8,291 to $16,582, but was never ratified by the United States because the increase in the monetary limitation was so nominal. Likewise, many United States Senators and others were understandably alarmed that the family of a passenger wrongfully killed in international flight could recover only a small amount from a negligent airline.

Consequently, the United States Government served notice of denunciation of the Warsaw Convention, to become effective May 15, 1966. Shortly before the denunciation was to become effective, the International Air Transport Association (IATA) brought about an arrangement among air carriers having landing privileges in the United States, which increased the limitation of liability of such signatory airlines to $75,000 per passenger in international flight, regardless of negligence. On May 13, 1966, the Civil Aeronautics Board "approved" this "agreement," and on May 14, 1966, the United States withdrew its notice of denunciation. The net effect of the agreement approved by the Civil Aeronautics Board of the United States on May 13, 1966, was that certain airlines agreed among themselves to increase the payment for either a death or injury in international travel to a maximum of $75,000, regardless of their negligence.

The agreement required the airline signatories, commencing on

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May 16, 1966, to include in their tariffs a separate contract in accordance with Article 22 (1) of the Convention. This tariff provided for a limit of liability for either injury or death of $75,000, inclusive of legal fees. In those states where provision was made for a separate award for legal fees and costs, a limit of $58,000 was provided, exclusive of legal fees and costs.

This maximum limitation is applicable only to such international transportation by the carrier, as defined in the Warsaw Convention, which includes a point in the United States as a point of origin, destination, or agreed stopping place. This liability is imposed upon the airline regardless of fault. The defenses of Article 20(1) of the Convention (or the Convention as Amended by the Protocol) are not available. The Interim Agreement does not change the provisions of the Warsaw Convention with reference to wilful misconduct. The air carrier is liable for full damages if wilful misconduct is proven by the passenger, or, in the event of his death, by his personal representative or heirs.

Any carrier may become a party to this agreement by signing a counterpart of the agreement and depositing it with the Civil Aeronautics Board. Withdrawal from the agreement may be effected by giving twelve months written notice to the Board and the other carrier parties.

VALIDITY OF THE WARSAW CONVENTION, THE HAGUE PROTOCOL, MONTREAL INTERIM AGREEMENT, AND THE PROPOSED NEW TREATY

As of the present time, the validity of these treaties and Montreal Interim Agreement has not been passed upon by any Appellate Court. But in a fairly recent opinion, Burdell v. Canadian Pacific Airlines,\textsuperscript{17} Cook County Circuit Judge Nicholas J. Bua ruled that the Warsaw Convention's damages and venue provisions were unconstitutional. The court also held that, apart from unconstitutionality, the Warsaw Treaty limitations did not apply to that particular case because the tickets supplied to the passenger-victim did not contain adequate warning of the damage and venue limitation provisions, and, also,

\textsuperscript{17} 11 Avi. 17,351 (Ill. Cir. Cook Co. Oct. 21, 1969); 10 Avi. 15,151 (Ill. Cir. Cook Co. Nov. 7, 1968).
because one of the countries involved in the total flight as its point of origin (namely, Singapore) had not then adhered to the treaty.

The facts were undisputed. On February 28, 1966, Mr. Burdell embarked on an air journey from Singapore to Tokyo and a return to Singapore with intermediate stops at Bangkok and Hong Kong. An airline ticket was issued to him at Singapore. He flew from Singapore to Bangkok to Hong Kong on Cathay Pacific Airways. On March 4, 1966, he flew from Hong Kong to Tokyo on a Canadian Pacific Airlines flight.

The Canadian Pacific-operated airliner was a Douglas DC-8. Upon arrival in the Tokyo area, it circled Tokyo Airport for approximately one hour, due to extremely thick fog and obviously very hazardous conditions. The pilot then told the control tower at Tokyo Airport that he would head for Taiwan. Nonetheless, he attempted to land in the thick fog at Tokyo, and quickly turned into an approach pattern over Tokyo Bay and headed down toward the runway. At the end of the runway the plane rammed a seawall, somersaulted and exploded into flame, killing its crew of ten and all but eight of its 62 passengers.

In defending an action brought by Mr. Burdell's estate, Canadian Pacific Airlines asserted: (1.) All rights of the heirs of Burdell were limited by the Warsaw Convention for the reasons that (a.) the point of origin of Burdell's trip on defendant's airline was Hong Kong, and both the Crown Colony of Hong Kong and Japan were signatories and adherents to the Warsaw Convention; and that (b.) even if Singapore were to be deemed the point of origin of decedent's flight, Singapore was also an adherent to the treaty. (2.) Therefore plaintiffs could not seek relief in the courts of Illinois or, indeed, in any court in the United States, but must maintain their actions in Hong Kong, Tokyo, Canada or Singapore, even though plaintiffs were (as was Mr. Burdell) citizens of the United States and of the State of Illinois, and even though defendant airline admittedly carried on business within the State of Illinois and had been properly served with summons. The basis for this contention was that the Warsaw Convention required suit to be brought at: (a.) the domicile of the carrier; (b.) the principal place of business of the carrier; (c.) the place where the contract of carriage was made; or (d.) the destination. In short, Canadian Pacific contended that plaintiffs, United
States citizens, had to bring their actions in Singapore, Hong Kong, Tokyo, or Canada, even though it was conceded that (except for the provisions of the Warsaw Convention, if applicable and if valid) the Circuit Court of Cook County had jurisdiction of the parties and of the subject matter. (3.) Therefore the recoverable damages of plaintiffs were limited to $8,291.

In reply, plaintiff contended that (A.) Both the damage and the venue limitations of the Warsaw Convention were unconstitutional: (1.) The Warsaw Treaty, insofar as it purported to limit damages to $8,291, was unconstitutional because it is violative of the due process clause of the Constitution of the United States. (2.) The Warsaw Treaty, insofar as it purported to restrict the right of the plaintiffs to bring their action solely in the courts of Hong Kong, Singapore or Canada, was also unconstitutional, because it took away the fundamental right of every citizen to seek redress in the courts of this country against any defendant concededly otherwise subject to the jurisdiction of the courts of this country.

(B.) Even if both the damage and the venue limitations of the Warsaw Convention were constitutional, neither was applicable to the Burdell case because: (1.) The ticket issued to the decedent in this case did not provide him with an adequate warning of the applicability of either limitation. (2.) Singapore was the point of origin of decedent's flight, and Singapore became a completely independent sovereign nation in 1965, prior to the accident, and did not itself become a signatory to the Warsaw Convention until after the accident. Articles 38 and 40 of the Convention prescribe specific requirements for adherence and ratification by any nation, and the independent, sovereign nation of Singapore did not comply with those mandatory requirements until after the accident.

Both the attorneys representing the plaintiffs, the widow and children, and the airline's attorneys invited the court to rule upon all issues, including constitutionality. After the opinion of Judge Bua was published, however, the airline requested the court to withdraw its ruling concerning constitutionality. The court granted this motion, stating, however, that it was persuaded that the Warsaw Convention damage and venue limitation provisions, as applied to this case, were unconstitutional. The case was settled for $215,000.

This decision, although that of a Circuit Court, rather than an
Appellate Court, is of considerable significance, especially in the light of two recent decisions, one from the United States Supreme Court, *Moragne v. States and Marine Lines*, the other from the Fifth Circuit Court of Appeals, *Hornsby v. The Fish Meal Co.* Moragne and Hornsby, respectively, eradicate any constitutional basis for any statute or treaty which would deny a fair recovery for the wrongful killing of a human being. The author believes that under basic constitutional law, no statute or treaty may take away from the family of a wrongful death victim or severely injured passenger that fair recovery to which he is entitled under the common law. The treaty’s limitations apply only to airlines. In *Burdell*, the court ruled that this discriminatory preference for airlines had no rational basis, and denied due process of law not only to the plaintiff, but also to the co-defendant manufacturer, Douglas Aircraft Company. The treaty afforded no protection to concurrently negligent aircraft manufacturers or other defendants. In other words, if a verdict had been rendered in *Burdell* in the exact amount of the subsequent settlement, namely, $215,000, and if the manufacturer, Douglas Aircraft Company, were held liable along with the airline, the manufacturer would have had to pay $206,709, whereas the much more negligent airline would have had to pay only $8,291, or approximately 4% of the total recovery.

In plain words, the Warsaw Convention grants enormous preferential treatment only to airlines with respect to their liability for damages for their negligence in international air transportation. The *Burdell* opinion properly referred to the absurdity of this preferential forty-year-old treaty, as applied to that case.

Professor Arthur John Keeffe stated with reference to *Burdell*:

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

Thus, few courts have faced up to the real issue: the constitutionality of treaties or statutes which would grant grossly discriminatory preferential treatment.

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19. 431 F.2d 865 (5th Cir. 1970).
There is no question that treaties, like statutes, are subject to constitutional restraint. Statutory patterns which result in arbitrary discrimination have been held violative of both state and federal constitutional safeguards. In Harvey v. Clyde Park District, the court ruled that legislation which restricted the amount of damages recoverable against school districts or similar public institutions was unconstitutional. Distribution of risks through insurance was a factor not unnoticed in reaching the eventual decision.

What about the cost of insurance in relation to international air travel? Two students of this economic problem have stated:

Allowing for a reasonable margin of error in what were conceded to be only estimates, the incremental insurance costs at various limits, taken as a proportion of operating cost, were clearly somewhere between the cost of the olive and the cost of the gin in the martini, and nowhere near the cost of an inflight movie.

Concerning the cost of the elimination of the Warsaw Convention, members of the staff of the Civil Aeronautics Board reached the conclusion: "The increase in insurance cost to the carriers, in the event they are subjected to unlimited liability as a result of U.S. withdrawal from the Warsaw Convention, would be minimal."

In any event, no one can dispute that insurance carriers, both United States and foreign, have served the aircraft industry well; and if higher rates, commensurate with the potential liability from larger, faster aircraft, are required, they should be paid. Certainly, no member of the passenger public would complain about minimal increases if he and his family were reasonably protected.

The airlines are currently working with the State Department in an effort to have a new treaty adopted which will attempt to insulate and protect commercial airlines from liability for either injury or

21. Cowles, Treaties and Constitutional Law 28; Cochrane v. United States, 92 F.2d 623 (7th Cir. 1937), cert. den. 303 U.S. 636 (1938); Restatement of Foreign Relations Law § 117(d), Comment (1965); 52 Am. Jur., Treaties, p. 809 (1944); Story, Commentaries on the Constitution of the United States 1508 (1833); Cooley, Principles of Constitutional Law 117 (1880); Cherokee v. United States, 78 U.S. 616 (1870); Dowling and Edwards, American Constitutional Law 298; Wheare, Federal Government 182 (1947); MacBride, Treaties versus the Constitution, 26 Int'l Law Pamphlets 17.


The amazing thing about this proposed treaty is that only airlines are to be insulated from all damages except to the extent of $100,000, even though the airline is not merely negligent, but even reckless. It is incomprehensible that manufacturers and component-part makers of aircraft, numbering over 25,000 companies in the United States alone, not to speak of the many thousands of such manufacturers in England, Germany, Italy, Japan and other countries, are going to sit by and permit themselves to continue to be subjected to strict liability—even though they are not negligent—while at the same time commercial airlines, although negligent, or even reckless, are permitted to gain discriminatory and preferential treatment from the United States Senate, by way of treaty. It should also be noted that the proposed treaty will definitely and substantially work to the detriment of the United States Government.

Entirely apart from the rights of plaintiffs, what of the rights of manufacturers, component part makers, private aircraft owners and operators, and even the United States Government? How many manufacturers, or even their counsel, know that under the present state of the law they may be liable for unlimited damages to the families of passenger victims of some commercial air crashes, which occur during certain types of international air travel, even though such manufacturers are not negligent, whereas airlines which may be indisputably negligent, may be sheltered from liability except to the extent of $8,291 for the death or injury of any passenger? In other words, if a case is worth $1,000,000 and both the airline and the manufacturer are liable, the airline may pay only $8,291, and the manufacturer $991,709.

The proposed treaty, with respect to monetary liability, would also be applicable to airlines only, and not to manufacturers or any other defendant, including private plane operators and owners, and even the United States Government. The government remains liable to passenger victims under the Federal Tort Claims Act with re-

27. “The District Court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private
spect to air crashes from, *inter alia,* Air Traffic Control error, or inadequate weather warnings.

If, as the Circuit Court of Cook County has ruled, the damage and venue limitation provisions of the Warsaw Convention are unconstitutional, the provisions of the Montreal Interim Agreement should likewise be invalid, and likewise the damage limitation provisions of the proposed Guatemalan Protocol appear to be vulnerable to constitutional attack.

Under basic constitutional principles, it would appear that airlines may not constitutionally agree to impose this $75,000 limitation upon the passenger public by signing a document, *inter se.* The approval or disapproval by the Civil Aeronautics Board should not affect the unconstitutionality of this "agreement." This is not to say that the Civil Aeronautics Board is not well motivated.

The Montreal Interim Agreement is not a treaty. It is, in reality, an unofficial amendment, signed by none of the signatory nations to either the Warsaw Convention or The Hague Protocol, but rather signed *only by certain airlines,* and approved by the United States Civil Aeronautics Board. Except for The Hague Protocol (which increased nominally the liability of airlines to $16,582), the Warsaw Convention has not been changed by the governments of the world since 1929. Only those air carriers which are and remain signatories to this Interim Agreement are bound by it. If Czechoslovak Air Lines is permitted to provide regular airline service from Prague to Chicago and return, the limitation of liability for the families of passengers killed while en route from Chicago to Prague would be $8,291 for any single death, *unless* Czechoslovak Air Lines is required to sign the agreement before being permitted to conduct this international travel. Czechoslovakia is listed as a signatory to the Warsaw Convention.

Certainly no court would tolerate an agreement of taxicab companies wherein they stipulated among themselves that their liability for their negligence would be limited to $75,000 per death or injury, regardless of the extent of damages. One can readily imagine the

person, would be liable to the claimant in accordance with the law where the act or omission occurred." 28 U.S.C. § 1346.


outcry of bus and truck companies, not to speak of private citizens, if the taxicab companies of Chicago were to enter into such an agreement, and if the courts were to uphold such a unilateral, self-protective arrangement.

The Legal Committee of the International Civil Aviation Organization met recently in Montreal and decided to recommend a modification of the Montreal Interim Agreement to provide for a novel rule of liability. The rule would make the carrier absolutely liable, regardless of whether or not the carrier was at fault. The only exception to the rule would be where the passenger or person claiming damages had himself caused or contributed to the accident. The limit of the air carrier’s liability would be raised to $100,000. This is the proposed Guatemalan Protocol, which was recently approved by the United States State Department. The United States Senate has not as yet considered “advising and assenting” concerning this proposed new treaty.

It is true that citizens of other countries have every right to criticize the present Montreal Interim Agreement, which obviously favors the American passenger public and requires passengers from other countries to pay for the preferential treatment accorded to American citizens. At least the new treaty treats the world’s passenger public alike. The fallacy, however, of this proposed treaty is that it is wrongfully assumed that a treaty may constitutionally be imposed upon the American international air traveling public, which treaty would insulate commercial airlines against the imposition of otherwise allowable fair damages, even though the airlines are guilty, not merely of negligence, but also of wilful or reckless misconduct.

It should be pointed out that, in spite of the various criticisms by some extravagant authors, amazing safety records have been made in the last decade since the jet age began. Fatal accidents are considerably less per passenger mile than twenty years ago, although there are more and much faster planes. This is a tribute to the entire aircraft industry and to all governments which are concerned with aircraft safety.

For example, during 1970, there were approximately 150,000-000 travelers upon commercial airlines in the United States alone.

Yet there was not a single air crash in 1970 involving a single fatality of a passenger of any scheduled commercial airline within any of the 50 states of the United States, and very few throughout the world. A person flying from Chicago to Florida via commercial airline is statistically safer than if he were to drive an automobile for that distance. However, there were international air accidents, as well as chartered aircraft disasters. Worldwide, 547 deaths ensued from the loss of 24 jetliners. When one considers the enormous amount of air travel, this number of deaths is small in relation to the total number of passengers, the air miles traveled and from a materialistic standpoint, the gross receipts of airlines. Insurance premiums constitute a relatively insignificant percentage of airlines’ gross receipts.

On January 21, 1971, the 747 superjet marked its first anniversary in airline service without a single fatality. By then, 100 were being flown by 18 airlines. They had logged 159,000 hours and 71 million miles and had carried about 7 million passengers, which is equivalent to flying the total population of Ireland from London to San Francisco. Thus, in its first year, the 747 flew as many miles and hours as the Boeing 707 flew in its first two years giving the 747 an “unequaled record,” according to Richard Sliff, deputy director of flight standards for the Federal Aviation Administration. Although the aircraft industry and the governments of the world are confronted with a serious problem because of vastly increasing air travel and planes, both commercial and private, the fact remains that the industry and such governments, to a considerable extent, have successfully resolved safety problems since the jet age began in 1959.

Why then should there be special legislation at all? There are companies which daily encounter far greater risks than airlines. Manufacturers of explosives and chemicals, nuclear power plants, operators of pipe lines, natural gas suppliers, electrical companies, and many other similar industries can cause an enormous number of deaths and injuries in a single incident. If there is to be insulation of one segment of one portion of the industry—the airlines—why should there not be insulation of the entire aircraft industry, and likewise the same protection granted to all industry, and for that matter, all individuals?

There is no rational basis for having any laws applicable to the aviation industry which are markedly different from the laws applicable to individuals, all companies and all entities. Why should not the airlines' transportation competitors have similar insulation? Why should bus companies, taxicab operators and railroads be subjected to unlimited liability? Why should an individual be held liable for unlimited damages if he negligently operates an automobile on the wrong side of the street and hits a bus which may be carrying 100 businessmen, when his total exposure for this one accident could be as high as thirty million dollars?

It is fundamental that any legislation or treaty which singles out any one segment of industry for preferential treatment must have a "rational basis." Accordingly, at the very least, the Warsaw Convention, Hague Protocol, Montreal Interim Agreement and the proposed new treaty, all of which extend markedly and discriminatorily preferential treatment to airlines, should be subject to serious question as to their constitutionality.

EXCEPTIONS TO THE WARSAW CONVENTION, HAGUE PROTOCOL, AND MONTREAL INTERIM AGREEMENT

The Warsaw limitation provisions have been held not to apply for a variety of reasons: (1.) The air carrier was proven guilty of wilful misconduct, (2.) tickets were not delivered to the passengers, and (3.) tickets were delivered to the passengers, but did not contain proper warning of Warsaw Convention limitations. Accordingly, it is not always difficult to avoid the damage or venue limitations and restrictions of the Warsaw Convention, Hague Protocol and Montreal Interim Agreement.

WILFUL MISCONDUCT

Article 25 of the Warsaw Convention provides:


34. Mertens v. Flying Tiger Line, 341 F.2d 851 (2nd Cir. 1965), cert. den. 382 U.S. 816 (1965); Warren v. Flying Tiger Lines, 332 F.2d 494 (9th Cir. 1965).

(1.) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2.) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by an agent of the carrier acting within the scope of his employment.36

The 1966 Interim Agreement does not change the original provision of the Warsaw Convention relating to wilful misconduct.

A passenger (or the family of a deceased passenger) may recover full damages, if proof is made of such wilful misconduct. Wilful misconduct has been variously defined. Article 25 of the Convention states that the definition of wilful misconduct shall be in accord with the law of the forum. This has been held to mean gross negligence or an utter disregard of consequences from known danger.37

Proof of wilful misconduct is not nearly as difficult as it might appear. It is obvious, but true, that an airplane cannot pull over to the side of the road, and that when it encounters adverse weather or mechanical problems and a crash takes place, the results are almost always disastrous. Courts have imposed liability in automobile cases, by analogy to guest cases, which require proof or wilful misconduct in a wide variety of situations: (a.) Striking a guardrail;38 (b.) speeding;39 (c.) operator falling asleep;40 (d.) drunkenness;41 (e.) failure to obey traffic signs;42 (f.) distraction of driver’s attention;43 (g.) driving without headlights.44

In the case of Turner v. Ovall,45 the Illinois Appellate Court held that evidence that an automobile left the pavement, traveled 150 feet, hit a railing and became airborne for 30 to 35 feet, was sufficient for

45. Supra note 38.
the jury on the issue of driver's wilful and wanton misconduct. The defendant owner of the automobile and another passenger were killed, plaintiff was the only survivor, and there was no eyewitness testimony to the occurrence events. Therefore, there could be no affirmative testimony as to the actual conduct of the driver of the car. Testimony as to the occurrence was presented by a state trooper who investigated the accident, a reconstruction expert, and the occupant of a car going in the opposite direction who did not see the actual occurrence, but saw only that the car was airborne for from 30 to 35 feet. The court pointed out that the only evidence presented was of the gyrations that the automobile took.

The court stated:

The evidence here presented and the inferences of wilful and wanton misconduct which may properly be drawn from the circumstances on the issue of wilful and wanton misconduct have evidentiary support within the rule of Larson. The trial court correctly let that issue go to the jury and properly denied a directed verdict and a motion for judgment notwithstanding the verdict.46

The court therefore upheld the trial court's finding that there was sufficient evidence to warrant submitting the issue of wilful and wanton misconduct to the jury. If the courts are willing to uphold a finding of wilful misconduct against an automobile operator who unexplainedly operates his automobile into a guardrail, causing injuries or death to a guest passenger, the analogy to aviation disasters is self-evident: If an aircraft crashes into a mountain or into the terrain short of a runway, and the airline cannot explain this self-evident wilful misconduct, a court or jury should be entitled to assess unlimited damages in favor of passenger victims or their families in accordance with Article 25 of the Warsaw Convention.47

It should further be noted that if a crash takes place during international air travel to which the Warsaw Convention or Montreal Interim Agreement is applicable, Article 17 of the Convention creates a cause of action.48 To be explicit, if attorney Williams, who was flying from Rome to Athens, was killed due to the wilful misconduct of the airline, or if his ticket did not contain adequate notice of the applicable treaty limitations, his family would be entitled to recover

46. Supra note 38, at —, 264 N.E.2d at 841; Larsen v. Harris, 38 Ill. 2d 436, 231 N.E.2d 421 (1967).

47. 49 Stat. 3000, 3020, 3015 (1934), T.S. No. 876 (effective October 29, 1934).

48. Id., at 3018.
pecuniary damages, not limited by any statutory or positive law of
the place of the occurrence, nor of his or his family's place of para-
mount interest, or center of gravity. In other words, the Warsaw
Convention Treaty and similar treaties provide for damages within
the treaties themselves, but limit those damages if the airline was
merely negligent and if the airline saw to it that appropriate tickets
containing explicit warning were delivered in ample time.

It is significant that in relation to the case of *Lisi v. Alitalia Air
Lines* the appellant, Alitalia Airlines, and the intervening amicus
curiae, the United Kingdom, both unequivocally stated that the
effect of the *Lisi* decision was that, in the event of the death of a
passenger during international travel to which the Warsaw Conven-
tion is applicable, there is no restriction of liability if the Warsaw
Convention limitation provisions do not apply because of wilful mis-
conduct, or non-delivery of, or inadequate, tickets. The United
Kingdom's brief in the United States Supreme Court stated:
The provision which the court below would read into Article 3(1) of the Con-
vention is contrary to the position taken by the United States at the Hague Confer-
ence in 1955, that the sanction of unlimited liability does not apply "if the ticket
does not include the notice required by paragraph 1(c) of this Article . . . ."  

Alitalia Airlines' counsel stated in its petition:
Article 3(2) of the Convention, in plain, simple, concise language, imposes upon
a carrier the severe and unusual penalty of absolute liability for personal injury or
death of its passengers, and *without limitation as to damages*, "if the carrier accepts
a passenger without a passenger ticket having been delivered."  

One well-known defense counsel has recently stated:
Finally, if you can convince an American court, which should not prove too dif-
ficult, that you did not receive adequate notice of the application of the limitation
of liability which the court ultimately determines was applicable to your transporta-
tion, the court will probably rule that the limitation does not apply to you. Or,
a passenger faced with the CAB 18900 limitation of liability defense might be able
to convince an American court that this is not a binding agreement on the passenger,
since it constitutes nothing more than a unilateral declaration by the CAB 18900
carrier that he will accept liability up to a limit of $75,000 per passenger. Having
thus eliminated the Warsaw/Hague/CAB 18900 limitation of liability, the court will
undoubtedly go on to rule that the carrier is deprived of any opportunity of over-

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49. Supra note 35.

for Leave to File Brief as Amicus Curiae and Brief for the United Kingdom of

supplied). Petition for a Writ of Certiorari to the United States Court of Ap-
coming the liability created by Article 17 of the Warsaw Convention. The situation in this case is that the carrier is absolutely liable for damages unlimited in amount. This, of course, is the net result of the Lisi case. 52

Suppose, for example, that attorney Williams in example (c) were from Missouri, which has a $50,000 statutory limitation in reference to wrongful death, and suppose further that Greece has a limitation of liability, imposed by its positive law, in the sum of $25,000. Neither limitation would apply, because Article 17 of the Warsaw Treaty manifestly creates liability for damages in the event of death or injury, unaffected by any other law:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 53

NON-DELIVERY OF TICKETS

Article 3 of the Convention provides that the carrier must deliver a passenger ticket and that

[i]f the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit liability. 54

There are occasions when tickets are not delivered to passengers at any time at all, or, if delivered, the delivery takes place after the passenger is aboard. In Warren v. Flying Tiger Line, Inc., 55 the passenger was given a “boarding ticket” or “pass” at the foot of the ramp leading to the aircraft. The court decided that the “delivery” must be made sufficiently in advance so that the passenger will have the opportunity to take self-protective measures, such as purchasing additional insurance if he so chooses. The “delivery” of a boarding ticket at the foot of the ramp as the plane was about to depart did not suffice. The carrier, accordingly, was barred by Article 3(2) from availing itself of the Convention’s liability limitations.

THE TICKET MUST CONTAIN SUFFICIENT WARNING

Article 3 of the Convention relating to passengers, provides that

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53. 49 Stat. 3000, 3018 (1934), T.S. No. 876 (effective October 29, 1934).
54. Id., at 3015.
55. Supra note 34.
the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;
(b) The place of departure and of destination;
(c) The agreed stopping places . . . ;
(d) The name and address of the carrier or carriers;
(e) A statement that the transportation is subject to the rules relating to liability established by this convention. 56

In Lisi, the court held that the notice requirements of the Warsaw Convention were not met by language, contained on an airline ticket, which was "ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else." 57 The Second Circuit Court of Appeals quoted with approval from the district court's finding that the notice contained on an airline ticket was insufficient to bind the passenger. "Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon." 58

By analogy, the venue provisions of Article 28, 59 which purport to restrict the places of suit, may not be available to the airline unless the ticket was delivered in apt time, and the ticket warned the passenger of these additional restrictive venue provisions. The Warsaw Convention expressly provides that the provisions of the treaty which "exclude or limit" liability of the airline are not applicable if a ticket has not been delivered to a passenger. Article 3 of the Convention states: "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." 60

SUMMARY

THE ABSURD EFFECTS OF THE WARSAW CONVENTION, HAGUE PROTOCOL, AND MONTREAL INTERIM AGREEMENT, AS WELL AS THE PROPOSED NEW TREATY

Let us take example (a.). The pecuniary loss, not to speak of

56. 49 Stat. 3000, 3015 (1934), T.S. No. 876 (effective October 29, 1934).
57. Supra note 35, 370 F.2d at 514. 370 F.2d 508 (2d Cir. 1966), aff'd 390 U.S. 455 (1968).
58. Supra note 35, at 514 n.10.
60. Id., at 3015.
loss of parental care and guidance and other elements of damage resulting from the death of Judge Jones while flying from Chicago to London, is at least $600,000. Yet the effect of the Montreal Interim Agreement, entered into by the airlines as a supposed amendment to (or, at least, change in) the Warsaw Convention, may be to limit Judge Jones’ widow and five minor children to less than two years of earnings. Why? Because, in 1934, the Senate of the United States specifically approved the Warsaw Convention, without debate, as a result of a voice vote (contrary to Senate procedures—which prohibit a voice vote for ratification of treaties), and because, in 1966, certain airlines got together and decided among themselves to increase their limit of damages to $75,000 with reference to any international travel having a contact with the United States.

At the outset, I would like to say that I never could see any basis for the Montreal Agreement. The granting of preferential treatment to international air passengers, simply because of the illogical and irrational determinant that they intend to stop in the United States, never made any sense to me. If an airplane en route from Rome to Paris to the United States crashes in Paris, I cannot perceive why some passengers, usually American citizens who boarded in Rome, should be preferred simply because they intended to fly on to the United States, while passengers who intended to disembark in Paris should be discriminated against. The limitation of liability enacted by treaties in favor only of airlines results in gross injustices, and, in my opinion, the unconstitutional denial of due process of law to aircraft manufacturers, component part suppliers, the United States Government and all other defendants, none of whom enjoys any such preferential treatment for their own negligence.

It seems somewhat presumptuous for air carriers to insulate themselves, at the expense of their suppliers. What do British Aircraft Corporation, Sud Aviation, Boeing Company, Lockheed Aircraft Company, General Dynamics Corporation, General Motors Corporation, McDonnell Douglas Aircraft Company, United Aircraft Company and General Electric Company, to name but a few end product manufacturers, have to say about the Warsaw Convention Treaty, Hague Protocol, Montreal Interim Agreement or this proposed Guatemalan treaty? Are not their executives and attorneys concerned that they will remain subjected to unlimited exposure to damages un-
der the doctrine of strict liability, even though they are *not negligent* at all, whereas airlines are and will remain immunized from liability?

According to the World Aviation Directory, there are approximately 25,000 manufacturers and component-part makers involved in the production of aircraft. Aren't the executives of and attorneys for these 25,000 manufacturers worried?

What about the United States Government? The United States Government is fully responsible for unlimited damages if its air traffic controllers or other government personnel are negligent.62

As to example (b.) in which attorney Smith was rendered a quadraplegic while flying from Des Moines to London via Chicago, courts have held that he is engaged in "international travel." Another passenger, on the same airplane, and paying the same fare, also en route to London, but who intends to buy a separate ticket from Chicago to London,63 could recover full damages without limitation against the negligent airline.

In other words, a person can be flying in "international air travel" even though, in fact, he is flying domestically. This is the result of early reactionary decisions which interpreted the Warsaw Convention so as to limit the damages of persons flying domestically (but whose ultimate ticketed destination was another country) to $8,291, even though the occurrence would take place within the United States upon a purely domestic airline.

As to example (c.) involving attorney Williams, who was killed while flying from Rome to Athens, the law is even more indefensible. Most people who fly to Europe visit the total Continent, just as persons who fly to the United States generally do not confine their trip to a single city. Europe, like the United States, contains many cities which are attractive to visitors. Changing weather is one factor which motivates Americans who are visiting Europe to travel from one city to another. But few, if any, lawyers or laymen are familiar with the pitfalls which exist if they are killed while flying in Europe, not only regarding the severe restriction of recoverable damages against admittedly negligent airlines, but also the possible un-

collectability of routine air-trip insurance policies which they might purchase at airports before departure.

In the case of attorney Williams, it must be remembered that he decided to fly from London to Rome, and, while in Rome, from Rome to Athens. Therefore, he would have purchased a new ticket in Rome to go to Athens. Accordingly, his existing ticketing would not have involved a "contact" with the United States, and thus his Rome-Athens trip would not come within the purview of the Montreal Interim Agreement.\footnote{C.A.B. Order No. E. 23680, at 2, Docket 17325, Agreement C.A.B.} Inasmuch as Italy and Greece are signatories to the Hague Protocol, the recoverable damages of attorney Williams' family against the admittedly negligent airline may be limited to $16,600. This is the limitation of liability prescribed by the Protocol.

What about the policy of insurance which Mr. Williams purchased to protect his wife and children? The machines at the airport which may be used to purchase this insurance contain a space which requires the applicant to write his name, the names and addresses of his designated beneficiaries, and his "point of departure" and his "destination." When Mr. Williams purchased his hypothetical policy, his then-existing ticket provided for a trip to London. Of course, he had in the back of his mind, as would anyone, that he might fly from London to Paris, to Rome, to Athens or any number of easily accessible cities—just as a European visitor to the United States might purchase a ticket to fly to Chicago, with the intention of possibly flying from Chicago to New York, Cleveland, Detroit, Washington, Minneapolis, New Orleans, Los Angeles, Dallas, or similar cities.

Yet in the fine print of these policies there are exclusionary provisions which some courts, believe it or not, have upheld—even though a person does not even get an extra copy of the policy, does not read it, and mails it, for obvious purposes, immediately to his family. Certainly no one would carry the policy aboard the plane and study it, because if the plane crashed, his family would not know that he had even purchased the policy.

The insurance companies adroitly limit the space on the machines. There is no space to insert particular trips or the details of
various other portions of the total voyage, which might be arranged before or after the purchase of the policy. The application limits the information required simply to "point of departure" and "destination." The application does not require the listing of and does not even contain the space for all contemplated possible voyages or trips which are to be taken by the insured within the time limit of the policy. The extent of ticketed mileage has no relationship whatever to premium cost. Nowhere in the capitalized printing is there any warning to the effect that if the purchaser carries out an additional or side trip, the policy is inapplicable.

The gist of the exclusionary clause is that the policy does not cover those trips which are arranged after the insured physically leaves the airport. In other words, if attorney Williams, after depositing his coins in the machine, went over to a counter and purchased additional tickets from London to Rome to Athens, the policy would cover the flights. The same is true as to the sales girls. Yet if he purchased his ticket in London, rather than in Chicago, 24 or 48 hours later, the policy would not apply. Needless to say, the insurance company is totally unaware of the changed itinerary until after Mr. Williams is dead. Only then will an insurance company investigate the place of the purchase of the tickets; and if it finds that the tickets for the new passage were purchased after initial departure, rather than before initial departure, it will refuse to pay. Thus, Mrs. Williams and her 5 minor children, will get nothing, simply because her husband purchased his tickets for the trip from London to Rome, and from Rome to Athens, a few days after leaving O'Hare Field. Obviously these tricky, camouflaged and unconscionable exclusionary clauses in policies of air trip insurance (whether supplied by machines or sales girls) affect hundreds of millions of American international air travelers.

A recent article by Robert L. Jackson focused upon this problem: 

"... Today's air passenger may buy a $15,000 flight-insurance policy for 50 cents and board his airplane without second thoughts about the price. But this casual insurance buyer, whose numbers are legion this summer, is feeding a multimillion dollar program that mainly enriches airport terminals and insurance companies, according to government investigations.

The payout on air travel insurance is extremely low, they have found. Only 26 per cent of the premiums collected over eight years have been paid out in benefits
by insurance companies. The Justice Department and the Federal Trade Commission are looking into the matter.\textsuperscript{65}

Many passengers seek to protect the financial well-being of their families through the purchase of Airline Trip Insurance. In spite of the good faith efforts of attorney Williams to protect Mrs. Williams and his 5 small children, his intentions are thwarted by hypertechnical, exclusionary language buried in a policy of approximately 2,000 words, often containing sentences of over 150 words. It should be kept in mind that the premium has no relationship to the length or extent of the proposed trip or trips. It costs exactly the same amount to purchase air trip insurance whether a traveler intends to fly around the world or fly 100 miles. Nonetheless, the United States Court of Appeals has upheld the validity of this type of contract applied to a housewife with 5 small children,\textsuperscript{66} let alone a lawyer.

**DOMESTIC DAMAGE LIMITATIONS**

Laymen, not attuned to the indefensible vagaries in the law, would regard the inequalities and injustices concerning awards for injury or death in aviation cases as stranger than fiction. There are many vastly different laws which can determine damages applicable to the survivors of air crash victims. Peculiarly, the damages which may be recoverable by the survivors of victims of a single commercial air crash may vary substantially, even though the victimized passengers are flying upon the same aircraft, paying the same fare, and can prove the same amount of loss.

Basically, there are two principles which determine the amount of damages in respect to domestic accidents: (a.) One doctrine, lex loci delicti, requires the court to assess damages in accordance with the law of the place of the accident; (b.) the other doctrine, the law of "paramount interest," also known as "grouping of contacts" or "center of gravity," requires the court to assess damages in accordance with the law of the place of "paramount interest" applicable to each particular passenger. These basic concepts, or one of them, have been employed by United States courts in selecting the cri-


\textsuperscript{66} Fakhri v. The Fidelity and Casualty Company of New York, 428 F.2d 499 (7th Cir. 1970).
teria of damages applicable to a given case. Each of the fifty states has a statute regarding damages for wrongful death. Forty-one states have no limitation of damages; nine states retain a statutory wrongful death limit.67

Much of the confusion concerning the law relating to damages for wrongfully inflicted death arises from the erroneous common law concept, inherited from English law, that there is no cause of action for wrongful death unless there exists a specific enabling statute. Because of this fallacious premise, courts have resorted to plausible determinants to reach preordained conclusions, in order to provide a semblance of justice for wrongful death. However, attempts of these commendably socially-oriented judges, while praise-worthy, result in only partially distributed justice. In other words, the "paramount interest" doctrine alone not only does not solve the problem, but can increase it.

Fortunately, the Supreme Court of the United States seems to have come finally to grips with the problem. It would appear that Moragne v. States Marine Lines68 has rejected, once and for all, the English common law rule denying civil action for wrongful death. It is therein stated:

Our analysis of the history of the common law rule indicates that it was based on a particular set of factors that had, when The Harrisburg was decided, long since been thrown into discard even in England, and that had never existed in this country at all.

Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous."69

The Fifth Circuit Court of Appeals has already embraced this decision, stating: "There is now a cause of action for wrongful death in admiralty that is not dependent on adjacent state law."70 Another court has stated:

The substance of Moragne is simply that the United States Supreme Court has

67. Only nine states retain a statutory wrongful death limit: Kansas, $35,000; Massachusetts, $50,000; Minnesota, $35,000; Missouri, $50,000; New Hampshire, $60,000; Oregon, $25,000; Virginia, $50,000; West Virginia, $110,000; and Wisconsin, $35,500.
68. Supra note 18.
69. Supra note 18, at 381.
70. Supra note 19, at 867.
now unanimously held that there is a cause of action for wrongful death *apart from statute*. Although that case did not involve a death upon the high seas, the court squarely overruled *The Harrisburg*, 119 U.S. 199 (1886), and later decisions following *The Harrisburg*, which in effect followed the alleged common law rule that there is no civil action for wrongful death in the absence of statute. The obvious effect of *Moragne* is that there is a common law action for any wrongful death against any wrongdoer, whether the death occurs in water or on land. It would be the height of absurdity if the families of wrongfully killed persons could recover full and fair damages if the deaths occurred in water, but could not recover similar damages if the deaths occurred on land. A moment's reflection will demonstrate the incongruousness of such a ruling. If a plane were to crash and some of the victims were to land in a lake and some upon land (such as in Wisconsin), it would be a peculiar law if the families of those victims who fell into water and were drowned could recover twenty or thirty times more than the families of those who were killed by falling onto land. This court can hardly believe that the sole criterion of determination of damages is going to be determined by whether the victim was killed on land or water.71

There is some disagreement as to the meaning of *Moragne*, although the language of the decision is clear enough. It is enough to say that, although the use of the "grouping of contacts" or "paramount interest" doctrine succeeds in the granting of fair damages in some cases, it does not provide a universally satisfactory solution.72 Judges who believe that they will achieve solutions by rejecting the traditional *lex loci delicti* principle in favor of the "more modern", "center of gravity," or "grouping of contacts" principles regretfully are mistaken. For example, if the Chief Judge of the Supreme Court of Oregon has lunch with the Chief Judge of the Supreme Court of New York, in New York, and both are killed while riding as passengers in a taxicab due to the negligence of the operator, what are the rights of the families of each Judge? The strict application of the "center of gravity" or "paramount interest" doctrine espoused by the Restatement, would impose a limitation of liability as to the family of the Oregon Judge in the amount of $25,000.00, whereas, of course, the family of the New York Judge could recover fair damages, consistent with his earning potential and pecuniary losses, which could well be in excess of $500,000.73 On the other hand, if the Oregon Judge were killed in Illinois, the Illinois courts would not apply the "paramount interest" doctrine, but probably would apply Illinois law


which does not limit damages.\textsuperscript{74}

The mechanical application of the new remedy might prove to be worse than the sickness.\textsuperscript{75} Professor Cavers emphasized the content of the law to be applied as being most significant in the choice of law as against overriding geographic factors.\textsuperscript{76}

Professor Leflar develops five major “choice-influencing considerations” within which “all or most of the factors that ordinarily affect choice-of-law decisions can be incorporated.”\textsuperscript{77} These factors, which are remarkably similar in concept to the Restatement view, are: (a.) predictability of results; (b.) maintenance of interstate and international order; (c.) simplification of the judicial task; (d.) advancement of the forum’s governmental interest; and (e.) application of the better rule of law.

Courts which attempt to adhere too strictly to an indiscriminate application of the “most significant contacts” rule place themselves in an inextricable straitjacket so that they must blindly follow a rigid formula, unattuned to reality, contrary to common sense, and resulting in harsh and oppressive results. The goal of courts to achieve a consistent formula in order to achieve reasonable predictability is obtainable by adopting a choice of laws doctrine which enables the forum court to employ either \textit{lex loci delicti} or center of gravity, in order to achieve fair results.\textsuperscript{78}

The New Hampshire Supreme Court stated the matter simply:

We prefer to apply the better rule of law in conflicts cases just as is done in nonconflicts cases, when the choice is open to us. If the law of some other state is outmoded, an unrepealed remnant of a bygone age, “a drag on the coattails of civilization,” we will try to see our way clear to apply our own law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state’s law. Courts have always done this in conflict cases, but have usually covered up what they have done by employing manipulative techniques such as characterization and renvoi.\textsuperscript{79}

\textsuperscript{74} Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970).


Now the Wisconsin Supreme Court also has adopted the “better rule of law” in conflict of laws cases:

We emphasize that we prefer the Wisconsin rule of ordinary negligence not because it is Wisconsin’s law, but because we consider it to be the better law. In three cases within a year, Heath, Zelinger, and this case, we have preferred Wisconsin law, but it should be noted that the merits of the competing rules of law were carefully considered, and the choice was made not as a matter of parochial preference but in the honest belief that, given the opportunity to apply either a forum or nonforum law, the better law in each case proved to be that of the forum.80

It should be pointed out that even the “better law” rule will not achieve simple fairness. This is particularly true with respect to major aviation disasters. Each passenger pays the same consideration. It seems indefensible to limit the damages of the family of one passenger and not to limit the damages of the family of the passenger sitting next to him, simply because the latter passenger’s center of gravity is a “non-limit” state. What happens if the occurrence takes place in a limit state and the passenger’s center of gravity is also a limit state? Suppose a commercial aircraft crashes in Oregon, carrying 200 lawyers. The death of a lawyer, age 40, earning $50,000.00 a year, leaving surviving a widow and five minor children, involves pecuniary losses which could well exceed one million dollars, considering the potential contributions. Suppose 100 of the lawyers are from Missouri and 100 from Illinois. Illinois would reject the Oregon limitation. Thus, the families of the Illinois lawyers could recover substantial damages. The families of Missouri lawyers, on the other hand, might recover only limited damages.

Suppose, for the sake of example, there were twin brothers on the same aircraft, each of whom had a wife and five children and each of whom was earning $50,000.00 per year. One was from Missouri, the other from Illinois. They boarded the plane together in Chicago and were killed in the air crash in Oregon, due to the negligence of the airline. The family of the Illinois lawyer could recover possibly one million dollars.81 The family of the Missouri lawyer would be limited to either $25,000.00 (the law of Oregon) or $50,000.00 (the law of Missouri). The foregoing and many similar examples could be supplied to prove that the only way in which simple justice can

81. Supra note 74.
be applied in this type of litigation is for the courts to reject statutory or treaty-imposed limitations of damages for wrongful death.

As pointed out by Professor Arthur John Keeffe,
The basic difficulty in these cases is that we are still laboring under the delusion that an American personal representative, whose deceased is wrongfully killed, needs Lord Campbell to permit our courts to entertain the action against the wrongdoer. Can this be any longer true?

As far as I have been able to discover, a complete misunderstanding has existed in the American courts on this subject for too many years.
The common law revolved around a single precept: For every injury, a remedy. The right of a widow to recover for the wrongful killing of her husband was recognized in ancient days.82

The courts have always recognized that the law is neither static nor sterile, and should be a living thing, responsive to the needs of society and the moral sense of the community.

Apart from Moragne there is precedent which reveals that actions for wrongful death did exist in the early law of England.83 At early common law, the dependent family of a victim, wrongfully killed, did possess an enforceable claim for damages. In 1808, Lord Ellenborough repudiated this early common law, in his infamous nisi prius dictum, in which he denied any recovery to the husband of a woman who was negligently injured and killed in a stagecoach accident. Ten years later, this same Lord Ellenborough said that the family of a wrongfully killed victim, in order to obtain redress, must obtain it from the wrongdoer by beating him physically (trial by battle). That was the concept of "justice" of Lord Ellenborough, whom Imlah in his biography described as "moulded to the Tory point of view," who "attached excessive importance to penal methods of defending property and privilege."84

The opinion of Lord Ellenborough, a judge described by Prosser as one "whose forte was never common sense,"85 has received widespread criticism as unsound, unjust, erroneous, and unsupported by precedent. Yet, that opinion remains, except for Moragne, as the underlying premise for the almost unbelievably conflicting and indefensible laws relating to damages which are demonstrably absurd, particularly in aviation disasters. What possible legally justifiable

83. IMLAH, LORD ELLENBOROUGH 6 (1939).
84. Id.
85. PROSSER, TORTS 709 (2d ed. 1955).
explanation can there be for the incongruous state of the law, which in certain instances would permit, for example, a millionaire owner of a racehorse to collect upwards of two million dollars for its negligently caused death, but would restrict the widow and children of an innocently killed husband, father and wage-earner, the driver of the truck in which the racehorse was being transported, to $25,000.00, simply because the accident happened in Oregon and the truck driver and his family lived in that state? It is suggested that no legislature ever had or now has any right to deny to its citizens equal protection or due process of law through the passage of statutes which limit the damages of survivors of an airplane disaster or any accident to an arbitrarily restricted sum, regardless of undisputed proof of much greater damage.

Attempts to solve the problems which result from fifty different damage laws in fifty different states, through the utilization of either traditional rules or newly composed principles (such as "center of gravity" or "place of most significant contacts"), have met with some success, but gross injustices remain. The simple fact is that stagecoach-era legal principles are not adaptable to the jet age.

In any event, it now seems abundantly clear that the Supreme Court of the United States, by its unanimous decision, has laid to rest, once and for all, the indefensible limitations of damages, the absurdity of which is particularly pointed up in commercial airplane disasters. The effect of this decision is that any statute which restricts damages for wrongful death is unconstitutional.

A problem not yet decided by any court is whether the judge or the jury determines the ultimate issue of the place of "center of gravity," or "place of most significant contacts." This issue may be the only genuine fact issue in an aviation case. If the state where the injury occurs is not disputed, and that state has a statutory limit, the only debatable issue may be what is the place of "most significant contacts" applicable to the particular case. Inasmuch as the determination of this ultimate fact issue can be decisive, and can delineate the rights of the families of passenger victims, it is my belief that under basic jury law the resolution of this issue should be for the jury, under appropriate instructions. The only exception would

86. Supra note 18.
be when there is no genuine issue of fact concerning the "place of most significant contacts," as is the rule in any case where there is no factual issue.

CONCLUSION

With respect to international air travel, the net effect of the Warsaw Convention, The Hague Protocol, the Montreal Interim Agreement of 1966, and the proposed new treaty is that commercial airlines alone receive preferential status, as opposed not only to their competitors (railroads, bus companies, etc.), but also in relation to other segments of the aircraft industry, as well as individuals. A private aircraft owner or operator is fully liable for his negligence. He receives no preferential discrimination. A private aircraft manufacturer is fully liable for its negligence. It receives no preferential discrimination. Commercial aircraft manufacturers are fully liable for their negligence. They receive no preferential discrimination. The Government is fully liable for its negligence. It receives no preferential discrimination.

Entirely apart from aviation, all corporations, companies, partnerships or individuals in the United States, regardless of their type of business, are fully liable for their negligence. They receive no preferential discrimination.

The sole beneficiaries of discriminatory treaties (Warsaw Convention and The Hague Protocol), and the Montreal Interim Agreement, as well as the proposed new treaty, are commercial airlines.

The law relating to international travel has become so complicated that a computer has been devised to determine what law applies, depending on the point of origin and destination of the air traveler.87

With respect to domestic air crashes, attempts to explain on any logical basis the conflicts in the law relating to the conflict of the laws concerning damages is like trying to tattoo soap bubbles. One of the faults of the legal profession is that we are inclined to engraft upon pre-existing rules, however archaic and outmoded they might be, in an attempt to prescribe some degree of "reason" based upon precedent, in order to conform the law to modern society and its needs. One thinks of Emerson's "foolish consistency."

The law has even reached such absurdities, in regard to conflict of laws, that the rights of families of innocent victims of a negligently caused air crash, in which the airplane crashes into water, may depend on whether there was salt in the water. For example, if a plane crashes into water which is defined as the "high seas" (the oceans of the world), the rights of the families of victims are supposedly determined by the statute known as the "Death on the High Seas Act."\(^8\)

Fortunately, the United States Supreme Court has recognized the problem. The substance and effect of the \textit{Moragne} decision, according to a recent opinion,\(^8^9\) is simply that \textit{Moragne} definitely creates a cause of action for wrongful death, independently of any legislation.

This court agreed with the philosophy expressed in \textit{Moragne}, i.e., that the supposed common law rule that there was no action at all for wrongful death, in the absence of a statute, was and is invalid. The corollary of this is obvious. If the common law permits a cause of action for wrongful death, then enabling statutes are not needed, because plaintiffs who suffer damages by reason of wrongfully inflicted deaths may recover damages apart from any statute.\(^9^0\)

Therefore, we may have reached the light at the end of the tunnel. Instead of courts employing conflict of laws principles, in an attempt to avoid the harshness of statutorily imposed limitations for wrongful death, the simple answer is that the courts of this country are not so constricted that they may not take appropriate action to provide simple and expedient justice for the families of passengers who may be wrongfully killed in the crash of airplanes. This can be brought about only if the courts recognize that any unreasonable limitation for wrongful death, arbitrarily imposed by any state, is not valid. Although the \textit{Moragne} decision involved an admiralty case, its language is clear and unquestionable, and should lay to rest once and for all any statutorily imposed limitations upon the recovery of fair damages for negligently caused deaths. \textit{Moragne} leads inexorably to the conclusion that a statute is not needed in order for a court to grant full and fair damages, without limitation, for any wrongful death which occurs within or over not only inland waters, but on or over land. Otherwise, the courts would be defending an

\(^8\) See Cox v. Northwest Airlines, 379 F.2d 893 (7th Cir. 1967).
\(^8^9\) Supra note 71.
\(^9^0\) Supra note 71, at 17,922.
indefensible hiatus in the law. How could the courts justify granting full damages to the family of a victim who dies in water, but limit damages to the family of a victim who dies on land? If a plane crashes, for example, in Wisconsin on the shores of Lake Michigan, are the courts to apply different standards of recovery to the families of victims of the same airplane, based upon whether passengers died in the lake or on the beach? Are the families of victims who die on the beach to be limited to $32,500 (the Wisconsin limitation), based upon lex loci delicti, or restricted to such limitations as may be prescribed by their respective states of "paramount interest" if the latter choice of laws doctrine is applied by the forum. Is a passenger who is dying on the beach, following a crash, supposed to crawl into the water to die so that his family will receive fair compensation, rather than $32,500 or some other arbitrarily limited amount?

This is but one brief example of the incongruous state of the law regarding damages in wrongful death cases, which incongruity finds its greatest expression in aviation disasters.

The only remedy is for the courts to have the fortitude and sound thinking to stop defending a poor position which is based upon an 1808 lower court English decision, consisting of one-half of one page, which cited no precedent, but which "ruled" that there is no cause of action at the common law for wrongful death.

The courts, seeking to rectify the many unjust results which emanate from this 1808 decision, Baker v. Bolton, have employed various doctrines including principally the "paramount interest" rule, sometimes also known as the "center of gravity" principle. But this new rule simply does not achieve even a semblance of justice in many cases. Some lawyers and judges believe that the United States Supreme Court decision in Moragne really holds, in ultimate analysis, that there is a cause of action at the common law for wrongful death, regardless of whether the occurrence takes place on land or in navigable water. Surely, the United States Supreme Court could not have intended that the families of those who "fortuitously" are killed in water are to receive fifty or more times as much as those families of passengers on the same plane who happen to die on land. This could happen if a large jetliner were to come apart in the air because the bodies could, of course, land many miles apart.
Generally, it should be stated that attempts to engraft upon existing law have led and are leading the legal profession from confusion to chaos. The proposed Guatemalan Protocol is nothing but an amendment to the Warsaw Convention. The effect of the Guatemalan Protocol is to relieve airlines of liability for death or injury, over $100,000, even if the airline is not merely negligent, but guilty of recklessness and wilful and wanton misconduct. The Warsaw Convention Treaty was drafted in 1929 when there was no liability of either manufacturers or the United States Government. Now, manufacturers are liable, not only for their negligence, but even apart from negligence, if they manufacture an unsafe product. The Government is liable for its negligence under the Federal Tort Claims Act. Neither manufacturers nor the United States Government, nor for that matter, any potential defendant in an aviation disaster, is insulated or protected in any manner from the imposition of full damages.

There is no constitutional basis for any treaty or statute which would single out one segment of one industry and grant to that one segment enormous preferential treatment, at the expense of other members of the same industry, not to speak of the United States Government and the general public.
APPENDIX A

May 10, 1971

M. Cherif Bassiouni
Professor of Law
De Paul University
College of Law
25 East Jackson
Chicago, Illinois

Dear Mr. Bassiouni:

On March 8 a Protocol to the Warsaw Convention was adopted at an international conference held at Guatemala City. The United States and twenty other countries signed the Protocol. I believe you will be interested in the substantive decisions which were reached at the conference, which are reflected in the attached copy of the Protocol.

In dealing with the rights, obligations and liabilities of carriers providing international air transportation, the Protocol contains features that we believe are important not only because they offer a solution to the specific problem of the inadequacy of the existing limit of liability of a carrier to its passenger, but also because they represent a new approach to reconciling the conflicts that exist in various states between national and international treatment of this problem of liability of the carrier to its passengers.

At present, air carrier liability may be governed by one of three different systems on flights that are “international carriage” within the meaning of the Warsaw Convention: (1) the Warsaw Convention, (2) the Hague Protocol, or (3) the special inter-carrier arrangement known as the Montreal Agreement for flights to and from the United States. The limit of liability for death or injury to passengers is $8,300 under Warsaw, $16,600 under Hague, and $75,000 under the Montreal Agreement. Under the Warsaw Convention and the Hague Protocol the carrier can avoid liability if it can prove it and its agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures; under the Montreal Agreement this defense is waived.

The Guatemala Protocol would establish a uniform limit of $100,000 for the air carrier’s liability in cases involving “international carriage” within the meaning of the Warsaw Convention brought in the courts of States becoming Party (Article 22(1)(a)). Furthermore, to account in part for the effects of inflation, this limit is to be increased by $12,500 five and ten years after the Protocol enters into force, unless a conference of Parties meeting in those years decides (by a 2/3 vote) on a lesser increase (Article 42). A general diplomatic conference can be called at any time for the purpose of revising the limit or any other provisions (Article 41).

Under this Protocol the standard of liability in the case of death or injury...
to passengers is absolute rather than negligence (Article 17 and 21). Thus, even in a case of death or injury arising out of hijacking or sabotage of an aircraft or an act of war the carrier will be liable. The carrier will not be liable in two kinds of cases relating to the passenger's state of health or the claimant's or passenger's contributory fault. Because the question of liability will generally not be at issue, the only question open normally will be the amount of the damage.

A primary objective of absolute liability is to assure a high net recovery to claimants by reducing the need for and cost of litigating claims. In this respect, the new Protocol contains a second provision, a "settlement inducement" clause, to encourage rapid and adequate offers of settlement from carriers without the need for litigation (Article 22(3)). The provision provides that a claimant can recover costs, including attorneys' fees (permitting a recovery above the limit of liability established in the Protocol), if he gives written notice to the carrier of the amount claimed and an explanation of the claim and the carrier does not within six months make an offer of settlement at least as high as the claimant eventually recovers.

The limit of liability agreed to at Guatemala was established on the basis that it could not be exceeded except in the case of settlement inducement (Articles 22(3)(c) and 24(2)). The United States accepted the unbreakable limit of liability without insisting that it be conditioned upon giving notice by the carrier to the passenger that the Convention limits liability. States, independently of the Convention, will retain the right to prescribe notice requirements with appropriate enforcement measures to ensure compliance.

One of the most significant of the amendments agreed to at Guatemala concerns national systems to supplement recoveries available under the Convention. Article 35A provides that any State may adopt a domestic supplement so long as the supplementary system imposes on carriers neither an increase in liability nor any financial or administrative burden other than collecting contributions. The other restraints on the supplement are that it shall not discriminate among passengers on the basis of the carrier used, and that its benefits shall apply in every case in which the passenger, whether or not a national of the State enacting the system, has been required to contribute to its funding. The purpose of this provision, which is written in general terms, is to provide a means by which States can adjust international recoveries to meet national requirements. This constitutes a departure from the prior concept under which all States were required to accept internally a common international limit of liability representing a compromise between the standards of many States and a balance of carrier and passenger interests. In accepting this provision, States have thus explicitly recognized in an international convention that in dealing with the problem of compensation for damages the differing needs among the parties must be accounted for.

The Guatemala Protocol, taken as a whole, contemplates two possible tiers of responsibility for liability arising out of the death or injury of passengers. At the first level, liability up to $100,000, carriers will be responsible without regard to their fault. At a second level, above $100,000, State systems
may provide compensation for damages in response to their special needs growing out of such factors as a high standard of living, high cost of living, or incomplete social benefits for survivors. These national systems might or might not contain a limit of liability, and their financial burden could be borne by passengers on flights departing the States enacting the systems. Of course, both the international regime and the domestic supplements would operate without prejudice to or effect upon any insurance the passenger might contract for on an individual basis.

The Guatemala conference agreed on several other amendments to the Warsaw system. The provision on jurisdiction (Article 28) was amended to allow suit in the State of domicile or permanent residence of the passenger if the carrier has an establishment in the same State. Previously, actions were limited to the State where the carrier had its principle place of business or a place of business where the ticket was purchased, or the State which was the destination of the flight. The Protocol contains a limit of liability of approximately $4,000 in the case of delay of passengers (Article 22(1)(b)). The carrier can avoid liability if it can prove that all necessary measures were taken to avoid the damage or that it was impossible to take such measures (Article 20(1)). For baggage loss or damage the carrier will be absolutely liable (Article 17(a)). The limit of such liability is $1,000, and is applicable on a per passenger rather than per piece or weight basis (Article 22(1)(c)). No distinction is made between checked baggage and articles carried on board by the passenger himself (Article 17(3)). These revisions are intended to allow streamlining of the check-in process by eliminating the present constraints of the Warsaw Convention requiring weighing of baggage.

The conference was primarily concerned with the rules of liability relating to passengers and baggage. A review of the cargo provisions was not attempted. The Protocol incorporates the regime and limits of liability for cargo agreed to in the Hague Protocol (Articles 18, 20(2), 22(2), 24(1), 25, 25A(3), and XVII). This issue is a priority item on the ICAO work program.

We are now in the process of considering possible supplements to accompany submission of the Protocol to the Senate for advice and consent, and we would welcome suggestions from interested parties of particular schemes including details with respect to legal implementation and an indication of comparative costs for various levels of benefits.

If you should desire further information in regard to the conference at Guatemala or the substantive decisions that were reached there, or if you should desire to submit suggestions for a supplement, I would be pleased to try to answer any questions you may have.

Sincerely yours,

Jared G. Carter
Assistant Legal Adviser
for Economic Affairs

Enclosure:
As stated.
U.S. SIGNS PROTOCOL REVISING WARSAW CONVENTION

On March 8, 1971, the United States and twenty other nations signed a Protocol at Guatemala City to revise the rules of international air transportation established by the Warsaw Convention, as amended at The Hague in 1955, in regard to air carrier liability for death or injury to passengers, damage to baggage, and ticketing procedures.

Fifty-five nations were represented at the one-month diplomatic conference, which concluded with adoption of the Protocol by a vote of 36-6. The provisions of the new Protocol promote the objectives of the United States as set forth in the Statement of International Air Transportation Policy approved by the President on June 22, 1970.

The text of the Protocol is attached.

APPENDIX C

PROTOCOL TO AMEND THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW ON 12 OCTOBER 1929 AS AMENDED BY THE PROTOCOL DONE AT THE HAGUE ON 28 SEPTEMBER 1955

The Governments Undersigned

ConSIDERING that it is desirable to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955,

Have agreed as follows:

CHAPTER I

Amendments to the Convention

ARTICLE I. The Convention which the provisions of the present Chapter modify is the Warsaw Convention as amended at The Hague in 1955.

ARTICLE II. Article 3 of the Convention shall be deleted and replaced by the following:

"Article 3. 1. In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:
(a) an indication of the places of departure and destination;
(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.”

ARTICLE III. Article 4 of the Convention shall be deleted and replaced by the following:

“Article 4. 1. In respect of the carriage of checked baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a document of carriage which complies with the provisions of Article 3, paragraph 1, shall contain:
(a) an indication of the places of departure and destination;
(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the baggage check referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.”

ARTICLE IV. Article 17 of the Convention shall be deleted and replaced by the following:

“Article 17. 1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage.

3. Unless otherwise specified, in this Convention the term ‘baggage’ means both checked baggage and objects carried by the passenger.”
ARTICLE V. In Article 18 of the Convention paragraphs 1 and 2 shall be deleted and replaced by the following:

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the cargo is in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever."

ARTICLE VI. Article 20 of the Convention shall be deleted and replaced by the following:

"Article 20. 1. In the carriage of passengers and baggage the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

2. In the carriage of cargo the carrier shall not be liable for damage resulting from destruction, loss, damage or delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures."

ARTICLE VII. Article 21 of the Convention shall be deleted and replaced by the following:

"Article 21. If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of the death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger."

ARTICLE VIII. Article 22 of the Convention shall be deleted and replaced by the following:

"Article 22. 1. a) In the carriage of persons the liability of the carrier is limited to the sum of one million five hundred thousand francs for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed one million five hundred thousand francs.

b) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to sixty-two thousand five hundred francs.

c) In the carriage of baggage the liability of the carrier in the
1. case of destruction, loss, damage or delay is limited to fifteen thousand francs for each passenger.

2. a) In the carriage of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor’s actual interest in delivery at destination.

b) In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier’s liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. a) The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including lawyers’ fees, shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant the whole or part of the costs of the action, including lawyers’ fees which the court considers reasonable.

b) The costs of the action including lawyers’ fees shall be awarded in accordance with subparagraph a) only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later.

c) The costs of the action including lawyers’ fees shall not be taken into account in applying the limits under this Article.

4. The sums mentioned in francs in this Article and Article 42 shall be deemed to refer to a currency unit consisting of sixty-five and a half miligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.”

ARTICLE IX. Article 24 of the Convention shall be deleted and replaced by the following:

“Article 24. 1. In the carriage of cargo, any action for damages, however founded, can only be brought subject to the condition and limits set out in this Convention.

2. In the carriage of passengers and baggage any action for damages,
however founded, whether under this Convention or in contract or in
tort or otherwise, can only be brought subject to the conditions and
limits of liability set out in this Convention, without prejudice to the
question as to who are the persons who have the right to bring suit and
what are their respective rights. Such limits of liability constitute
maximum limits and may not be exceeded whatever the circumstances
which gave rise to the liability.”

**ARTICLE X.** Article 25 of the Convention shall be deleted and re-
placed by the following:—

“The Article 25. The limit of liability specified in paragraph 2 of Article
22 shall not apply if it is proved that the damage resulted from an act or
omission of the carrier, his servants or agents, done with intent to cause
damage or recklessly and with knowledge that damage would probably
result; provided that in the case of such act or omission of a servant or
agent, it is also proved that he was acting within the scope of his em-
ployment.”

**ARTICLE XI.** In Article 25A of the Convention paragraphs 1 and 3
shall be deleted and replaced by the following:—

“1. If an action is brought against a servant or agent of the carrier
arising out of damage to which the Convention relates, such servant or
agent, if he proves that he acted within the scope of his employment,
shall be entitled to avail himself of the limits of liability which that car-
rrier himself is entitled to invoke under this Convention.

3. The provisions of paragraphs 1 and 2 of this Article shall not apply
to the carriage of cargo if it is proved that the damage resulted from an
act or omission of the servant or agent done with intent to cause damage
or recklessly and with knowledge that damage would probably result.”

**ARTICLE XII.** In Article 28 of the Convention the present paragraph 2
shall be renumbered as paragraph 3 and a new paragraph 2 shall be in-
serted as follows:—

“2. In respect of damage resulting from the death, injury or delay of
a passenger or the destruction, loss, damage or delay of baggage, the ac-
tion may be brought before one of the Courts mentioned in paragraph 1
of this Article, or in the territory of one of the High Contracting Parties,
before the Court within the jurisdiction of which the carrier has an es-

tablishment if the passenger has his domicile or permanent residence
in the territory of the same High Contracting Party.”

**ARTICLE XIII.** After Article 30 of the Convention, the following Ar-
ticle shall be inserted:—

“Article 30A. Nothing in this Convention shall prejudice the question
whether a person liable for damage in accordance with its provisions
has a right of recourse against any other person.”

**ARTICLE XIV.** After Article 35 of the Convention, the following Ar-
ticle shall be inserted:—

“Article 35A. No provision contained in this Convention shall prevent
a State from establishing and operating within its territory a system to
supplement the compensation payable to claimants under the Conven-
tion in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required to do so;

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.”

ARTICLE xv. After Article 41 of the Convention, the following Article shall be inserted:—

“Article 42. 1. Without prejudice to the provisions of Article 41, Conferences of the Parties to the Protocol done at Guatemala City on the eighth March 1971 shall be convened during the fifth and tenth years respectively after the date of entry into force of the said Protocol for the purpose of reviewing the limit established in Article 22, paragraph 1 a) of the Convention as amended by that Protocol.

2. At each of the Conferences mentioned in paragraph 1 of this Article the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall not be increased by an amount exceeding one hundred and eighty-seven thousand five hundred francs.

3. Subject to paragraph 2 of this Article, unless before the thirty-first December of the fifth and tenth years after the date of entry into force of the Protocol referred to in paragraph 1 of this Article the aforesaid Conferences decide otherwise by a two-thirds majority vote of the Parties present and voting, the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall on those dates be increased by one hundred and eighty-seven thousand five hundred francs.

4. The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the event which caused the death or personal injury of the passenger.”

CHAPTER II

SCOPE OF APPLICATION OF THE CONVENTION AS AMENDED

ARTICLE XVI. The Warsaw Convention as amended at The Hague in 1955 and by this Protocol shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single
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Party to this Protocol with an agreed stopping place in the territory of another State.

CHAPTER III

FINAL CLAUSES

ARTICLE XVII. As between the Parties to this Protocol, the Warsaw Convention as amended at The Hague in 1955 and this Protocol shall be read and interpreted together as one single instrument and shall be known as the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971.

ARTICLE XVIII. Until the date on which this Protocol enters into force in accordance with the provisions of Article XX, it shall remain open for signature by all States Members of the United Nations or of any of the Specialized Agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to this Protocol.

ARTICLE XIX. 1. This Protocol shall be subject to ratification by the signatory States.

2. Ratification of this Protocol by any State which is not a Party to the Warsaw Convention or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971.

3. The instruments of ratification shall be deposited with the International Civil Organization.

ARTICLE XX. 1. This Protocol shall enter into force on the ninetieth day after the deposit of the thirtieth instrument of ratification on the condition, however, that the total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five States which have ratified this Protocol, represents at least 40% of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization in that year. If, at the time of deposit of the thirtieth instrument of ratification, this condition has not been fulfilled, the Protocol shall not come into force until the ninetieth day after this condition shall have been satisfied. This Protocol shall come into force for each State ratifying after the deposit of the last instrument of ratification necessary for entry into force of this Protocol of the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Protocol comes into force it shall be registered with the United Nations by the International Civil Aviation Organization.

ARTICLE XXI. 1. After the entry into force of this Protocol it shall be open for accession by any State referred to in Article XVIII.

2. Accession to this Protocol by any State which is not a Party to the Warsaw Convention or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971.

3. Accession shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the deposit.

ARTICLE XXII. 1. Any Party to this Protocol may denounce the Protocol by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

3. As between the Parties to this Protocol, denunciation by any of them of the Warsaw Convention in accordance with Article 39 thereof or of the Hague Protocol in accordance with Article XXIV thereof shall not be construed in any way as a denunciation of the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971.

ARTICLE XXIII. 1. Only the following reservations may be made to this Protocol:

a) a State whose courts are not authorized under its law to award the costs of the action including lawyers' fees may at any time by a notification addressed to the International Civil Aviation Organization declare that Article 22, paragraph 3 a) shall not apply to its courts; and

b) a State may at any time declare by a notification addressed to the International Civil Aviation Organization that the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971 shall not apply to the carriage of persons, baggage and cargo for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

2. Any State having made a reservation in accordance with the preceding paragraph may at any time withdraw such reservation by notification to the International Civil Aviation Organization.

ARTICLE XXIV. The International Civil Aviation Organization shall promptly inform all signatory or acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession, the date of entry into force of this Protocol, and other relevant information.

ARTICLE XXV. As between the Parties to this Protocol which are also Parties to the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter referred to as the "Guadalajara Convention") any reference to the "Warsaw Convention" contained in the Guadalajara Convention shall include reference to the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971, in cases where the carriage under the agreement referred to in Article 1, paragraph b) of the Guadalajara Convention is governed by this Protocol.

ARTICLE XXVI. This Protocol shall remain open, until 30 September
1971, for signature by any State referred to in Article XVIII, at the Ministry of External Relations of the Republic of Guatemala and thereafter, until it enters into force in accordance with Article XX, at the International Civil Aviation Organization. The Government of the Republic of Guatemala shall promptly inform the International Civil Aviation Organization of any signature and the date thereof during the time that the Protocol shall be open for signature in Guatemala.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Protocol.

DONE at Guatemala City on the eighth day of the month of March of the year One Thousand Nine Hundred and Seventy-one in three authentic texts in the English, French and Spanish languages. The International Civil Aviation Organization shall establish an authentic text of this Protocol in the Russian language. In the case of any inconsistency, the text in the French language, in which language the Warsaw Convention of 12 October 1929 was drawn up, shall prevail.