

1964

Current Legislation and Decisions

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Recommended Citation

Rodney D. Moore et al., *Current Legislation and Decisions*, 30 J. AIR L. & COM. 390 (1964)
<https://scholar.smu.edu/jalc/vol30/iss4/6>

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CURRENT LEGISLATION AND DECISIONS

Criminal Law — Aviation — Bomb Hoax

Following the disaster in 1956 near Longmont, Colorado, in which forty-five lives were lost as a result of a bomb explosion in the baggage compartment of an airliner, Congress enacted the "bomb hoax" or "false tip" statute, 18 U.S.C. § 35.¹ The statute established a federal crime for willfully imparting or conveying information, known to be false, concerning attempts or alleged attempts to do any act prohibited by 18 U.S.C. § 32.² Section 32 was enacted simultaneously with Section 35 and its purpose was to provide adequate punishment in the federal courts for the willful damaging or destruction of aircraft used in interstate, overseas, or foreign air commerce, and for attempts to damage or destroy such aircraft.³ In prosecuting under Section 35, federal prosecutors interpreted the word "willfully" as meaning merely a voluntary and conscious imparting or conveying of the false report, but it was difficult to convince

¹ 18 U.S.C. § 35 (1956)

§ 35. Imparting or conveying false information

Whoever willfully imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than \$1,000, or imprisoned not more than one year or both.

² 18 U.S.C. § 32 (1956)

§ 32. Destruction of aircraft or aircraft facilities

Whoever willfully sets fire to, damages, destroys, disables, or wrecks any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;

or

Whoever willfully sets fire to, damages, destroys, disables, or wrecks any aircraft engine, propeller, appliance, or spare part with intent to damage, destroy, disable, or wreck any such aircraft; or

Whoever, with like intent, willfully places or causes to be placed any destructive substance in, upon, or in proximity to any such aircraft, or any aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, or other material used or intended to be used in connection with the operation of any such aircraft, or any cargo carried or intended to be carried on any such aircraft, aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, or other material unworkable or unusable, or hazardous to work or use; or

Whoever, with like intent, willfully sets fire to, damages, destroys, disables, or wrecks, or places or causes to be placed any destructive substance in, upon, or in proximity to any shop, supply, structure, station, depot, terminal, hangar, ramp, landing area, air-navigation facility or other facility, warehouse, property, machine, or apparatus used or intended to be used in connection with the operation, loading, or unloading of any such aircraft or making any aircraft ready for flight, or otherwise makes or causes to be made any such shop, supply, structure, station, depot, terminal, hangar, ramp, landing area, air-navigation facility, or other facility, warehouse, property, machine, or apparatus unworkable or unusable or hazardous to work or use; or

Whoever, with like intent, willfully incapacitates any member of the crew of any such aircraft; or

Whoever willfully attempts to do any of the aforesaid acts or things—shall be fined not more than \$10,000 or imprisoned not more than twenty years or both.

Added July 14, 1956, c. 595, § 1, 70 Stat. 539.

³ See H.R. No. 1979, 84th Cong. 2d Sess., U.S. Code Cong. & Ad. News (Mar. 29, 1956) p. 3145.

the courts that the word did not embrace an evil purpose.⁴ Because of the difficulty in interpreting the meaning of "willfully," Section 35 was amended in 1961.⁵

The 1961 amendment was designed to make the existing law on imparting false bomb information more effective by making it a misdemeanor knowingly, but without malice, to impart or convey such information, and a felony to convey such false information willfully and maliciously or with a reckless disregard for human life.⁶ Attorney General Kennedy, in a letter to the Speaker of the House of Representatives, stated that the amendment was submitted by the Justice Department in order to clarify the statute and deter false bomb reports by pranksters which disrupt the orderly operations of aircraft and other common carriers.⁷ Section 35, as amended, covers false reports made with a specific intent to harm the carrier by disrupting air traffic as well as those made in jest.

Four of the six reported cases under Section 35 were concerned with violations of the statute prior to the amendment in 1961. There is disagreement between the various courts as to what the indictment, information, or complaint must allege in order to be sufficient.

In *Smith v. United States*,⁸ the first reported case prosecuted under Section 35, the defendant was convicted of telephoning to the federal agency in charge of an airport control tower a false report that a bomb was on an outgoing aircraft. Although the sufficiency of the indictment in the *Smith* case was not in issue, it charged the defendant, in the language of Section 35, with conveying a false report that an attempt was being made to place a bomb upon an aircraft with intent to damage, destroy, disable, and wreck such aircraft.⁹

The defendant in *United States v. Silver*¹⁰ stated to the ticket agent when making arrangements for his flight, "I have a bomb in my brief

⁴ The Committee on Interstate and Foreign Commerce of the House of Representatives amended the proposed Section 35 to cover fictitious, as well as false, reports that attempts to destroy or damage an aircraft were being made or contemplated.

⁵ 18 U.S.C. § 35 (1956), as amended, 18 U.S.C. § 35 (Supp. V 1961).

§ 35. Imparting or conveying false information

(a) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) Whoever willfully and maliciously or with reckless disregard for the safety of human life, imparts or conveys, or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or an alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be fined not more than \$5,000, or imprisoned not more than five years or both.

⁶ See S.R. No. 1055, 87th Cong. 1st Sess., U.S. Code Cong. & Ad. News (Sept. 15, 1961) p. 3052.

⁷ *Id.* at 3054.

⁸ 283 F.2d 16 (6th Cir. 1960), *cert. denied*, 365 U.S. 847 (1961).

⁹ The indictment in the *Smith* case note 8 *supra* reads as follows:

. . . Robert James Smith did willfully impart and convey and cause to be imparted and conveyed, false information, knowing the same to be false, concerning an attempt and alleged attempt being made and to be made to willfully place and cause to be placed a destructive substance, to wit: a bomb, and employed in interstate commerce with intent to damage, destroy, disable, and wreck such aircraft, a crime prohibited by Section 32, Title 18, United States Code, a part of Chapter II, Title 18, United States Code

¹⁰ 196 F. Supp. 677 (E.D. Pa. 1961).

case," and the plane was delayed some twenty minutes. After a search, it was revealed that Silver was carrying a can of aerosol bug spray with the words "Bug Bomb" on its label. The United States District Court for the Eastern District of Pennsylvania ruled that Section 35 did not require that the defendant have an actual and true intent to do damage to an aircraft as well as the giving of false information. The court stated that to be in violation of Section 35 proof of intent to violate Section 32 was unnecessary.

However, the United States Court of Appeals for the Ninth Circuit in *Carlson v. United States*,¹¹ held that the information which charged Carlson with violating Section 35 was fatally defective in that it alleged that he had falsely informed the stewardess that explosives had been placed on an aircraft, but failed to allege that he had falsely informed her that the explosives were placed on the aircraft with intent to damage or destroy it. The court also held that while the information must allege that the false report was to the effect that explosives were placed on the aircraft with intent to damage or destroy it, the prosecution need not prove the defendant expressly stated that such was the purpose in placing explosives on the aircraft. It would be sufficient if the recipient could have reasonably inferred that the informant intended to convey the idea that the aircraft would be damaged or destroyed. The facts and indictment in the *Smith* case would have met this court's requirements for a conviction.¹²

In *United States v. Allen*,¹³ the defendant, relying on the *Carlson* case, contended that the information was defective for failure to allege that the false report contained an allegation of intent on someone's part to damage or destroy the plane. In finding the information sufficient, the court held that an actual intent to damage on someone's part need not be alleged in the information. The holding which upheld the information was in direct conflict with the holding in the *Carlson* case. The question, "Is that the bag with the bomb in it?" made in front of an airport attendant, was held to be sufficient to convict Allen under Section 35. The court stated that Allen's statement was open to the inference that he meant the destruction of the plane was contemplated.

In *United States v. Sullivan*,¹⁴ the first of two reported cases under the amended Section 35, the Court of Appeals for the Second Circuit, relying on the decision in the *Allen* case, ruled that the information need not allege specifically a threat to destroy the plane. In the *Sullivan* case the defendant used the words "bomb" or "TNT" while asking the stewardess about his bags while airborne on a Mohawk Airlines flight. The court also held that an allegation of malice or of an evil purpose is not required in the information, indictment, or complaint.

In the most recent case under Section 35, *United States v. Rutherford*,¹⁵ the Court of Appeals for the Second Circuit, again relying on the *Allen* case, upheld an indictment which was similar to the information in the *Sullivan* case. The indictment did not contain an allegation that the hoax

¹¹ 296 F.2d 909 (9th Cir. 1961).

¹² See note 9 *supra*.

¹³ 317 F.2d 777 (2d Cir. 1963).

¹⁴ 329 F.2d 755 (2d Cir. 1964), *cert. denied*, 377 U.S. 1005 (1964).

¹⁵ 332 F.2d 444 (2d Cir. 1964).

involved a statement that a bomb was placed on the aircraft with intent to damage or destroy it. The court further ruled that the statute was not unconstitutionally vague and that it did not offend the First Amendment as applied to the defendant's act.

To be guilty of the offense described in Section 35, as amended, a defendant must impart or convey or cause to be imparted or conveyed information concerning an attempt or an alleged attempt being made or to be made to do an act which would be a crime prohibited by Section 32, such information being false and known to be false. Under Section 32, it is a crime to place a destructive substance upon or in proximity to an aircraft only if one has an intent to damage or destroy such aircraft. The courts in the *Silver*, *Allen*, and *Sullivan* cases correctly held that the defendant need not have an actual intent to damage or destroy an aircraft in order to be convicted under Section 35. If a defendant's statement is false to begin with, it is impossible for him to have an actual intent to damage or destroy an aircraft. At most his intent would be to disrupt the orderly operations of air carriers. However, since an intent to do damage is an essential element of Section 32,¹⁶ the court in the *Carlson* case properly ruled that the indictment, information, or complaint must allege that the false report was to the effect that a destructive substance was placed in, upon, or in proximity to an aircraft with the intent to destroy or damage such aircraft. The phrase "with the intent to destroy or damage" should be construed as meaning "for the purpose of destroying or damaging." The court in the *Carlson* case strictly construed Section 35, but such a construction does not prevent Section 35 from covering false reports made in jest as well as those made with a specific intent to harm the carrier by disrupting traffic, since a false statement mentioning explosives violates the statute if it is open to a reasonable inference that the destruction of an aircraft is being attempted or contemplated. The courts should not be concerned with the defendant's purpose in making the false report. However, a person should not be convicted for merely mentioning explosives unless his statements are open to a reasonable inference that the destruction of an aircraft is being contemplated.¹⁷ Unless his statements can reasonably be interpreted as meaning that explosives have been placed upon or near an aircraft with intent to damage or destroy or for the purpose of damaging or destroying it, he has committed no crime under Section 35.

Rodney D. Moore

¹⁶ *Carlson v. United States*, note 10 *supra*.

¹⁷ In *United States v. Rex Lyon Simpson*, Crim. No. 3-246, D. Dallas Div., April 8, 1964, the defendant had made a statement to an airport official to the effect that he had an atomic bomb in his brief case and the information charged him with a violation of 18 U.S.C. § 35a. The case was dismissed with the approval of the Justice Department after defendant's attorney argued that since everyone knew that the government had a monopoly on atomic bombs it was not reasonable for the airport official to infer that an attempt to destroy an aircraft was being made or contemplated.

Warsaw Convention — Wilful Misconduct — Damage Limitation

In a wrongful death action the plaintiff, to avoid the damage limitation provision of the Warsaw Convention,¹ alleged that the defendant airline was guilty of wilful misconduct. The international flight was without incident and the aircraft was normal in all respects until it reached the United States coast line where the crash occurred. However, the pilot had disregarded radio orders to maintain an altitude of at least 500 feet above all clouds until signaled by radio to descend. There was no appearance that the radio signal device was not functioning or that a false signal was received by the pilot. *Held*: Plaintiff's motion for judgment *non obstante veredicto* was granted. Even though it was not shown that the pilot intended the fatal crash or had actual realization of the danger of a crash, his action in flying below the ordered level constituted wilful misconduct under the Warsaw Convention. *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 219 F. Supp. 289 (S.D.N.Y. 1963).

The elements of wilful misconduct given in the *Berner* court's jury instructions² are consistent with the Restatement of Torts³ and with jury instructions in other cases involving wilful misconduct.⁴ Neither the violation of regulations or orders alone,⁵ nor negligence in failing to discharge some duty necessary to safety, would be sufficient without knowledge that damage is substantially certain to follow.⁶ Yet reckless disregard for the consequences may be used as a substitute for such knowledge where the actor's duty is so obvious that a breach thereof constitutes more than mere negligence.⁷ Further, proof of a malicious or felonious intent is not necessary.⁸

However, the federal courts have applied the wilful misconduct provision in only two cases prior to *Berner* to allow recovery in excess of the Warsaw Convention limits. In *American Airlines, Inc. v. Ulen*⁹ wilful misconduct was found for chartering a flight less than 1,000 feet above the highest obstacle (a mountain) in the course to be flown. In *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*,¹⁰ four instances of wilful misconduct were pointed out: (1) failure to instruct passengers as to location and use of life vests; (2) failure

¹ Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, art. 22. Recovery is limited to \$8,292.00. Art. 25 makes the limitation inapplicable when the accident results from "Wilful misconduct." 49 Stat. 3020 (1934).

² 219 F. Supp. 289, 360. "1. The intentional performance of an act or failure to perform an act. 2. Knowing or having reason to know of facts which would lead a reasonable man or woman to realize. 3. That his conduct not only created an unreasonable risk of bodily harm to the passengers. 4. But also involved a high degree of probability that substantial harm would result to the aircraft and the passengers by the doing or failing to do the act in question."

³ Sec. 500, Reckless Disregard of Safety.

⁴ *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Air Lines Holland v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961); *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955); *Pekelis v. Transcontinental and Western Air, Inc.*, 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951); *American Airlines, Inc. v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949).

⁵ *American Airlines, Inc. v. Ulen*, *supra* note 4.

⁶ *Pekelis v. Transcontinental and Western Air, Inc.*, *supra* note 4.

⁷ *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*, *supra* note 4.

⁸ *American Airlines, Inc. v. Ulen*, *supra* note 4.

⁹ *Ibid.*

¹⁰ *Supra* note 4.

to send a distress signal; (3) failure to take appropriate steps to rescue the deceased from the tail of the plane after the crash; and (4) failure of the ground agent to be aware of loss of radio contact with the airplane and to institute a prompt search and rescue operation. *Berner*, as the third American case in which wilful misconduct under the Warsaw Convention has been found, may be indicative of similar future holdings, especially in view of the growing discontent with damage limitations in actions arising out of airplane crashes.¹¹ Such a discontent was most aptly displayed when this case finally went to trial on the issue of damages. A jury verdict resulted in the amount of 924,396 dollars.¹²

John E. McFall

Hague Protocol — Ratification

The United States has failed to take action to ratify the Hague Protocol of 1955¹ which became effective in ratifying nations August 1, 1963. This international agreement amended the Warsaw Convention of 1929, ratified by the United States in 1934.² This country with forty-five other nations has adopted the Warsaw Convention which provides a damage limitation of 8,292 dollars for personal injuries and death to passengers on international flights.³ However, the treaty provides in Article 25 that the carrier shall not be permitted to avail itself of the limitation on damages if the accident was caused by "wilful misconduct."⁴ The new treaty, the Hague Protocol, provides that the damage limitation be doubled to 16,584 dollars and re-defines the wilful misconduct provision of the earlier treaty.⁵

There has been much debate in this country over ratification of the protocol. As expected the aviation industry and insurance groups have taken a stand in favor of the treaty. A committee of the New York Bar Association also spoke out for the protocol setting forth the principal

¹¹ 30 J. Air L. & Com. 395 (1964); 30 J. Air L. & Com. 98 (1964); Gardner, *So You're Going to Fly to London*, 43 A.B.A.J. 412 (1957); Lissitzyn, *International Aviation Policy: The Warsaw Convention, The Hague Protocol and International Limitation of Liability*, 56 Am. Soc. Int. L. Proc. 115 (1962).

¹² *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 230 F. Supp. 240 (S.D.N.Y. 1964).

¹ ICAO Doc. 7632. See generally, Committee on Aeronautics, Association of the Bar of the City of New York, *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. Air L. & Com. 255 (1959) (Hereinafter Report); Mennell & Simeone, *United States Policy and the Warsaw Convention*, 2 Washburn L.J. 219 (1963).

² 49 Stat. 3000 (1934); see generally, Drion, *Limitation of Liabilities in International Air Law* (1954).

³ Art. 22, *supra* note 2 at 3003.

⁴ There has been much discussion and resulting confusion over Article 25 in the official French version which uses the word "dol" (implies fraud or deceit) rather than "wilful misconduct" which has been supplied in the translation.

⁵ Under Article 25 of the Hague Protocol the damage limitation will not apply if it is proved that the damage resulted from an act or omission of the carrier, its servant or agent, done with intent to cause damage or recklessly with knowledge that damage would probably result. See generally, Report, *supra* note 1 at 260; United States Policy and the Warsaw Convention, *supra* note 1 at 240.

reasons for ratification that other groups have advanced.⁶ They were first concerned with the protection of American citizens and secondly concerned with the United States' responsibility to foster and encourage international agreements. Those against ratification have argued that the principle of limiting liability is foreign to our traditional concept of common law justice.⁷ There has been some concern that the increased liability for passengers would be an invitation to sabotage, especially in Asian countries.⁸

Recent developments in the Senate, by courts and in governmental agencies have brought the question of ratification into public view. Perhaps the strongest statement to date concerning the treaty was by Senator Norris Cotton (R-N.H.), the ranking minority member of the Senate Aviation Subcommittee. In a speech before the Senate on November 14, 1963, the Senator said:

The United States Government through wilful inaction is in the position of placing a lower value on the lives of its citizens than almost any other major nation. Whether it is from vacillating indecision or callous indifference on the part of the Administration, the result is that, in the usual situation the life of an American today is worth only half as much as the life of a Frenchman, an Italian . . . or a Russian.⁹

While the Senator urged ratification of the treaty he made it clear that other courses of action would also protect United States citizens.¹⁰ Another recent development was a Civil Aeronautics Board regulation requiring airlines to inform passengers of the existence and amount of airline liability under the Warsaw Convention.¹¹ Still another important development was the decision of the Court of Appeals for the District of Columbia in *Tuller v. KLM*¹² in which the court manifested a liberal tendency to allow recovery over the limits of the Warsaw Convention by making use of the "wilful misconduct" provision. The four acts of misconduct¹³ in *Tuller* seem to be below the degree of fault found necessary in earlier

⁶ Report, *supra* note 1, at 266. "Recommendation . . . for the United States therefore, to renounce international agreement in an important area affecting international air carriage—and particularly where the United States has been largely responsible for the latest version of such agreement—would deal a serious blow to United States prestige in this field and would hamper the continuing efforts of the United States to obtain wider international agreement on matters affecting international air transport. . . ."

⁷ See, e.g., New York Times, June 23, 1963, p. 87, col. 1.

⁸ *Ibid.*

⁹ 184 Cong. Rec. 20752 (daily ed. Nov. 14, 1963) [hereinafter Speech].

¹⁰ *Ibid.* Cotton did not elaborate, however, on any other plans, but suggested that they be explored without delay.

¹¹ CAB Order No. E-395. Aviation Daily, Nov. 5, 1963, p. 2. Carriers are required to publish information in their tariffs, print on tickets or ticket envelopes or enclose with the ticket on a separate slip of paper, and post on signs at the ticket counter a statement advising the dollar amount of the carrier's limit of liability. This regulation, which became effective March 1, 1964, was praised by Senator Cotton for "throwing the whole situation into the light of public awareness." Speech, *supra* note 9.

¹² 292 F.2d 755 (D.C. Cir. 1961), *cert. denied* 368 U.S. 921 (1961), noted 37 N.Y.L.J. 323 (1962).

¹³ The four acts upon which the Court of Appeals affirmed the judgment of 35,000 dollars were: (1) that KLM failed to properly instruct passengers about life vests; (2) that defendant failed to broadcast an emergency message; (3) that defendant's crew failed to take steps to rescue the deceased from the tail of the plane when various alternatives of rescue were available; and (4) that KLM's ground agent failed to take notice to initiate prompt search and rescue operations when it did learn that the plane was missing.

cases.¹⁴ *Tuller* suggests dissatisfaction with present limits on carrier liability, and may be indicative of future awards based on a judicially expanded concept of wilful misconduct.¹⁵ In yet another development pointing toward ratification, the Interagency Group on International Aviation (IGIA), headed by FAA Administrator Najeeb Halaby, sent its recommendation for ratification (accompanied by draft legislation) to the State Department on August 12, 1963.¹⁶ However, the Administration has not taken steps to bring the matter before Congress. The IGIA also recommended simultaneous enactment of legislation requiring United States airlines to carry 50,000 dollar trip insurance on each international passenger,¹⁷ but this proposal has also generated little administrative action.

These recent developments clearly show an effort to force the Administration to make a decision on ratification of the protocol. The net effect of these efforts remains to be seen, but they have been successful to some extent, as Senator Cotton puts it, "in throwing the whole situation into the light of public awareness."¹⁸ Further, the *Tuller* case indicates that passengers (or their representatives) will be allowed to recover more than the convention limits under facts heretofore found to establish less than wilful misconduct.¹⁹ Certainly if the question of ratification should come to a vote, it is evident that pressure and opinion is for the treaty, and the arguments advanced for ratification remain intact. The protection of American citizens on international flights demands adoption of the treaty. The 8,292 dollar limit on liability under the convention is unreasonable considering today's increased standard of living and values. Further, refusal to ratify the Hague Protocol is inconsistent with the role of the United States as a leader in international cooperation, especially in this instance because of the part played by the United States in drafting the protocol.²⁰

George Bramblett

¹⁴ Prior to *Tuller* the only other American decision to give a plaintiff recovery in excess of the Convention limits was *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949). The "wilful misconduct" in that case was the defendant's failure to chart the height of a mountain in its flight plan. As a result of this oversight the plane crashed into that mountain while flying on course at the scheduled altitude.

¹⁵ See *Berner v. British Commonwealth Pacific Airlines*, 219 F. Supp. 289 (S.D.N.Y. 1963), noted in 30 J. Air L. & Com. 394 (1964).

¹⁶ *Aviation Daily*, Nov. 18, 1963, p. 89.

¹⁷ *Ibid.*

¹⁸ Speech, *supra* note 8.

¹⁹ See *supra* note 15 and accompanying text.

²⁰ See *supra* note 6.