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# SESSION THREE

## PROSPECTS OF AMENDMENT OF THE WARSAW CONVENTION

DR. PIETER J. SWART†

### I. INTRODUCTION

AS THE MAIN ELEMENTS of a possible amendment of the Warsaw Convention, the limits and systems of liability, have already been discussed, I understand the “prospects” attributed to me refer to the chances that the Convention will indeed be amended on these respects. What makes it difficult is that these chances depend mainly on the United States, on what the Government of the United States is willing to accept. From what has been said so far it has become clear that the United States has not yet made up its mind, or maybe I should say “their minds.” Amendment of the Convention, of course, requires the consent of the other contracting States and, therefore, also depends upon them. However, some kind of consensus exists among those other States to the effect that the contents of the so called Montreal Agreement are about the limit they could accept, and that some safeguards are required in order to prevent the new limits from being broken except in very exceptional cases.<sup>1</sup>

Under these circumstances I decided that the best thing to do would be to discuss the source of the present difficulties; the difference of opinion between the United States on the one hand and all other States on the other hand. In so doing, I must simplify things and disregard the differences which exist internally in the United States and the differences among the other States; all those differences are of relatively minor importance.

### II. POSITION OF OTHER STATES

One could say that the other States were, until recently, more or less content with things as they were. In any instance doubling the liability limit for passengers would have been quite sufficient for them (as became clear at the I.C.A.O. conference of January 1966). As a result of the denunciation of the Convention by the United States, those States—*i.e.*, their airlines—were forced to make far-reaching concessions. In so doing they went further than the United States had previously considered possible and also further than those States originally wanted, both in view of the costs involved and as a matter of principle. For many of them the result was tan-

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<sup>1</sup> Even so, some States may require an alternative possibility, with a lower limit, in respect of carriage between those States.

amount to unlimited liability. The United States may be able to consolidate things on this new basis, thereby restoring the pre-Montreal unity, provided it is willing to give some kind of guarantee that those new high limits will be real limits, that they will not be broken in the same way as the old limits.

Recent events have made it clear that the other States are prepared to fight for this Convention and its dominant feature: the limitation of liability. Also, they are willing to make some sacrifices for it. One reason is of course that the Convention exists, which in legal matters is a valid argument. More important is that it seems to offer the only possible basis for a world-wide uniform regulation of the subject matter, which, by its very nature, asks for uniformity. There is more to it, however, and above all stands the conviction that the Convention is a good and reasonable convention and that its limitation of liability is justified. In speaking of justification I do not refer to the reason why the limitation was originally adopted—something which would be difficult to ascertain—but the reason to maintain it under the present circumstances. What is this justification?

In my personal view, one should start by realizing that the great majority of the aviation accidents we think of have nothing to do with moral fault, but are part of the aviation risk. That risk, at least in the long run, will have to be paid for by the passengers as a whole. If the carrier has to bear the risk in the first instance, he will shift it to the passengers as part of the fare. If there is no limitation, passengers will represent a very difficult risk, but nevertheless must contribute equally. In other words: the "poor" passengers, as they have been called, will have to pay for the "rich" passengers—the "peasant" for the "king." In case of fatal accidents it is not only the income which counts, but also the question whether the passenger has any dependents. In the average it is the income we are concerned with: the poor have to pay for the rich. But that is not all.

Airline passengers like other people run the risk of all kind of accidents, such as car accidents, many of which are a result of their own negligence or as a result of unknown or insolvent third persons. People can and should insure themselves in view of such accidents and in many cases are so insured. I do not know of any statistics on this point, but I noticed that Mr. John E. Stephen mentioned an amount of \$125,000 as an average for accident insurance and that Mr. Andreas F. Lowenfeld said that probably about twenty percent of all passengers take out trip insurance. If we add something for other accident insurance and life insurance, and if we realize that part of the passengers are children or other people without any dependents, one could, in my view, safely say that passengers have in the average provided coverage for possible damage as a result of their death or injury, to an amount of \$50,000 each. One is inclined to forget or ignore this. The result is that the poor passengers have to pay for either a windfall on the part of the rich passengers, in case they were fully insured, or the negligence of rich passengers in failing to take out such insurance. In both cases the result is contrary to elementary principles of justice. It is much better that passengers, and especially those with a more than average income, take out their own insurance.<sup>2</sup> That should be encouraged, not

<sup>2</sup> A high income individual should not be able to impose on the rest of society the extra burden of the risk involved in his entering into a dangerous situation. Lang, *Compensation of Victims—A Pious and Misleading Platitude*, 54 CALIF. L. REV. 1559 (1966).

in the interest of the airlines, but in the interest of the persons themselves. It is irrational to expect such insurance only of twenty percent of the passengers, as a United States delegate did on one occasion. Those who argue against limitation have a tendency only to look at the relatively small number of cases in which there has been an accident, and to ignore circumstances which should be relevant, such as the amount of insurance.

I do not want to create the impression that there is a consensus on these matters outside the United States, but I am convinced that as a whole there is a certain willingness to share these views.

### III. POSITION OF THE UNITED STATES

The question is: Why do the views of the United States differ so much from those of other States? Why are they so much opposed to the Convention? Maybe we should leave it to the United States to give an explanation of their own exceptional position, but it is sometimes easier for others to do so. The position of the United States in this respect reminds me of the proud mother who witnessed a parade and stated that the whole regiment was out of step except her son.

The first difficulty an outsider is faced with, is the question to whom he should address himself, which body or persons in the United States have a decisive influence in matters like these? One would be inclined to say: the Government, the Executive, but it is a well known fact that this Government proposed and considered various solutions, but was very handicapped by the views of the Senate on the matter. It seems very difficult, however, to determine the views of the Senate and even more so to establish the reasoning behind those views. The impression was created that those views were very strongly influenced by the trial lawyers, because their association has been very active in proclaiming its ideas and this is about the only group which would profit from the system which the Senate seems to favour, *viz.*, a system without limitation of liability or one with a very high limit. This intervention of the trial lawyers was not, of course, very likely to create sympathy abroad.

As to the arguments used: many of them were not very convincing. I refer to statements such as that the American passenger should be more adequately "protected" or made "whole." In the first place I fail to see how you can have degrees in adequate protection and why American passengers need special protection. However, more important is that the expression "protection" is misleading, as it creates the impression that in the proposed system more lives will be saved, whereas it only affects the question, "How much money should be paid afterwards to surviving relatives, if any?" Other arguments were put forward to show that the United States could very well live without the Convention. Arguments like those are not very likely to satisfy those who should like to know why it is necessary that the United States, being the most important State in aviation, denounce the most important and most widely accepted convention on air law, and maybe even on private law in general. This is not, however, the only question concerning the American approach which remained unanswered. I will mention a few others.

In the first place the question why the United States has raised its price so many times and to such an extent. In 1934, the United States adhered to

the Convention, including the limit for passengers of \$8,300, because the Government of the United States considered the Convention beneficial to passengers. In 1955, at The Hague Conference, the United States delegation asked \$25,000, but agreed to \$16,600. In 1964, the United States government proposed for its internal use \$66,600 (\$16,600 plus \$50,000 insurance). In 1965, the same Government asked \$75,000 and declared its aim to be \$100,000. Recently, amounts in excess of \$100,000 have been mentioned. One wonders where is the end and what is the reasoning behind all this? Why does the United States ask a limit which is thirteen times as high as the one agreed to in 1934, when the average income is at present only 5 or 6 times as high as in 1934? Why is Canada, with a very similar standard of living content with half the amount (\$50,000)?

A second question is why in nearly all the statements and publications on this subject in the United States is the obvious advantage of limitation of liability mentioned above ignored, *viz.* that it forces airline passengers to pay for their own special risk by way of insurance, which they need anyway for other, more frequent accidents? I know very well that this was not the reason why one limited the liability of the carrier in the Convention, but that historical reason, whatever it may be, need not concern us now.

A third question is why did the United States denounce the Convention without calling for the assembling of an international conference in conformity with Article 41 of the Convention and even without waiting for the results of the special general assembly already called by the Council of I.C.A.O.? This hasty step seems difficult to justify taking into account that the United States took ten years to make up its mind.

A fourth and last question is why in the United States is such a fundamental difference made between passengers and goods? I do not know of any objection raised against the limitation of liability contained in the Convention in respect to goods. As far as I can see the reasons for such limitation are similar as in respect to passengers.

#### IV. THE REAL REASONS FOR THE UNITED STATES APPROACH

It is clear from the above that I seriously doubt the validity of most of the arguments used in support of the United States position, against the Convention. This implies that in my view there must be other reasons for this position. As I see it these reasons are twofold.

In the *first* place the attitude of the United States towards international unification of private law in general. It is very difficult to expect much enthusiasm from such international unification from a country which is, so far, unwilling or unable to bring about unification on a national level, as among its separate states. The scope of the Warsaw Convention is confined to international carriage, thereby leaving national carriage to national laws. Most States, however, have also adopted the rules of the Convention in respect of national carriage, though with some amendments. This is a consistent attitude, because it furthers unification and shows that the rules were not only adopted for the sake of unification, but also because of their intrinsic value. The United States has not followed this example and could not do so without some unification of the state laws. This, combined with the fact that national carriage in the United States

is much more important than international carriage, resulted in the present situation in which the rules of the Convention apply only in more or less exceptional circumstances. Therefore, the system of the Convention is regarded in the United States as an abnormal system, and met with distrust and hostility. It has never been truly accepted as the law of the land. This is clearly shown in the well known decision in the *Lisi* case.<sup>3</sup> There is a very strong tendency to adapt the international rules to the national rules instead of the otherway around, like in other States.

The *second*, and most important reason, for the United States approach is the high level of awards for accidents generally in the United States. The fact that that level is very high can best be illustrated by comparing the figures mentioned as the limits necessary in order to cover 90% of claims: \$150,000 for the United States and \$60,000 for Canada. This high level of awards is the result of a great number of factors, of which I mention:

(a) *The standard of living*. The importance of this factor should not be overestimated. This alone is unable to explain the difference in awards between the United States and Canada, because the difference in the standard of living between these countries is not very great. As far as other countries are concerned it should be realized that in many of them the standard of living has increased considerably in recent years, but that air travel is mainly limited to people with a relatively high standard of living.

(b) *A tendency in the United States to try to express the value of almost everything in money*. It is something which strikes anyone visiting the United States. The result is that people in the United States are, as a whole, very claim-minded and that there is a certain readiness on the part of the courts to allow moral damages.

(c) More or less *peculiar features of the legal procedure in the United States*, in particular the *jury system* and the *contingent fee system*, which both result in high awards. The jury system because a jury is in general inclined to favour the plaintiffs in cases like these,<sup>4</sup> and the contingent fee system because in this system fees are high and should be paid out of the award.

(d) Last, but not least, the combined *influence of a still underdeveloped social security system and an obsolete conception of the function of tort law*.<sup>5</sup> This results in a tendency to disregard all collateral sources of compensation and to require compensation of imaginary, abstract damages, out of punitive considerations, causing in many cases considerable profits to the victims or their next of kin. This is not only detrimental to the defendants, but to society as a whole. Cases like those referred to are all

<sup>3</sup> *Lisi v. Alitalia*, 370 F.2d 509 (2d Cir. 1966), cert. granted, 36 U.S.L.W. 3189 (U.S. 6 Nov. 1967).

<sup>4</sup> Most influential has been the role of the jury. For it can hardly escape the most unperceptive observer that laymen called at random to the task of decision making are inclined to be more perceptive to the sentimental appeal of the victim's plight than to any, conceivably competing, long-range considerations of social policy (that might weigh more heavily with a professional judge). J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS, 16 (1967).

<sup>5</sup> See, Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966). "In the United States this process of emancipation from the paralyzing legacy of largely obsolete folklore is still in its infancy, but it is bound to gain increasing momentum as social security and other collateral regimes are assuming a greater role in the business of meeting accident costs."

but exceptional. They are often not recognized as such because the true facts are not disclosed. From my own limited experience I know of several persons who died as a result of an airline accident and whose widows were financially better off than before as a result of the amounts they received by way of pension, social security and insurance. Anything received from the airline in such cases by way of compensation of damages only adds to the windfall.

If the above mentioned reasons are indeed the main reasons for the more or less hostile attitude in the United States towards the Warsaw Convention, as I believe they are, that attitude should be reconsidered, because nearly all of those reasons can be challenged.

#### V. MODERN TRENDS IN TORT LAW

I should like to conclude by drawing attention to some modern trends in tort law, which do affect air law and will probably do so even more in the future. Many of the traditional views on the matter, in the United States and elsewhere, remind me of the tribal customs in Ethiopia mentioned by Professor Sand in his contribution to the Symposium. They have in common the tenacity with which people cling to old traditional customs and concepts. The main difference is, that in the example given by Professor Sand, those tribal customs were put to use for a specific modern needs, whereas, the adherence to old tort law customs only results in an enormous waste of time and money.<sup>6</sup>

The main trends in tort law as I see them are described in the following paragraphs.

##### A. *Absolute Liability*

An important step is the recognition of absolute or strict liability as a separate form of liability, with its own rationale, its own structure and its own problems. Therefore, I greatly welcome the more or less unexpected acceptance of this form of liability in the Montreal Agreement. Mr. Joseph N. Onek in his contribution compared the attacks on the principle of absolute liability with the flogging of a dead horse, but Mr. Lee S. Kreindler made me realize that the horse is not as dead as one might think. It is a striking example of the slowness with which law adapts itself to modern needs. The Prussian Railway Liability Act of 1838 contained this system of liability, at a time when the Lord Campbell Act had not even been enacted. However, half a century passed before its importance began to be realized. In 1925, the First Conference on Private Air Law in Paris considered the adoption of the system of absolute liability for the Convention, but decided against it because aviation had not yet reached the perfection of railways. Time has come to reconsider this.

Absolute liability has been accepted in many other areas, e.g., workmen's compensation, product liability, nuclear accidents, automobile accidents, gas, electricity and water accidents. This system is still making progress, for various reasons. In the first place because it is more equitable: it is highly unsatisfactory that a carrier can refer a passenger to a third

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<sup>6</sup> MILLNER, NEGLIGENCE IN MODERN LAW, 227: "[I]t is convincingly demonstrated that litigation based on fault is a costly, unpredictable and inappropriate method of determining whether compensation is to be paid."

person such as the manufacturer of the aircraft, the Air Traffic Control or someone who placed a bomb aboard the aircraft. The second reason is it is simpler because one can avoid the many complicated constructions which have been invented in practice to reach the same result. The third reason is it is cheaper, because it gives rise to less litigation, and fourth it is more effective.<sup>7</sup>

### B. *Limitation Of Liability*

The acceptance of absolute liability makes it easy to accept limitation of liability as well, not only as a kind of *quid pro quo*, but because in the long run the passengers will have to pay for the risk, and limitation is the best way to distribute the risk in an equitable manner.

### C. *Social Security*

The abandonment of the fault principle with its punitive element opens perspectives also in regard to the person liable for the tort. The main requirement is that he be someone who is able to pay the loss—e.g., because he has ample means or because he carries liability insurance—and to distribute this loss in an effective and equitable manner amongst those who profit by the dangerous activity. It may be the manufacturer, the owner, the user or the operator of the dangerous thing or substance, but it may also be an outsider like an underwriter or the State. That may explain why this kind of liability can easily be replaced by a system of social security, as has been done with workmen's compensation and is envisaged by some in respect to automobile accidents. It seems very unlikely, however, that this system will be adopted for aircraft accidents in the near future. In any instance, developments like these are clearly beyond the power of the courts. The legislature will have to make the choice.

### D. *Exclusive Liability*

Older forms of absolute liability, such as vicarious liability of employers, were added to fault liability, as a kind of additional guarantee. Nowadays, there is, however, a certain tendency for absolute liability to become exclusive—to replace fault liability. This is clearly the case in the different conventions on nuclear liability. There are, however, also signs of it in other fields, such as vicarious liability. An advantage of this system is that there is only one person who needs to take out insurance. It avoids multiple insurance and eliminates recourse actions. This system is particularly desirable in case of limitation of liability, as in aviation, because it makes it impossible to evade that limitation by suing others. It might be the answer to the problem raised by Mr. Kreindler of the manufacturer of spare parts who is unable to pay for the necessary liability insurance.

### E. *Collateral Sources*

Last, but not least, there is a growing tendency to subordinate the

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<sup>7</sup> Strict liability, far from being a disincentive to care, is in practice the most effective spur to accident prevention. J. FLEMING, *supra* note 4, at 162. Although either the fault or the strict liability principle would accomplish the objective of eliminating unreasonable action, the latter is the superior principle because it also assists in eliminating excessive activity of a reasonable kind. Lang, *supra* note 1, at 1564.



liability, in particular absolute liability, to other, collateral sources of compensation, such as pensions (widows and disablement pensions), wages, social security benefits and even life and accident insurance. The main argument to ignore these sources, or to give them a recourse action, has always been that the wrongdoer should not profit by them. However, once one abandons the punitive conception of liability, by accepting absolute liability, this argument loses its value. One starts wondering if it is really worthwhile to complicate matters by those recourse actions.<sup>8</sup>

I feel entitled to say this because in the Netherlands the recommended system has existed, at least to some extent, since 1838. Actions for wrongful death are very limited, in the first place because the law (Article 1406 of the *Neth. Civil Code*) only gives an action to the surviving spouse, the children and the parents of the deceased who were supported by his labour, and secondly because the court may (and does) take into consideration all circumstances, such as an inheritance received, pensions, amounts received from accident insurance, *etc.* No compensation is given for moral damages in a case like this. This combined with a modern pension and social security system results in low awards in actions for wrongful death. An award of more than \$30,000 is an exception. At a recent meeting of the Dutch Lawyers Association<sup>9</sup> it has even been suggested to abolish all liability in case of accident, of whatever nature, for damage to persons. This proposal stands no chance of being adopted in the near future, but the very fact that it was proposed characterizes the enormous difference between the Netherlands and the United States in matters like these.

I do not say all this in order to persuade the United States to adopt the Dutch system, but to show that the United States system is not the only one possible. Many objections can be raised against that system and one should think twice before rejecting the Warsaw Convention because of that system. That would improve the prospects of amendment of the Warsaw Convention.

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<sup>8</sup> See, Fleming, *supra* note 5, at 1544: "[I]n contrast to most other countries which are categorically committed to the compensatory and opposed to the punitive theory of damages, American courts continue to entertain an ambiguous and uneasy tolerance of double recovery."

<sup>9</sup> See also, A. BLOEMBERGEN, NAAR EEN NIEUW ONGEVALLENRECHT, INAUGURAL LECTURE (1965).