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## SESSION FOUR

### STILL ANOTHER VIEW OF THE WARSAW CONVENTION

BY G. I. WHITEHEAD, JR.†

TO APPRECIATE the battering the Warsaw Convention has taken in recent years as natural and inevitable, it is necessary to recognize only the extraordinary growth in the United States of sophistication in the techniques of collecting money damages for personal injury and death in all sorts of circumstances and in ever increasing amounts.<sup>1</sup> Technique alone, however, is not enough. The growth of new legal devices, expansion of existing legal rules and introduction of novel theories of recovery required, and found, a favorably disposed judiciary much concerned, as the 21st century approaches, with individual rights. In the 1949 *Froman* case,<sup>2</sup> a majority of the Judges of the New York Court of Appeals could hold:

[I]t can hardly be disputed that, when a ticket bearing appellant's name and all particulars as to the intended route as well as reference to the Warsaw Convention limitation was laid in front of appellant on the table in the airport, she, by thereafter boarding the plane as a traveler on that ticket, impliedly, if not expressly, satisfied and adopted what had been done by the Army, and later by Abraham, in taking out that ticket in her name.

In 1965 the Second Circuit Court of Appeals had no difficulty in saying in the *Mertens* case:<sup>3</sup>

We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability.

What has happened in the sixteen years between *Froman* and *Mertens*? Judge Moore, dissenting in the *Lisi* case,<sup>4</sup> partly answered the question where he observed: "The majority do not approve of the terms of the

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<sup>1</sup>For technique and sophistication see the PLI tort law courses, the PROCEEDINGS OF THE SECTION OF INSURANCE NEGLIGENCE & COMPENSATION LAW OF ABA (1966), or almost any ATLA News Letter or NACCA Law Journal. Technique is used, too, in the attack on the treaty, Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 12 Oct. 1929, 49 Stat. 3000, T.S. No. 876 (1934) [hereinafter Warsaw Convention]. Opponents always use descriptive adjectives such as "obsolete," "archaic," "harsh" and "discredited." A radio program was even included in the battering, see verbatim transcript of Barry Gray show, "The Plaintiff's Advocate," October 1962, published by NYSTLA.

<sup>2</sup>Ross v. Pan American Airways, Inc., 77 N.Y.S.2d 257 (Sup. Ct. 1948), *aff'd*, 80 N.Y.S.2d 755 (1st Dep't 1948), 85 N.E.2d 880 (N.Y. Ct. App. 1955), see also *Froman v. Pan American Airways, Inc.*, 349 U.S. 947 (1955).

<sup>3</sup>*Mertens v. Flying Tiger Line, Inc.*, 35 F.R.D. 196 (S.D.N.Y. 1963), *aff'd and rem'd*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816, *reh. denied*, 382 U.S. 933 (1965). The court commented, "this position is not necessarily inconsistent with *Ross v. Pan American Airways*. . . ." Upon comparing the facts readers may judge this for themselves.

<sup>4</sup>*Lisi v. Alitalia-Linee Aeree Italiane S.p.A.*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *cert. granted*, 387 U.S. 901 (1967).

treaty and, therefore, by judicial fiat they rewrite it." A full answer requires examination of contemporaneous events which have led to the strongly hostile reactions to limitations of liability for bodily injury and death as illustrated by the majority opinion in *Lisi*. Space and the subject of this paper do not permit a study in depth of the effect on principles of liability and damages of changing economic and sociological standards and the influence of concerted group efforts in shaping those standards. Nevertheless the central fact is that money is what the Warsaw Convention controversy is all about.<sup>5</sup>

The "Montreal Agreement"<sup>6</sup> singles out air carriers engaged in certain international transportation of passengers for a remarkable discrimination, but foreign friends of United States aviation should know that Warsaw Convention is not the only mark being shot at. This extraordinary statement appears in the recent *Gore* decision<sup>7</sup> where the accident state limitation on recovery for wrongful death was held inapplicable:

As causative of New York's policy New York courts have pointed out that the fear of large recoveries in wrongful death actions might influence common carriers to exercise more care in transporting their passengers than they would perhaps exercise if the possible recoveries in such actions were arbitrarily limited to sums that might have no relationship to the pecuniary value particular decedents may have had to their surviving next of kin.

A statement of this sort is deeply worrisome because it emphasizes the court's inordinate efforts to find sufficient legal reasons for defeating the limitation of liability defense.<sup>8</sup> Surely no one can seriously suggest that the Captain in command of the *Gore* crash aircraft deliberately placed himself in a position of danger while on final approach for a landing at Nantucket, Massachusetts, after rationalizing: "Liability is limited here so I'll take a chance."<sup>9</sup> More importantly aviation people know that without safety air transportation could not survive.<sup>10</sup> As one executive of a major air carrier put it in quoting from instructions to its attorneys:

<sup>5</sup> The United States Delegation to the Hague Conference, September 1955, was instructed in substance that the Warsaw Convention no longer produces an equitable balance between carrier and passenger. "Consequently, the fundamental and overriding position of the United States Delegation should be to restore the balance—primarily through a substantial increase in the limits of liability for death or injury. . . ." Interestingly enough at that time the United States Delegation was seeking an increase of at least 375,000 francs (\$25,000), Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. AIR L. & COM. 253 (1956). See also NACCA letter to President Eisenhower, 15 Mar. 1956. "There are people and families in our country today whose lives have been broken by Article 22 of the Warsaw Convention." But see *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd without opin.*, 48 N.Y.S.2d 459 (1st Dep't 1943), 293 N.Y. 278, *cert. denied*, 324 U.S. 882 (1944). "The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof."

<sup>6</sup> C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966).

<sup>7</sup> *Gore v. Northeast Airlines, Inc.*, 222 F. Supp. 50 (S.D.N.Y. 1963), *rev'd*, 373 F.2d 717 (2d Cir. 1967).

<sup>8</sup> New York's anti-limitation policy is clearly one of permitting full compensation to the beneficiaries. See, e.g., dictum in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

<sup>9</sup> In the same vein, can anyone believe that substandard equipment, maintenance, crew selection and training, depending upon the nature and extent of the air carrier's legal liability to passengers, would be tolerated? See generally for federal authority 49 U.S.C. §§ 1424, 1425 and in particular Federal Aviation Regulations Part 121—Certification and Operation: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators of Large Aircraft.

<sup>10</sup> Statistics show declining passenger revenues following major air crashes, perhaps most pronounced when two or more occur within a relatively short period and involving the same type of equipment.

"The air carrier has a definite sense of responsibility to the public which compels the dissemination of information and the furnishing of all possible cooperation and assistance to the investigators in determining the cause of the accident."<sup>11</sup>

That this is not a perfect world with a ready remedy for all misfortunes was perceived clearly in a Maryland decision<sup>12</sup> where the court in deciding a choice of law issue declined to apply "the state with the most significant interest" rule, saying in part:

This court has consistently followed the rule that when an accident occurs in another state substantive rights of the parties, even though they are domiciled in Maryland, are to be determined by the law of the state in which the alleged tort took place. \* \* \* The rule was, and still is, followed by the great majority of other states. \* \* \*

In what we have said, we do not intend any implication that *lex loci delicti* is, in general, in our opinion, an unjust rule. Hardship may result in a particular case, but, that, unfortunately, is true under any general legal principle. Certainty in the law is not so common that, where it exists, it is to be lightly discarded. We recognize the force of the countervailing arguments, but in the present state of the law, we leave any change in the established doctrine to the legislature.

"Hardship" brings to mind a cliché heard from time to time that bad facts make bad law, which may be stated another way: Some highly dubious legal propositions stem from pains to bring about a happy ending for victims of accidents. At one point the majority in *Lisi* had this to say:

The Convention's arbitrary limitation on liability—which has been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

It is not within the assigned range of this paper to devote particular attention to the many interesting facets of the *Lisi* decision and its progress in the courts.<sup>13</sup> It is used here merely to show where unnecessary comment simply exposed to view the prejudices of the majority of the court.<sup>14</sup> The question of damages allowable under the Warsaw Convention, generally conceded to be low by United States standards, was not at issue.<sup>15</sup> One wonders, too, whether the possibility was even considered, and discarded,

<sup>11</sup> Address by McErlean, The Society of Air Safety Investigators, Washington, D.C., 10 Nov. 1966.

<sup>12</sup> *White v. King*, 244 Md. 348 (1966); accord, *Marmon v. Mustang Aviation, Inc.*, 4 Av. Cas. ¶ 17,300 (Tex. Civ. App. 1967). But see Mendelsohn, *Another View on the Adequate Award in International Aviation Accidents*, 1967 *INS. L. J.* 197, 201. "While recent cases can still be unearthed that adhere to the venerable rule of *lex loci delicti*. . ." cf. *Kantleliner v. United States*, 10 Av. Cas. ¶ 17,347 (E.D.N.Y. 1967) where the court dealing with nine possible jurisdictions noted "Seven of them follow the traditional rule that the law of the place of death governs, while New York and Pennsylvania have adopted a significant contacts approach."

<sup>13</sup> Petition for certiorari granted, 387 U.S. 901 (1967).

<sup>14</sup> See Note 7 in the majority opinion where the attack on the Warsaw Convention limits of liability is summarized.

<sup>15</sup> The principal issue appears to be whether actual notice of the limitation of liability is a condition precedent to the application of Article 22.

by the majority that in the absence of presumed liability and a trial on the issue of negligence, a jury may have returned a verdict for the defendant. The suggestion "to take such other steps for his self-protection as he sees fit" is good advice for anyone, including the breadwinner who is killed in a fall down his cellar stairs and there is no one to sue for money damages. Perhaps the decedents in *Lisi* were well aware of the Warsaw Convention limit of liability, and the expense and uncertainties of damage suits in general, and therefore took "other steps" so that their survivors' welfare would not depend upon an uncertain recovery at some indefinite time in the future. Insurance information is not provided in the decision, but the curious observer might inquire: Is *Lisi* authority for a rule that makes the facts of decedents' insurances, flight or other, competent evidence for the limited purpose of showing that decedents have seen fit to provide for their self-protection?<sup>16</sup> What would the impact on *Mertens* and *Lisi* be, if the facts were that the deceased passengers had purchased the maximum available flight insurance? One may wonder, too, whether notice in any form would have satisfied the majority of the *Lisi* court.

The *quid pro quo* for established limits of recovery under Warsaw Convention is presumed liability.<sup>17</sup> A court has said of the escape provision for the air carrier; "Even if it be assumed that carrier is entitled to claim the benefit of Article 20(1) the court finds that it has not met the almost insurmountable burden required of it."<sup>18</sup> If through changing circumstances it develops that the original agreement favors one part more than the other, there are procedures for restoring the equilibrium and these are being pursued.<sup>19</sup>

Until recent years the Warsaw Convention \$8300 limit of recovery in exchange for presumed liability was not at variance with the average recoveries in wrongful death cases under domestic death statutes.<sup>20</sup> Therefore, in 1949 Beaumont could correctly say, "The average compensation paid for death or injury in accidents outside the Convention, where negligence has to be proved, would not seem to exceed greatly, if at all, the Convention limits."<sup>21</sup> The *Capehart* case<sup>22</sup> (action to recover for the wrong-

<sup>16</sup> Collateral source rule will be raised, see generally Lambert, *The Case for the Collateral Source Rule*, 1966 *INS. L. J.* 531; Peckinpugh, *An Analysis of the Collateral Source Rule*, 1966 *INS. L. J.* 545.

<sup>17</sup> The *quid pro quo* rationale is inconclusively discussed in H. DRON, *LIMITATIONS OF LIABILITIES IN INTERNATIONAL AIR LAW*, 28-34 (1954).

<sup>18</sup> *Glassman v. Flying Tiger Line, Inc.*, 234 F. Supp. 223 (S.D. Cal. 1964), same case and others on issue of ticket delivery see 352 F.2d 494 (9th Cir. 1965). The argument is made that Article 20(1) has substantially the same effect as the United States application of *res ipsa loquitur*. *Cox, Adm'r v. Northwest Airlines, Inc.*, 10 Av. Cas. ¶ 17,250 (7th Cir. 1967) no doubt will be cited in support of this position. There is nothing in the decision to indicate how the court weighed the inference of due care of the deceased crew, but in all events, a rebuttable inference of negligence, *res ipsa loquitur*, is substantially different from the complete shifting of the burden of proof, and the degree of proof required, to escape liability under Article 20(1). *Res ipsa loquitur* cannot be described as an "almost insurmountable burden."

<sup>19</sup> The Panel of Experts on Limits for Passengers under the Warsaw Convention and the Hague Protocol, established by ICAO council, 27 June 1966. Warsaw Convention, Article 41.

<sup>20</sup> Early writers on the subject could cite one-third of United States jurisdictions having an average limitation on recovery for wrongful death of under \$15,000 with common law principle of negligence applicable, Orr, *The Rio Revision of the Warsaw Convention*, 21 *J. AIR L. & COM.* 399 (1954).

<sup>21</sup> Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 *J. AIR L. & COM.* 395 (1949).

<sup>22</sup> Unreported, tried to a jury verdict for plaintiffs on issue of wilful misconduct, later settled, S.D. Fla. (February 1963).

ful deaths of the son and daughter-in-law of the former Senator from Indiana in an air crash at Montego Bay, Jamaica, in 1960) has been referred to as triggering the current difficulties with which the Warsaw Convention is beset.<sup>23</sup> The concept of limiting liability for wrongful death should not have astonished the Senator and his associates from Indiana, where, until 1957, liability was limited by statute to \$15,000.<sup>24</sup> The Warsaw Convention limits of liability were under emotional attack<sup>25</sup> long before *Capehart*, and under continuing appraisal, too, by persons who believe the Warsaw Convention is a most useful treaty.<sup>26</sup> It was not necessary to prove to the latter what already had become apparent. The continued usefulness of the Warsaw Convention in the United States depends upon finding a satisfactory solution to the dispute over parity with the quantum of damages recoverable in United States domestic air crash cases<sup>27</sup> and giving assurance to the air carriers that the presumptive liability limit will not be a ceiling more honored in its penetration than in its application. This is a tall order. An attempt was made in the Hague Protocol<sup>28</sup> to satisfy these essential requirements.<sup>29</sup> Nevertheless, if possible, the Hague Protocol became more unpopular with the plaintiffs' bar than the Warsaw Convention. Doubling the limits of liability did not go far enough to meet the principal objection. Similarly, the revision intended to substitute a clear statement of when the limits of liability do not apply for the "wilful misconduct" provision was condemned as an airline scheme, the practical effect of which would be to limit the liability of the air carriers in all circumstances where the degree of fault was at issue.<sup>30</sup> The Hague Protocol deserves better treatment. It provides specific measures to improve the Warsaw Convention where experience has shown some changes are advisable and others necessary. It deals with the divisive issues of presumptive liability limits and the nonapplicability of those limits. The limitation of liability with respect to passengers continues to be controversial, but surely with a modicum of patience there can be a settlement of differences short of scrapping a valuable set of rules uniformly fixing the responsibilities of air carriers to their passengers and to shippers in all countries which are parties to the Warsaw Convention.

Meanwhile, under the gun of a crises created by the United States de-

<sup>23</sup> Stephen, *The Adequate Award in Aviation Accidents*, 1966 PROCEEDINGS, SEC. OF INSURANCE NEGLIGENCE & COMPENSATION LAW OF ABA 82, 89.

<sup>24</sup> BURNS ANNO. IND. STAT., Title 2, §§ 2-404, from \$10,000 to \$15,000 1949 Amend.; \$15,000 removed, 1957 Amend.

<sup>25</sup> For example, NACCA Letter to President Eisenhower, 15 March 1956. SHERMAN, THE SOCIAL IMPACT OF THE WARSAW CONVENTION (1952).

<sup>26</sup> The usefulness of the Warsaw Convention as the law under which most passenger and shipper claims against the world's airlines are quickly and satisfactorily resolved is largely overlooked in the emphasis on a few situations such as *Capehart* and *Froman*.

<sup>27</sup> Local and national standards must be studied although the Warsaw Convention is international in character. Nevertheless, the United States cannot insist that the world accept standards considered proper by its damage suit trial bar. The same rule applies to any nation which arbitrarily insists upon the application of its standards whether high or low in world opinion.

<sup>28</sup> Protocol, dated at the Hague, 28 Sept. 1955 to amend the Warsaw Convention.

<sup>29</sup> Article XI amends Article 22 by increasing the passenger legal liability to 250,000 francs (\$16,600). Article XIII amends Article 25 by describing the act or omission as "done with intent to cause damage or recklessly and with knowledge that damage would probably result. . . ."

<sup>30</sup> "[A] view expressed in this connection was that if some benefit was to be conferred on the passenger by raising the limit, a corresponding benefit should appear in Article 25 in order that the carrier may be protected against litigation which is now possible because of the ambiguity of the present text of the article." Report on Revision of the Warsaw Convention, Legal Committee, 9th Sess., Rio de Janeiro, August-September 1953.

nunciation of the Warsaw Convention<sup>31</sup> the world's airlines accepted the United States' unilateral amendment, the so-called "Montreal Agreement."<sup>32</sup> The air carriers' dilemma was the decision either to deal with the vacuum left by the United States withdrawal as a party to the Warsaw Convention or accept the "Montreal Agreement," a selection between alternatives which were likely to prove equally bad, but denunciation was the obvious spur which persuaded them to take the acceptance route. Apparently it was useless to bargain for ratification of the Hague Protocol in exchange for swallowing the "Montreal Agreement." Perhaps, hopefully, the air carriers felt that cooperation with the United States would lead to an early ratification of the Hague Protocol or a new treaty document, but in all events that they would not be faced with a long "interim." The suggestion that this amendment was conceived as a "special contract" between the air carriers and their passengers<sup>33</sup> is the biggest fish story since Jonah and the whale. That the "Montreal Agreement" is in fact an inter-carrier, rather than inter-governmental, agreement is a myth which simply cannot be sustained.<sup>34</sup> Any reasonably objective examination of the circumstances will suggest it was contrived in haste and presented to the world's airlines as something of a Hobson's choice.<sup>35</sup> The fundamental objection to the Warsaw Convention, low limits, and so stated to be the United States' sole reason for denunciation,<sup>36</sup> was generously removed,<sup>37</sup> but somewhere in the process of drafting the "Montreal Agreement" the presumptive limit of liability became absolute.<sup>38</sup> The idea of absolute liability in air crash cases has to come from individuals expressing their private notion of what the law ought to be. This theory is not in conformity with any general trend in the United States. The principle underlying the concept of absolute liability is justified as placing the risk of loss on the enterprise carrying on the operation out of which the injury arose or as workmen's compensation laws are sometimes explained, an occupational injury should be part of the cost of the product or service of the occupation in which it occurs. With respect to the latter it is necessary only to note the fixed schedule of benefits and elections required.<sup>39</sup>

<sup>31</sup> Dep't St. Press Rel. No. 268, 15 Nov. 1965.

<sup>32</sup> Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, C.A.B. Docket No. 17325, C.A.B. Order No. E-23680 (13 May 1966).

<sup>33</sup> Warsaw Convention, Article 22(1).

<sup>34</sup> Many of the world's major airlines are chosen instruments of their governments and government-owned in whole or in part. Proposal for Interim Agreement Among Carriers, letter Department of State, 14 Mar. 1966, including list of principal international carriers necessary to be included as United States' minimum requirements.

<sup>35</sup> It appears that United States air carriers were given a week in which to review the United States proposal on a take-it-or-leave-it basis. Following the rejection of the absolute liability provision by the United States air carriers the State Department proposal was disclosed to foreign flag carriers and subsequently accepted as the "Montreal Agreement," Lowenfeld & Mendelsohn, *The United States and The Warsaw Convention*, 80 HARV. L. REV. 497, 588 (1967).

<sup>36</sup> *Supra* note 31. "The United States of America wishes to state that it gives this notification solely because of the low limits of liability for death or personal injury. . . ."

<sup>37</sup> \$75,000 inclusive of legal fees and costs or \$58,000 exclusive of legal fees and costs, depending upon the law of the forum State.

<sup>38</sup> A rule of absolute liability seemed to be a dead issue having been rejected at Montreal and there being no United States precedent for the doctrine, Lowenfeld & Mendelsohn, *supra* note 35, at 573.

<sup>39</sup> Ordinarily, workmen's compensation is provided as a percent of average weekly wage with an established maximum and minimum and this remedy against the employer is exclusive, *King v. Pan American World Airways, Inc.*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1959).

Turning to sometimes called "enterprise liability," even under the most advanced rules proof of defect and causation is essential to recovery.<sup>40</sup> What are the positions of plaintiff and defendant where the "Montreal Agreement" is applicable? The plaintiff in all events—an aircraft shot down by hostile action, bombed in a heinous crime, destroyed by an Act of God<sup>41</sup>—may recover provable damages to the absolute limit of liability<sup>42</sup> and may sue, and recover, for unlimited liability under the harsh rules relating to technicalities of notice and documentation or go for the verdict without limit on the issue of the degree of fault.<sup>43</sup> Why select international air transportation for such severe treatment?<sup>44</sup>

"Interim" is a roomy word. The "interim" under the "Montreal Agreement" is likely to continue indefinitely without marked change even though the United States has stated it "stands ready to participate in the negotiation of a revision of Warsaw Convention which would provide substantially higher limits. . . ."<sup>45</sup> and the threat of United States denunciation of Warsaw Convention is a ghost which stalks any meeting where it is proposed to make the air carriers' position under the "Montreal Agreement" more tolerable.<sup>46</sup>

The Warsaw Convention is an instance where private international law has not kept pace with the parallel rate of development of the private national laws of one contracting party in one important detail, the attitudes in relation to the amount of awards in damage suits for bodily injury and death. The "Montreal Agreement" concept of recognizing and treating the problems peculiar to one contracting party, while novel, might well be reappraised in the search for a solution to the narrow problem of disparity in how the contracting parties regard and deal with those who are damaged. A study of this sort, if undertaken, should be accomplished within the framework of the Warsaw Convention.<sup>47</sup> And, if accepted, and this is not necessarily a commitment in support of such an agreement, put into effect as an additional Protocol. However, the reality of the situation is evident: The United States is committed to the basic principles of the "Montreal Agreement" for a long trial stage in any case.<sup>48</sup> Therefore, stalemate seems to be the prospect for any conference in the immediate future on a revision of Warsaw Convention satisfactory to the United States, unless the contracting parties are prepared to incorporate the "Montreal Agreement" principles into a new treaty. Perhaps the major emphasis at

<sup>40</sup> Dalrymple, *Brief Opposing Strict Liability In Tort*, DRI monograph (July 1966). German, *Products Liability—Strict Liability*, 33 *Ins. C.J.* 259 (1966).

<sup>41</sup> Jury verdict—no air carrier liability—Warsaw Convention case, *Winsor v. United Air Lines, Inc.*, 1960 U.S. & C. Av. R. 39 (D. Col. 1960), aircraft dynamited, Graham murder case.

<sup>42</sup> The "Montreal Agreement" requires the air carriers to waive their rights under Article 20(1).

<sup>43</sup> Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 52 *A.B.A.J.* 1122 (1966).

<sup>44</sup> The rationale of absolute liability and the possibilities of exporting it to other forms of transportation is discussed by Lowenfeld & Mendelsohn, *supra* note 35, at 600, 601. But they do not explain to any degree of satisfaction the basic injustice of removal of the Article 20(1) air carriers' defense leaving the passengers' escape routes intact, assuming that the air carriers are entitled to equal justice, too.

<sup>45</sup> United States Notice of Denunciation delivered to Poland, 15 Nov. 1965.

<sup>46</sup> Having taken the denunciation route once before, it seems quite obvious that this is still the United States' alternative to an unacceptable new treaty document or substantial amendment to the "Montreal Agreement."

<sup>47</sup> Warsaw Convention, Article 41.

<sup>48</sup> United States Rep. David's 5 June 1967 letter to Sec. Gen. Twigt (ICAO) stated that "ample time should be allowed to obtain experience under the Interim Agreement."

this juncture should be directed toward a sensible look at and amendment of the "Montreal Agreement." A start has already been made in that direction by the Panel of Experts appointed by the ICAO Council to examine the limits for passengers under Warsaw Convention and the Hague Protocol.<sup>49</sup>

Insurers' part in the Warsaw Convention controversy seems to be interpreted erroneously by some. Simply stated, professional aviation underwriters have a serious obligation to their insureds to maintain a wide range of current knowledge of what is going on in the world to affect the risks against which insurance is provided and to be in a position to express a prompt and definite judgment of the impact these activities may have on the insured' insurance programs, and, principally, the terms under which the risk will be written. Whether the Warsaw Convention, or the Warsaw Convention as it may be amended, is good or bad, right or wrong, is not an insurance decision. It is the appropriate business of insurers, however, indeed a responsibility, to direct their insureds' attention to settled and unsettled questions raised by amendments, or proposed amendments, affecting substantive rights, problems of administration which should be foreseen and dealt with in advance and what this all means in terms of premium dollar requirements.

The push for a federal compulsory aviation accident insurance law by a bill in the 89th Congress to amend the Federal Aviation Act of 1958, as amended, was quite another matter.<sup>50</sup> Here the insurers' interest was direct. This highly specialized piece of legislation would have required air carriers to procure and pay for accident insurance for the benefit of passengers on certain journeys subject to the Warsaw Convention whether they wanted it or not or could afford it or not, and put the regulation of a segment of insurance in the control of a federal agency for all significant purposes, rate making and policy forms, their terms and conditions.<sup>51</sup> Important issues raised by the proposed legislation included *state* versus *federal* regulation of insurance,<sup>52</sup> and *voluntary* versus *compulsory* methods of providing the air traveling public with aviation accident coverages.<sup>53</sup> The curtain has descended on this part of the act, at least for now, with a victory for the validity of voluntarism over compulsion.

While representatives of the world's airlines and people at the United States Department of State were debating the future of the Warsaw Convention, professional insurers of risks in aviation recognized the probability of some alterations in the rules of liability applicable to international air carriage of passengers, changes which were likely to affect the character of exposure to loss, and materially in many cases. To permit the mid-stream re-rating of the risk upon the happening of specific events, a mutual revision clause was drafted and has been in widespread use since the

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<sup>49</sup> PE - Warsaw Report - 1, 31/1/67 Annex B, Report of Working Group on Interim Agreement is a valuable examination of some of the problems. Note the United Kingdom has increased the limits of liability for internal and non-Warsaw Convention flights to £21,000, Carriage by Air Acts (Application of Provisions), 1967, which would indicate support from this source for the United States position with respect to low limits.

<sup>50</sup> S. REP. No. 2032, 89th Cong., 1st Sess. (1965).

<sup>51</sup> *Id.* at Sec. 418.

<sup>52</sup> For one, McCarran-Ferguson Act, 15 U.S.C. § 1012, 61 Stat. 448 (1964).

<sup>53</sup> There seemed to be a large measure of big brother paternalism in the idea that the air traveling public does not have the intelligence to take care of its own money matters.

early spring of 1966. The standard clause currently made a part of many insurance policies provides:<sup>54</sup>

As used herein:

"Warsaw Convention" means the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw, October 12th 1929 or any amendment or supplement to that Convention whether by means of Protocol, additional, new or supplemental Convention or otherwise.  
MUTUAL REVISION

If at any time during the currency of this policy the Insured's legal liability may be affected by any one of any combination of the following events:

- (a) Any ratification or denunciation of, or accession or adherence to, the Warsaw Convention or if the Warsaw Convention ceases to apply in respect of any State or Territory where it was previously in force
- (b) Any alteration of liability by national legislation or in conformity with any Government or other official requirement

THEN notwithstanding any other provisions of the policy, and in contemplation of any of the above events, either the Insured or the Underwriters shall have the right to request a revision of terms and conditions. Revised terms and conditions agreed by the parties hereto shall, unless otherwise agreed, become operative if and when the events (or event) relevant to the aforesaid revision become(s) effective.

If no agreement is reached on revised terms and conditions on the expiry of 60 days from the date of a written request for the aforesaid revision, then either party shall have the right to give 30 days' notice of cancellation of the Policy.

The cost, in increased premiums to provide insurance coverage for each of several plans under study to amend the Warsaw Convention or replace it, is of understandable concern to those who are engaged in the task of evaluating these plans. Insurers were, and are, ready to cooperate, and did. But, surprise was expressed, and some annoyance, too, when they could not provide precise answers to questions relating to cost. When asked to estimate the cost of a scheme described in a few short sentences as having the features of a workmen's compensation statute, the only reply possible had to be that the costs of insurance could not be estimated with any degree of useful accuracy without knowing a great deal more of the plan's details including the schedule of compensable losses. Where the question simply related to an increase in the limits of liability the substance of the answer was that to the extent costs are influenced by damages the basic underwriting concept of initially evaluating the cost of the increase would be *pro rata*. Experience alone will prove the degree of accuracy of the prospective rating.<sup>55</sup> With respect to major changes of substance, apart from limits, their impact on loss ratios cannot be known until the issues they raise are tested in the courts.<sup>56</sup> Then, too, the judgment factor, the thinking processes of experienced aviation underwriters,

<sup>54</sup> A standard clause was prepared, too, to apply when the insured and passenger agreed to a higher limit of liability in accordance with Article 22(1). British European Airways, for example, has agreed to extend the "Montreal Agreement" to all of its international passengers.

<sup>55</sup> The purpose of this paper does not include a discussion of the mechanics of rating aviation insurance risks and the preparation of retrospective and various formula rating plans. It is clear, however, that the industry is to a large extent self-rating as rate reflects experience. For some history on the subject see Tuan, *Aviation Insurance in America*, 32 J. OF RISK & INS., No. 1 (March 1965).

<sup>56</sup> The Warsaw Convention has been in force in the United States since 1934 and 33 years later its provisions are still being tested in the courts as to meaning and intent.

is not easily catalogued and reduced to print. This point was underscored some years ago by an insurance expert when he testified:

Aviation insurance rates, in my opinion, cannot be judged by comparatively short periods of past performance. Cognizance must be taken of the limited number of risks units engaged in aircraft flying service, prospective increase in the value of such units, the contemplated future changes in the characters of service and the extraordinary catastrophe hazard associated with this branch of insurance. The experimental stages seem by no means to be over. And in light of existing unsettled conditions, judgments rather than statistical formulae must be the final arbiter for the present. By way of analogy, even in Marine insurance, a much older and more stabilized form of insurance than Aviation insurance, judgment rating (judgment with respect to the individual insurance account of the insured) is still a very important factor in rate making procedure. Two policy holders with similar physical factors nevertheless may have different rates because of the difference in operating efficiency. Rates are necessarily different for every Aviation line. The judgment factor in rating Aviation risks is inevitable and there should be no disposition to simplify these matters by treating risks *en masse*.<sup>57</sup>

An insurance contract providing protection against legal liability for bodily injury to aircraft passengers contains, among other terms and conditions, the familiar insuring agreement to pay damages and the standard condition to defend suits which necessarily includes the right to investigate and settle. Therefore when accidents occur and passengers are injured the insurer's interest is direct and important.

Insurance liability claims administration practices will be unaffected for the most part by the "Montreal Agreement." For immediate purposes there may be less emphasis on a determination of the cause of the accident. Steps will be taken, as they always are, to develop the facts relating to damages and evaluate individual cases for settlement. People who are damaged deserve a prompt appraisal of their claims.<sup>58</sup> Therefore, an early contact is established with them to explain the insurer's interest and open settlement conversations. These early contacts frequently lead to satisfactory adjustments. Sometimes they do not. The offer to settle simply does not meet the claimant's expectations.

Supporters of the "Montreal Agreement" must suppose that claimants, given the opportunity for a fair settlement, will recognize that lawsuits are neither necessary nor inevitable and that expense and delay of litigation holds no advantage for them; that insurers, faced with a situation where the "if" is removed and the only issue is "how much," will reach for settlements. This is an interesting hypothesis, but probably not so. Even in the best of circumstances the issues may be and frequently are, stubborn in converting "fair settlement" into a dollar amount—"fair" by whose and what standard? Moreover, a claimant's actual experience as regards Warsaw Convention and the "Montreal Agreement" is being gained on a first-time, one-time basis. There is nothing particularly new about this situation, but it is by no means an easy task for an airline or insurance claims representative to explain to a skeptical claimant things like—\$75,000 is a limitation, not an indemnity, and the significance of a con-

<sup>57</sup> S. HUEBNER, *STUDY OF AVIATION INSURANCE* (1944).

<sup>58</sup> "Prompt appraisal" not only means an offer to settle, but also a prompt denial of liability with a full explanation when denial appears appropriate either on the law or facts.

tingent-free right of recovery. Claims subject to the "Montreal Agreement" will probably take, in general, the established course of Warsaw Convention cases. Some differences may stem from the psychology of absolute liability—this is shooting fish in a barrel—and the higher limit will produce increased litigation where damages are in dispute. At least the same frequency of Article 25 suits may be expected. There will be more activity in the future under Article 3 to break through the absolute liability ceiling.

These conclusions, or at least some of them, seem to be supported by the limited experience to be gained from a recent "Montreal Agreement" contract of carriage accident in which the injuries sustained by the one hundred-one passengers might be classified from none to serious by a person with reasonable detachment.<sup>59</sup> The claims of twelve foreign nationals were settled almost immediately. Nine months later claims involving seventy-seven United States nationals are still open—seven in suit. Wide differences exist in evaluating the nature and extent of the injuries. An early claims contact was made with substantially all of the passengers to effect settlement "quickly and economically" which Messrs. Lowenfeld and Mendelsohn suggest is essential to the success of the "interim" arrangement.<sup>60</sup> They also say:

It may well be that in the case of principal wage earners in the United States, claims will be handled like health or life insurance claims—with forms and perhaps interviews with the plaintiff and with the decedent's employer, but without any litigation. Where lawyers do participate, either to establish the proper claimant or to participate in the determination of the amount of damages, their task will be far simpler than at common law. They will not be required to have expertise either in conflict of laws or in the causes of air accidents, and with the issue of fault laid aside, there will be no risk of nonrecovery. It would seem fair to assume that in these circumstances the cost of lawyers' services will be drastically reduced.<sup>61</sup>

Lawyers were retained in thirty-eight cases within thirty days after the accident. In the twelve settled claims of United States nationals, counsel appeared in seven.

Essentially what has been said in this paper is fairly obvious, but some points perhaps, nonetheless, are worthy of emphasis. The Warsaw Convention unimproved by the Hague Protocol is still the private international air law of the United States. Decisions in the passenger documentation area, Article 3, are making a mockery of its objectives. The "interim" arrangement is a "jerry built"<sup>62</sup> attempt unilaterally at a solution to the United States sole objection, low limits. For what may be the best of motives, the "Montreal Agreement" became the worst of arrangements when used as an instrument for sociological experimentation, a means of testing private notions of social justice with international air transportation the guinea pig. When this Warsaw Convention controversy is stripped

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<sup>59</sup> This accident will remain unidentified because of its open and active status. When all legal matters have been concluded a summary will be prepared for the express purpose of evaluating experience under the "Montreal Agreement."

<sup>60</sup> Lowenfeld & Mendelsohn, *supra* note 35, at 600.

<sup>61</sup> *Id.*

<sup>62</sup> Adjective Messrs. Lowenfeld and Mendelsohn use to describe the "Montreal Agreement," *Id.* at 601.

of an emotionalism that is clearly excessive, the principal questions appear to be two which may be asked:

- (1) Is there still "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier . . . ?"<sup>63</sup>
- (2) Assuming the answer to (1) is yes, where uniformity cannot be achieved without substantial and material conflict with private domestic law, can the differences be accommodated within the treaty by additional Protocol, or new treaty document, and not destroy its usefulness?

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<sup>63</sup> From the Introductory statement by heads of government to the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) done at Warsaw, Poland, 12 Oct. 1929. United States adherence 29 Oct. 1934, 49 Stat. 3000, T. S. 876 (1934).