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THE WARSAW CONVENTION — DID THE CARRIERS TAKE
ALL NECESSARY MEASURES TO AVOID THE DAMAGE
TO THE CONVENTION — OR WAS IT IMPOSSIBLE
FOR THEM TO TAKE SUCH MEASURES?

BY MELVIN L. MILLIGAN†

WE ARE GATHERED here to pay our respects, hopefully not our last, to a fallen comrade, the noble Warsaw Convention. Few of us a dozen years ago, at the celebration of the marriage of dear old conventional Warsaw with that protocol loving maid Hague, could have foreseen the strange history to follow. The marriage was not to be recognized in the United States, but the illegitimate offspring born in Montreal was to get citizenship here. Such are the wonders of modern governmental science that to be conceived in Washington may be a more effective, though artificial, act of international union than the conventional way. It may not be love but it sure gets results.

In those happy old days when 125,000 Poincaré francs meant something, namely 125,000 French francs consisting of 65 1/2 milligrams of gold each, at a standard fineness of nine hundred thousandths (whatever that means), the airlines of the world had a certainty upon which they could rely in charting their international route and traffic expansion. The human body, containing some \$1.87 in chemical constituents, was now to bring up to \$8,300 under appropriate circumstances.

However, this airline generosity, sanctioned by governmental ratifications, did not meet with universal thanksgiving from grateful passengers or their estates. While the airlines were notable in their defense of Warsaw and the legal benefits which it tried to bestow, it was not often that airlines were in the forefront of the efforts to raise the monetary ceiling of Warsaw. Nor did insurers evidence much interest in such efforts. Perhaps it was a fear of the havoc that could result from a heavy-handed tinkering with the Warsaw mechanism that prompted reactionary responses from airline interests. In any event, in all candor, I must observe that the airlines were drawn kicking and screaming into the 1966 Montreal Agreement.

Has this airline approach to the serious matter of international accident liability been justified? Originally, in the infancy of the 1930's the airline industry dared not expose itself beyond Warsaw. The considerable revenue losses on international routes in the immediate post war years also argued for fiscal sobriety. I submit, however, that the combination of the jet age and post war inflation did change the name of the game. The new name: You have to *spend* money to *make* money.

Conditions in the airline industry have changed dramatically in recent years. This trend will accelerate as the advanced subsonic jets and super-

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sonic transports make their debut. For example, at fifty percent load factors, liability settlements (not claims), plus hull loss, occasioned by the loss of a large subsonic ship in domestic service, could run nearly five times greater than in the case of a loss of a present-day twin-jet. In international service using the limits of the Montreal Agreement, the loss of a big plane with one hundred fifty passengers would involve a maximum passenger liability alone of \$11,250,000. To increase the absolute liability of the carriers by an additional \$25,000 would increase this maximum to \$15,000,000. This is big money by any industry's standard. In global figures, the anticipated average hull and liability insurance costs for 1967 of a large international airline, with an insurance program comparable to TWA's, will be in the neighborhood of \$10 million with a maximum, based on experience, of around \$16 million. In 1971, with a bigger fleet and bigger planes, average insurance costs of around \$26 million may be expected, but the maximum could go as high as \$50 million.

Any discussion of insurance in the air industry must include a recognition of the industry's preoccupation with safety. The airline safety record has improved steadily over the years. Last year in the United States scheduled airlines achieved their finest year. Continuing safety research and development is intensive throughout the industry. New devices, new structures, new systems, new procedures contributing to safety are being introduced into the industry on a continuing basis. The built-in safety of the giant jets of tomorrow will be unprecedented.

I cited the insurance cost potential, however, to give an element of perspective to the problem of Warsaw and the Montreal Agreement. The days when airlines should be shocked at tort settlements in excess of \$8,300, \$16,000, or \$75,000 have long since passed, if indeed they ever existed. With each new agonizing reappraisal, the industry's threshold of pain rises. Each escalation in settlement may at the time shock and hurt, but the industry has prospered nonetheless. Each increase in airport rentals and landing fees hurts, but a return to the good old days of low costs and low revenues is unthinkable. A proposal is seriously being considered to build a new Chicago airport five miles off shore in Lake Michigan and the cost of site preparation alone is estimated to be \$285 million. To that must be added the cost of the airport itself—runways and buildings.

Against this backdrop of the realities of airline life in the last third of the 20th Century, the cries of alarm from all quarters about Warsaw-Hague-Montreal—seem anachronistic. The airlines cried poor boy so long that a *credibility gap* was evident. Were the spokesmen for the plaintiffs' bar less restrained?

By letter dated 2 May 1966, addressed to the President of the United States and purporting to bear the signature of the Chairman of the Aviation Law Section of the American Trial Lawyers Association, the following remarkable statements appear with regard to the Montreal Agreement:

The system of absolute liability invites very serious, if not frightening, dangers, of its own. First, and most obvious, and the reason that the Airline Pilots Association has come out vigorously in opposition, is the obvious invitation to sabotage of airplanes. If there is going to be an automatic payment of \$75,000 in any accident, even if caused by bombing, then all sorts of lunatics will now be able to bomb airplanes for money without even incurring

the risk of detection now afforded by the necessity of buying insurance. Neurotic people with terminal cancer, or those under serious financial stress, may be impelled to commit suicide by bombing airplanes, and thereby provide \$75,000 to their families. . . . There will be many more such suicide bombings if absolute liability becomes the rule.

* * *

Furthermore, the system of absolute liability presents a separate serious danger. One leading aviation insurance executive recently termed it an invitation to steal. . . . But if absolute liability becomes the rule the airlines who have thought the problem through fear that for every small injury the passengers will come in, with liability established whatever the cause of the injury and ask for an assessment of damages upon all their aches and pains, both real and imagined. These nickel and dime cases as they are called in automobile liability, will soon cost the airline a fortune, both in legal fees and payments.

Thus, the withdrawal of the denunciation of the Warsaw Convention combined with a \$75,000 limit of damages and a system of absolute liability is the worst possible solution to the problem.

* * *

With anything less than complete unanimity there will be utter chaos in international aviation, and the very purpose of international uniformity will have been defeated. Furthermore, enormous confusion will reign because of the interline nature of international aviation.

* * *

Many airline people and aviation insurance people are fearful of absolute liability. . . . One association called the plan madness and the other called it crazy.

We urge you to reject this foolish proposal. The United States' denunciation of the Warsaw Convention should not be disturbed.

Now Lee Kreindler is my friend and classmate. In that spirit I would add that if he is so violently opposed to the Montreal Agreement, then it cannot be all bad.

We recognize that, in the field of international aviation, governments must establish the legal regime in which we fly. The industry's views can, in the last analysis, be no more than factual inputs to be programmed by the governmental policy makers. When the government mandates new safety standards, the airlines pay, usually quite willingly. When the government pressures for lower fare levels, the airlines grin and bear it. When the government franchises new competitors, the financial blow is absorbed. So it must be with the new rules of aviation liability, even though they add cost and not passengers. Just as a new labor agreement with a group of employees may add \$5 million in annual labor cost so would a \$25,000 increase in the Montreal Agreement limit of liability add an exposure of \$5 million for two hundred passengers on a giant aircraft.

Having belatedly recognized the need for a drastic upward revision of liability limits if the unifying virtues of Warsaw were to be salvaged, the carriers welded themselves into the modern sculpture of Montreal. It may not look like Warsaw-Hague, but the hand of the same sculptor is still visible. The Montreal Agreement preserves the principle of uniformity—virtually all carriers flying to or in the United States are parties. This in turn has made possible the continuation of the many other good features of Warsaw—choice of courts, governing law, limitation of cargo liability and standard forms of traffic documents. Uniformity is of great import-

ance to the carriers and their customers. Despite the radical features of the Montreal Agreement, the Legal Committee of IATA urged its widespread adoption in presenting its report to the 22nd Annual General Meeting in Mexico, October-November, 1966.

The Report of Legal Committee was presented by its Chairman, Mr. Lionel Cooper (El Al).

He said that the committee's major task during the past year had been to find an acceptable compromise revision of the limits of liability in the face of the United States denunciation of the Warsaw Convention. Mr. Cooper summarized developments, culminating in the Montreal Agreement and withdrawal by the United States Government of its denunciation. While the Montreal Agreement was satisfactory from many points of view, it would be wrong to ignore its less happy consequences arising from the fact that there was a divergency in applicable limits of liability dependent on the route and the carrier operating the service.

The Legal Committee believed that IATA should encourage a wider acceptance of the principles of the Montreal Agreement. Adherence by all carriers would result in some additional insurance costs for the carriers concerned, but all carriers would then be subject to uniform rules in respect of the field of transportation to which the Montreal Agreement applied. It was, of course, recognized that the desirability of extending the principles to carriage worldwide was a major question of policy, which should not be answered until experience of the new regime, in its present limited form, had been accumulated. [Reported in IATA Bulletin No. Thirty-Four at page 18.]

The airlines favor the prompt settlement of claims. The concept of absolute liability promotes this and would most certainly do this if the willful misconduct exception of Article 25 were removed. The frequency with which the courts have found "willful misconduct" is less a libel on the world's airline pilots and safety engineers than it is a sophisticated avoidance of the harsh Warsaw limit. Hague comes closer to recognizing the truly exceptional situation that must be found to exist in order to avoid the Convention (Article 25A, paragraph 3: "the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.").

Hague offers many procedural advantages and refinements over Warsaw and is more adaptable to modern commercial transactions. Some of these improvements include: the technicalities of ticketing required by Warsaw are greatly modified (Hague III and IV), the requirements for a valid waybill are simplified (Hague VI and VII), and the special protection of the carrier in event of cargo damage occasioned by poor piloting or aircraft handling is removed (Hague X). I would urge that the best possible improvement in Montreal would be the swift ratification of Hague by the United States. The United Kingdom has recently done so and many other countries undoubtedly would follow the United States.

We have swallowed, but not yet digested, absolute liability. If the United States government believes that \$75,000 is still too low then I am sure no arguments from me can be of any weight. Whether other countries will accept an increase is also not for me to say. There quite clearly is a point beyond which the price for Warsaw-Hague-Montreal comes too high. That the airline industry's obsession with safety should be rewarded

with a regime of absolute liability, not applied to any other industry, is bound to irritate many, including foreign governments. It would seem to me that strong evidence of a desire in the United States to ratify Hague would go far toward persuading other countries to up the Montreal ante.

With the advantages of hindsight, it does not appear that the carriers' efforts over the years to save Warsaw were sufficiently responsive to the social and political needs as formulated by many governments, particularly the United States. One might now ask whether the United States government will recognize that it has substantially achieved its aims and the time has come to re-evaluate old prejudices. If other governments and airlines are agreeable to a reasonable upward revision of Montreal, the United States airlines can live with it. It would, however, be a welcome American gesture in the direction of uniformity in world law, if the United States would also ratify Hague as so many other countries have done.

At the recently concluded Geneva World Conference on World Peace Through Law, and the companion World Assembly of Judges, Chief Justice Warren made a stirring plea for more widespread adoption of the multilateral agreements sanctioned by the United Nations. Taking heed, the Conference unanimously adopted a resolution recognizing that "voluntary acceptance by nations of treaties and conventions is a major means of expanding international law and many of the approximately four hundred treaties and conventions that have been drafted and adopted by the United Nations and its specialized agencies have not been given adequate consideration by the nations." The Conference urged on each nation "acceptance or adherence to such of said treaties and conventions as are deemed appropriate." Hague is one of those conventions (478 United Nations Treaty Series 371). It would, in my opinion, be a good place to start to implement a small bit of world peace through law.