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Current Legislation and Decisions

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CURRENT LEGISLATION AND DECISIONS

NOTES

Warsaw Convention — Limited Liability — Notice

On 26 February 1960, while enroute from Rome to New York, an aircraft owned and operated by Alitalia-Linee Aeree Italiane, S.p.A. crashed shortly after taking off from an intermediate stop at Shannon, Ireland. Five suits were brought for wrongful death, personal injuries, and property damage allegedly suffered by thirteen of the passengers aboard the aircraft, and were consolidated in the United States District Court for the Southern District of New York. In answer to the complaints, Alitalia plead as affirmative defenses those Articles of the Warsaw Convention[1] which serve to exclude or limit an air carrier's liability to its passengers in the event of death or personal injury or loss of or damage to baggage.[2] Prior to trial, plaintiffs moved for a partial summary judgment to dismiss the affirmative defenses. Plaintiffs asserted that these defenses were not available because Alitalia had failed to deliver a passenger ticket and baggage check properly notifying the passengers that the Convention limitations applied to the flight, as required by Articles 3 and 4 of the Convention.[3] Alitalia maintained that the defenses and limitations of liability

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter cited as the Warsaw Convention), 29 Oct. 1934, 49 Stat. 3000, T.S. No. 876 (concluded at Warsaw, Poland, 12 Oct. 1929).

[2] Warsaw Convention, art. 20(1), 49 Stat. 3019, T.S. No. 876, provides that: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Warsaw Convention, art. 21, 49 Stat. 3019, T.S. No. 876, provides: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

Warsaw Convention, art. 22, 49 Stat. 3019, T.S. No. 876, provides in part:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8,300]. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
>
> (2) In the transportation of checked baggage and of goods the carrier shall be limited to a sum of 250 francs per kilogram [approximately $7 per pound], unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum. . . .

[3] Warsaw Convention, art. 3, 49 Stat. 3015, T.S. No. 876, provides:

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
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> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises

for death or injury applied as long as the carrier had delivered a ticket to the passenger before departure, even though the ticket did not contain the proper notice. Although Alitalia claimed further that the ticket had in fact contained such notice, the district court granted plaintiff's motion to strike the defenses. Trial was stayed pending a determination by the United States Court of Appeals for the Second Circuit on the controlling question of whether the challenged defenses were available to Alitalia on the basis of the facts presented. Defendant's application for leave to appeal was granted pursuant to the Interlocutory Appeals Act.[4] *Held, affirmed*: Although a literal reading of Article 3(2) of the Convention deprives the carrier of limited liability only where the carrier fails to deliver a ticket to the passenger before departure, the sanction also applies when the ticket fails to include a statement that the Convention's limitations apply to the flight. The court further held that the statement concerning limited liability given in the Alitalia ticket in question was concealed by exceedingly small print and could not have given the necessary notice to the passengers. *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*, 389 U.S. 926 (1967).

I. Warsaw Convention—Background and Developments

The Warsaw Convention of 1929, a multilateral, legislative treaty,[5]

that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Warsaw Convention, art. 4, 49 Stat. 3015-16, T.S. No. 876, provides:

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, *or if the baggage check does not contain the particulars set out at (d), (f), and (h) above*, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability [Emphasis added.].

[4] 28 U.S.C. § 1292(b) (1964).

[5] The "legislative treaty" is a modern term applied to agreements in which the parties have identical aims. The Warsaw Convention seems to fall within this classification rather than within the older "contractual" type, in which the parties have separate interests, such as the buyer and

long recognized as an important legal development, is today the most widely accepted treaty in the area of commercial law.[6] Promulgated at a time when the aviation industry was in its infancy, the Convention had two primary goals: first, to establish a uniform system of law in the growing area of international air transportation; second, to protect the infant air transport industry by providing a limitation on the carrier's liability for death or injury to passengers and damage to baggage and cargo.[7] Although these goals have been attained to a substantial degree, and the Convention is widely recognized as being of vital importance,[8] it is presently the center of a storm of controversy and over the past fifteen years has been the subject of constant negotiations.

Most of the criticism of the Convention has come from the United States, and has centered on Article 22, which limits carrier liability for death or injury to 8,300 dollars. The economic strength of the American air industry and public dissatisfaction with the treaty's low damage limitations prompted the United States government to request that an international conference be convened to attempt to revise the Warsaw Convention. In 1955, such a conference was convened in the Netherlands, which resulted in proposed amendments to the Warsaw Convention: The Hague Protocol. Basically, The Hague Protocol doubles the damage limitation to 16,600 dollars, and makes it more difficult to recover actual damages over the limitation.[9] The amendments proposed by The Hague Protocol have become part of the Convention only in those nations that have ratified it. Although the United States has signed the Protocol, Senate ratification has never been possible, on the basis that even a doubled limit is too low.[10]

On 15 November 1965, the United States formally denounced the Warsaw Convention, such denunciation to become effective six months later in accordance with Article 39.[11] During the next six months interested parties all over the world, such as domestic and foreign airlines, the International Air Transport Association (IATA), and various foreign governments, in an effort to save the basic concept of the Convention, engaged in constant negotiations. The result was an "interim agreement" (also known as the Montreal Agreement and the CAB Agreement) which is based on individual contracts between carriers and passengers as provided for in the Convention.[12] With the agreement of most foreign airlines to

seller in a commercial contract. See A. McNAIR, LAW OF TREATIES 739-54 (2d ed. 1961). The concept of identical interests is important when the potential effects of the *Lisi* decision are considered.

[6] D. BILLYOU, AIR LAW 124 (2d ed. 1964). For a list of the more than 90 nations that are signatory to the Warsaw Convention, see TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, TREATIES IN FORCE 227 (1966).

[7] Warsaw Convention, art. 22, 49 Stat. 3019, T.S. No. 876.

[8] D. BILLYOU, *supra* note 6.

[9] For a full discussion of The Hague Protocol, see Beaumont, *The Warsaw Convention of 1929 as Amended by the Protocol Signed at The Hague on Sept. 28, 1955*, 22 J. AIR L. & COM. 414 (1955); Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. AIR L. & COM. 253 (1956); Ass'n 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).

[10] The Hague Protocol has never been called up for a vote in the Senate, and with the formulation of the Montreal Agreement, may well be considered a dead issue as far as the United States is concerned. For a complete discussion of the history of The Hague Protocol in the United States Senate see Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291, 297-302 (1965).

[11] Dep't of State Press Release No. 268 (15 Nov. 1965).

[12] Warsaw Convention, art. 22(1), 49 Stat. 3019, T.S. No. 876.

adhere to the Montreal Agreement, the United States withdrew its denunciation of the Convention.[13] Basically, the Montreal Agreement covers all international flights departing from, terminating in, or with an agreed stopping place in the United States, and provides for a maximum liability of 75,000 dollars (58,000 dollars exclusive of legal fees) and absolute liability of the part of the carrier.[14]

Thus, although the Warsaw Convention is still in effect, it is subject in some cases to the Montreal Agreement and in others to The Hague Protocol; and even now, constant attempts are being made to find a satisfactory replacement for the Convention and its supplementary agreements.[15] Even while attempts are being made to preserve the Warsaw Convention system of liability in international air transport, there is a movement to take the United States out of any such system entirely. Advocates of the limited liability concept consider it vital to international air law.[16] Proponents of unlimited liability have attacked the Convention on economic, moral, and sociological grounds.[17]

It is within this context that the *Lisi* decision must be viewed. If affirmed by the Supreme Court, *Lisi* will greatly expand the conditions under which the carrier may lose its limited liability and could present the carriers with great problems. Extreme views believe that *Lisi* alone could result in the virtual destruction of the Convention.[18]

II. Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.

When the Warsaw Convention applies, as in *Lisi*,[19] Articles 17 and 18 create a *presumption of liability* on the part of the carrier for death or injury to passengers and for damage or destruction to check baggage or cargo.[20] As stated, this liability is limited by Article 22 to approximately $8,300 for death or injury to each passenger and to approximately seven

[13] Dep't of State Press Release No. 110 (13 May 1966); Dep't of State Press Release No. 111 (14 May 1966), 32 J. Air L. & Com. 247-48 (1966). There remains some question as to whether a denunciation may be withdrawn once it has been submitted, since such is not provided for in the Convention. However, this question is not likely to be raised since the general consensus is that the United States must be kept in the Convention in order to preserve the Warsaw system.

[14] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, CAB Docket No. 17325, CAB Order No. E-23680 (13 May 1966). For a list of the eighty-nine participating carriers as of 31 May 1967, see CAB Press Release No. 67-80, 382-6031 (31 May 1967).

[15] The United States is continuing efforts to find a satisfactory replacement for both the Warsaw Convention and The Hague Protocol, with increases in limits of up to $100,000 or more. See Panel of Experts on Limits for Passengers Under the Warsaw Convention and The Hague Protocol, *Report on the Work of the Second Session*, PE-Warsaw Report-2 (18 July 1967).

[16] *See generally* Hildred, *Air Carriers' Liability: Significance of the Warsaw Convention and Events Leading up to the Montreal Agreement*, 33 J. Air L. & Com. 521 (1967); Martin, *The Defendant's View of Montreal*, 33 J. Air L. & Com. 538 (1967); Sand, *Risk in the Air and the Myth of Fault*, 33 J. Air L. & Com. 594 (1967).

[17] *See generally* Kreindler, *A Plaintiff's View of Montreal*, 33 J. Air L. & Com. 528 (1967); Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. Air L. & Com. 291 (1965); Ass'n 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, 268 (1959).

[18] Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention*, 33. J. Air L. & Com. 663, 669-70 (1967).

[19] The *Lisi* case presented no real question of Warsaw applicability. It is important to note that this case did not involve the Montreal Agreement, but could have an effect on future litigation under the Agreement.

[20] Warsaw Cnvention, art. 17, 49 Stat. 3018, T.S. No. 876; Warsaw Convention, art. 18, 49 Stat. 3019, T.S. No. 876.

dollars per pound for checked baggage.[21] The presumption of liability may be rebutted, and the carrier may escape liability altogether in some cases, if the carrier "proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible . . . to take such measures."[22] Further, if the carrier can show that damage to baggage was caused by pilot error and that the carrier had taken all necessary measures to prevent the damage, there may be no liability for damage to baggage or goods.[23]

A carrier will be precluded from availing itself of both the limitations of liability and the defenses allowed under the Convention, and will be subject to *absolute and unlimited* liability if the plaintiff can establish:

(1) that the accident was caused by the "wilful misconduct" of the carrier,[24] or

(2) that the carrier accepted the passenger without having delivered a ticket as required by Article 3, or

(3) that even if a ticket was delivered to the passenger, delivery was not *adequate* to satisfy Article 3(2).[25]

The *Lisi* decision opens another avenue to the plaintiff, that of requiring that, first, the required notice be so printed on the ticket as to draw the passenger's attention, and, second, that the notice be so worded as to give adequate notice of the Convention's application and effect.

The Second Circuit accomplished the above result by concluding that the delivery requirement in Article 3 not only requires physical delivery of a ticket, but that the ticket contain adequate notice of the applicability of the Warsaw Convention. Alitalia contended that the court's interpretation was not supported either by the structure of the Convention's traffic document sections or by the diplomatic history of the Convention, and that the court exceeded the bounds of treaty interpretation as established by the Supreme Court.[26]

A comparison of the Convention's traffic document articles discloses a significant distinction between Article 3 and Articles 4[27] and 9.[28] All three Articles require the delivery of the applicable document and specify information to be printed on the document. All three imposed the sanction

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[21] Warsaw Convention, art. 22, 49 Stat. 3019, T.S. No. 876.

[22] Warsaw Convention, art. 20, 49 Stat. 3019, T.S. No. 876.

[23] *Id.*

[24] Warsaw Convention, art. 25(1), 49 Stat. 3019, T.S. No. 876.

[25] Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965).

[26] The United States Constitution makes treaties part of the supreme law of the land, placing them on the same level as federal statutes, U.S. Const. art. IV. It is a familiar rule of United States courts that treaties must be construed so as to give effect to the intentions of the parties to the treaties. In attempting to give effect to the parties intentions, courts give a reasonable and sensible interpretation by examining the treaty as a whole and by taking the words in their ordinary meaning as understood in the public law of nations. Bacardi Corp. v. Domenech, 311 U.S. 150 (1950); Valentine v. United States, 299 U.S. 5 (1936); Santovicenzo v. Egan, 284 U.S. 30 (1931). Courts are not restricted to the written words of a treaty, but may look to the negotiations and diplomatic correspondence of the contracting parties and to those parties' own practical construction of its terms. Factor v. Laubenheimer, 290 U.S. 276 (1933); Nielson v. Johnson, 279 U.S. 47 (1928). While courts may interpret a treaty liberally, they must take it as they find it, and may neither add to nor detract from its provisions. Valentine v. United States, 299 U.S. 5 (1936).

[27] Warsaw Convention, art. 3, 49 Stat. 3015, T.S. No. 876; Warsaw Convention, art. 4, 49 Stat. 3015, T.S. No. 876.

[28] Warsaw Convention, art. 9, 49 Stat. 3017, T.S. No. 876.

of absolute and unlimited liability when the document is not delivered. However, in addition, Articles 4(4) and 9 *expressly* impose the sanction of absolute and unlimited liability *if the baggage check and air waybill fail to contain certain required particulars, one of which is a statement that the carriage is subject to the Convention's rules on liability.* In the case of the passenger ticket, Article 3(2) imposes the sanction *only* in a case of non-delivery. Alitalia contended that because of the difference in the articles, no notice was required in the passenger ticket. This conclusion, when advanced by Alitalia, was rejected by the Second Circuit. The court stated that "[i]t is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us."[29]

Instead, the court relied on two cases, neither of which were quite on point, and on a concept of what constitutes the overall purpose of the Convention. In *Mertens v. Flying Tiger Line, Inc.*,[30] a military officer was presented with a ticket after he was already on board the aircraft. After the aircraft crashed, the Second Circuit was called upon to determine whether or not the ticket was presented in time so as to constitute delivery under Article 3(2). The court reasoned that it would be illogical to require the ticket to contain a warning of the applicability of the Convention if it were not implied that the ticket must be delivered in such circumstances as to allow the passenger the opportunity to take self-protective measures, such as the purchase of trip insurance.[31] The court went on to hold that, as a matter of law, delivery was inadequate and that no ticket had been delivered as required by Article 3(2).

A short time later, in *Warren v. Flying Tiger Line, Inc.*,[32] the Ninth Circuit reached a similar decision. There, the military passenger was given a "boarding pass" at the foot of the aircraft boarding ramp. Following the *Mertens* decision, the court found that the function of the delivery requirement was to apprise the passengers of the Convention's limited liability so that self-protective measures might be taken, and that the ticket has not been so delivered.[33]

The Second Circuit reached its decision in *Lisi* by applying a liberal interpretation to the delivery requirement of Article 3. Following the reasoning in *Mertens* and *Warren* the court found that the only logical reason to require adequate delivery of a passenger ticket was to allow the passenger time to take measures to protect himself financially against possible death or bodily injury. Extending this reasoning one step further, the court determined that the Convention required that the ticket contain *adequate notice* of the limited liability, or there could be no reason to require delivery. In effect, therefore, the *Lisi* court has merged the concepts of actual physical delivery of a ticket and delivery of notice with that ticket, rather than treating them as separate requirements of the Convention.

The Second Circuit also relied on what it considered to be the "overall purposes of the Convention" for its decision in *Lisi*.[34] The court char-

[29] 370 F.2d at 511.
[30] 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).
[31] *Id.* at 857.
[32] 352 F.2d 494 (9th Cir. 1965).
[33] *Id.* at 498.
[34] 370 F.2d at 512.

acterized the limitations of liability as "arbitrary" and "advantageous to the carrier," and emphasized the fact that the Convention has recently come under severe criticism.[35] Commenting on the "one-sided advantage" enjoyed by the airlines, the court stated:

> [T]he *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.[36]

Having determined that Article 3(2) of the Warsaw Convention does require that the ticket contain notice of Convention applicability just as Articles 4(4) and 9 for baggage checks and air waybills, the court proceeded to examine the documents involved in the *Lisi* case. The documents involved were the standard passenger ticket and baggage check, the form of which was established and required by the International Air Transport Association (IATA), and which are in general use throughout the international airline industry.[37] On the front of the ticket and the baggage check was the statement directing the passenger to examine "the Conditions on page 4."[38] The conditions to which the passenger's attention was directed included, among others, a statement that the carrier was subject to the Warsaw Convention. Further, each flight coupon contained immediately under the passenger's name the statement:

> If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.[39]

The Second Circuit characterized the above statements as being printed in "exceedingly small print,"[40] and agreed with the district court that the notice contained in the ticket and baggage check was:

> [C]amouflaged in Lilliputian print in a thicket of "Conditions of Contract". . . . Indeed the exculpatory statements on which defendant relies are vitually invisible. They are ineffectively positioned . . . and unemphasized by boldface type, . . . or anything else. The simple truth is that their presence is concealed.[41]

The court also noted that even had the notices been printed in sufficiently large type, it would be "highly questionable whether he [the passenger] would be able to understand the meaning of the language contained thereon."[42] As examples of unclear language, the court noted that the passenger was referred to the carrier's filed tariffs in order to determine

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[35] *Id.* at 512-13.

[36] *Id.* at 513.

[37] Brief for Defendant at 24, Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 370 F.2d 508 (2d Cir. 1966), *cert. granted*, 389 U.S. 926 (1967).

[38] For a reproduction of the ticket cover and the conditions, see Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 253 F. Supp. 237, 240-41 (S.D.N.Y. 1966).

[39] See reproduction of ticket coupon, Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 253 F. Supp. 237, 242 (S.D.N.Y. 1966).

[40] 370 F.2d at 513.

[41] Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 253 F. Supp. 237, 243 (S.D.N.Y. 1966).

[42] 370 F.2d at 514 n.10.

whether his flight was international carriage, and that the carrier's liability was expressed in French gold francs.[43]

The Second Circuit based its decision partly on public policy; because limited liability for personal death or injury is unfamiliar in the United States, notice is of special importance.[44] Commenting further on the importance of the notice requirement to United States citizens, the court stated: "It is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may recover in the event of an accident is drastically reduced."[45]

III. Lisi: A Critical Analysis

This writer disagrees with the decision reached by the Second Circuit. Although the *Lisi* result may seem to be logical and reasonable, it is not proper treaty interpretation.

As previously noted, Article 3(2) imposes the sanction of absolute and unlimited liability only in cases of non-delivery, whereas Articles 4(4) and 9 extend it to cases of inadequate notice. The court's rejection of the importance of this distinction seems to be in conflict with the earlier case of *Grey v. American Airlines, Inc.*[46] In *Grey*, plaintiff contended that the sanction in Article 3 applied on the ground that the ticket omitted one of the agreed stopping places as required by that Article. The district court, in an opinion adopted by the Second Circuit, rejected this contention, stating:

> *Article 3(2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4(4) and 9.* I must conclude that this omission or difference is most significant. For I cannot agree with plaintiffs argument . . . when those who drafted the treaty were so explicit in this regard in Articles 4(4) and 9 [Emphasis added.].[47]

The Second Circuit dismissed Alitalia's reliance on *Grey* as being "misplaced."[48] The court stated that in *Grey* there had been "delivery" of a ticket as required, and that the technical omission did not change the international character of the flight.[49]

The difference between Article 3 and Articles 4(4) and 9 is further emphasized by the history of negotiation of the Convention. The preliminary draft of Article 3, prepared in 1928, contained the following sanction:

> [*I*]*f the ticket does not contain the particulars indicated above* . . . the carrier will not be able to avail himself of those provisions of this Convention which exclude in whole or in part his liability direct or derived from the omissions of his agents [Emphasis added.].[50]

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[43] *Id.*
[44] *Id.* at 513.
[45] *Id.*
[46] 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956), *aff'g*, 95 F. Supp. 756 (S.D.N.Y. 1950).
[47] Grey v. American Airlines, Inc., 95 F. Supp. 756, 758 (S.D.N.Y. 1950).
[48] 370 F.2d at 513 n.8.
[49] *Id.*
[50] IIEME CONFERENCE INTERNATIONALE DE DROIT PRIVE AERIEN, ICAO Doc. No. 7838, at 167-68.

The drafting committee, however, believed that the sanction was too severe to impose for the omission of one or any of the particulars, and so deleted the words "or if the ticket does not contain the particulars indicated above."[51] The minutes of the drafting conference, therefore, reflect the presence of an intent to impose the sanction *only if there was no delivery of the ticket.* This distinction was recognized by Dr. Goedhuis[52] in the first critical analysis of the Convention.[53] Goedhuis concluded that, however illogical it may seem, since the Convention had not provided for any sanctions for such omissions, the carrier is not deprived of the limited liability or defenses of the Convention if the ticket delivered does not contain the particulars listed in Article 3(1).[54]

At The Hague Conference of 1955, the United States government clearly indicated that it recognizes that Article 3 of the Convention does not require that "notice" of limited liability appear on the ticket. At the conference, the United States delegate proposed that the Convention be amended so as to *extend* the sanction in Article 3(2) *to situations where the passenger ticket fails to notify the passenger of the liability limits for personal injury or death.*[55] During the ensuing debate, the conference delegates consistently recognized that the sanction does *not* apply under the original Article 3(2) for failure to deliver notice.[56] The amendment, which reads "or if the ticket does not include the notice required by paragraph 1(c) of this Article. . . ."[57] was eventually adopted by the conference, though never ratified by the United States Senate. It appears, therefore, that the United States government as well as foreign nations recognize an interpretation of Article 3(2) that is diametrically opposed to that applied by the Second Circuit in *Lisi.*

In both of the cases on which the court did rely, *Mertens* and *Warren*, the question presented was whether or not there had been adequate *delivery* of a ticket, and not whether the ticket itself was adequate. Even though in *Mertens* the court did indicate that the type was too small, both courts assumed that the notice was present and that the passenger would have been able to take self-protective measures if there had been time to read the ticket. While it is logical to conclude that since a ticket must be delivered properly it must therefore contain readable notice, such a conclusion would seem to be in opposition to the intent of the drafters of the treaty. At the same time, it is illogical to assume that the drafters expressly deleted a provision of such importance and then failed to express their intent in another way.

As noted, the Second Circuit seemed to believe that the only thing available to the passenger to offset limited liability of the carrier was notice. As stated in the dissent:

The majority do not approve of the terms of the treaty and, therefore, by

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[51] *Id.* at 101-02, 129.

[52] D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1937).

[53] *See also* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 1, 251 (1954); C. SHAWCROSS & K. BEAUMONT, AIR LAW § 406(c) (2d ed. 1951).

[54] D. GOEDHUIS, *supra* note 52, at 152.

[55] *See, e.g.,* I ICAO, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 1955, at 66-91, ICAO Doc. No. 7686-LC/140 (1956).

[56] *Id.*

[57] For the text of The Hague Protocol, see C. SHAWCROSS & K. BEAUMONT, AIR LAW xvii-xxviii (2d Supp., 2d ed. 1955).

> judicial fiat, they rewrite it. They think a "one-sided advantage" is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability.[58]

Assuming for discussion that the ticket is required to contain notice of the Convention's applicability, other important advantages given the passenger as *quid pro quo* for limited liability, and disregarded in the majority's opinion are:

> (1) The Convention provides for a uniform presumption of liability,[59] without which the plaintiff would be required to prove negligence of the carrier, often with only *res ipsa loquitur* on which to rely.
>
> (2) The plaintiff is given a choice of four separate forums in which the action may be brought, allowing him to choose the most convenient.[60]
>
> (3) The Convention provides for a uniformity of law among the various nations in which the action may be brought.
>
> (4) The passenger is protected from lower limits, either those provided by statute or otherwise valid contractual waivers of liability.[61]
>
> (5) In the absence of special circumstances, the passenger is not subjected to lengthy litigation, which may last for years.

In addition, when the court recognized that the treaty has come under severe criticism, it failed to mention that that criticism has centered around the low liability limits, and not the relative position of the carrier and the passenger created by the Convention.[62] Even though a court disagrees with the "one-sidedness" of a treaty as here, it remains that court's duty to sanction and enforce the performance of the treaty according to the intent of the drafters until the government chooses to officially denounce and withdraw from the agreement.[63]

In stating that, in the United States, notice of limited liability for personal death or injury is of special importance, the court was absolutely correct, and normally public policy is quite strict in this area. However, the court failed to consider that a treaty, being part of the supreme law of the land, displaces conflicting public policy doctrines of both state and federal courts. By entering into the Convention, the United States government announced the terms of the Convention as the public policy of the nation. The court also failed to note that a number of states within the United States do in fact have limited liability systems in connection with their wrongful death statutes.

As to the court's references to the ticket statements not being understandable, it is quite true that many passengers would not fully understand the legal effect of the Convention from reading the statements in the ticket. While true that the examples may not be "understandable" to the average passenger, the fact is that nothing more is required of the carrier under the Convention. Nothing in the Convention requires the carrier to interpret "international flight" for the passenger, and even in the United

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[58] 370 F.2d at 515.

[59] Warsaw Convention, art. 17, 49 Stat. 3018, T.S. No. 876; Warsaw Convention, art. 18, 49 Stat. 3019, T.S. No. 876.

[60] Warsaw Convention, art. 28, 49 Stat. 3020, T.S. No. 876.

[61] Warsaw Convention, art. 23, 49 Stat. 3019, T.S. No. 876.

[62] In its denunciation of the Warsaw Convention, the United States government specified that the reason for such denunciation was the low liability limit. See Dep't of State Press Release No. 268 (15 Nov. 1965).

[63] Factor v. Laubenheimer, 290 U.S. 276 (1933).

States, properly filed tariffs constitute notice to a passenger or shipper.[64] Further, the Convention itself speaks in terms of liability in French gold francs, and the use of a gold conversion standard provides a basic, stable valuation for most currencies. Since under the Warsaw Convention, many citizens of countries other than the United States bring actions in this country, the question arises as to whether a court following the *Lisi* rationale would require that the statements be printed in that plaintiff's native language and liability expressed in his native currency in order to be understandable.

IV. Lisi: Problems and Effects

The notice requirements of *Lisi* give rise to a number of problems. Simply deciding whether or not the Convention applies to a particular flight or not is often a problem in itself. Convention applicability depends on the overall contract of carriage entered into by the parties.[65] In light of the complexity of modern travel, which may originate, enter, and end in numerous countries and which may involve several successive carriages, the question of whether a particular flight falls within the Convention is one which often baffles aviation lawyers.[66] It was because of this very difficulty that the Convention was amended by The Hague Protocol to provide for a statement that the flight *may* be subject to the limited liability[67] rather than a statement that it *is* so subject. Since the United States has not ratified The Hague Protocol, the original Warsaw Convention, as supplemented by the Montreal Agreement, is in effect in this country, and requires a definite statement that the Convention *is* applicable.[68] The Second Circuit would seem to require that the carrier inquire into each passenger's overall travel plans and then, having made a determination of the legal status of the carriage, fully explain the Convention's applicability and effect.

Another problem arises for the carrier when the contract of carriage involves notice of Hague's higher limits of liability.[69] If an action were brought in another country on the basis of Hague carriage, would the courts there recognize the Warsaw notice required by the Second Circuit, or do the carriers have to provide separate tickets and other documents, depending on the particular law involved? While such problems would not be so acute to the carriers if only United States courts and carriage to and from the United States were involved, the international character of the carriage involved makes these problems very real and places the carriers in a difficult position. As the dissent in *Lisi* stated:

> Were actual notice to be the requirement, every airline would have to have its agent explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation.[70]

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[64] For a complete discussion of tariffs in United States law, see Pratt, *Tariff Limitations on Air Carriage Contracts*, 29 J. Air L. & Com. 14 (1963).

[65] Warsaw Convention, art. 1, 49 Stat. 3000, T.S. No. 876.

[66] Calkins, *Grand Canyon, Warsaw Convention and The Hague Protocol*, 23 J. Air L. & Com. 253, 261 (1956).

[67] *See* note 57 *supra*.

[68] Warsaw Convention, art. 3(1)(e), 49 Stat. 3015, T.S. No. 876.

[69] *See* note 57 *supra*.

[70] 370 F.2d at 515.

As noted by the Second Circuit, the Civil Aeronautics Board (CAB) had disapproved of the form of the documents involved in *Lisi* and the language of the statements contained therein.[71] With the addition of some changes to cover the Montreal Agreement,[72] the carriers are now providing the required CAB notice and are prepared to prove it in future litigation.

While compliance with the CAB's new document standards would seem to make the question of notice in *Lisi* and similar cases moot, such is not the case. As stated by Harold Caplan,[73] the CAB is not the court which rules on the adequacy of a particular document in a lawsuit, and the CAB cannot guarantee that the courts of the United States or any other country will approve such documents.[74] There is also some doubt as to the authority of the CAB to prescribe notice requirements for international flights by carriers of nations other than the United States.[75]

Unless the CAB or some similar standards are found to be controlling, it is doubtful that the carriers can ever produce a ticket or other document which will completely satisfy the requirements set by the Second Circuit.[76] In effect, the Second Circuit would require that the carrier take every effort to deliver to the passenger notice that is both, as a matter of law, readable and understandable as to the applicability of the Convention to a particular flight.

Much of the controversy concerning the *Lisi* decision has come from international circles, not only from foreign airlines, but also from governments. If *Lisi* is allowed to stand, the confidence of many of the Contracting Parties in the Convention may be seriously undermined.[77] The *Lisi* decision has already received serious consideration in the House of Commons of the United Kingdom.[78] The United Kingdom has shown that it will follow the decision in *Grey v. American Airlines, Inc.*[79] by reaching a similar decision in *Preston v. Hunting Air Transp., Ltd.*[80] as to the

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[71] The form specified by the CAB may be found in 14 C.F.R. § 221.175 (1965). The Hague Conference rejected a proposal by the United States that notice must be printed in certain colors and type sizes. See I ICAO, INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW 1955 at 60, 75, 124, ICAO Doc. No. 7686-LC/140 (1956).

[72] Civil Aeronautics Board Order No. E-23680, 13 May 1966.

[73] Assistant Manager, The British Aviation Insurance Co. Ltd., London, England.

[74] Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention*, 33 J. AIR L. & COM. 663, 669 (1967).

[75] The CAB derives its authority over foreign carriers from the Federal Aviation Act of 1958, § 402, 72 Stat. 754, 49 U.S.C. § 1371 (1964), which gives the Board the power to issue permits to foreign carriers before they may operate in the United States. The Act provides that the CAB has the power to "prescribe the duration of any permit" and to "attach to such permit such reasonable terms, conditions, or limitations as . . . the public interest may require." However, this power is limited by the Federal Aviation Act of 1958, § 1102, 72 Stat. 797, 49 U.S.C. § 1502 (1964), which provides that: "In exercising and performing their powers and duties . . . the Board . . . shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement . . . ." Whether the CAB's power under the above section extends to authority over foreign carrier documentation is doubtful. Until the question is decided by the courts or settled by further legislation, carriers cannot be certain that by complying with the CAB standard that they will also satisfy the *Lisi* doctrine.

[76] PANEL OF EXPERTS ON LIMITS FOR PASSENGERS UNDER THE WARSAW CONVENTION AND THE HAGUE PROTOCOL, REPORT ON THE WORK OF THE SECOND SESSION, PE-Warsaw Report-2, Annex 1(4), 18 July 1967.

[77] Caplan, *supra* note 74.

[78] House of Commons: 740 Official Report 139 (8 Feb. 1967), Col. 1576-91.

[79] 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

[80] [1956] 1 Q.B. 454.

interpretation of the notice and delivery standards of Article 3. If other Contracting Parties should follow the *Grey* and *Preston* decisions and if *Lisi* should become the law in the United States, the most important purpose of the Convention, uniformity of international law, will be undermined. If *Lisi* should be accepted by other nations, uniformity will be achieved, but the carriers will have to bear the costs of potentially unlimited liability every time a judge or jury decides that proper notice was not given. Considering he difficulties of notice already discussed, there are doubts in some areas of the air industry that the Warsaw Convention could survive effectively.[81] Other extreme views hold that even if the carriers are able to satisfy the *Lisi* standards, the court in the United States will find other defects in order to avoid the Convention limits, and that the Warsaw Convention system is, in effect, already a dead issue.[82]

V. CONCLUSION

Had the *Lisi* case involved purely domestic issues and statutes, the decision would have been quite proper, in fact would have been admirable as protecting the rights of the individual citizen, in the light of public policy as to notice of limited liability in the United States. However, *Lisi* involved a multi-lateral treaty that is recognized as one of the most successful and important in international commercial law, and the effects of the decision will be worldwide. The Second Circuit emphasized the need to protect the passenger, especially the United States citizen, who is not familiar with the limited liability concept. Yet, the signatory nations have not ignored the passenger, and have tried to protect him by properly amending the Convention and by providing for other mandatory agreements. As noted in the dissent in *Lisi*, the Second Circuit has imposed its own concept of what is required for the protection of the passenger under the Convention, and has rejected the clear intent of the drafters. If the Convention is unsatisfactory from the viewpoint of the passenger, it is not the duty of the courts to change it to suit existing conditions, but it is the duty of the legislative and executive branches acting through proper diplomatic procedures.

B. L. Florsheim

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[81] *Supra* note 16.
[82] Kreindler, *A Plaintiff's View of Montreal*, 33 J. AIR L. & COM. 528, 535 (1967).

Torts — Negligence — Res Ipsa Loquitur

Plaintiff's decedent was a passenger on Northwest Airlines' Douglas DC-7C airliner when it crashed into the Pacific Ocean off the coast of Canada, killing all aboard. The cause of the crash was unknown, and no evidence of negligence after the plane took off was produced, although the airline offered some proof of general care prior to that time. The Illinois Federal District Court applied the doctrine of *res ipsa loquitur* to find the airline liable under the Death on the High Seas Act.[1] *Held, Affirmed in part:* "[The] finding of negligence was a permissible one—warranted though not compelled . . . and . . . the court's conclusion on the issue of applicant's liability is thus supported by the evidence and the application of correct legal criteria." *Cox v. Northwest Airlines, Inc.*, 10 Av. Cas. ¶ 17,251, 379 F.2d 893 (7th Cir. 1967).

The doctrine of *res ipsa loquitur* is used to establish the defendant's breach of duty. The Latin phrase itself originated in 1863 when Baron Pollock used it in an argument with counsel,[2] but there was nothing magical about it then, and time has confused rather than clarified its meaning. It applies to those cases in which there may be a reasonable inference of actionable negligence from the very happening of an event. Because the doctrine goes to the element of breach of duty, the plaintiff must first establish that the defendant owed him a duty of care. In airline crash cases it is easy to show a duty owed, but *res ipsa* must often be relied on to show a breach.

Three classic conditions must be present to apply *res ipsa loquitur.*[3] Basically, they are:

(1) *The event must be of a kind which ordinarily does not occur in the absence of negligence.*

This criterion is based on simple probability. It has been pointed out that the requirement is "only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that someone must have been negligent."[4]

(2) *The instrumentality causing the injury must be under the exclusive control of the defendant.*

It is never enough for the plaintiff to prove mere negligence—he must also show that his injury was caused by the defendant. In *res ipsa loquitur*

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[1] 41 Stat. 537-38 (1920), 46 U.S.C. §§ 761-68 (1964).

[2] Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863).

[3] W. PROSSER, THE LAW OF TORTS, § 39 (3rd ed. 1964); 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2509(A) (3d ed. 1940).

[4] W. PROSSER, supra note 3, at 218. See also Foltis, Inc. v. New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).

this is accomplished by a process of elimination in which the most reasonable of all the possible causes are those shown to be controlled by the defendant.

(3) *The plaintiff must not have contributed to his own injury.*

In addition to eliminating third parties as tortfeasors, the plaintiff must also eliminate his own conduct as a cause of his injury. Restatement (Second) of Torts states, "Where the evidence fails to show a greater probability that the event was due to the defendant's own conduct, the inference of the defendant's responsibility cannot be drawn."[5]

Some courts discuss a fourth condition for the application of *res ipsa loquitur*, which is that the *evidence* of the cause of the injury must be more accessible to the defendant than to the plaintiff.[6] It would seem that this amounts to an observation on the usual state of affairs, since he who is in exclusive control of something almost always knows the most about it. However, it does not follow that because this is normal it should be indispensable, and most courts,[7] as well as Prosser[8] and Restatement (Second) of Torts,[9] feel that it is not necessary. Clearly, if the circumstances warrant an inference that the defendant was negligent, the case should not be dismissed simply because such negligence happened to result in the type of accident which made evidence available to the defendant as well as to the plaintiff.

In the majority of jurisdictions, the procedural effect of *res ipsa loquitur* is that of a permissible inference, whereby the jury *may* find for the plaintiff if it so chooses.[10]

> Thus if the defendant rests at the close of the plaintiff's case the fact that *res ipsa loquitur* has been applicable does not indicate that the plaintiff is entitled to a directed verdict as a matter of law. The *res ipsa* inference is one that the jury may draw, but does not have to draw.[11]

Prior to World War II, most courts felt the safety record of aviation was still too uncertain to justify holding that the very fact of a plane's crash meant that someone had probably been negligent. If a non-negligent cause was a possible explanation, the courts were unwilling or unable to determine that a negligent cause was probable; and *res ipsa* was only rarely applied.[12] The attitude of the times is perhaps most poetically described in

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[5] RESTATEMENT (SECOND) OF TORTS, § 328D(i) (Pamp. 3 1965).

[6] Hughes v. Jolliffe, 313 P.2d 678 (Dept. 1, Sup. Ct., Wash. 1957); Levendusky v. Empire Rubber Mfg. Co., 87 A. 338 (N.J. 1913).

[7] Backman v. Des Marais, 3 Av. Cas. ¶ 18,061, 100 F. Supp. 1 (D. Alas. 1951), *aff'd sub. nom.*, 3 Av. Cas. ¶ 18,062, 198 F.2d 550 (9th Cir. 1952), *cert denied*, 344 U.S. 922 (1953); Smith v. Pennsylvania Cent. Airlines Corp., 76 F. Supp. 940 (D.D.C. 1948).

[8] W. PROSSER, *supra* note 3, at 227, 228.

[9] RESTATEMENT (SECOND) OF TORTS, § 328D(k) (Pamp. 3 1965).

[10] Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952); Calhoun v. Northeast Airlines, Inc., 180 F.Supp. 532 (S.D.N.Y. 1959); Orme v. Burr, 157 Fla. 378, 25 So. 2d 870 (1946); Judd v. Sams, 186 Misc. 1044, 62 N.Y.S.2d 678 (1946); Foltis, Inc. v. New York, 287 N.Y. 108, 38 N.E.2d 455 (1941). A few jurisdictions hold that *res ipsa* creates a presumption of negligence, rather than in inference. In these jurisdictions, if the defendant produces no evidence, the plaintiff is entitled to a directed verdict.

[11] 1 L. KRIENDLER, AVIATION ACCIDENT LAW, § 3.09[6] (1963).

[12] Morrison v. Le Tourneau Co., 138 F.2d 339 (5th Cir. 1943); Cohn v. United Air Lines Transp. Corp., 17 F. Supp. 865 (D. Wyo. 1937). *Contra.*, Smtih v. Pacific Alas. Airways, 89 F.2d 253 (9th Cir., *cert. denied*, 302 U.S. 700 (1937).

Cohen v. United Air Lines Transport Corp., a 1937 case, where the court stated:

> It may be that in the not too distant future in the evolution and development of the wonderful and enchanting science of aviation, a sufficient fund of information and knowledge may be afforded to make a safe basis in compensating for injuries sustained, the application of the doctrine here invoked; but it seems to me quite clear that that time has not yet arrived.[13]

The general trend toward allowing *res ipsa loquitur* in airline crash cases began after the war.[14] The airplane no longer awed the public, and technological advancement had made flying relatively safe. The shift in attitude since the war is summarized by the court in *Rogow v. United States*:

> In the early days of aviation, perhaps, it could have been said that planes crashed frequently and mysteriously through no fault of pilot or maintenance personnel. But great technical progress in the last few years has brought the art of flying to the state where aircraft do not generally meet disaster in the absence of some negligence.[15]

Thus, as air safety has become increasingly sophisticated, the airlines must maintain higher standards for the courts to find they used "reasonable care." Because most hazards today can be anticipated and avoided, the doctrine of *res ipsa* permits the jury to infer that when an accident *does* occur, someone failed to take the necessary precautions. An example of how these elements are presented to the jury is the charge given in the leading case of *Citrola v. Eastern Air Lines, Inc.*:

> You may infer from the very happening of the crash, since it was not an ordinary event happening in the course of [landing] that the crash was occasioned by some negligent act of the operators of the airplane. It is an

[13] Morrison v. Le Tourneau Co., 138 F.2d 399 (5th Cir. 1943); Cohn v. United Air Lines Transp. Corp., 17 F. Supp. 865, 869 (D. Wyo. 1937). *Accord*, Wilson v. Colonial Air Transport, 278 Mass. 420, 180 N.E. 212 (1932); Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935); Smith v. Whitley, 27 S.E.2d 442 (N.C. Sup. Ct. 1943); Towle v. Phillips, 180 Tenn. 121, 172 S.W.2d 806 (1943); Boulineaux v. Knoxville, 20 Tenn. App. 404, 99 S.W.2d 557 (1935).

[14] The first case to reflect this post-war change in attitude was Smith v. Pennsylvania Cent. Airlines Corp., 76 F. Supp. 940 (D.D.C. 1948). The court stated at 945:

> The progress of aviation has been rapid. In the course of comparatively few years, it has reached a point at which a host of transport airplanes flying according to fixed schedules over a network of permanent routes, carry thousands of passengers annually. Airplane lines vigorously compete with railroads and steamships. Those responsible for the remarkable and swift growth and development of aviation can justifiably boast of a superb record of unparalleled and rapid achievement and success. *Accomplishment must be accompanied by responsibility.* No reason is discernible why the principles that govern the liability of other common carriers, such as railroads, should not be equally applicable to transport airplanes operating as common carriers [Emphasis added.].

A case particularly significant to air law is Backman v. Des Marais, 100 F. Supp. 1 (D. Alas. 1951), *aff'd sub, nom.*, 198 F.2d 550 (9th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953), in which the plane on which the plaintiff's decedent was a passenger disappeared without a trace ,and neither party had any knowledge as to the cause of such disappearance. The court allowed *res ipsa loquitur* in spite of the fact that the defendant's knowledge was not superior to the plaintiff's, on the ground that an "equality of ignorance" would not preclude the use of the doctrine. This is significant to air law because airplane crashes by their very nature frequently destroy the evidence of their cause.

[15] Rogow v. United States, 173 F. Supp. 547, 556 (S.D. N.Y. 1959). *Accord*, Capital Airlines v. Barger, 47 Tenn. App. 636, 341 S.W.2d 579 (1960).

> inference you may draw but you are not required to draw from such findings. The fact that the law permits you to draw this inference . . . does not shift the ultimate burden of proof to the defendant in any way, not even the burden of offering an explanation as to how or why the crash occurred; the burden still rests with the plaintiff of establishing to your satisfaction by a preponderance of the evidence that the negligence of the defendant was the substantial factor contributing to causing the crash.[16]

The instant case, *Cox v. Northwest Airlines, Inc.*, is a classic example of the modern trend in *res ipsa loquitur* as applied to airline crashes. Here the cause of the crash at sea was wholly unexplained, and there was no evidence of specific negligence or even unusual circumstances surrounding the crash. On appeal, the airline argued unsuccessfully that, because it showed some proof of due care, *res ipsa* would have no application without at least minimal evidence of specific negligence to sustain the plaintiff's burden of proof. The court followed the general rule[17] that on the issue of breach of duty, the plaintiff may go to the jury with *res ipsa* alone unless the defendant's evidence of care is such that no reasonable man could find for the plaintiff.

The increasing application of *res ipsa loquitur* to unexplained air crashes has significant practical implications. Depending on the circumstances of the crash itself, the doctrine may impose the equivalent of strict liability on an airline failing to explain why a crash occurred. Although the airlines may oppose such a result, there are two strong public policy arguments in its favor: (1) Assuming that neither the airline nor the passenger was at fault, the airline is best able to bear the loss. Even if this burden is later shifted to all passengers in general by increased fares, the passengers are still better able to bear the burden as a class than as individuals. (2) The airline is in a position to develop better techniques to ascertain the causes of crashes and prevent them; the individual passenger is not. The prospect of liability for all unexplained crashes is obviously a very real economic incentive to explain or prevent as many crashes as possible.

Nancy A. Ellsworth

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[16] Citrola v. Eastern Air Lines, Inc., 264 F.2d 815 (2d Cir. 1959). Similar charges in Calhoun v. Northeast Airlines, Inc., 180 F. Supp. 532, 533 (S.D. N.Y. 1959). *Accord*, Bratt v. Western Airlines, Inc., 169 F.2d 214 (10th Cir. 1948); Trihey v. Transocean Air Lines, 255 F.2d 824 (9th Cir.), *cert. denied*, 358 U.S. 838 (1958); Lobel v. American Airlines, 192 F.2d 217 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952); Judd v. Sams, 186 Misc. 1044, 62 N.Y.S.2d 679 (1946).

[17] J. C. Penney Co. v. Forrest, 183 Okla. 106, 80 P.2d 640 (1938); Evans v. Missouri Pac. R.R., 342 Mo. 420, 116 S.W.2d 8 (1937).

RECENT DECISIONS

DOMESTIC

Warsaw Convention — Limited Liability — Notice Requirement

Plaintiff's decedent purchased a round trip ticket from New York to Vancouver, which provided for her return by way of Seattle and Chicago. As a result of some unforeseen event, plaintiff's decedent was required to travel from Vancouver to Seattle by bus where she continued under the original contract of carriage to Chicago. At Chicago another carrier was substituted for the scheduled carrier for the flight to New York; it was during this final leg of the journey that the fatal crash occurred. Plaintiff alleged that the Warsaw Convention does not apply because the contracting carrier did not perform all of the actual carriage and, in the alternative, moved to dismiss defendant's affirmative defense under the liability limitation provisions of the Convention on the ground that "almost unreadable 4½ point" print on the airline ticket warning of the carrier's limited liability did not constitute adequate notice as required by Article 3(1)(e) of the Convention. *Held*: The contract of carriage was governed by the Warsaw Convention, but due to inadequate notice, plaintiff's motion to dismiss defendant's affirmative defense should have been granted. *Egan v. Kollsman Instrument Corp.*, 10 Av. Cas. ¶ 17,651, 36 U.S.L.W. 2441 (N.Y. Ct. App. 28 Dec. 1967).

"The contract embodying the original ticket issued in this case was undoubtedly for international transportation since, in the words of the Convention (art. [2]), it provided for 'an agreed stopping place within a territory . . . of another power.' "[1] It was determined that the flight from Chicago to New York was part of the original contract and, hence, was governed by the Convention, since it was the original carrier which obtained the ticket for the final leg of the journey. Article 30(1) specifically provides that any successive air carrier who accepts passengers under a contract of international transportation is "subject to the rules set out in this convention. . . ." Plaintiff contended that because of the bus trip from Vancouver the later flights were not performed by "successive air carriers" as required by Article 1(3). It was further maintained that in order for the subsequent domestic flights to be controlled by the Convention, the international portion of the journey must be completely by air. However, the court found to the contrary. Since the original carrier was named as a successive carrier in the contract of carriage, the court held the Convention applicable so long as the flight was performed pursuant to the contract.

Article 3(1)(e) requires an airline to deliver a passenger ticket which

[1] Egan v. Kollsman Instrument Corp., 10 Av. Cas. ¶ 17,651, 17,653 (N.Y. Ct. App. 1967).

contains a "statement that the transportation is subject to the rules relating to liability established by this convention." While there was agreement that there was literal compliance with this requirement, the court went on to inquire whether such compliance satisfied the overall objectives of the Convention and found that "a statement which cannot reasonably be deciphered fails of its purpose . . . of affording notice. . . ."[2] The court rejected the carrier's argument that *Ross v. Pan American Airways*[3] requires physical delivery only on the ground that *Lisi v. Alitalia—Linee Aeree Italiane*[4] declares that an unreadable warning of limitation does not afford adequate notice. In addition, in 1963 the CAB adopted regulations requiring that the statement concerning limitations "be printed in type at lease as large as ten point modern . . . ."[5] For the above described reasons, the court determined that the carrier had failed to fulfill the "national policy requiring that air carriers give passengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence." This decision is of particular value to those who have followed with interest the progress of the newly defined *Lisi* doctrine.

M.E.D., Jr.

Warsaw Convention — Limited Liability — Charter Flights

On 2 February 1962, an Air France jet liner crashed at Orly Field, Paris, France killing all 122 passengers aboard: all members of the Atlanta Art Association that had entered into an International Charter Flight Agreement with Air France to furnish the jet liner for the flight from Atlanta to Paris. Plaintiffs instituted actions for wrongful death of the passengers, seeking recovery of damages in an unlimited amount. Air France, alleging the applicability of the Warsaw Convention limitation of $8,291.87 per person, contended that the claims for unlimited damages were contrary to the Warsaw Convention, the laws of France, and the contract of carriage. Plaintiffs filed a motion for partial summary judgment, seeking dismissal of each part of the defenses asserting the applicability of the Convention. The district court, denying the motion, held that under the facts of the case the Warsaw Convention was applicable.[1] *Held, affirmed*: Recovery by passengers under a contract of carriage on a voyage charter flight is limited by the Warsaw Convention. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967). *appeal docketed*; No. 21609, 5th Cir., 5 Feb. 1968; *petition for cert. filed*, 36 U.S.L.W. 3317 (U.S. 13 Feb. 1968) (No. 1089).

[2] Egan v. Kollsman Instrument Corp., 10 Av. Cas. ¶ 17,651, 17,654 (N.Y. Ct. App. 1967).
[3] 299 N.Y. 88, 85 N.E.2d 880 (1949).
[4] 370 F.2d 508 (2d Cir. 1966), *cert. granted*, 387 U.S. 901 (1967).
[5] 14 C.F.R. § 221.175 (1967).

[1] "[U]nder the factual situation in the cases at hand, where the Atlanta Art Association chartered an aircraft from Air France for the Carriage of passengers on a specific flight . . . (and) where Air France, the air carrier, owns, operates, and controls the aircraft and, prior to departure, delivers proper tickets to the passengers for their passage, the Warsaw Convention would be applicable." Block v. Compagnie Nationale Air France, 229 F. Supp. 801 (N.D. Ga. 1964).

Initially, the court discussed the background of the state of aviation at the time the Convention was drafted and analyzed specific articles of the Convention. They noted that on its face, the Convention covers all international carriage by air, Article 1(1), with three exceptions, Articles 2(2) and 34, none of which covered the flight here involved. The court observed that a specific provision probably would have been included had the framers intended such an exception and concluded that to achieve the uniformity sought, the Convention would have to be given a broad construction. In answer to the plaintiffs' allegation that even without a specific exception, the Convention did not apply here because coverage is premised upon a direct contractual relationship, the court acknowledged the necessity of a contract but held that the contract required was a contract of carriage that arises from the relationship between a carrier and the passengers.

> To sum up, for a flight to come within the scope of the Warsaw Convention, the carrier must have agreed to carry the passenger, and both the carrier and the passenger must have consented to the particular route. If the carrier is an "air transportation enterprise" the passenger need not have paid or have promised to pay, provided that the carrier has consented to transport the passenger under those conditions. Finally, the passengers and the airline need not have been in a position where they could bargain over the terms of carriage.
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> The contractual relationship established between Air France and the passengers and evidenced by the individual issuance of these tickets fits the description of the relationship required by the Warsaw Convention.

Responding to the plaintiffs' contention that limitations expressed in the Convention and rejection of the Brazilian proposal to include charters in the definition of the word "carrier" served as a rejection of any connection between the Convention and charter flights, the court concluded:

> [T]he history of the Convention, before and after Warsaw, shows that the Warsaw Convention applies to a voyage charter flight. The question courts must decide, within the context of each case is: Who is the Carrier?

In answering this question the court stated:

> When a passenger is transported a contract of carriage exists whether or not the transportation is undertaken pursuant to an air charter. It exists regardless of the contractual relationships between the owner and the charterer and between the charterer and the passenger. Here Air France was the carrier. Air France assumed full contractual responsibility for the transportation of the passengers. In recognition of that responsibility, Air France controlled the aircraft and operated it through an Air France crew. A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention.

The dissent was of the opinion that due regard for current public opinion requires a construction of the treaty which is least restrictive of the rights of individuals.

R.H.E.

Governmental Liability — Air Traffic Control — Duty to Warn

Plaintiffs brought an action under the Federal Torts Claims Act[1] against the United States to recover for the death of a pilot and his passenger, allegedly as a result of the negligence of air traffic control in its failure to sufficiently discharge the duty to warn of the possible presence of wing tip vortex of a larger DC-7 departing immediately ahead of the light aircraft. In clearing the Bonanza for take-off shortly after a departing DC-7, the controller warned, "Watch the prop wash." Plaintiffs appealed from a lower court decision holding that the air traffic controller owed no duty other than that of maintaining separation between the aircraft sufficient to avoid a collision and, even though the controllers had no duty to warn the Bonanza pilot of possible turbulence, the warning given was sufficient. *Held, reversed and remanded*: The controller had a duty to give a warning to the Bonanza of the possible danger from wing tip vortex[2] and the warning given by the controller was insufficient. *Hartz v. United States*, 10 Av. Cas. ¶ 17,606 (5th Cir. 1968).

Although recognizing that the aircraft pilot is primarily responsible for the operation of his aircraft, the appellate court stated that he must first know all the facts which are material to safe operation. The court further stated that the controller should have been aware of the danger of the Bonanza taking-off closely behind a DC-7, and that because of the controller's experience and his location on the airfield he was better qualified to determine when the smaller airplane should have been cleared for take-off. The pilot of the Bonanza should have been warned of the possible danger of wing tip vortex turbulence by the method prescribed for controllers in the Air Traffic Control Procedures Manual, rather than in the language he actually used. The controller did not fulfill his duty to warn the pilot of the impending danger in a manner which was sufficient, nor did he satisfy the additional duty to delay take-off clearance for a reasonable time in order to permit such turbulence from the DC-7 to dissipate. The court thus found that the controller's breach of duty clearly was a proximate cause of the crash of the Bonanza.

L.R.J., Jr.

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[1] 28 U.S.C. § 1346(b) (1964).

[2] Prop wash and wing tip vortex are not the same. Vortex is more hazardous and takes longer to dissipate than does prop wash. The court stated that the controller's use of the term "prop wash" may have led the pilot of the Bonanza to believe that "he would encounter a minimal wind force which would not endanger his aircraft." Hartz v. United States, 10 Avi. 17,606 (5th Cir. 1968).

Federal Aviation Act — Statutory Interpretation — Inclusive Tours

An appeal was taken by three regular air carriers from a series of orders of the Civil Aeronautics Board (hereinafter CAB or Board) granting five supplemental air carriers (intervenors in this case) the right to engage in "inclusive tours"[1] between the United States and various foreign countries. The petitioners appeal was based on the allegation that the CAB lacked authority to allow these "inclusive tours." "Supplemental" is the term used to designate air carriers that are not assigned regularly scheduled routes by the CAB and are restricted by the Federal Aviation Act of 1958, as amended, to deal only in "*charter trips* in air transportation . . . to supplement the scheduled service" authorized by the Board. The focal point of this conflict revolved around the question of whether or not the "inclusive tours" fit within the term "charter trips" which the CAB has some discretion in defining. The CAB Proceeding from which these orders evolved was the same one that issued inclusive tour authority to ten "domestic" supplemental air carriers. The Board asserted that the issue here presented had been decided by the Court of Appeals for the District of Columbia when it reviewed and affirmed the authorization of *domestic* "inclusive tours," and therefore, that decision should be *res judicata* to this appeal. In the alternative the Board stated that the *Waterman doctrine* denied the court the right of review. *Held, reversed and remanded*: The legislative history of the amendment of the Federal Aviation Act of 1958 concerning supplemental carriers, as drawn from explicit statements (concerning the definition of "charater trips") made during the floor debate on the amendment, conclusively demonstrated that the Board acted outside its authority in granting supplemental carriers the rights to engage in "inclusive tours." *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2d Cir. 1967), *cert. granted*, 36 U.S.L.W. 3308 (29 Jan. 1968).

The court blunted the *res judicata* defense on the ground that different orders and parties were involved though the same issue, arising from the same proceeding, was presented. A motion to transfer the appeal to the Court of Appeals for the District of Columbia was denied on the same ground. Likewise, the tribunal avoided the *Waterman doctrine* by declaring that the judiciary is not denied the right to review a case when the action taken, before the matter reaches the President, is beyond the Board's power to act. The court then delved into the merits of the matter placing major emphasis upon the fact that a conflict had existed between the Senate and House versions of the bill pertaining to the term "charter trips." The Senate proposal defined "charter trips" to include "inclusive tours," while the House bill contained no definition whatsoever relating

[1] Inclusive tour is generally synonymous with an "all-expense" or "package" tour. The CAB has adopted the term "inclusive tour" rather than "all-expense" tour because all expenses are not necessarily required to be included in the tour price.

to "charter trips." The Conference Committee reported out a compromise offering (that eventually became the amendment) which deleted the definition of "charter trips." Statements were specifically made in the floor debate on the bill that the definition had been dropped by the Senate proponents and that "inclusive tours" were not to be a part of "charter trips."

The prior decision that affirmed the *domestic* "inclusive tours"[2] placed little weight on the floor debate but considered in detail the effect of "inclusive tours" as authorized (which the court in the present case did not consider at all) plus a previous decision which approved "split charters"[3] of one aircraft to two different groups. The D.C. Circuit found "chapter trips" had no fixed meaning and that Congress left the task of defining the term to the CAB so as to be able to meet changing needs. The Second Circuit reached a result diametrically opposed to the aforementioned views and seemed to be a willing partner to the petitioner's desire to obtain a hearing on this matter in the Supreme Court.[4]

If the statute's legislative history deliniates legislative intent, then the Board literally exceeded its power to regulate when it granted "inclusive tour" authority to the supplementals. On the other hand, the airline industry has enjoyed a tremendous amount of growth since 1962 and the needs of the public may also have changed just as rapidly. In either case it is now up to the Justices of the Supreme Court to decide.

E.G.S.

Negligence — Air Traffic Control — Weather Information

Plaintiff was injured in the crash of an aircraft owned by defendant, True-Flite, Inc., and operated by its agent. The plane took off after receiving instructions from the tower that VFR conditions existed, and shortly thereafter flew into some thick clouds and visual contact with the ground was lost. Without ever having regained visual contact, the plane crashed into a swamp, permanently injuring the pilot; plaintiff was injured less severely. The two remained in the swamp approximately thirty hours before aid arrived. Plaintiff alleges that True-Flite through its agent was negligent in that he did not check local weather conditions before takeoff since he knew that unfavorable conditions existed. Evidence was also introduced that the pilot was negligent in the execution of the proper

[2] American Airlines, Inc. v. CAB, 365 F.2d 939 (D.C. Cir. 1966). For an extensive discussion of this case and the general area of conflict between the regular and supplemental carriers, *see* Note, *Federal Aviation Act—Statutory Interpretation—Inclusive Tours*, 33 J. AIR L. & COM. 179 (1967).

[3] American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C. Cir. 1965), *noted in* 32 J. AIR L. & COM. 127 (1966). Prior to this decision the concept of "plane load" charter had been limited to one group chartering the full capacity of a single aircraft.

[4] In the opinion under consideration (after evaluating the CAB's motion to transfer to the D.C. Circuit and determining that it had jurisdiction over the appeal) the court stated at 774:

> However, the Board argues that petitioners are guilty of forum-shopping, seeking a determination from this court contrary to that reached by the District of Columbia Circuit, thus enhancing their opportunity for review in the Supreme Court of the legal issues here tendered.

The court then proceeded to deny the motion and determine the case contrary to the decision reached by the District of Columbia Circuit.

procedure to establish visual contact with the ground. An action was brought against the United States under the Federal Tort Claims Act on the ground that its agent, the tower operator, failed to give accurate information to the pilot when he asked if VFR weather conditions existed. Plaintiff further contended that the tower operator did not immediately initiate search and rescue operations when the plane failed to return. *Held*: Any airline that deliberately carries unsuspecting passengers into dangerous weather which results in their death or injury shall be liable for the consequences. *De Vere v. True-Flight, Inc. & United States of America*, 268 F. Supp. 226 (E.D.N.C. 1967).

The finding of negligence on the part of the carrier was based on the fact that the pilot, in his flight into the airport to pick up the plaintiff, observed the unfavorable weather conditions and, thus, it became his duty to gain the latest information directly from the weather bureau. Since pilots and airlines have knowledge of weather conditions superior to that of passengers, they should be held strictly responsible when adverse weather conditions are voluntarily encountered. This should be especially true in light of the fact that a large number of airplane accidents occur in inclimate weather.

The claim against the United States was dismissed. The court found by records and testimony of a meteorologist that at the time of takeoff VFR conditions did exist. Hence, the tower operator, although he was unable to contact the weather bureau by phone to confirm that such a condition existed, was not guilty of giving erroneous information. According to regulations, the tower operator was not negligent in failing to begin a search and rescue mission immediately. The duty to initiate such search procedures arises when the operator has actual knowledge that an aircraft is down. The court concluded here that the operator might reasonably have believed the the aircraft had flown on to another airport.

J.A.M.

FOREIGN

Warsaw Convention — Article 25 — Unlimited Liability

A Milan company committed to K.L.M. Airlines three packages, weighing kg. 3,400, containing gold jewelry for delivery in New York. The shipment was worth $5,000. At Kennedy Airport the packages were unloaded but left untended in an unlocked K.L.M. truck for approximately one hour. They disappeared. Suit was brought by an Italian insurance company against K.L.M. after K.L.M. had claimed limited liability under Article 22 of the Warsaw Convention (damages of $56.) *Held*: Under the total facts of the case K.L.M.'s negligent handling of the cargo amounted to the equivalent of wilful misconduct under Article 25 of the Warsaw Convention and, therefore, the carrier was liable for the full amount. *Soc. Agrippina v. K.L.M. Airlines*,[1] Tribunal of Milan.

[1] This case is summarized from a translation of the complete text reprinted in 6 Il Diritto Aero (1967) (Italy). Translator: Tomaso Quattrin.

The court found that the carrier had been fully apprised of the value of the packages by a letter from the consignor. The lack of diligence on the carrier's part to take special care of such small, highly valued packages especially at nighttime, caused the court to consider such action extreme negligence, and the equivalent of wilful misconduct under Article 25 of the Warsaw Convention. Thus, the carrier had submitted itself to unlimited liability, and was denied the right to avail itself of the limitations of Article 22.

Conflict of Laws — Ticket Sales — Warsaw Convention

Plaintiff German corporation asked a Swiss citizen to buy plane tickets on defendant German airline. The Swiss citizen ordered the tickets from a Swiss travel agent in order to get a cheaper fare for international carriage. Plaintiff corporation paid the Swiss citizen for the tickets and he was to pay the travel agent. He never did. When the tickets were presented in Munich for booking of the trip they were seized by defendant. Plaintiff sought to rcover the amount paid for the tickets with defendant contending that the money had never been received. *Held*: According to applicable German law, the Swiss citizen was an agent of the plaintiff German corporation, and therefore, plaintiff had never paid defendant. *Oberlandesgericht Köln*, 29 May 1967.

The court applied German and not Swiss law. This follows from a limitation on the principle of German Private International Law that the choice of law in respect to contracts depends on the intention of the parties. That limitation provides that, where the parties have not made an express agreement as to choice of law and no special interest of either party warrants application of other than German law, German law will apply. Here plaintiff and defendant were both German corporations domiciled in Germany. Moreover, a printed clause on the back of the plane tickets referred to Article 28 of the Warsaw Convention, which provision provided that plaintiff had to sue in Germany and that German law was to apply.

According to the German law of agency, the Swiss citizen (defendant's actual contractual partner) was found to be plaintiff's agent because the law of defendant's country controls. Just because an agent was involved the choice of law did not change. Also, under the law of torts, German law applied since Munich was the place where the seizure (refusal to book the tickets) had occurred.

The highest German state court decided for defendant according to the German Civil Code (§§ 326, 327) since plaintiff never gave anything in performance of the contract and, therefore, had no grounds for recission.

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[1] The summary of this case is drawn from a translation of the full reprint of the case in 16 Zeitschrift für Luftrecht und Weltraumrechtsfragen (1967) (Germany). Translated by Rainer Kasolowsky.