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THE AFTERMATH OF A HIJACKING— PASSENGER CLAIMS AND INSURANCE

GEORGE N. TOMPKINS, JR.*

In this speech given at the Air Law Symposium on March 22, 1973, Mr. George N. Tompkins, Jr. presents an overview of insurance-related problems that arise from airplane hijackings. Mr. Tompkins examines the legal aspects of recovery by passengers for injuries, both physical and mental, that are caused by hijackings. He explains that the applicable rules governing this recovery will depend on whether the passenger was traveling within one country, between countries, or between the United States and some other country. Mr. Tompkins also discusses the development of aviation war risk insurance and whether it, or all risk insurance, provides coverage for losses arising from hijackings.

HIJACKINGS of commercial aircraft have, unfortunately, become quite commonplace. As could be expected, this fact has generated some interesting and complex legal issues, some of which have not yet been resolved. This is exemplified by an article concerning the Pan American 747 destroyed at Cairo on September 6, 1970, which stated:

Hijacking as a deliberate political act has become a fact of life. And the problem of insuring aircraft—who should pay what to whom—has become a major question likely to keep battalions of lawyers busy for years.¹

While these legal issues are not yet keeping battalions of lawyers busy, several squads are presently heavily engaged in litigating them.

Two of these problems, although somewhat diverse in nature,

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¹ Bus. Wk., Dec. 5, 1970 at 64.

are the subject matter of this article. The first is the subject of passenger claims for personal injury, death, or delay that arise as a result of a hijacking. The second concerns the subject of insurance. How can an airline insure itself against the risks inherent in any hijacking; risks to passengers and risks to the aircraft? And what problems arise in determining which insurance policy covers the inherent risks of a particular hijacking?

The problems of the infant airline industry fifty years ago contrast greatly with one of the most serious problems facing the airline industry today, that of hijacking. When airlines were first being formed fifty years ago, flying was a fairly simple, if somewhat unpredictable, business. The pioneer aviators dusted off their bi-planes and carried their intrepid passengers for short daylight hops whenever the weather permitted. No one gave a thought to such matters as aerial piracy or how to insure against it. The situation has certainly changed.²

The nature of hijacking itself also has changed. Initially, hijacking was represented by the side trip to Cuba, and was joked about by passengers, government and industry members alike. No one today considers hijacking a matter to be treated lightly. The political terrorists have appeared on the scene, and the ransom seekers are a recent innovation. Civil aviation has become a prime target of those who seek to draw world attention to their cause. Passengers and airlines alike have become the innocent victims of this terrorist activity.

Political or terrorist hijackings had their grandest moment on the Labor Day weekend of 1970, when no less than five jet aircraft, including a 747, were hijacked on the same day.³ Only one of the hijackings was thwarted—that involved an El Al Israel Airlines aircraft on which the hijackers were subdued and the aircraft made a forced landing at London's Heathrow Airport. Three of the aircraft, those of BOAC, TWA, and Swissair, were diverted to a desert landing strip in Jordan where they were subsequently destroyed by the hijackers and their compatriots.⁴ The fifth, a Pan American 747, was ultimately diverted to Cairo where it too was destroyed within minutes after landing. Members of the Pop-

² *Id.*

³ N.Y. Times, Sept. 7, 1970, at 1, col. 4; *Id.* Sept. 8, 1970, at 1, col. 8.

⁴ *Id.*

ular Front for the Liberation of Palestine took credit for all five hijackings.⁵

The legal problems which have developed from this particular day and these hijackings are representative ones, and as such, Labor Day weekend of 1970 provides an easy reference point for a discussion of the legal aspects of air piracy, both in the realm of passenger claims and insurance coverage. Several passenger claims against TWA, Pan American, and Swissair are pending in the state and federal courts of New York.⁶ The question of who should pay for the loss of the Pan American 747 has been tried in the United States District Court for the Southern District of New York, and a decision has just recently been rendered.⁷

This article makes no attempt at resolution of the legal problems which have arisen from hijackings. The purpose is simply to delineate these problems and to outline the legal principles that are, or probably will be, applied in resolving them.

I. PASSENGER CLAIMS

Because aviation is inherently international in nature, two separate systems of liability rules have developed in the United States for resolving passenger claims for injury, death, or delay in any aviation case, including a hijacking case. The basis for determining the applicability of one system as opposed to the other is the nature of the transportation of the particular passenger involved. This derives from the complete routing of his journey as evidenced by his passenger ticket. The distinction sometimes is referred to as domestic versus international transportation, but it is preferable to categorize the two different systems as international and non-international.

⁵ *Id.*

⁶ *Husserl v. Swiss Air Transport Company, Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *appeal docketed*, No. 73-1501, 2d Cir., March 5, 1973; *Raful v. Trans World Airlines, Inc.*, 41 App. Div.2d 753, 341 N.Y.S.2d 655 (2d Dept. 1973); *Herman v. Trans World Airlines, Inc.*, 40 App. Div.2d 850, 337 N.Y.S.2d 827 (2d Dept. 1972); *Rosman v. Trans World Airlines, Inc.*, 40 App. Div.2d 963, 338 N.Y.S.2d 664 (1st Dept. 1972); *Salmon v. Pan American World Airways, Inc.*, Index No. 096917, Sup. Ct. N.Y. County, March 16, 1971.

⁷ *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.*, 71 Civ. 1118 (S.D.N.Y. 1971). Since this talk was given, the non-jury trial has concluded and a decision has been rendered. The court, in a lengthy opinion, has held that the Pan American loss falls within the all risk policy. 71 Civ. 1118 (filed Sept. 17, 1973). The author understands that this decision will be appealed.

The international system of liability rules is set forth in a treaty of the United States known as the Warsaw Convention.⁸ The non-international system of liability rules as applied in this country is simply the common law rules of negligence.⁹ The liability rules of the Warsaw Convention "apply to all international transportation of persons, baggage or goods performed by aircraft for hire."¹⁰ "International transportation" is defined in Article 1(2) of the Warsaw Convention as any transportation in which the places of departure and destination are situated either within the territory of two parties to the Convention, or within the territory of one party provided that there is an agreed stopping place in the territory of another country, even though the other country is not a party to the Convention.¹¹ The places of departure and destination, and agreed stopping places, are determined by reference to the contract of carriage which, in the transportation of passengers, is generally the passenger ticket.¹²

If the particular passenger ticket provides for "international transportation" as defined in Article 1 of the Warsaw Convention, then the liability rules applicable to any passenger claim for personal injury, death, or delay are exclusively those set forth in the Convention.¹³ If the particular transportation is not international as defined in the Warsaw Convention, then the liability rules which will be applied generally in the United States are the common

⁸ Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, Oct. 12, 1929, 49 Stat. 3000 et seq., T.S. 876 (1934) [hereinafter cited as Warsaw Convention].

⁹ See *Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972); *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969); See generally *Federal Insurance Co. v. Colon*, 392 F.2d 662 (1st Cir. 1968); *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967); *Berguido v. Eastern Air Lines, Inc.*, 369 F.2d 874 (3d Cir. 1966); *Orr v. Trans World Airlines, Inc.*, 332 F.2d 177 (6th Cir. 1964); *Eastern Air Lines, Inc. v. Silber*, 324 F.2d 38 (5th Cir. 1963).

¹⁰ Warsaw Convention, article 1(1).

¹¹ Warsaw Convention, article 1(2).

¹² *Molitch v. Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); *Grey v. American Airlines, Inc.*, 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). See also *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

¹³ See cases cited note 12 *supra*.

law rules of negligence applicable to the passenger-carrier relationship.¹⁴

Although it was originally intended that all signatories to the Warsaw Convention would, by legislative enactment, render the liability rules of the Convention applicable to non-international transportation as well, the United States has not done so. In the United States, therefore, we must deal with two distinct systems of liability rules in passenger aviation cases, dependent upon the nature of the transportation as evidenced by the individual passenger ticket.

The result has been confusion and misunderstanding in many instances. For example, two men travelling side by side on the same aircraft operating as a shuttle service between Dallas and Houston could be subject to different sets of passenger-carrier liability rules. One passenger ticket may read Dallas/Houston/Dallas. This is non-international transportation and the liability rules applicable presumably would be the law of Texas dealing with the passenger-carrier relationship. The other passenger ticket may read Dallas/Houston/Mexico City/Houston/Dallas. This is international transportation as defined in the Warsaw Convention and the liability rules of the Convention would be applicable even with respect to the shuttle service between Dallas and Houston.

At the risk of belaboring this point, this legal distinction between international and non-international transportation must be emphasized because the international liability rules are quite different from the non-international rules.¹⁵ The most important thing to remember is that in order to determine the applicability of one system as opposed to the other, the controlling factor is the individual passenger ticket pursuant to which the person making the claim was travelling when the claim arose. The key to the applicability of one system or the other is simply the passenger ticket. The nature of the particular flight, the nationality of the passenger, the nationality of the airline, whether the aircraft is travelling between different nations or wholly within one nation, are all irrelevant in determining whether the liability rules applicable are the international or the non-international rules.

¹⁴ See cases cited note 9 *supra*.

¹⁵ See text adjacent to note 22 *infra*.

A. *The Non-International Liability Rules*

In cases of non-international transportation the liability rules that are applied by the courts in the United States are the common law rules of negligence, and generally an airline, as a common carrier, owes the highest degree of care to its passengers in the conduct of its flight operations.¹⁶

The hijackings which have taken place in this hemisphere have not led to a significant amount of litigation by passengers involving injuries, death, or delay. In applying the common law rules of negligence, the basic questions would be whether the airline was negligent in permitting the hijacking to occur and whether the damage complained of was proximately caused by the hijacking.

As a result of recently enacted federal regulations, airlines and airports are now required to adopt and follow certain minimal security procedures designed to prevent hijackings. These include visual inspection of carry-on baggage items and clearance of each passenger either by a detection device or a personal search.¹⁷ Obviously, if an airline neither adopts such procedures nor follows the required procedures in a particular incident and a hijacking results, the airline will be held liable for the foreseeable consequences of the hijacking.

Problems may arise, however, in determining just what are the foreseeable consequences of a hijacking. For example, can it reasonably be said that the deliberate or accidental shooting of a passenger by a hijacker or a security guard was proximately caused by, or is a foreseeable consequence of, the hijacking? Similarly can it reasonably be said that the destruction of an aircraft by explosive devices resulting in death or injury of passengers was proximately caused by, or is a foreseeable consequence of, the hijacking?

The lines of proximate causation and foreseeability in these areas have not yet been drawn by the courts. Fortunately, a major disaster involving serious injury or death of passengers has not yet resulted during the course of a hijacking of a commercial aircraft in the United States. The courts, therefore, have not yet decided the extent to which an airline will be liable for the injury or death of passengers sustained during the course of a hijacking.

¹⁶ See cases cited note 9 *supra*.

¹⁷ 14 C.F.R. §§ 107,121 (1973).

This determination in all probability will depend upon the application of traditional negligence rules, and the concepts of proximate cause and foreseeability.¹⁸

A passenger may, however, sustain injury or death during the course of a hijacking, not as a proximate or foreseeable result of the hijacking, but as a result of one of the normally recognized risks of the air. For example, turbulence may cause injury to a passenger. A passenger may fall on the aircraft, sustain food poisoning, fall getting off the aircraft, or the aircraft itself may crash in the course of the hijacking for reasons of operational or mechanical deficiencies unrelated to the hijacking. The fact that any of these events may take place during the course of a hijacking may not determine the liability of the airline since such events are normally recognized risks of the air which, under the circumstances, may not have been increased by the hijacking. In these cases, the liability of the airline may be determined without regard to the fact that the injury was sustained during the course of the hijacking. In some instances, however, the airline may not be held responsible for the same degree of care because of the pressures inflicted on the airline personnel due to the hijacking.

Under some circumstances, a hijacking can increase the normally recognized risks of the air; for example, when the aircraft is forced, either by the hijackers, fuel shortages, or other considerations, to land at an inadequate airfield. In these circumstances, the questions of causation, foreseeability, and whether the hijacking was the result of the airline's negligence undoubtedly will arise.

With regard to foreseeability, it may be determined that criminal acts of hijackers in the course of and in furtherance of the hijacking are intervening factors for which an airline will not be civilly responsible, even though these acts result in the death or injury of passengers. On the other hand, it may be determined that an airline should be held to be the legal insurer of the safety of its passengers in any hijacking situation. Since the airline is in a better position to prevent a hijacking, the courts may conclude that an airline should be responsible for whatever happens to a passenger once a hijacking commences and until he is delivered safely to his original destination.

A brief word on the subject of delay in transportation. Every

¹⁸ See cases cited note 9 *supra*.

hijacking inherently involves some delay in the completion of a passenger's journey. Domestic airlines, however, are able to avoid or limit liability for delay in accordance with tariffs filed with and approved by the Civil Aeronautics Board.¹⁹ There is no reason to believe that tariff provisions of this nature will not apply equally to hijacking cases.

B. *The International Liability Rules*

These rules are encompassed within the Warsaw Convention of 1929 and the 1966 Intercarrier Agreement, generally referred to as the Montreal Agreement.²⁰ The hijacking litigation existing today involves the application of these rules to specific cases of alleged passenger injuries. This litigation arises out of the hijackings of September 6, 1970, to the Jordanian Desert and Cairo.

As previously stated, the liability rules in the Warsaw Convention apply to "international transportation" as defined in the Convention. The special 1966 Intercarrier Agreement rules apply to a particular type of Warsaw Convention international transportation, namely, that which involves a point of origin, point of destination, or agreed stopping place in the United States.²¹

The principal liability provision of the Warsaw Convention relating to passengers is Article 17, which provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.²²

The requisites for airline liability under the Warsaw Convention, therefore, are: (i) that there be an accident, and (ii) that it take place on board the aircraft or in the course of embarking or disembarking. In such circumstances, Article 17 creates presumptive liability on the part of the airline for the damage sustained because

¹⁹ Federal Aviation Act of 1958, 49 U.S.C. § 1373 (1970). *But see* Warsaw Convention, article 19, dealing with the carrier's liability for delay in international transportation.

²⁰ CAB Agreement No. 18900, approved in Order E-23680 (May 13, 1966). Throughout, this Agreement will be referred to as the 1966 Intercarrier Agreement.

²¹ *Id.*

²² Warsaw Convention, article 17.

of the death, wounding, or other bodily injury of a passenger.²³ It is important to note, as the First Circuit Court of Appeals stated in the case of *MacDonald v. Air Canada*,²⁴ that an accident is the first requisite for invocation of this presumptive liability on the part of the airline.

Pursuant to Article 20(1) of the Warsaw Convention, the presumptive liability created by Article 17 can be overcome upon proof by the carrier that it took "all necessary measures" to avoid the damage alleged or that it was impossible to do so.²⁵ These defenses are waived by participating airlines in cases to which the 1966 Intercarrier Agreement applies, but only in respect of death, wounding, or other bodily injury of a passenger.²⁶

Article 19 creates presumptive liability for damage occasioned by delay in the transportation of passengers.²⁷ The Article 20(1) defenses are not waived in the 1966 Intercarrier Agreement with respect to Article 19 liability.²⁸ This provision has not been the subject of a great deal of litigation, even in respect to hijacking cases.

The Warsaw Convention limits the liability of the airline, absent willful misconduct within the meaning of Article 25, as follows:

- (i) In cases governed by the 1929 unamended Warsaw Convention to approximately \$9,000, but perhaps now about \$10,000 because of the recent further devaluation of the dollar.²⁹
- (ii) In cases governed by the 1929 Warsaw Convention as amended by the 1955 Hague Protocol, to approximately \$18,000, although again because of the recent devaluation this may be about \$20,000.³⁰
- (iii) In cases to which the 1966 Intercarrier Agreement applies, to \$75,000.³¹

²³ *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Berguido v. Eastern Air Lines, Inc.*, 369 F.2d 874 (3d Cir. 1966), *cert. denied*, 390 U.S. 996 (1968); *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

²⁴ *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971).

²⁵ Warsaw Convention, article 20(1); *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

²⁶ CAB Agreement No. 18900, approved in Order E-23680 (May 13, 1966).

²⁷ Warsaw Convention, article 19.

²⁸ CAB Agreement No. 18900, approved in Order E-23680 (May 13, 1966).

²⁹ Warsaw Convention, article 22; CAB Order 72-6-7 (June 2, 1972).

³⁰ S. EXEC. DOC. H, 86th Cong., 1st Sess. (1959); S. EXEC. REPT. NO. 3, 89th Cong., 1st Sess. (1965); CAB Order 72-6-7 (June 2, 1972).

³¹ CAB Agreement No. 18900, approved in Order E-23680 (May 13, 1966).

It must be remembered that the 1966 Intercarrier Agreement is not a treaty. It is not a treaty amendment. It does not constitute an amendment of the Warsaw Convention. The 1966 Intercarrier Agreement is simply an airline agreement whereby participating carriers have agreed, with respect to Warsaw Convention international transportation involving a point of origin, destination, or an agreed stopping place in the United States:

(i) That the limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of \$75,000; and

(ii) That article 20(1) defenses, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger, are waived.³²

Even in cases to which the 1966 Intercarrier Agreement applies, the basic requisites for an airline's liability are still the same. There must be an accident, and it must take place on board the aircraft or in the course of embarking or disembarking.³³

This is a summary of the liability rules applicable to international transportation as defined in the Warsaw Convention. The hijackings of September 6, 1970, have led to a number of claims against the carriers involved. Several suits were brought in New York against TWA, Swissair, and Pan American.³⁴ The Warsaw Convention-1966 Intercarrier Agreement rules appear to have been applicable to all of these claims. A number of the Pan American passengers sustained injuries in evacuating the 747 at Cairo. The hijackers had allowed approximately eight minutes for the completion of the landing and evacuation of the passengers before the aircraft was destroyed by preset explosive charges located throughout the aircraft. Although the passengers who were injured left the aircraft by the emergency exits, it appears correct to conclude that their injuries were sustained as a result of an accident to them in the course of disembarking the aircraft. Thus recovery has been allowed in the Pan American cases for the physical injuries sustained in the course of evacuating the aircraft.³⁵ This result seems consistent with the Warsaw Convention-1966 Inter-

³² *Id.*

³³ *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971).

³⁴ *See* cases cited note 6 *supra*.

³⁵ *Salmon v. Pan American World Airways, Inc.*, Index 096917, Sup. Ct. N.Y. County, March 16, 1971.

carrier Agreement liability rules. It would not appear to be significant *where* the disembarking takes place, that is at the terminal of a normally concluded flight or via an emergency exit at any place to which the aircraft has been diverted as the result of a hijacking, as in the Pan American cases.

Similarly, if a passenger sustains an accident on board the aircraft in the course of the hijacking, liability for the physical injury would appear to be clear under the Warsaw Convention-1966 Intercarrier Agreement rules subject, of course, to the contributory negligence defense of Article 21.³⁶ If the aircraft itself is involved in an accident, even during the course of a hijacking, these rules would appear to impose liability for any passenger personal injury or death, subject, of course, to the applicable limit of liability.

Some interesting legal questions have arisen in a number of cases brought against TWA and Swissair arising out of the September 6, 1970, hijackings. In these particular cases, no claim is made for physical personal injury. Plaintiffs are claiming damages for psychic injuries such as fright, depression, loss of weight, sleeplessness, nightmares, dermatitis, mental pain, anguish, and the like.³⁷ It appears that in each of these cases no plaintiff sustained bodily contact injury or an accident of any kind involving his or her person.

The passengers were held in the desert for a number of days by the hijackers and their compatriots and, subsequently, in hotels in Amman, Jordan, before ultimately being allowed to resume their journey. The claims made are really for the scare and fright that these passengers experienced during the course of the hijacking and until they were safely on their way after being released in Jordan.

The basic issue confronting the courts is whether the airlines involved are liable under the Warsaw Convention-1966 Intercarrier Agreement rules for the damages alleged to have been sustained because of the frightening experience of the hijacking. The

³⁶ Warsaw Convention, article 21.

³⁷ *Husserl v. Swiss Air Transport Company, Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *appeal docketed*, No. 73-1501, 2d Cir. March 5, 1973; *Rafal v. Trans World Airlines, Inc.*, 41 App. Div.2d 753, 341 N.Y.S.2d 655 (2d Dept. 1973); *Herman v. Trans World Airlines, Inc.*, 40 App. Div.2d 850, 337 N.Y.S.2d 827 (2d Dept. 1972); *Rosman v. Trans World Airlines, Inc.*, 40 App. Div.2d 963, 338 N.Y.S.2d 664 (1st Dept. 1972).

defense of the cases has taken two distinct courses. In the TWA cases, the defendant argues that fright without bodily contact injury is not wounding or any other bodily injury within the meaning of Article 17 of the Warsaw Convention and, therefore, TWA is not liable for the alleged damages.³⁸ In the Swissair cases, however, the defendant argues that a hijacking alone is not an accident within the meaning of Article 17, that the prime requisite for Warsaw Convention-1966 Intercarrier Agreement liability, viz., the happening of an accident on board the aircraft or in the course of embarking or disembarking, is therefore lacking and Swissair is not liable for the alleged damages.³⁹

In the TWA cases, the plaintiffs moved for summary judgment on the issue of liability, asserting that the Montreal Agreement establishes absolute liability for provable damages up to the sum of \$75,000 per passenger. The trial court in each case granted the motion, and the concluding paragraphs of the trial court's opinion in the case of *Herman v. Trans World Airlines, Inc.* exemplify the rationale:

It is the court's opinion that, since the plaintiff's damage was sustained both while on board the aircraft during flight (when the hijacking commenced) and while physically still on board during the subsequent week of detention in the desert (while the hijacking was still in progress), the plaintiff has demonstrated compliance with the provision of Article 17 of the Warsaw Convention that the accident (hijacking) which caused the damage so sustained took place on board the aircraft.

In the court's opinion the defendant has no defense to the liability imposed upon it under the Warsaw Convention, as modified by the Montreal Agreement, to the extent of plaintiff's provable damages for injuries resulting from the intentional tort committed upon the person of the plaintiff when, while a passenger in flight on board defendant's airplane, she was held in close confinement by armed hijackers both while the plane was in flight and thereafter while the plane was grounded until she was released seven days later after the hijackers had destroyed the airplane.⁴⁰

³⁸ *Herman v. Trans World Airlines, Inc.*, 40 App. Div.2d 850, 337 N.Y.S.2d 827 (2d Dept. 1972); *Rosman v. Trans World Airlines, Inc.*, 40 App. Div.2d 963, 338 N.Y.S.2d 664 (1st Dept. 1972).

³⁹ *Husserl v. Swiss Air Transport Company, Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *appeal docketed*, No. 73-1501, 2d Cir., March 5, 1973.

⁴⁰ *Herman v. Trans World Airlines, Inc.*, 69 Misc.2d 642, 645 (Sup. Ct. Kings Co. 1972), *rev'd*, 40 App. Div.2d 850 (2d Dept. 1972).

The appellate courts in each of the TWA cases have concluded that summary judgment should not have been granted. The orders of the trial courts have been reversed and the motions for summary judgment denied. The appellate courts have concluded that triable issues of fact are presented involving the precise meaning of the official French text of Article 17 of the Warsaw Convention and whether the language of Article 17 permits recovery for mental anguish or non-bodily contact injury.⁴¹ These cases are in the process of further appeal to the New York Court of Appeals. It is worth noting that the appellate courts have stated that the basis for an airline's liability as set out in Article 17 of the Warsaw Convention was not in any manner affected by the 1966 Inter-carrier Agreement since that Agreement merely increased the limit of liability of participating carriers and deprived them of certain Article 20 defenses.⁴²

The leading Swissair hijacking case is pending in the Southern District of New York.⁴³ The plaintiff in that case seeks to recover damages for emotional distress during the course of the hijacking. Again, there is no claim for any bodily contact or impact injury.

Swissair moved to dismiss the complaint for failure to state a claim upon the basis that there was no accident within the meaning of Article 17 of the Warsaw Convention which caused the alleged injuries. The basic question raised by the motion to dismiss was whether a hijacking standing alone is an accident within the meaning of Article 17 of the Warsaw Convention. The district court denied the motion and held that "a hijacking is within the ambit of the term 'accident', and sufficient to raise the presumption of liability under the Warsaw Convention as modified" by the 1966 Inter-carrier Agreement.⁴⁴ The court went on to express the view, *sua sponte*, that it had difficulty reading the Warsaw Convention to permit recovery for mental anguish and suffering alone.⁴⁵

The district court has certified the question of whether a hijack-

⁴¹ *Herman v. Trans World Airlines, Inc.*, 40 App. Div.2d 850, 337 N.Y.S.2d 827 (2d Dept. 1972); *Rosman v. Trans World Airlines, Inc.*, 40 App. Div.2d 963, 338 N.Y.S.2d 664 (1st Dept. 1972).

⁴² See cases cited note 41 *supra*.

⁴³ *Husserl v. Swiss Air Transport Company, Ltd.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *appeal docketed*, No. 73-1501, 2d Cir., March 5, 1973.

⁴⁴ *Id.* at 702, 707.

⁴⁵ *Id.* at 707-08.

ing is an accident within the meaning of Article 17 of the Warsaw Convention to the Second Circuit Court of Appeals pursuant to the Interlocutory Appeals Act,⁴⁶ and that court recently granted Swissair's petition for leave to appeal.⁴⁷

Parenthetically, it should be noted that the Guatemala Protocol of 1971, which, if it comes into effect, would amend the Warsaw Convention in several respects, does not contain the word "accident" in the new Article 17. The new Article 17 reads as follows:

The carrier is liable for damages sustained in case of death or personal injury of a passenger upon condition only that the *event* which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.⁴⁸

This amendment to Article 17 would seem to lend support to the argument that the term accident in the original Article 17 was intended to have a very restricted meaning.

On the subject of delay in transportation, there are no reported cases resulting from a hijacking. It appears, however, that the airline would be liable under Article 19 of the Warsaw Convention for provable damage occasioned by delay.⁴⁹ The 1966 Inter-carrier Agreement does not apply to delay cases, however, and, accordingly, the airline would have available to it the "all necessary measures" defenses of Article 20(1) in any delay case.⁵⁰ Additionally, the limit of liability applicable to a delay case would be the Warsaw Convention limit of approximately \$9,000 as opposed to the 1966 Inter-carrier Agreement limit of \$75,000.⁵¹

This is the current status of the civil litigation arising out of the September 6, 1970, hijackings. It will be interesting to see how the two distinct issues which have arisen will be resolved by the respective appeals courts. Eventually the questions may reach the United States Supreme Court.

⁴⁶ 28 U.S.C. § 1292(b) (1970).

⁴⁷ *Appeal docketed*, No. 73-1501, 2d Cir., March 5, 1973.

⁴⁸ ICAO Doc. 9040-LC/167-2 at 189 (1972) (emphasis added).

⁴⁹ Warsaw Convention, article 19.

⁵⁰ Warsaw Convention, article 20; CAB Agreement No. 18900, approved in Order E-23680 (May 13, 1966).

⁵¹ Warsaw Convention, article 22; CAB Agreement No. 18900, approved in Order E-23680 (May 13, 1966).

II. INSURANCE

The subject of insurance against the risks of hijacking deserves particular attention since hijacking has become such a common risk. Treatment of the subject of insurance coverage for the risks of a hijacking will be brief and will relate only to the situation as it exists in the London market, since that is the one with which the writer is most familiar. Any discussion of this subject requires consideration of what is best described as war risk insurance and the development of policy language over the past four years or so to accommodate the relatively new element of aircraft hijacking risks.

In the early years there was not a recognized market for aviation war risk insurance as there was in the case of the marine market. As a result, it was not uncommon for an airline which desired war risk coverage to ask its all risk underwriters to delete all or part of the standard war risk exclusion clause subject to an additional premium. As the demands for aviation insurance generally increased, the aviation insurance market expanded and airlines sought and obtained war risk coverage for certain areas of the world. After World War II, in order to meet the increased demand caused in part by the advent of more sophisticated aircraft, a specialized market developed for aviation war risk insurance.

At the present time, war risk coverage for aircraft hulls and legal liability is available, at a price, in the traditional war risk market. In some instances, coverage can also be obtained from all risk underwriters. This coverage may be limited in amount, however, in view of the very high values of modern jet aircraft and the potential liabilities. Additionally, some underwriters in the United States, Europe, and in other countries are not prepared to underwrite war risk or, if they do, they are not prepared to underwrite war risk for airlines operating in high risk areas. This lack of capacity in recent years has resulted in certain governments accepting some part of the responsibility for war risk of their national airlines in order to give some protection.

In the United States war risk insurance can also be provided by the government. Title 13 of the Federal Aviation Act authorizes the Secretary of Transportation to provide war risk insurance whenever it is determined by the Secretary that such insurance, adequate for the needs of the air commerce of the United States,

cannot be obtained on reasonable terms and conditions in the commercial market.⁵² Under this statutory authority war risk insurance may be provided with respect to American registered aircraft and foreign flag aircraft engaged in aircraft operations deemed by the Secretary to be in the interests of the national defense or the national economy of the United States.⁵³ The last information on the subject was that no war risk insurance was being made available by the Secretary for foreign flag aircraft.

Obtaining war risk insurance, however, is not always the ready answer to an airline's problem of insuring itself against the risks inherent in hijacking. Hijacking itself has never really been considered as a war loss. Nevertheless, as a result of a series of amendments to the London market war risk exclusion clause, commencing in 1969, hijacking now appears as one of the separately excluded risks in the war risk exclusion clause presently in use in the London market. This clause today is entitled: "WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE (AVIATION)."⁵⁴

⁵² 49 U.S.C. § 1532 (1970).

⁵³ 49 U.S.C. § 1533 (1970).

⁵⁴ WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE
(AVIATION)

This Policy does not cover claims caused by

- (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
- (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radio-active force or matter.
- (c) Strikes, riots, civil commotions or labour disturbances.
- (d) Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (e) Any malicious act or act of sabotage.
- (f) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority.
- (g) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured.

Furthermore this Policy does not cover claims arising whilst the Aircraft is outside the control of the Insured by reason of any of the above perils. The Aircraft shall be deemed to have been restored to the control of the Insured on the safe return of the Aircraft to the Insured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).

The assured can still ask for any one or more of the separately excluded risks to be deleted from the exclusion clause subject, of course, to the payment of an additional premium. The deletion of one or more risks contained in the war risk exclusion clause serves to afford coverage for that particular risk in the all risk policy. Those which the all risk underwriters are not prepared to delete can then be insured by the war risk market if they are disposed to do so. Recent amendments to this clause have been designed to bring it more in line with the war risk market's insuring clause so as to remove the legal distinctions between the all risk exclusions and the war risk cover language.

What happens when an aircraft hull loss occurs? The airline would normally present the claim to its all risk underwriter who then has the burden of proving that the loss comes within one of the exclusions of the policy, including a hijacking exclusion if there is one. The airline, on the other hand, would have the burden of proving that a particular loss falls within its war risk hijacking cover if it has one.

When an airline has two policies, one covering all risks with the standard war risk-hijacking exclusion clause, and another covering the precise risks excluded from the all risk policy, the only question that should arise when an aircraft is lost is the question of causation. Was the cause of the loss one of the risks excluded by the all risk policy and thereby included in the war risk policy? This question hopefully would be resolved between the two competing groups of underwriters after the airline has been paid the loss.

When the exclusionary language in the all risk policy is not quite the same as the coverage in the war risk policy, serious construction problems can arise. This can result in the airline not receiving payment of its claim until the question of who should pay has been decided in a court. Since 1970, the differences between the all risk policy war exclusion clause and the language of the war risk cover have largely been ironed out in the London market so that, hopefully, this problem should not arise in the future. Causation should be the only question when a loss occurs during the course or as the result of a hijacking. The airline should not be required to wait for payment pending resolution of this question of causation. An additional problem can develop, how-

ever, when a government participates in the war risk cover, unless the particular government is prepared to provide the same coverage as the war risk policy or as excluded in the all risk policy. Otherwise, a government guarantee may not be as extensive as the normal war risk coverage.

Returning once again to the hijackings of September 6, 1970, the destruction of the Pan American 747 resulted in serious coverage questions. As it has developed, Pan American is caught in the middle of a dispute between competing sets of insurers as to who should pay for the loss of the 747. The all risk underwriters evidently have taken the position that the loss of the 747 was caused by a war risk. The war risk underwriters, on the other hand, evidently have taken the position that the cause of the loss was a hijacking and not a war risk. The result is that Pan American has not yet been paid for the hull, and the question of who should pay is the subject of a trial just recently concluded in the federal court in New York in which Pan American has sued all the underwriters including the United States government which wrote a substantial part of the war risk cover. A decision in that case has recently been rendered. The district court, in a lengthy opinion, held that the Pan American loss falls within the all risk policy.⁵⁵

Hopefully, the recent amendments to the war risk-hijacking exclusion clause will eliminate problems such as that confronting Pan American. An even stronger hope is that the necessity to resolve such problems will never arise again in that we shall not again experience the destruction of a civil aircraft by terrorists or criminal or political hijackers.⁵⁶

⁵⁵ *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 71 Civ. 1118 (filed Sept. 17, 1973). The author understands that this decision will be appealed.

⁵⁶ Unfortunately, as quite recent events in the Middle East have demonstrated, the elimination of the incidence of political, terrorist, or criminal hijackings will not render obsolete the question of war risk versus all risk coverage. As recently as February 21, 1973, a Libyan airliner was shot down by the Israeli Air Force over the Sinai Desert. *N.Y. Times*, Feb. 22, 1973, at 1, col. 8. The Pan American 747 loss case was tried to a court sitting without a jury and the court's decision in this fascinating and important case should be studied. *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.*, 71 Civ. 1118 (filed Sept. 17, 1973). The legal aftermath of the hijacking of aircraft has resulted in the emergence of new and seemingly complex legal issues. Resolution of at least some of these issues will be forthcoming shortly. I urge you to follow closely the progress of the litigation discussed herein.

Notes and Comments

