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John E. Clare J.

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EVALUATION OF PROPOSALS TO INCREASE THE "WARSAW CONVENTION" LIMIT OF PASSENGER LIABILITY

By JOHN E. J. CLARE

Insurance Manager, Pan American Airways, Inc.; Bachelor of Science in Business Administration, New York University, B.S.; Chairman of Insurance Sub-Committee and Member of Warsaw Convention Sub-Committees of IATA; Member of Insurance Committee of Air Traffic Conference of America; *Formerly*, Assistant Economist of New York Stock Exchange Financial Analyst and Investment Counselor for 15 years prior to association with PAA.

A LIVELY debate was set off at Cairo in 1946 when one of the British representatives on the CITEJA officially proposed that article 22 of the "Warsaw Convention"¹ be amended so as to double the limit of passenger liability. This would mean raising the limit to 250,000 French gold (Poincare) France as defined in the convention. Major K. M. Beaumont, in his article in the Law Journal² of November 28, 1947, has advocated increasing the limit to 375,000 Poincare Francs. Christopher Shawcross, in his article in the March 1948 issue of Air Transport and Airport Engineering³ has gone so far as to suggest a limit of £8,000 or about four times the present limit.

Translated into U.S. Currency, this would mean increasing the present limit from \$8,292 to \$16,584, as proposed by Brigadier Wilberforce at Cairo, in 1946; to \$24,876, as proposed by Major Beaumont in 1947; and to \$33,252 as proposed by Mr. Shawcross early in 1948. While the debate continues, powerful basic economic forces continuously, effectively and automatically are correcting the Warsaw Convention limit of passenger liability for changes in the gold value of the national currencies of the various adherent nations. This is a tribute to the farsightedness and excellent judgment of the original framers of this convention.

When viewed against the background of post war inflation, it may, at first glance, seem highly appropriate to some, to bring up for amendment and revision this nineteen-year-old document. To some, in view of the steady upward trend of commodity prices throughout the world, the revision of this treaty may appear urgently necessary, particularly with respect to those of its provisions which limit the liability of the air

¹ U.S. Treaty Ser. No. 876; 49 U.S. Stat. at L. 3000; 1934 USAvR 245.

² Beaumont, K. M., *Liability of International Air Carriers*, The Law Journal (London, England), November 28, 1947.

³ Shawcross, C., *The Warsaw Convention and Air Commerce*, 3 Air Transport and Airport Engineering, (London, England) 54-55 (Feb. 1948); 80-82 (March 1948).

carrier arising out of bodily injury to or death of a passenger. As evidence of the need to change the limits of passenger liability, some proponents of revision cite the increasing size of awards for tortious bodily injury or death which currently are being made in the Courts of both England and the United States of America.

It is the purpose of this study to examine certain economic facts and to discover whether or not they support the theories advanced by those who favor upward revision of the Warsaw Convention limit of passenger liability.

Every student of this treaty recognizes the fact that the limit of passenger liability agreed upon in 1929 was a compromise. Even in 1929 the limit of 125,000 French gold francs⁴ probably was rather low for the United States since at that time it was equivalent to only \$4,898. The same probably could have been said for Great Britain since in 1929 the limit was equivalent to only £1006. Both of these countries then enjoyed, and still do enjoy, a relatively high standard of living. Consequently, in these two countries, it is only natural that a comparatively high value is placed upon a human life. From a moral point of view, there is not sufficient money in the world to pay for the loss of a human life. However, as a practical matter, it is both necessary and customary to estimate the economic or money value of the damage suffered by dependents as a result of the death, or the permanent disability or other injury of the breadwinner, by taking into consideration, among other things, the deceased or injured person's station in life; his family responsibilities; his earning power; and his life expectancy.

In any discussion of the adequacy of the limit of passenger liability it must be borne in mind that the Warsaw Convention creates a presumption of liability⁵ on the part of the air carrier so that a plaintiff may recover damages without the necessity of proving affirmatively that the air carrier⁷ was negligent. In order to escape liability, on the other hand, the air carrier must prove that he took "all necessary measures" to avoid the damage or that it was impossible for him to take such measures.⁶ This was done to protect the public, since plaintiffs so often found it impossible to prove negligence because of lack of evidence or very difficult to prove the law of the place of the accident. It is therefore only just, in view of the creation of this presumption of liability, that the air carrier has been given the benefit of a reasonable limit of liability.

The manner in which the public is protected by the presumption of liability embodied in the Warsaw Convention is well illustrated by the decision of Mr. Justice Schreiber in the case of *Wyman and Bartlett v. Pan American Airways, Inc.* in which he said, in part, that there was: "no proof in this case of 'wilful misconduct' on the part of the defend-

⁴ Article 22(1).

⁵ Article 17.

⁶ Article 20(1)

ant," and that there was: "indeed no proof of any negligence connected with or a proximate cause of the accident." He then went on to say that: "The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention *which here operate to permit a recovery that otherwise might be impossible for want of proof.*"⁷ On these considerations at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of \$8,300 in accordance with the rules stated.

The limit of passenger liability agreed upon in 1929 was intended to be high enough to provide reasonable satisfaction for claimants in the United States and Great Britain, considering the 1929 level of prices and cost of living in those countries, and yet not so high as to discourage other nations from adhering to the convention. Some thirty nations, their territories and possessions have adhered to it.⁸ The widespread acceptance of the Warsaw Convention is another great tribute to the good judgment of the framers of that document. Yet the Convention has not been universally accepted, and it is believed that most of the non-adherent countries are non-adherents primarily because the limit of passenger liability was in 1929, and in 1949 still is, too high in relation to the respective standards of living in those countries.

In Brazil, the Brazilian Air Code⁹ has set a limit of passenger liability of 100,000 Cruzeiros (approximately \$5,440 U.S. currency) for passengers injured or killed in domestic (intra-Brazil) and non-Warsaw international air transportation. Brazil also is an adherent to the Warsaw Convention and thereby accepts the present passenger liability limit of 152,426 Cruzeiros (\$8,292 U.S. Currency) as respects injury to or death of passengers in the course of air transportation which meets the Warsaw Convention definition of international air transportation. If Brazil should accept an increase of the Warsaw Convention limit of liability to 304,852 Cruzeiros, (\$16,584 U.S. Currency) or to 457,278 Cruzeiros (\$24,876 U.S. Currency) for passengers injured or killed in international air transportation while its liability limit, as defined in the Air Code, is only 100,000 Cruzeiros (\$5,440 U.S. Currency) with respect to passengers injured or killed in domestic air transportation, the government could, and probably would, be accused of unfair discrimination in favor of international passengers and against domestic passengers.

The regulations issued by the Mexican Ministry of Communications to give effect to the Mexican General Communication Law of 1940¹⁰ state that if an air carrier provides passenger accident insurance

⁷ 181 Misc. 963; *aff'd*, 267 App. Div. 947; *aff'd*, 293 N.Y. 878; *Cert. den.*, 324 U.S. 882.

⁸ See 1948 USAvR, June 1948, page i.

⁹ Brazilian Air Code, Decree-Law No. 483 of June 8, 1938; published in Diario Oficial June 27, 1938.

¹⁰ Ley de Vias Generales de Comunicacion, approved December 30, 1939; published in Diario Oficial February 19, 1940.

in the amount of 5,000 pesos (about \$724 U.S. Currency) for each passenger, the air carrier shall have no further liability in the event of injury to or death of a passenger. Mexico also is an adherent to the Warsaw Convention of 1929 and thereby accepts the present limit of passenger liability which is equivalent to about 57,226 Pesos (\$8,292 U.S. Currency) as respects international air transportation. Prior to July 26, 1948 the limit in terms of Mexican Currency was 40,305 Pesos. If Mexico were to accept a limit of liability of 114,452 Pesos or 171,678 Pesos or 228,904 Pesos for passengers injured or killed in international air transportation it would have great difficulty in justifying to its own people the present limit of liability of only 5,000 Pesos for passengers injured or killed in domestic air transportation.

With the exception of Brazil and Mexico, there are no other adherents to the Warsaw Convention south of the U.S. border in the Americas aside from certain British, French and Netherlands possessions. It is believed that the present limit of passenger liability set by the Convention has discouraged adherences since it is already too high for many countries.

Although the United Kingdom is an adherent to the Warsaw Convention and thereby accepts the passenger liability limit of £2057 (\$8,292 U.S. Currency) as respects passengers injured or killed in international air transportation,¹¹ it is highly interesting to note that in domestic air transportation the rules of liability of the Warsaw Convention are not applied. On the contrary, the air carrier is permitted to contract out of any and all liability for injury or death of a passenger *even though the injury or death be caused by the negligence of the air carrier.*¹² This is an obvious discrimination in favor of international passengers and against domestic passengers. The Warsaw Convention does not permit an air carrier to contract out of its liability.¹³

Thus it is believed that the British Government would find it extremely difficult to convince the people of Britain that the Warsaw Convention limit of passenger liability should be quadrupled as has been suggested by Mr. Shawcross.

France, which also is an adherent to the Warsaw Convention of 1929, accepts the present limit of passenger liability of 125,000 gold (Poincare) Francs consisting of 651½ milligrams of gold 9/10 fine.¹⁴ At the end of 1947 this was equivalent to 987,143 current or paper francs, which in turn was equivalent to \$8,292 U.S. Currency. However,

¹¹ British Carriage by Air Act, 1932; 22 and 23 Geo. v. Ch. 36; 1933 USAvR 299. This law will NOT apply to domestic air transportation until an appropriate Order In Council is issued. Up to January 15, 1949 this has not been done.

¹² *McKay and Craigie v. Scottish Airways, Ltd.* Scottish Court of First Instance, 1948 USAvR 79. Also see *Luditt v. Ginger Coote Airways, Ltd.* 1947 USAvR 1.

¹³ Article 23.

¹⁴ Article 22(4).

on January 26, 1948, France fixed a new "official" exchange rate. By this act of the French Government the Warsaw Convention limit of passenger liability, expressed in terms of current Francs, automatically was increased to 1,775,209 current Francs on the basis of November 1948 exchange rates. Although this latter figure represents an increase of about 80% in terms of current or paper Francs, the limit still remains unchanged at \$8,292 in terms of U.S. Currency.

Can it reasonably be expected that France would approve a passenger liability limit of 3,550,418 Francs or 5,325,627 Francs or 7,100,836 Francs?

The recent increase of 42% in the limit of liability in terms of Mexican Pesos and the increase of 80% in the limit in terms of French Francs, which have been cited above, came about because of the fact that the limit of liability now contained in the Warsaw Convention is stated in terms of a commodity, namely, gold.

The automatic way in which the Warsaw Convention limit of passenger liability, expressed in current monetary units, is corrected for changes in the value of money can more easily be understood if the limit of liability is considered as being the value of 236.9 troy ounces of fine gold. In this connection it should be pointed out that in 1929, when the official U.S.A. gold price was \$20.67 per fine ounce, the Warsaw Convention limit of passenger liability was \$4,898 U.S. Currency. When the price of gold in the U.S.A. was raised to \$35.00 per fine ounce in 1934, the Warsaw Convention limit of passenger liability automatically was increased to \$8,292, U.S. Currency. Table I shows the increases which automatically have occurred in terms of various other currencies since 1929.

It would be a serious mistake to define the limits of liability in terms of anything other than some unit of gold currency of a specified weight and fineness. If the present limit had been stated in 1929 as 125,000 current or paper Francs, the dollar equivalent today would be only \$584 U.S. Currency at the current official rate of exchange. One could not ask for a better illustration of the great protection given to the public by defining the limit of passenger liability in terms of a gold currency unit.

In 1929, when the present limit of passenger liability was set, the various national currencies had only recently been established on a gold basis and were freely convertible. It would be futile to attempt to set a new limit of passenger liability until the various national currencies have once again been stabilized and are freely convertible. Otherwise there could be no assurance that a new liability limit might not be required within another two or three years.

In view of the fact that some non-adherent countries still consider the present limit of passenger liability to be too high, it does not seem

reasonable to expect to obtain new adherents to the Warsaw Convention if the limit of passenger liability is to be doubled, trebled or quadrupled. Rather it seems more probable that, by doubling or trebling the limit of passenger liability, some of the present adherents, such as Brazil, France, Mexico and Portugal might be compelled to denounce the Convention. Surely the proposal to increase the present limit of passenger liability appears to be diametrically opposed to the stated purpose of attempting to obtain more universal acceptance by additional adherences!

The doubling or trebling or quadrupling of the limit of passenger liability could not fail to increase the average of claim settlements. This, in turn, would increase insurance premium costs and would impose an additional burden upon commercial air transportation companies at a time when every effort is being made by those carriers to reduce their operating expenses and to lower fares in order to stimulate a higher volume of traffic. It seems much fairer for those passengers who desire higher limits of protection to buy readily obtainable aviation accident insurance rather than to saddle this greater cost upon all passengers by means of higher fares.

Another probable effect, which may not have been foreseen by the proponents of raising the limit of passenger liability, is the great increase in litigation which seems almost certain to follow such an increase. At the present time, the limit is so low at \$8,292 U.S. Currency that it seldom is worthwhile, from the air carrier's viewpoint, to litigate a claim to which the Warsaw Convention applies. Thus, it ordinarily is unnecessary for either the plaintiff or the defendant to incur heavy expense in an effort to prove the circumstances surrounding the accident. With doubled or trebled limits, however, there would be far more incentive for the air carriers to resist claims. The results of this cannot fail to be disadvantageous to the public as well as to the claims experience of those international airlines which may be so unfortunate as to suffer accidents which result in injury to or death of passengers. The increase in litigation expense also would tend to increase insurance premium costs.

In view of all of these adverse factors, it seems difficult to understand why it is proposed to double, treble or quadruple the limit of passenger liability.

Is there any substance to the oft repeated claim that the purchasing power of the present limit of passenger liability is too low? This question may be answered by examining Table I which shows the present-day (1948) purchasing power of 125,000 French Gold (Poincare) Francs, consisting of 65½ milligrams of gold nine-tenths fine.

Study of Table I reveals that the purchasing power of 125,000 gold (Poincare) francs, as defined in the Warsaw Convention, has declined

in eight of the nineteen countries for which the complete data are shown. These are as follows:

<i>Country</i>	<i>% Decline in Purchasing Power</i>
*Belgium	—74.6
*Brazil	—23.5
Colombia	— 2.2
*Czechoslovakia	—20.7
Egypt	—17.1
*France	—72.5
*Portugal	—14.3
*Sweden	— 2.2

* Adherent Nations

In all of the remaining eleven countries, although contrary to popular belief, the purchasing power of 125,000 Poincare francs actually has increased. These increases in purchasing power range from 1.0% in Switzerland to 49.8% in Australia, as follows:

<i>Country</i>	<i>% Increase in Purchasing Power</i>
Argentina	+25.6
*Australia	+49.8
*Canada	+21.8
*Denmark	+19.0
*Mexico	+ 7.0
*Netherlands	+ 6.4
*Norway	+27.7
*South Africa	+31.4
*Switzerland	+ 1.0
*United Kingdom	+38.7
*U.S.A.	+16.4

* Adherent Nations

The countries included in Table I were used because of the ready availability of the statistical data with respect to them and regardless of whether or not they are adherents to the Warsaw Convention.

The above table demonstrates that in many nations the purchasing power of the French Gold (Poincare) Franc has increased. Thus, without revising the convention, the existing liability limit already has been effectively increased as the result of the operation of well known economic laws.

The present Warsaw Convention has worked very well in practice for more than 19 years. It, therefore, would seem far more prudent for all air carriers to try to conform to, and to live with, the present Convention, despite certain admitted but nevertheless minor defects, rather than to run the risk of having no Convention at all.

Any radical change in the rules of liability would set naught the very substantial body of case law which has been built up so laboriously during the last nineteen years by a strong line of favorable judicial decisions upholding the present Warsaw Convention.

Moreover, unless all of the adherents to the present Convention should agree to accept a proposed new convention, it is quite possible that we should find ourselves in the unfortunate position of having two conflicting Conventions in effect at the same time covering the same subject matter. This could only cause greater confusion and lead to more difficulties both for the traveling public and for the air transportation companies.

TABLE I

January 15, 1949

Adequacy of Warsaw Convention Limit of Passenger Liability—
Purchasing Power of 125,000 French Gold (Poincare) Francs, as Defined,
Based Upon Cost of Living Index 1929=100

Country		1. Warsaw Convention Limit of Passenger Liability		3. % of 1929	4. Cost of Living Index 1948 1929=100		5. Purchasing Power	
		1929	1948		Paper Basis	Gold Basis	Gain (+)	Loss (-)
Argentina	P	11,701	27,851	238.0	177.2	74.4	+ 25.6	
*Australia	£	1,019	2,581	253.3	127.4	50.2	+ 49.8	
*Belgium	F	176,060	362,888	206.1	359.9	174.6	- 74.6	
*Brazil	C	41,473	152,426	367.5	453.9	123.5	- 23.5	
*Canada	\$	4,932	8,292	168.1	131.5	78.2	+ 21.8	
Colombia	P	5,073	14,545	268.8	292.7	102.2	- 2.2	
*Czechoslovakia	K	165,473	413,360	249.8	301.8	120.7	- 20.7	
*Denmark	K	18,276	39,755	217.5	177.7	81.0	+ 19.0	
Egypt	£	983	2,009	204.3	238.9	117.1	- 17.1	
*France 1/48	F	125,000	987,143	789.7	1,850.9	235.1	-135.1	
11/48			1,775,209	1,420.1	2,453.1	172.5	- 72.5	
*Mexico 6/48	P	10,166	40,305	396.5	506.0	127.5	- 27.5	
11/48			57,226	562.9	522.6	93.0	+ 7.0	
*Netherlands	G	12,187	22,070	181.1	169.3	93.6	+ 6.4	
*Norway	K	18,351	41,131	224.1	162.0	72.3	+ 27.7	
*Portugal	E	109,575	205,655	187.7	214.5	114.3	- 14.3	
*South Africa	£	1,014	2,069	204.0	142.1	68.6	+ 31.4	
*Spain	P	33,365	90,802	272.1	?	?	?	
*Sweden	K	18,297	29,803	162.9	166.4	102.2	- 2.2	
*Switzerland	F	25,391	35,492	139.8	138.4	99.0	+ 1.0	
*United Kingdom	£	1,006	2,057	204.5	125.3	61.3	+ 38.7	
*United States	\$	4,898	8,292	169.3	141.6	83.6	+ 16.4	

* Adherent Nations.

Column 1. Computed on basis of 1929 parity of various currencies in terms of U.S. dollars. See Statistical Year Book of the League of Nations 1942/44, Table 96 (b).

Column 2. Computed on basis of 1948 values of various currencies in terms of U.S. dollars. See Federal Reserve Bulletin, December 1948, page 1549.

Column 3. Computed by dividing figures in column 2 by the corresponding figures in column 1.

Column 4. Computed by multiplying the Cost of Living Index for 1948 (1937-100) by the Cost of Living Index for 1937 (1929-100). See Monthly Bulletin of Statistics—United Nations November 1948, Table 61, page 150 *et seq.* 1942/44, Table 95, page 196 *et seq.*

Column 5. Computed by dividing figures in Column 4 by corresponding figures in Column 3.

Column 6. Computed by subtracting the index numbers shown in Column 5 from 100.