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RESOLUTION OF AMERICAN BAR ASSOCIATION URGING STRICT LIABILITY AND INCREASED LIABILITY LIMITS IN REVISIONS OF WARSAW AND ROME CONVENTIONS, ADOPTED FEBRUARY, 1950

AT the midyear meeting of the House of Delegates of the American Bar Association held in Chicago February 27-28, 1950, the following Resolution of the Section of International and Comparative Law was adopted, after discussion,[1] by vote of 74 to 21:—

> *Resolved,* That the American Bar Association urges the Air Coordinating Committee to instruct the United States delegate to the Legal Committee of the International Civil Aviation Organization to:
>
> (1) Advocate an increase in the present presumptive liability limitation of $8,291.87 in damages for death or non-fatal personal injury in international air transportation imposed by the Warsaw Convention.

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* Executive Secretariat, Department of State.

[1] Letter report, dated March 3, 1950 by George W. Orr, Member, Associate Advisory Committee and Vice Chairman, Aviation Insurance Law Committee, to the Committee on Aeronautical Law and to the Aviation Insurance Law Committee of the Insurance Section:

"I believe you may be interested in the result of the meetings held by the Standing Committee on Aeronautical Law and its Associate and Advisory Committee and the Aviation Insurance Law Committee of the Insurance Section in Chicago, February 26, 1950.

"I enclose the Report of the first named Committees which, you will note, is concurred in by seven of the nine Committee members present—which I believe was constituted a quorum by absent members. There is also enclosed a copy of the Dissent, a slightly corrected version of the original suggested draft Report sent out Februray 13, 1950, which Dissent is signed by the two members not concurring in the majority Report. This would appear to leave no doubt that the members of these Committees were opposed to the adoption of each of the three subsections of Resolution No. 4 of the International and Comparative Law Section.

"As to the Aviation Insurance Law Committee of the Insurance Section, no formal meeting was held, but all members were furnished with the draft of the suggested Report circulated by Chairman Pogue of the Standing Committee, February 13th, and the Dissent circulated by the writer, February 21st, with the request that each member notify Chairman Stanley C. Morris as to whether or not Resolution No. 4 should be approved. More than a majority of the full Committee notified Chairman Morris that they opposed the adoption of Recommendation No. 4. These replies were examined by an informal meeting of several members of the Committee who were present in Chicago and the Chairman reported to the Insurance Section Council that on the basis of a poll of the members, the Aviation Insurance Law Committee opposed the adoption of each of the three subsections of Resolution No. 4 of the Section of International and Comparative Law. The Council thereupon unanimously endorsed the position taken by the Aviation Insurance Law Committee in opposition to the adoption of said Recommendation No. 4.

"It is therefore apparent that both Committees, created by the ABA specifically to report on matters of aeronautical law, are strongly opposed to all three subsections of Resolution No. 4, which was recommended to the 1949 meeting of the Association in St. Louis, deferred to hear a Report from the Standing Aeronautical Law and Insurance Law Committees and again on the agenda for the mid-year meeting in Chicago beginning February 27, 1950.

"It is disappointing to have to report that regardless of the unequivocal stand taken by both Committees specializing in aeronautical law, the House of Delegates passed Resolution No. 4. The writer had undertaken to either convey

(2) Oppose exonerating the international air carrier from liability to his passengers upon the mere showing that "Reasonable measures" were taken by it to conduct a safe operation as urged by the Rapporteur on the revision of the Warsaw Convention.

(3) Insist that aircraft operators should be responsible, regardless of negligence, for damages on the surface to innocent persons and their property, as in the present Rome Convention, unless the accident is proved to be due to an Act of God or third party.

This resolution was originally prepared by the International Transport Committee[2] of the International and Comparative Law Section and was presented by this Section at the 1949 Annual Meeting of the Association. At that time the House of Delegates referred it for the joint consideration of the Committee on Aeronautical Law, and the Councils of the Sections of Insurance Law and International and Comparative Law, for report to the 1950 midyear meeting.

MAJORITY REPORT OF COMMITTEE ON AERONAUTICAL LAW OPPOSING THE ADOPTION OF THE RESOLUTION*

THE House of Delegates at the meeting held in St. Louis, Missouri, in September, 1949, deferred action on Recommendation No. 4 of the Section of International and Comparative Law that the Air Coordinating Committee give certain specified instructions to the United States Delegates to the Legal Committee of the International Civil Aviation Organization with respect to the liability of international air carriers and requested that the Standing Committee on Aeronautical Law, together with the Councils of the Section of Insurance Law and the Section of International and Comparative Law report thereon at the mid-year meeting. At this joint meeting held February 26, 1950, the members of the Committee on Aeronautical Law and its Associate and Advisory Committee (hereinafter referred to collectively as "The Committee") took the following action:

Resolved, That the Standing Committee on Aeronautical Law, together with its Associate and Advisory Committee, report to the House of

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the position of the Aeronautical Law Committee to the House or to arrange for it being done. Since it appeared doubtful that the resolution would be reached before Tuesday or Wednesday and unanimous consent was required for the writer to address the House, and the position of the Aeronautical Committees in opposition had been clearly decided, it did not seem neressary for the writer to remain in Chicago after it was found possible to arrange for Mr. Henry W. Nichols, the Insurance Section Delegate to the House of Delegates and former Chairman of the Insurance Law Section, to report since he was thoroughly familiar with the matter and quite competent to make the report. The writer, naturally, made no arrangements for unanimous consent to address the House after such arrangements were made, since he did not plan to even be in Chicago. Nevertheless, someone who apparently did not know of the arrangement with Mr. Nichols arranged for the writer's appearance before the House, without his knowledge, and when the matter became the order of business it was concluded without permitting Mr. Nichols to make any statement in spite of his using every effort to do so.

"I feel it necessary to make this statement to explain that I did not leave without making definite arrangements for the position of the Aeronautical Committees to be competently explained to the House and that Mr. Nichols exerted every effort, even to moving down to the first row, calling the Chairman, and waving his papers to gain the recognition of the Chair to make such a statement, but was not recognized by the Chair who declared the debate closed and called for the vote."

[2] For complete report of this Committee, submitted by Edward C. Sweeney, Chairman, see 16 J.Air L. & C. p. 336 (1949).

* Filed with the House of Delegates in February, 1950.

Delegates the position taken by the Committee, and the Councils of the Section of Insurance Law and the Section of International and Comparative Law and that the Standing Committee on Aeronautical Law and the Associate and Advisory Committee on Aeronautical Law are opposed to adoption of each of the three subsections of Recommendation No. 4 of the Section of International and Comparative Law and that because of the importance and complexity of the questions involved that the Standing Committee on Aeronautical Law and the Associate and Advisory Committee on Aeronautical Law request permission to give a detailed report supporting its position on the matter in the Annual Report of the Committee.

EXPLANATION

The above resolution was passed by a vote of seven to two. The following explanation is offered in support of the majority position, subject to later amplification as embodied in the resolution.

> "(1) Advocate an increase in the present presumptive liability of $8,291.87 in damages for death or non-fatal personal injury in international air transportation imposed by the Warsaw Convention."

This proposition urges that the American Bar Association take an unqualified stand in favor of changing one isolated provision of a Convention containing over forty separate articles. No adequate reason for supporting a blanket increase unrelated to the other provisions of the Convention is apparent. The question of whether any revision of the Convention will even be attempted is entirely uncertain. In the event of a general revision, this would be only one of many items which should be considered as an interrelated whole.

The Convention has been signed by over thirty nations, any one of which can renounce it at will on six months notice. Such renunciation is quite likely to follow an upward revision in the case of states with a lower standard of living.

Careful consideration has also been given to each of the following factors:

1. The limitation on amount is accompanied by a rule of almost absolute liability.

2. The limitation does not apply in case of "dol" (wilful misconduct) which can always be made a fact issue.

3. The limitation is not out of line in amount with similar limitations in the various states which have set them up.

4. The limitation is expressed in gold francs and has actually increased dollar-wise by more than half since its inception, this being more than the actual increase in the cost of living.

In view of all the above, a revision upward is not considered necessary, practical or desirable.

Text of Subsection 2 of Recommendation No. 4 of the Section of International and Comparative Law:

> "(2) Oppose exonerating the international air carrier from liability to its passengers upon the mere showing that "reasonable measures" were taken by it to conduct a safe operation as urged by the Rapporteur on the revision of the Warsaw Convention."

The Committee does not find that the Rapporteur suggests exonerating the airlines from liability "upon the mere showing that 'reasonable measures' were taken by it to conduct a safe operation." The draft at the time the

International and Comparative Law Section made the Recommendation (ICAO LC No. 84) suggested no such thing. The Rapporteur merely suggested the substitution of the word "proper" (meaning the highest degree of care for a carrier) for the word "necessary."

It is the sentiment of the Committee that such a change would be desirable in the event of a general revision of the Warsaw Convention. However, the recommendation does not request that any action be taken relating to the actual convention. It merely asks that the American Bar Association oppose a suggested revision made by a reporter. Such action is not deemed necessary or desirable.

Text of Subsection 3 of Recommendation No. 4 of the Section of International and Comparative Law:

> "(3) Insist that aircraft operators should be responsible, regardless of negligence, for damages on the surface to innocent persons and their property unless the accident is proved to be due to an Act of God or third party, as in the present Rome Convention."

The Committee finds this subsection in error and therefore confusing. The present Rome Convention does not provide for relief from liability if "the accident is proved to be due to an act of God or third party." The present Rome Convention imposes absolute liability "unless negligence of the injured party caused the damage or contributed thereto."

The Committees do not approve of absolute liability without fault and without regard to local law as provided by the present Rome Convention, and do not feel it advisable for the American Bar Association to urge insistence on any such principle.

Respectfully submitted,
L. Welch Pogue, *Chairman**
Paul M. Godehn
Palmer Hutcheson, Jr.
Francis H. Inge
Members of the Committee joining in the majority report

E. Smythe Gambrell
Ray Nyemaster
George W. Orr
Donald B. Robertson
Members of the Advisory Committee joining in the majority report

MINORITY REPORT OF COMMITTEE ON AERONAUTICAL LAW FAVORING THE ADOPTION OF THE RESOLUTION

THE House of Delegates at the meeting held in St. Louis, Missouri, in September, 1949, deferred action on Recommendation No. 4 of the Section of International and Comparative Law and requested the Standing Committee on Aeronautical Law to report thereon at the mid-year meeting.

The air transport industry of the United States has established itself on a plane of excellence, both domestically and internationally. It is probable that the future will see a steady and eventually a very large growth. The position of the United States with respect to the impact of this comparatively new industry upon the public, both at home and abroad, is a matter requiring the exercise of responsible statesmanship. This dissent is founded upon the view that the best interests of the air transport industry of the United States is of paramount importance; and that it is contrary to such interest to vote with the majority because that vote avoids a responsibility which we believe air operations will some day be required to assume.

* Mr. Pogue does not concur in the majority report above. The minority report follows.

(1) Article 22 of the Warsaw Convention limits recovery for death or non-fatal personal injury in international air transportation, to 125,000 gold francs, which is the equivalent of $8,291.87. In 1947, the American Bar Association adopted a resolution advocating an increase in this liability limitation, but, at that time, the Government of the United States did not support such an increase. However, in May 1949, the policy of the United States Government was reversed and it is therefore proper and would be helpful for the American Bar Association to go on record again at this time in favoring an increase.

It is generally agreed tha tthe figure of $8,291. is too low an evaluation of human life, and such a recovery is particularly inadequate when a passenger is seriously injured, with a continuing financial drain as a result of incapacity. It has been argued, however, that this figure is not low when it is recalled that an air carrier bears a presumptive liability for this amount and has unlimited liability in the case of "dol" (wilful misconduct). Although these arguments have a good deal of merit, it is felt that they do not outweigh the inadequate liability ceiling which limits a passenger's recovery upon death or serious injury.

The fact that some seventeen or eighteen states impose limits for wrongful death ranging between $5,000. and $20,000., generally averaging in excess of $10,000., is not a controlling argument as to why the $8,291. figure under the Warsaw Convention is adequate, since the wrongful death statutes only cover death and not personal injury. It is difficult to see why an analogy should be drawn in the first place to those states with wrongful death statutes, rather than to the remaining majority of states with unlimited liability.

An increase in liability will, of course, result in increased costs to a carrier. It is believed, however, that the estimates of the extent of possible increased costs have been exaggerated. The Economic Division of the Air Coordinating Committee has estimated that doubling the liability limit of the Warsaw Convention could be met through an increase in the passenger rate of approximately 1% (ACC 51/22.3B, March 17, 1949).

The argument has been frequently made that, as long as trip insurance is available, the limitations should not be increased since a passanger can always fully protect himself. In actuality, however, few passengers know the amount in their national currencies by which liability is limited. Furthermore, there is no protection through trip insurance for disabilities other than loss of sight or limbs.

There is fear in some quarters that, if the United States attempts to push this increase in liability through, the opposition raised by other nations may jeopardize the admitted benefits of the present convention, which, everyone would agree, is better than having no convention at all. However, the present convention can be preserved by providing that any revised convention would supplant the present one only if a requisite number of nations ratify it.

(2) Articles 17 and 20 of the Warsaw Convention make an international air carrier liable to its passengers on the theory of negligence, but the carrier has to sustain the burden of proof that it was not negligent. The second recommendation of the Section of International and Comparative Law opposes the substitution of the words "reasonable measures" for the words "necessary measures" as they exist in Article 20. The effect of the substitution would be to shift the basis of liability to that of ordinary negligence and away from the presumptive liability presently existing in

the Warsaw Convention. If liability is artificially limited, as it is in the existing Warsaw Convention, then concomitantly the passenger should be given a broad right to recover, particularly when he is generally informed of the existing liability limitation. In any event, insurance is available to cover the risk.

For the above reasons, therefore, we support the liability increase and retention of the present basis of liability urged by the Section of International and Comparative Law in sections 1 and 2 of its Recommendation No. 4.

(3) The third recommendation of the Section of International and Comparative Law contains a technical error. The phrase "as in the present Rome Convention," should be moved up and inserted between the word "property" and the word "unless." An Act of God or act of a third party are not existing defenses.

Since the time when this recommendation was made the Legal Committee of ICAO (International Civil Aviation Organization) has met in Taormina, Sicily, and has recommended to ICAO that the principle of absolute liability be retained (with increased limits of llability) and that, in addition, liability may be trebled in amount in case the plaintiff can show negligence on the part of the operator. As long as there is limited liability, the principle of absolute liability should be its concomitant. This is particularly true in the nature of aircraft accidents where the innocent person on the surface who is either personally hurt or whose property is subject to destruction, is generally not in a position to guard against such accidents. Furthermore, the carrier is protected by the limitation of liability from catastrophic loss.

In view of the recent action of the Legal Committee of ICAO, referred to above, the concern expressed in the third section of Recommendation No. 4 does not have the same urgency today which it had when that Recommendation was made. However, we want to make it clear that we favor retention of the absolute liability principle.

Respectfully submitted,
L. WELCH POGUE
WILLIAM S. BURTON

Note: Although the following members of the Standing Committee were not present at the meeting, their dispositions as derived from previous comments filed on Recommendation No. 4 would probably be as follows: Mr. Gerald B. Brophy and Mr. James E. Prince would favor the majority report and Mr. Frederick E. Hones would favor the minority report.