1956

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GRAND CANYON, WARSAW AND
THE HAGUE PROTOCOL

By G. Nathan Calkins

One of the inevitable aftermaths of a great disaster such as the Arizona collision between a TWA Super Constellation and a United Airlines DC-7 over the Grand Canyon is the settlement of wrongful death claims against the airlines involved in the tragedy. At this writing it appears that the accident took place at approximately 21,000 feet over a barren wilderness, with no survivor left to tell the story and no reliable eye-witness present to tell history what happened. It may well be, as the investigation unfolds, that circumstantial evidence will reveal where the fault lay if there was in fact fault. However, looking at the disaster through the eyes of present knowledge, it is not possible to say whether the accident occurred through the fault of both operators, one of them, or neither.

Under the circumstances, it will be almost impossible for the executor or next of kin of a person killed in the accident to establish that the airline he sues was negligent and that its negligence was the proximate cause of the accident. The weather in which the aircraft were flying at the time of the accident is not known. However, testimony of other pilots flying in the general area indicates that the floor of the cloud tops was around 15,000 feet with scattered columns of cumulus type clouds extending up to at least 22,000 feet. But this testimony does not give the specific weather the aircraft were in at the time. If instrument weather conditions actually prevailed, one set of rules would apply; if both airplanes were operating free and clear of clouds, another set would apply.

During the course of the accident hearing, a representative of the Civil Aeronautics Administration testified that so far as that Administration was concerned, there was no known violation of the Air Traffic Rules. In the past the courts have been liberal in applying the doctrine of res ipsa loquitur to collision cases. Smith v. O'Donnell (Cal.) 1932 U. S. Av. R. 145; Parker v. Granger (Cal.) 1935 U. S. Av. R. 83 (reversed Parker v. Granger (Cal.) 1936 U. S. Av. R. 251) Parcell v. United States, S. D. W. Va. 1952 U. S. & C. Av. R. 391. However, in
the *Smith* case the collision occurred while the colliding aircraft were landing at an airport in good weather, and the aircraft operated by the defendant and in which the plaintiff was riding was the higher of the two. Unless the other aircraft had engaged in some extraordinary maneuver, it had the right of way as the lower landing craft. Under such circumstances the application of the *res ipsa* doctrine appears well warranted.

In both the *Parker* and the *Parcell* cases the colliding aircraft were both operated by the same operator, a fixed base operator in the former case and the United States Air Force in the latter. Application of the doctrine in the *Parker* case, however, was reversed upon a showing that each airplane was equipped with fully functioning dual controls and that in each case the right seat was occupied by a representative of the movie studio which had hired the aircraft to take close-up air shots of a third airplane. The court held that the movie representative might have interfered with the controls of one or both ships during a tight formation turn.

In the *Parcell* case two Air Force jet pilots took off in tight formation and entered the overcast, the collision occurring shortly thereafter. It may be questioned whether flying a tight formation in an overcast is not negligence *per se*, if damage results to third persons, but even if not, since the United States was the employer of both pilots, it would be liable whether one or both pilots had been negligent.

However, these cases can give little comfort to prospective plaintiffs against the airlines involved in the Grand Canyon accident. All that is known is that a collision probably occurred, but the circumstances are completely unknown. As has been stated, if the collision occurred in the overcast, one set of rules would apply. On the other hand, if the two aircraft were being operated in the clear, well away from clouds, negligence on the part of one or the other or both pilots would be almost inevitable.

In addition to the foregoing difficulties facing the application of the *res ipsa* rule, there are at least three variants of the doctrine itself as applied by the courts of the different States. Heaped on top of this is a complete confusion in the law of conflicts of law as to whether the doctrine is a rule of evidence or one of substance.

Thus, the courts of New York and Massachusetts will apply the law of the forum to determine the extent to which *res ipsa* should help the plaintiff, the courts of the District of Columbia and Virginia will apply the doctrine as applied by the courts of Arizona.

In addition to the wholesale confusion as to how and to what extent the doctrine of *res ipsa* will be applied, if at all, to accidents

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1 Harper on Torts Sec. 77 (1933).
of this type, the question of limitations of liability is equally vexatious. This accident happened in Arizona. In that State liability for wrongful death is unlimited.\(^8\)

However, if the accident had been postponed one half hour when the aircraft were over Colorado, under the same conditions, the recovery for each death would be limited to $10,000,\(^4\) and if it had not occurred until the aircraft were over Kansas, the limit of liability would jump to $25,000.\(^5\) Moreover, the track followed by these long distance flights is not necessarily the same—under certain conditions of wind and weather, the flights could have been routed far to the north or to the south with attendant variations in applicable liability rules.

The basic difficulty in cases of this nature is the rule that the law of the situs fixes legal liability. Not that the rule itself is wrong, but in its application of State law to aircraft accidents of this type it is too microcosmic. Two airplanes traveling at speeds approaching four hundred miles per hour, four miles above the surface of the earth, and subject to exclusive federal control cannot in any realistic sense be said to be within the jurisdiction of the underlying State. The occupants of the aircraft are completely cocooned and insulated from the effective reach of the local law below; the State cannot enforce; it cannot police; it cannot protect. We should stop trying to make it do so with respect to the relations inter se of the passengers and the carriers.

In the writer’s opinion the only sensible solution to the legal morass we now are in is a federal law establishing uniform rules for determining liability of air carriers to passengers and shippers. Such a law should not attempt to impose any special or discriminatory burden on aviation. It should not make the carrier an absolute insurer of the passenger’s safety. To do so would be an unwarranted departure from our traditional notions of fair play, and common carrier responsibility.

However, such a law should recognize the facts of life of aviation—that accidents such as the Grand Canyon collision do occur and that the rules of res ipsa, even if uniformly imposed by federal law, do not give an adequate solution. While it is certainly true that collisions do not generally occur without someone’s having been negligent, human experience is powerless to pin point the negligence in collision cases where it is not known whether the accident happened in the clouds or in the clear.

The fairest solution appears to be a reversal of the burden of proof accompanied by a reasonable limitation of liability. Reversal of the burden of proof is fair in the same way that res ipsa is fair. If time could be reversed and stopped at the first split second of impact, the carrier through its servants could far better explain the accident and

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\(^8\) Arizona Constitution Article II, Sec. 31.
\(^4\) Chap. 41, Art. 1, Sec. 1 Col. Rev. Stat. 1953.
\(^5\) General Statutes of Kansas 1949, 60-3202.
how it occurred than could the passenger. *Res ipsa* would require such an explanation to the then-living passenger. Death of all the participants should not deprive the plaintiff's executor of this advantage.

On the other hand some limitation of liability seems appropriate. With the reversal of the burden of proof the defendant gains an incalculable advantage in cases such as the Grand Canyon accident. Frequently a non-negligent defendant will be held liable because of complete absence of proof to exculpate himself. Obviously in such situations it is unfair to saddle a defendant airline with unlimited as well as unmerited liability.

Perhaps a better analysis is this: in a certain number of situations, of which the Grand Canyon accident may be typical, the law becomes stalled on dead center because of total absence of proof. Society—particularly the air traveling part of it—owes a self-interested obligation to see to it that in such circumstances the individual passenger does not lose out. Under the rule that I have here outlined this obligation would be discharged by the carrier, who insures such liability and passes the premium on to the passenger or shipper by a slight additional charge for the ticket. Thus, each passenger assumes a *pro rata* share of the obligation. Each passenger pays the same amount for the same transportation, whether he be rich or poor, a man on death's doorstep or in the prime of life. Each contributes equally to the common fund, but one may receive much, another little.

Within limits such disparity is entirely fair. All other aspects of transportation at standardized fares involve some discrimination between passengers. But there is no reason for one passenger to pay a higher rate than he otherwise would in order to help buy insurance to cover the exceptional case of the $200,000 or $300,000 claimant. Consequently, it is submitted that the limitation of liability should be fixed at what experience has shown to be the *average* recovery in other cases in air transportation, leaving the person deserving more coverage to take it out himself and to pay the premium thereon.

The foregoing discussion leads naturally into a discussion of the Warsaw Convention and of the protocol thereto which was adopted at The Hague last year. At this time it is not known how many—if any—passengers on either airplane involved in the Grand Canyon collision were traveling on an international journey within the meaning of the Warsaw Convention. If there are any such cases, their settlement should be quick and easy.

The Warsaw Convention itself came into force as a treaty on February 13, 1933 after ratifications had been deposited by Spain, Rumania and Brazil, France, Latvia and Poland. The United States, which had not attended the Warsaw Conference and had not signed the Convention, became a party to it by adherence. Its instrument of adherence was deposited with the Government of Poland on July 31,
1934, and accordingly it came into force with respect to this country on October 29, 1934. As of September 10, 1955, 45 countries had either ratified or adhered to the Convention.

Thus, the Warsaw Convention for a substantial part of a generation has governed the liability of air carriers to shippers and passengers in a major and ever increasing part of the world's international commerce by air. On the whole it has been a beneficial Convention. It has laid down uniform documentation rules. It established a system of liability based on negligence coupled with a transfer of the burden of proof to the carrier to prove that he has taken all necessary measures to avoid the damage—or that it was impossible for the carrier and his servants and agents to take such measures. Most important, it established a limitation of liability in the case of passenger injury or death, occurring during the period of international carriage, at 125,000 gold francs—which at current rates of exchange amounts to slightly less than eighty-three hundred dollars.

The Convention was by no means perfect. Dissatisfaction with some of its provisions began to be voiced shortly after it came into force. This dissatisfaction arose primarily from certain ambiguities contained in the original text. As a result, the matter of revision was undertaken by the Citeja in 1935. However, international drafting was no speedier then than now, and the faltering steps to restudy the Convention were completely halted by the war.

After the close of World War II, the restudy of the Warsaw Convention was taken up again by the Citeja and subsequently by its successor, the Legal Committee of the International Civil Aviation Organization. The Convention's revision was discussed by the Citeja at its meeting in Cairo in November of 1946; thereafter the Legal Committee of ICAO devoted time to it in 1948 at its Lisbon meeting and took the matter up again in Montreal in June of 1949. It was not discussed again until January, 1952, when a special subcommittee of the ICAO Legal Committee met in Paris to consider the question, and prepared a draft text of a new Convention to replace the existing one.

By this time the revision was in full swing. The final preparatory work was accomplished at Rio in September of 1953. At this point, however, it was decided to abandon the more ambitious project of drawing up a complete new Convention and to confine the revision to a few necessary amendments which could be set forth in the form of a protocol.

The draft protocol which came out of Rio bore a strictly pro-carrier flavor. While the limits of liability were raised from one hundred and twenty-five thousand to two hundred thousand gold francs (approximately $13,330) for personal injury or death, this raise fell far short of the twenty-five thousand dollars which the United
States sought to obtain. Moreover, certain of the detailed documentation requirements which in the older Convention inured to the benefit of the shipper and passenger were eliminated, and Article 25—which sets forth the circumstances under which the limitation of liability will not apply—was severely curtailed in such a way as to make it virtually impossible to exceed the liability limits. Under the Rio draft it was necessary practically to show criminal intent for the liability limitations not to apply.

In addition, under the Rio proposal a new Article 25A was included providing that in instances where defenses and limits were available to the carrier, they would also be available to a servant or agent of the carrier in any tort suit brought against him under applicable internal law. This provision was inserted in order to prevent a "short-circuiting" of the limitations of liability through a suit against the pilot or his estate, coupled with the usual agreements by the carrier with his personnel to hold them harmless for any personal liability which might be incurred by them.

When the Rio-draft protocol came to be considered by The Hague Conference, the major issues of substance included the following points: Simplification of documentation requirements; notice to passengers and shippers of the Convention's possible applicability and effect; raising of the limits of liability; treatment of attorney's fees and other litigation expenses; principles of liability; "willful misconduct"; and limitation of independent liability of servants or agents. These, together with matters of more subordinate interest are discussed more fully below.

(a) Simplification of Documentation

The present Warsaw Convention has a complete chapter devoted to traffic documents, dealing with their form and content and placing responsibility for furnishing particulars on the carrier in the case of passenger tickets and baggage checks, and on the carrier and consignor separately in the case of the air waybill. With respect to the content of the traffic documents, the present Convention deals with three broad categories of particulars. In the first category come those essential parts of the transportation contract which establish whether the transportation falls within the terms of the Convention. Thus the place of departure and destination of the journey contracted for must be set forth since only after these are known is it possible to determine whether the Convention applies. Moreover, since such determination may in some cases depend on the existence of an intermediate "agreed stopping place," the present Convention requires that such particulars be inserted.

Only one item comes within the second category of particulars required by the present Convention. That particular is a specific statement that the carriage "is subject to the rules of liability estab-
lished by the Convention.” It is understood that the draftsmen of the original Convention had two reasons for inserting this requirement: (a) a notification to the transportation user that the carriers’ potential liability was governed by a special set of rules; (b) an undertaking between the parties to include the liability provisions of the Convention in their contract of carriage, to the end that if suit on the contract were brought in a non-contracting state, the courts of that country could enforce the Convention requirements, even though its government were not a party to the Convention.

The third category of particulars are those not covered by the first two categories but which good commercial practice would normally require to be inserted in traffic documents. Such particulars spell out the terms of the agreement. Some, like the place and date of issue, have a bearing on the enforcement of rights under the Convention as well as an independent commercial significance. Others may affect the consignee of cargo as well as the shipper and carrier. It is understood that the reason for inclusion of this requirement was that legislation of this nature was considered desirable and that there should be intergovernmental agreement on precisely what was required in order to achieve uniformity. However, the only sanction which the Convention provided for failure to insert any of the required particulars was unlimited liability of the carrier. While this sanction did not apply in all cases, it did so in a large number of them and the result could be frequently far out of proportion to the gravity of the fault on the part of the carrier. For this reason there was a strong desire on the part of many governments to eliminate the last category of particulars from any mandatory requirement in the Convention.

The United States position was to support a certain amount of simplification, but to oppose the complete deletion of the requirements relating to the third category of particulars. The delegation urged that if documentation requirements were eliminated, a regulatory void would be left which governments would think essential to fill, and that, in so doing, conflicting requirements would undoubtedly be imposed. While a motion to eliminate all documentation requirements was defeated, the argument was not sufficiently strong to keep the large majority of representatives from eliminating all required particulars falling into the third category. Consequently the protocol revises the Convention so far as required documentation is concerned by retaining only the “jurisdictional” requirements and the requirement of notice of the Convention’s applicability.

With respect to the jurisdictional particulars, it will still be necessary to include the places of departure and destination in the passenger ticket, the baggage check (when it is a separate document), and in the air waybill. So far as agreed stopping places are concerned, these need be mentioned only when the applicability of the Convention
turns upon there being an agreed stopping place. Thus the inclusion of an agreed stopping place in the traffic documents is required only if the places of departure and of destination are within the territory of the same contracting state, and there are one or more agreed stopping places in another state. It should be noted that in case of a plurality of agreed stopping places, only one of them must be mentioned.

The net effect of the changes made in the documentation provisions is to permit a considerable simplification of tickets, baggage checks, and particularly air waybills. Carriers will have the power to develop more flexible practices with regard to traffic documentation as the needs for commerce may dictate. Undoubtedly, self-interest on the part of the carriers will prompt them to continue in practice to include most of the particulars which are currently required by the Convention.

(b) Notice to Passengers and Shippers of the Convention's Application

A matter closely related to the simplification of the documentation discussed in (a) above is the matter of notice of the application of the Convention to the passenger or shipper. The present Convention contains a mandatory requirement that there be included in each traffic document a statement that "the transportation is subject to the rules relating to liability established by this Convention." The language of the requirement, supported by the legislative history at the Warsaw Conference, indicates that it probably was the intention of the draftsmen to require an unequivocal statement that the particular transportation concerned was covered by the Convention.

The reasons for the foregoing requirement are believed to have been two fold—primarily to bring about an undertaking between the carrier and the passenger or shipper that the rules relating to liability of the Convention would apply as a matter of contract between them. In the early days, prior to the time that the Convention achieved its present widespread acceptance, this provision may have had a certain utility, since it provided a mechanism, based on well accepted principles of conflicts of laws, for enforcing the Convention in non-contracting states, and from a theoretical legal point of view at least this was an important consideration.

The second reason for requiring this statement was to put the user upon notice that his liability relations with the carrier were subject to special rules of which he might otherwise not be aware. This point was of lesser importance then than it is today, since in a large number of countries at the time the Warsaw Convention was signed it was possible for the carrier to exculpate itself entirely from liability. However, the notification provisions did place the passenger or shipper on notice that a special law applied to his relationship with the carrier.
With most of the air transport countries of the world today parties to the Convention, the need for securing its enforcement in non-contracting states has diminished. At the same time, since there has undoubtedly been an increase in national legislation outlawing exculpation by common carriers for their own negligence, the notification provision has become increasingly important in order to bring home to passengers the fact that restrictions will apply.

For a number of years the United States, in the debates on the subject in the Legal Committee of ICAO, had supported a specific notification provision. However, notice is subject to the difficulty that in many instances it will be next to impossible even for a trained lawyer to determine whether the carriage contracted for is subject to the Convention, and the continued insistence on a specific notice requirement would have imposed serious burdens in some cases upon air carriers. A mistake by a ticket agent in determining whether or not the carriage is to be under the terms of the Convention would have entirely altered the liability situation for the specific case, and while the difficulties were not insuperable and probably could have been covered by insurance, a real problem existed.

Because the benefit accorded by the statement presently in the Warsaw Convention was so small to the passenger or shipper, the United States urged a somewhat different policy at the Conference. This was to require the printing of a general notice on all travel documents coming under the Warsaw Convention. Because of the generality of its terms, the notice could also be printed on travel documents which did not apply to Warsaw carriage, including domestic transportation.

The purpose of the revised notice was to give the passenger or shipper information which would permit him to protect himself by taking out insurance. It read as follows:

"ADVICE TO INTERNATIONAL TRAVELLERS
(in letters not less than one-half centimeter high)

"Travellers embarking upon a journey involving an ultimate destination or stop in a country other than the country of origin are advised that the Warsaw Convention may be applicable to their journey. The Convention governs the liability of carriers to passengers and shippers and limits liability for personal injury or death in most cases to _________ Poincaré gold francs. (Here insert the amount prescribed by the Convention.)"

In the debate on this subject, three different proposals were given the most serious consideration by the Conference. The first of these was that contained in the Rio text, which provided for a specific notification. The second was a joint United Kingdom-Israeli proposal which, although general in form, was phrased in precise legal language, and the third proposal was that of the United States, in which the International Air Transport Association joined.
After considerable debate, the United States proposal was adopted in a modified form by twenty votes to ten. However, the Conference decided not to include requirements either as to the size of the type or a statement of the monetary extent of the limitation.

The substance of the U. S. notification provision as discussed above with respect to personal injury and death was also accepted by the Conference, with necessary modifications, in Article IV with respect to baggage, and in Article VI with respect to cargo. These provisions are all substantially the same, with slightly different wording to fit the different situations.

(c) **Limitations of Liability**

By far the most important issue considered by the Conference, and the one on which most debate was had, was the matter of limitation of liability for passenger death or personal injury. Throughout the development of the Protocol the United States had taken the position that the limits should be very substantially raised. This took the form of urging that the limits should be tripled so as to permit recovery for any one passenger death or injury up to 375,000 Poincaré gold francs, or approximately $25,000. This position was renewed at the Conference.

During the discussion of the Draft Protocol at the Rio meeting of the Legal Committee of ICAO, the United States Delegation there had obtained agreement to the raising of the limits only to 200,000 gold francs, or 60% above the present limits. Additionally, and notwithstanding that rather meager increase from the passenger's viewpoint, the Rio group had adopted a counter-balancing amendment to Article 25 of the Convention, which severely restricted the instances where the limits would not apply.

It became apparent at the outset of the Conference that the majority of the delegates present were prepared to accept the Rio provisions without substantial amendment in either regard. Since the matter of raising the limits was coupled in the minds of most delegates with the matter of restricting the provisions of Article 25, the debate was conducted within this framework.

With regard to both these provisions, the United States position was undoubtedly at the liberal extreme from the point of view of the passenger. Not only did the United States Delegation urge that the limits be raised to $25,000, but it strongly argued that the present provisions of Article 25 should not be amended.

After a full day and a half of discussion as to the limits and with respect to Article 25, the Conference took a trial vote on several combinations of limits and redrafts of Article 25. This vote showed that, even with the restrictive Rio text of Article 25, the 375,000 franc limit requested by the United States would be acceptable to only three delegations, and that 250,000 francs would have been acceptable only
to seven. Seventeen delegations, however, would have supported the Rio limits with the Rio text of Article 25. With the Warsaw text of Article 25 only two votes would have been received for 375,000 francs, two for 300,000 and two for 250,000. The trial vote showed twenty-three delegations for the Warsaw text of Article 25 with a 200,000 franc limit, but this was influenced largely by the fact that the United States had voted in favor of this combination to mark its preference of the Warsaw text of Article 25 over the other two texts of that article. Consequently the vote in this last case must be considered as misleading and not indicative of the true sentiment of the Conference.

Before the matter came up for final vote, the United States had introduced a proposal to raise the limits to 250,000 francs ($16,584), coupled with a provision raising the limits an additional 25% to cover reasonable attorneys' fees in the event that the defendant carrier forces the plaintiff to litigate. In presenting the United States proposal for the 250,000 franc limit, together with the 25% increase for attorneys' fees, the United States Delegation stated that it would accept this either with the so-called Norwegian proposal for the revised Article 25 of the Convention or with the Warsaw text as it was in the original Convention. It stated it would not accept it linked to Article 25 of the Rio draft.

After a three-day postponement of discussion and vote on this article, the basic United States proposal was adopted by a majority of twenty-four votes to fourteen, with three abstentions. Of the fourteen voting against the proposal, eight signed the final Protocol.

(d) **Attorneys' Fees and Other Litigation Expenses**

As noted above, one of the points urged by the United States was that the court should be permitted to increase the limits by an amount not exceeding 25% to cover court costs and reasonable attorneys' fees to the plaintiff, to be paid by the carrier in addition to the amount of the recovery. This proposal was subject to the qualification that the limits would not be subject to this escalator action if the defendant carrier could show that prior to the commencement of the trial it offered to settle the case for the same or a greater sum than the recovery actually awarded.

When this proposal was presented to the Conference, coupled with the 250,000 franc limit, there were a number of reactions. First, several delegates indicated that their countries had administered the provisions of the present Article 22 (limits of liability) as not precluding the award of attorneys' fees to the plaintiff, and that they did not consider such costs as coming under the limits at all. Secondly, a number of states disliked the specification of attorneys' fees and desired that the provision be framed in more general terms, such as "legal expenses." It was pointed out that in certain countries attorneys' fees
covered only trial attorneys' fees and did not include legal costs for the preparation of the trial and other legal expenses. Thirdly, a formalistic objection was made to the raising of the limits by 25% instead of merely providing that the presence of the limitation of liability would not bar the court from awarding attorneys' fees and other legal costs, which when added to the recovery under the Convention would exceed the limits.

After considerable debate and a number of drafting modifications, the Conference finally agreed to accept the provision as set forth in the amendment to Article 22, subparagraph 4, which reads as follows:

"4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months of the date of the occurrence causing the damage, or before the commencement of the action, if that is later."

It should be noted that the language finally adopted preserves the United States proposal in its substantive aspects, but differs from it in that there is no limitation on the amount of the attorneys' fees; attorneys' fees as such are not specified (although it is definitely clear that they are included); nor is there any requirement that the fees be reasonable.

With respect to the 25% limitation, it was pointed out by a number of delegations that if the recovery were very low, a limitation of 25% would by no means reimburse the plaintiff and it would be wholly unjust to limit attorneys' fees to 25% in such cases. For that reason the majority decided to eliminate the 25%. With respect to the word "reasonable," objection was made on behalf of a number of the French and Spanish speaking delegates that "reasonable" could not be translated into their tongues with the meaning in which it was used in English, and that in addition, any court costs or attorneys' fees which had been allowed or approved by the court would ipso facto have to be considered reasonable. For this reason the Conference decided to eliminate the word "reasonable."

It should be pointed out that the provision concerning legal expenses is not limited to passenger injuries or death actions. It also applies in the case of baggage claims and other actions brought under the Convention.

On the whole, it is believed that the inclusion of this provision goes a long way toward increasing the value of the limits actually obtained.

Supplemental legislation may be necessary in order to put this provision uniformly in effect in United States courts, although each state
can, of course, provide that in Warsaw cases their courts may award attorneys' fees to be payable by the defendant in any amount which may be customary in that jurisdiction.

(e) "Wilful Misconduct"

Reference has been made under (c) and (d) above to the provisions of Article 25 of the Convention, which provide for the non-application of the limits of liability in certain cases. As presently written, the Warsaw Convention provides that the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part, as in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. The words "wilful misconduct" are a translation in both the English and American texts of the French word "dol." Legal writers and jurists have long asserted that this translation is not the equivalent of the French word "dol," and indeed it is doubtful whether there is any uniform understanding in Latin language countries as to what the French word "dol" means.

As a result of the confusion engendered by this provision, many states have sought its revision for a number of years. In certain countries the desired means of clarification was practically to foreclose any "breakthrough" of the limits of liability except in the most unusual and outrageous circumstances. Such a means of achieving clarification would obviously operate in favor of the carrier at the expense of the passenger or shipper. However, as mentioned earlier, this approach had the support of the majority at the Rio meeting of the Legal Committee of ICAO. Thus the provision in the Rio Draft of the Protocol, which was before the Conference, provided as follows:

"The limits of liability specified in Article 22 of the Convention shall not apply if it is proved the damage resulted from a deliberate act or omission of the carrier, his servants or agents, done with intent to cause damage; provided that, in the case of a deliberate act or omission of a servant or agent, it is also proved that he was acting in the course of his employment."

The United States Delegation strongly opposed the Rio provision and urged that the Conference leave unamended the present Article 25 of the Warsaw Convention. However, it was apparent that the Conference was unwilling to leave this article in its present state, and accordingly the delegation supported a proposal made by the Delegation of Norway which, in the writer's opinion, was the closest to the present Article 25 in substance.

The Norwegian proposal read as follows:

"The limits of liability specified in Article 22 of the Convention shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly not caring whether or not damage
was likely to result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting in the course of his employment, and within the scope of his authority."

After considerable debate, the proposal was adopted by the Conference, but was modified to read as follows:

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

In connection with the Norwegian proposal as finally adopted by the Conference, it is interesting to note the charge to the jury in the Jane Froman case in the Supreme Court of New York, which included the following:

"'Wilful' ordinarily means intentional; the act that was done was what the person doing it meant to do. But the phrase 'wilful misconduct' means something more than that. It means that in addition to doing the act in question, the actor must have intended the result that came about or must have launched on such a line of conduct with knowledge of what the consequences probably would be, and had gone ahead recklessly despite his knowledge of these conditions . . ."

It should be noted that the revised Article 25 does not require that the intent to cause damage be to cause the specific damage which results, nor in the case of reckless conduct, knowledge that the specific damage would come about. It suffices that any kind of damage be intended or foreseen as probable. Thus the doctrine of "transferred intent" is incorporated.

During the course of the debate some attempt was made to eliminate the word "recklessly," because of certain difficulties in its translation into French. The United States Delegation opposed this, since the elimination of this word could entirely change the scope of the article. For example, a pilot, making a forced or emergency landing, knows that some damage to the airplane or to the ground is probable, but his act may be in no wise reckless. Other instances will come to mind where some damage will probably result from a given act but where the act is either entirely justified or at the worst, simple negligence. If "recklessly" were not in the article, under the doctrine of transferred intent, unlimited liability would flow for an act of simple negligence, if damage of any kind were foreseeably probable, even though the damage that actually resulted was not foreseeable.

There is one interesting additional sidelight on the revision of Article 25. While the revised article is believed to be substantially a paraphrase of the present Article 25 as it is administered by United
States courts, there appears to be no doubt that it considerably tightens the article as it is now currently administered in certain foreign courts. Some foreign countries presently regard gross negligence as sufficient to bring this article into play. As a result of the Conference's action, the Spanish and French texts of the provision have been considerably restricted. This would bring about the result of maintaining substantially the same rule of law as is presently applied in courts within the United States, at the same time giving United States carriers the benefit of the treatment accorded them in our courts in suits in foreign countries.

(f) Conclusion as to Article 22 and Article 25

There is no doubt that these two articles represent the most important area dealt with by the Conference. In arriving at the result, the United States Delegation played a leading role, and the agreement obtained represents in the writer's opinion the maximum that is possible of achievement now or at any time in the reasonably foreseeable future. It is quite apparent that very few countries are willing to raise the limits of liability to the top amount desired by the United States. However, through the device of the attorneys' fees provision, the basic result sought by the United States is achieved in situations where the carrier forces the plaintiff to sue and to expend money on litigation. Its effect inevitably will be to cause the carrier to make offers of settlement at or close to the limits of liability in cases where it cannot clearly show that the damage was substantially less than those limits.

(g) Liability of Employees

As a result of the consideration of employee liability in connection with the development of the Rome Convention (Rome Convention, Article 9), the Legal Committee at Rio de Janeiro gave considerable thought to this question in the development of a Protocol to the Warsaw Convention. In the existing Convention, no attempt was made specifically to cover the liability of servants or agents of the carrier for their individual tortious acts.\(^7\) In essence, the problems presented in this connection are twofold:

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\(^7\) Cf. Wanderer v. Sabena, 1949 U. S. Av. R. 25 and Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611. These two cases, which respectively hold that an agent of the carrier and an independent contractor to the carrier are entitled to all the benefits of the Conventions, are believed clearly wrong. The report of Henry De Vos, submitting the Citeja draft text of the Convention to the Warsaw Conference, includes the following material (translation from the French):

"Before examining the articles of the draft, it is necessary to bring out the fact that in this field, international agreement cannot be obtained unless it is limited to certain determined problems. Therefore the text only applies to the contract of carriage—first with respect to its external forms, and second in the legal relationships which are established between the carrier and the persons carried or the shipper. It does not govern any other questions which the exploitation of the carriage may bring out." Minutes of the Warsaw Conference, p. 160.
(a) Because of the limitations of liability available to the carrier in most cases, pressures will be built up to sue the individual employee under usual principles of negligence law, with the hope that if negligence can be proved, a substantial recovery may be had against the pilot or other negligent servant. Thus the presence of a limitation of liability may tend to encourage suits against the servant in cases where customarily the operator alone would be called upon to defend.

(b) Secondly, in order to protect themselves against such potential liability pilots, and other employees, through their bargaining agents, will be astute to see to it that their contracts of employment contain clauses to hold them harmless, in the event they are so sued. This has the effect of circumventing the limitation of liability provided in the Convention.

For these two reasons it was deemed desirable to provide that the defenses contained in the Convention as to limits should be made available to the servant or agent as well.

It will be noted that the principle of Article 25 (a) is only to make available to the servant the limits of liability which are also available to the carrier. No cause of action whatsoever is provided in the Convention for suit against the servant or agent. Secondly, it should be noted that in paragraph 3 of Article 25 (a) the provisions do not apply if it is proved that the damage resulted from an act or omission of the servant or agent, done with intent to cause damage or recklessly and with knowledge that damage would probably result. Thus, the servant is subjected to the same rules with respect to loss of limitations of liability for reckless acts as is the carrier.

A further point should also be noted. The Conference was fully aware that this question was subordinate to the main purposes of the Convention, and expressly refrained from making a “Convention within a Convention” applicable to the liability of servants and agents of international carriers. Thus, if for any reason the limits of liability are not available to the carrier—as for example in the case where no ticket has been issued or the notice requirement has been omitted—the provisions of Article 25 (a) may not be availed of by the servant or agent. Also, presumably, if there has been a concurrent act of negligence on the part of the defendant servant which allows a wilful or reckless act of a fellow servant to produce damage, both servants acting within the scope of their employment, the negligent servant would be liable without limits, since the carrier would not be in a position to assert the limits of liability in such a case.

(h) Other Substantive Changes

In the Draft Protocol drawn up by the Legal Committee at Rio de Janeiro there was a provision excluding from the operation of the Convention the carriage of persons, cargo and baggage for military
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authorities by aircraft, the whole capacity of which had been reserved by such authorities. The Conference did not include a similar provision in the Final Protocol, but instead permitted (Article 26) a reservation to be made by a state at any time, by notification addressed to the depositary, that the Convention as amended by the Protocol should not apply to such carriage on aircraft registered in that state. Carriage on aircraft registered in one state and chartered by the military authorities of another would come under the provisions of the Convention notwithstanding the reservation.

In Article IX of the Protocol an amendment is made to Article 15 of the Convention, which provides that nothing in the Convention prevents the issuance of a negotiable air waybill.

This provision is referred to in a recommendation of the Conference set forth as A of the Final Act, which contains a declaration by the Conference that Article IX of the Protocol to Amend the Warsaw Convention was inserted therein only for the purpose of clarification. This is in substantial accord with the recommendations of the Negotiability Subcommittee of the ICAO Legal Committee, which met in Madrid in April of 1955.

The Conference deleted paragraph 2 of the present Article 20 of the Convention which, in cases involving baggage or cargo, currently gives a defense to the carrier where the damage is occasioned by an error in piloting or navigation, etc. Consequently, the deletion means that the rule as to cargo and baggage will no longer contain this exceptional exclusion from liability.

The English text of Article 22 has been modified somewhat, as it relates to special declarations, to correspond with the true intent of the same provision in the original Convention, and now there may be a special declaration of interest in delivery at destination by the consignor, which may exceed the value of the goods itself.

Over the objection of the United States Delegation, Section 22-(2) (b) was amended to provide for applying, in the case of partial loss of shipment, a limitation proportionate to the weight of the package actually lost or damaged, and not of the entire shipment, unless the object lost affects the value of the other packages covered by the same shipment.

Article 23 of the Convention, paragraph 1, was revised so as to permit contractual exclusions from liability for "loss or damage resulting from the inherent defect, quality or vice of the cargo carried." The Conference failed to adopt a proposal by the United States Delegation that this clause be limited to damage resulting solely from such inherent defect, etc. However, the legislative history is clear that omission of the word "solely" was based on the fact that its inclusion was unnecessary rather than intending a different rule of law.

A new article (Article 40 (a)) was inserted in the Convention, which modifies the definition of "High Contracting Party." This
modification is intended to deal with a specific situation on the applicability of the Convention as between members of the British Commonwealth of Nations. It is not believed to affect or otherwise interest the United States.

In Article 26 of the Convention, in accordance with the proposal of the United States, the time for giving notice of damage was extended to seven days from the date of the receipt in the case of baggage, and 14 days from the date of the receipt in case of cargo. In the case of delay this period was made 21 days.

(i) **Procedural Matters and Final Provisions**

One of the matters which the Conference had before it was set forth in a report of a Subcommittee on the Warsaw Protocol, which met at Madrid concurrently with the Subcommittee on Negotiability of the Air Waybill. This Subcommittee Report was made available to the Conference, and concluded that the obligations contained in the Convention, as amended by the Protocol, could be inconsistent with the obligation under the Convention not so amended, in the event that a liability relationship should arise as between carriers of a state which has ratified the Protocol and other citizens of a state or states, which though parties to the Convention, had not ratified the Protocol. The fear was expressed in the report that the courts of a state presented with such a question would not be able to follow the Convention's provisions as amended by the Protocol in favor of the carrier, for example, without infringing the rights of the passenger or shipper who were citizens of the non-Protocol state.

This matter was debated at some length and views were expressed that the obligations under the two documents would be consistent, as well as views supporting the Report of the Subcommittee. Certain states felt strongly that they would be unable to remain a party to the existing Convention if they became a party to the Convention as amended by the Protocol; whereas other states were equally strong in their views that they would desire to have both documents remain in effect with respect to the operations severally affected thereby.

The solution which the Conference adopted was a somewhat novel one and consists basically of permitting each Contracting State, at the time it ratifies the Protocol, to decide for itself whether the obligations under the Convention as amended by the Protocol will conflict to such an extent with those contained in the simple Convention that it must denounce the latter. States believing such to be the case may denounce the Convention, but in such event the parties to the Protocol will not construe such denunciation in any way as a denunciation of the Convention as amended by the Protocol (Article XXIV). This provision read together with Article XIX of the Protocol, which provides that, as between the parties to the Protocol, the Convention and the Protocol shall be read and interpreted together as one single
The Hague Protocol instrument makes certain that, as between the parties to the Protocol, any state may denounce the Convention with respect to states which have not ratified the Protocol, but still remain bound to it with respect to those states which have ratified the Protocol.

In view of the fact that the Government of Poland was the depositary under the original Warsaw Convention, the majority of the Conference believed that fewer legal questions would arise with continuing that government as depositary than by establishing the International Civil Aviation Organization as depositary of the Protocol. In this connection it should be noted that several of the parties to the original Warsaw Convention are not members of ICAO, and for that reason might have difficulty in ratifying the Protocol, were ICAO to be made the depositary. Although the United States Delegation supported the naming of ICAO as depositary, we joined in a motion to make the designation of the Peoples Republic of Poland unanimous, after a preferential vote indicated the desire of the majority of the delegates.

The Protocol is to come into effect as soon as thirty signatory states have deposited their instruments of ratification.

Article XXVI prohibits any reservation other than that heretofore referred to with respect to military charter flights.

It will be noted that the system adopted by the Protocol is somewhat unusual. The Protocol is divided into three chapters, of which Chapter I contains specific amendments to the Convention in the form of amending language. Chapter II, consisting of one single article (Article XVIII), provides for the application of the Convention as amended by the Protocol, confining the Convention as amended to international carriage which has its place of departure and destination either in the territories of two parties to the Protocol or within the territory of a single party to the Protocol with an agreed stopping place within the territory of another state. Chapter III contains the final clauses.

Conclusion

The Grand Canyon accident serves to underscore the need to put our legal house in order in the domestic air transport liability field. The rules presently applicable to airline passenger injury and death claims promote injustice, foster unnecessary litigation and increase costs of making reparation when accidents arise. The Warsaw Convention, as amended by The Hague Protocol, is a good approach to this problem, and while the limits of liability set forth therein may be too low for domestic use, in its basic approach is believed best for the traveling public and for air transportation.