THE CAUSE OF ACTION UNDER
THE WARSAW CONVENTION

BY G. NATHAN CALKINS, JR.
Partner Galland, Kharasch & Calkins, Washington, D. C.;
Chairman U. S. Delegation, The Hague Conference to Amend the
Warsaw Convention, 1955

PART II

In the first installment of this article, the reports, debates, and other
documents of the Citeja1 and of the Warsaw Conference were examined,
and it was concluded that the intent of the draftsmen of the Convention was
to create a contractual liability in the carrier for death of a passenger
traveling in international transportation as defined therein. This liability
was to arise whenever the "accident which caused the damage so sustained
took place on board the aircraft or in the course of any of the operations
ofembarking or disembarking" (Art. 17) where the carrier could not prove
"that he and his agents [had] taken all necessary measures to avoid the
damage; or that it was impossible for him or them to take such measures"
(Art. 20(1)).2 Thus, in Part I of this Article while the Komlos3 and the
Noel4 cases were referred to in passing, the basic discussion was limited to
historical events occurring thirty and more years ago. But historical dis-
cussion may be a bootless pursuit unless it can be related to matters of
current interest. It is therefore the intent in Part II of this Article to
analyze the problems which the existence of a cause of action in contract
under Warsaw presents to the courts and litigants in the United States, and
to suggest possible solutions to these problems. In so doing the author
recognizes that he is stepping out of the comparatively safe storm cellar
of historical perspective into a hurricane of controversy. Undoubtedly many
lawyers experienced in the death claim field will take issue with the con-
clusions. Some will disagree with the analysis. Few, however, can dispute
the fact that problems exist.

Analysis of the Problems

As a basic premise it will be taken as established, for the reasons set
forth in Part I of this Article, that the Warsaw Convention was intended
by its draftsmen to impose on carriers liability for the death of a passenger,
based on the contract of carriage, and subject to the terms, conditions, and
limitations set out in the Convention.

The creation of such a contractual obligation does not in itself create
problems. For the Civil Code countries, the matter of contractual liability
of a carrier for wrongful death is no novelty. It reflects their basic law.5
For certain of the common law countries at least, other than the United
States, the problem appears to have been side-stepped by the enactment of

1 Comité International Technique d’Experts Juridiques Africains.
2 The Convention also gave the carrier the defense ofcontributory negligence
(Art. 21), established a uniform period of limitation (Art. 29), limited the liability
(Art. 22) and the forums before which cases could be brought (Art. 28).
3 Komlos v. Compagnie Nationale Air France, 111 F. Supp. 398, (S.D.N.Y.,
1952), reversed 209 F. 2d 436 (C.A. 2, 1953); cert. den. 348 U.S. 820; 75 S. Ct. 31.
4 Noel v. Linea Aeropostal Venezolana, 247 F. 2d 667 (C.A. 2, 1957); cert.
den. 355 U.S. 907; 78 S. Ct. 334.
5 Brazil, Brasilian Air Code (1938), Chap. V; Chile, Hamilton, Manual de
Derecho Aereo p. 449 (1960); France, Juglart, Traité Elementaire de Droit Aérien
p. 240 (1952); Mexico, Rigalt, Principios de Derecho Aereo, p. 124 § 66 (1930).
national legislation putting the Convention into force. Thus, the United Kingdom in the Carriage by Air Act, 1932 has specifically provided in Section (4) that:

“(4) Any liability imposed by Article seventeen of the said First Schedule [The Warsaw Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law. And the provisions set out in the Second Schedule to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced.”

Schedule 2, referred to in the above excerpt reads as follows:

"Provisions as to Liability of Carrier in the Event of the Death of a Passenger"

(1) The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

In this paragraph the expression 'member of a family' means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, step-child, grandchild:

Provided that, in deducing any such relationship as aforesaid, any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

(2) An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under the last preceding paragraph enforceable, but only one action shall be brought in the United Kingdom in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in the United Kingdom, or not being domiciled there, express a desire to take the benefit of the action.

(3) Subject to the provisions of the next succeeding paragraph, the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court (or, where the action is tried with a jury, the jury) direct.

(4) The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside the United Kingdom in respect of the death of the passenger in question."

Canadian and Australian legislation are substantially similar, with differences which do not bear upon the point in issue.

By the Carriage by Air Act, 1932, as amended, the British appear to have eliminated the difficulties latent in an action for the death of a passenger, where liability is both contractual and delictual. Thus, while philosophical debate might still rage in Britain whether the basic right under the Convention sounds in contract or tort, all doubt has been removed that liability is created by the Convention and that when the Convention applies, such liability is to be in substitution for any other liability of the carrier in respect of the death of a passenger either under any statute or at common law.

It is apparent that this simple Act did at least three things: (a) it eliminated liability under Lord Campbell's Act or other statute for deaths of Warsaw passengers occurring in the United Kingdom; (b) it changed the rule of conflicts of law so far as British courts are concerned requiring

---

6 22 and 23 Geo. 5, C. 36.
8 Civil Aviation (Carrier Liability) An Act Relating to Carriage by Air (Assented to 21st April 1959).
application of foreign tort law in respect of such deaths occurring abroad;
(c) it defined both the person entitled to bring suit, and the persons to whom the proceeds were to be distributed.

In the United States we have solved the problems inherent in a Conventional cause of action in a different way—we have denied that it exists.\(^9\) In many ways this solution is a very serviceable one for a federal republic such as ours. Courts are not too frequently confronted with the problem. As Cashin J. said in the Noel case:\(^{10}\)

"Virtually all of the reported cases have not considered the question at issue, apparently because the application of the *lex loci delicti*, with the addition of the Convention presumption and limitation mentioned above, afforded the same right as if a separate cause of action were created."

The solution of "non-existence" has permitted the courts to follow the well known paths of tort law and conflict of laws in wrongful death cases, making only slight alterations on the way to accommodate the Convention without perturbation as to what would happen in a suit on the contract. It has avoided the need for reappraising our legal machinery, both of municipal and conflicts rules, to assure proper disposition of a contract claim arising from failure of the carrier to carry safely.

The United States solution, notwithstanding its familiar pattern, is cumbersome and it does not permit the Convention to help litigants out in the way it was intended. The Convention by Article 28 limited the right to sue to certain places—the domicile of the carrier, his principal place of business, the place where he had an office through which the contract of carriage was made, or the place of destination. The place of accident, as such, is not an authorized forum, although under the Komlos and Noel cases the cause of action necessarily is born of the law of that place. Consequently, it becomes vital under the U. S. solution to establish what the law of the place of accident is, the persons under that law to whom distribution of the proceeds is to be made, etc., even though suit is brought in the United States. The Komlos case is a good example of the travail the parties are forced to go through in order to prove foreign law.

Apart from the cumbersomeness of the tort law procedure—there is the added disadvantage that some day a Warsaw death will occur in a jurisdiction which gives no right of recovery for wrongful death, or limits such recovery to a sum less than that provided in the Convention. In such cases the traditional tort law approach would deny or restrict recovery to a plaintiff in this country.\(^{11}\) If a national of another contracting state were to be adversely affected by application of the Komlos doctrine, serious questions could be raised whether the United States was abiding by its international commitments.

In such circumstances the plaintiff might prevail upon the court to re-examine the entire question, and when that happens, the difficulties will have to be faced. It is thus the purpose of the Article to explore these difficulties and attempt to suggest ways of dealing with them when that re-examination occurs.

It is submitted that the problems would include at least the following questions:

(a) When balanced against the legislative history of the Warsaw Convention, is the reasoning of the Komlos and Noel cases so far as they construe the Convention as not intending to place a contractual obligation on the carrier for wrongful death of a passenger sufficiently persuasive as to constitute binding precedent?

---

10 144 F. Supp. 359, 360.
11 See Restatement of Conflicts, § 391, illustration.
(b) If the Convention did intend to create a contractual obligation, is it self-executing to the extent that the obligation must be recognized by all courts in the United States?

(c) If so, was it intended that the Warsaw cause of action be the exclusive gravamen in an action for damages resulting from the death of a passenger?

(d) If not intended to be exclusive, how are two separate counts to be handled for the same death, one in tort and the other in contract, where different persons may be entitled to distribution from the same limited fund?

(e) In Warsaw accidents occurring on or over the high seas, may the contract cause of action be used in a State court to defeat the otherwise exclusive admiralty jurisdiction under Death on the High Seas Act\(^\text{12}\) of the Federal Court sitting in the same place?

(f) In any event, by reference to what law is the identity determined of the person or persons entitled to bring the contractual cause of action, and what are their rights \textit{inter se}?

(g) In applying the substantive law, what legal pitfalls lie in the way of an appropriate solution? In this connection the fact that the entire machinery for dealing with death claims in the United States is oriented on tort\(^\text{13}\) is troublesome. Thus, what is the nature of a contract claim for death? Is it assignable? Does it pass by will? If not, does it abate by death? Does it make any difference whether death was instantaneous or whether it occurred days or perhaps months after the accident but as a proximate result thereof?

These questions, while easily listed as separate matters, are closely inter-twined, and consequently no rigid line of demarcation will be observed in the discussion which follows:

**DISCUSSION**

\textit{The Komlos and Noel Cases}\(^\text{14}\)

The \textit{Komlos} case is extremely important in the American jurisprudence of the Warsaw Convention because Judge Leibell's views in the District Court opinion have been used as the basis for the opinion of the Court of Appeals for the Second Circuit in the \textit{Noel} case, and other cases thereafter have fallen into line behind them.\(^\text{15}\)

It was the \textit{Komlos} case originally which held that the Warsaw Convention did not create a right of action. Two plaintiffs were involved. One was the insurance company which carried the Workmen's Compensation with respect to Emery Komlos, the decedent. It sued the defendant Air France as the statutory assignee of the wrongful death claim purportedly held by decedent's mother. The second plaintiff was the decedent's sister, suing as Administratrix of the estate on behalf of herself and her mother as next of kin.

The case came up on alternative motions by the defendant to dismiss the complaints, and consequently the real fight involved a dispute between the two plaintiffs.

Both complaints sounded in tort, alleging that the defendant by its negligence and willful misconduct caused the death of the decedent in the Azores\(^\text{16}\) in the Republic of Portugal. The attorney for the Administratrix

\(^{14}\) \textit{Komlos v. Compagnie Nationale Air France}, supra note 3, at pp. 397, 398.
\(^{16}\) \textit{Komlos v. Compagnie Nationale Air France}, supra note 3.
asserted that the law of Portugal, as the *lex loci delicti* governed the actions.\textsuperscript{17} Far from founding his action on the contract of carriage, he denied that the Warsaw Convention created a right of action of any kind.\textsuperscript{18}

Interestingly enough, the issue of the cause of action under the Convention was raised by the defendant Air France, which asserted that it supplanted the tort claim. Judge Leibell summarizes the defendant's position as follows:\textsuperscript{19}

"Counsel for defendant, Air France, contends that the Warsaw Convention created a cause of action 'ex contractu'; and that the law of Portugal, the place of the accident, has no application." (Italics supplied)

In effect, the defendant's position was that the Convention not only created a cause of action but that in so doing, it foreclosed the plaintiff from maintaining his suit in tort at all.

It is submitted as to this point that the plaintiff was clearly right. There is nothing in the Convention which automatically makes the cause of action under Warsaw supersede all other causes of action. Presumably it supersedes all other causes of action based on the *contract of carriage*, since the Convention in Article 32 proscribes any substantial variation in the terms of this contract. And since the contract by force of Article 3(1) (e) requires that the Convention be incorporated in the contract of carriage by reference, it would be impossible to base another cause of action on another contract for the same carriage.

With respect to actions founded on tort, however, the situation is different. In cases of this nature liability could arise in accordance with the law of the place where the occurrence took place, and there is nothing logically incompatible with having a tort cause of action founded on the law of a third country side by side with an action in contract. However, unless the tort cause of action were subject to the same terms and conditions as the contractual ones, uniformity would be defeated. Thus in order to protect the Conventional cause of action, the draftsmen provided in the wording of Article 24 that causes of action "however founded" were to be governed by the Convention and subject to the conditions and limits set out therein.

Not only is the implication from the drafting of Article 24 clear that the possibility of tort action was contemplated, but this point was specifically raised in the preliminary discussions held in Madrid by the Citeja.\textsuperscript{20} There, during the debate on the draft text which ultimately became Article 24, the committee discussed the possibility of tort suits. The draft text before them read:

"In case of death of the person holding the right, every liability action, however founded, may be exercised within the terms, conditions and limits provided by this Convention."

The debate (translated by the author) is as follows:

"Mr. Ripert. In accordance with the law of certain countries in case of death, the relatives [of the deceased] act by virtue of a right to reparation of the damage caused them, and the rules of contractual law no longer apply. Specifically this is the case with French law of maritime transport. Thus if we do not put something in, it will permit all the relatives to act on the theory that the contract is no defense against them."

It is evident from the above that the draftsmen of the Convention were fully aware of the possibility that next of kin and others might act on the basis of national law, tort or otherwise, in lieu of suing on the contract. Consequently they insisted on closing the gap in the Convention by making

\textsuperscript{17} Id., p. 399.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Citeja, Proceedings Third Session, Madrid, May 1928, page 55.
all causes of action, however founded, subject to the conditions and limits of the Convention in Article 24.

It is thus apparent that no attempt was made by the framers of the Convention to outlaw the right of a plaintiff in the circumstances of the *Komlos* case to bring an action in tort. Thus plaintiffs were entitled to bring an action in New York on the Portuguese law of wrongful death.

However, Judge Leibell did not choose to decide the point this way. Instead of holding that the Convention did not preclude the maintenance of a tort action (subject to Conventional terms and conditions), he held that it created no right of action at all.

The opinion on the Warsaw point is somewhat confusing. After reciting the facts and discussing certain of the earlier cases, Judge Leibell turns to Articles 17, 20, 22, and 25 and states that the language therein is such as “is commonly associated with actions in tort, actions *ex delicto*.”

Possibly so, but common association with tort in the common law does not preclude equally common association with contract in the civil law or in international conventions. And what may be customary as a general rule may have no application to a specific case. Thus the “common association” forms no firm foundation for his succeeding sentence which proclaims “Article 17 clearly relates to a cause of action *ex delicto*.”

However, the court, having disposed of the possibility that the Convention does not create a right of action in contract, finds it relatively easy to determine that it does not create a right of action for wrongful death in any way—but only a presumption of liability. He confirms this opinion by quoting an excerpt from a letter from Secretary of State Hull dated March 31, 1934, recommending the adherence of the United States to the Convention. The portion of this letter on which the court relies is as follows:

“The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of *res ipsa loquitur*, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.”

It is submitted that Judge Leibell gives much too much weight to this excerpt from Hull’s letter on the question under review. It is obvious that the writer of the letter had no specific intention of dealing with the question of presumption of liability as contrasted to the establishment of a cause of action by the Convention. The letter was written by the Secretary of State to the President setting forth the considerations which moved the Secretary to recommend its submission to the Senate as a treaty. The letter was certainly not written with the precision of an Eighteenth Century conveyance. Thus the comparison made in the letter between the burden of proof imposed upon the carrier by the Convention and the doctrine of *res ipsa loquitur* is not strictly accurate.

In regard to carrier liability, it should be borne in mind that the Convention deals not only with liability for personal injuries and death, but also

---

21 111 F. Supp. 393, 401.
22 *Ibid*.
23 111 F. Supp. 401.
with liability for destruction or loss of, or damage to checked baggage or cargo (Art. 18) and with liability occasioned by delay in the transportation of passengers, baggage, or cargo (Art. 19). Each of these articles begins with the same seven words:

"The carrier shall be liable for damage . . ."

Article 20 then states that the carrier "shall not be liable if he proves that he and his agents have taken all necessary measures . . ." etc. In so doing, it modifies the liability asserted in each of the three preceding articles, and this defense is what the Hull letter obviously refers to in characterizing Article 17 as "creating a presumption," since Article 17 standing alone is absolute in its terms.

Notwithstanding the parallelism of the trilogy of liability articles, the Hull letter deals with each differently. Its discussion of Article 17 is set forth above. It does not discuss Article 18 at all, except indirectly when it describes the occasions when the carrier is not liable.24 With respect to Article 19, the letter simply reads:25

"Under article 19 (Ch. III) the aerial carrier is liable for damages occasioned by delay in the transportation by air of passengers, baggage or goods, subject to certain defenses established by the Convention. In this respect the Convention appears to accord to passengers and shippers broader rights than they are generally entitled to with regard to other forms of transportation." (Italics supplied)

This disparity of treatment in the letter of three parallel articles subject to identical rules so far as the "presumption" point is concerned destroys the importance of the word "presumption" as used in regard to Article 17. The same phraseology cannot be construed to establish liability in one context (delay) and a mere presumption in another (death).

Consequently it is submitted that the Hull letter is no authority for concluding that the Warsaw Convention does not establish a cause of action for a passenger's death.

Judge Leibell does not appear to be absolutely certain of his own view that the Convention does not create a right of action. While he asserts this categorically at page 401 of the opinion, he retreats to some extent on page 402 where he says:

"But if the law of the place of the accident does not provide for a right of action for wrongful death, the forum would apply Article 17 of the Convention; and under those circumstances it might be said that Article 17 created the right of action for wrongful death."

More surprising still is his statement at page 403 of the opinion: "Thus the Convention has left open the question as to whether the lex fori or the lex loci delicti should determine which person or persons has the right of action created by the Convention . . ."*

Notwithstanding the lengthy and sometimes contradictory discussion by Judge Leibell of the Warsaw Convention in the Komlos case, the case really went off on the point of the New York State compensation law and the question whether it effected an assignment by operation of law of the Portuguese tort claim against the defendant Air France.

The questions relating to the assignment were interesting but bear no direct relationship to the interpretation of the Warsaw Convention. In summary, Judge Leibell applied the law of the situs (Portugal) to the question of who was entitled to distribution of proceeds of the claim. The law of Portugal determined that this was to be by the law of the place of accident (Portugal) but that that law was based on the right to legal support from the decedent, a right under Portuguese law to be determined.

---

25 Id. at p. 243.
* Italics added.
by the law of the domicile. Judge Leibell painstakingly crisscrossed back and forth between the law of New York and the law of Portugal and ruled against the Administratrix, holding that the claim belonged exclusively to the mother and had been assigned to the insurance carrier under the Workmen's Compensation law.

Although it is not entirely clear from the opinion, it seems likely that if the case had gone the other way on the Warsaw point (i.e., that the Warsaw Convention created an exclusive right of action) there would have been no difference in the holding. Assuming for the moment that the Air France contention was correct that the law of New York as the lex fori, determines who has the right to bring the suit and who are entitled to share in any recovery, the actual outcome of the case would have been the same.

In summary then the case appears to amount to this: Plaintiff Komlos brought an action in tort based on the law of Portugal against Air France. Air France defended on the ground (a) that the Warsaw Convention applied; that it created an exclusive cause of action in contract; that the law of New York determines who has the right to bring the suit and who are entitled to share in any recovery, that under New York law it was decedent's mother and that her claim had been effectively assigned to the insurance carrier; (b) that even if the law of Portugal applied the same result would obtain.

It is submitted that the actual holding of the District Court in the Komlos case in regard to the Warsaw Convention—i.e., that the Warsaw Convention did not create a bar to bringing the suit based on the pertinent law of Portugal—was correct. Insofar, however, as Judge Leibell goes beyond this and discusses whether the Warsaw Convention created a cause of action, this subject was unnecessary to the holding in the case and is consequently dicta. With respect to the holding that the claim vested in the mother as beneficiary, it is submitted that Judge Leibell's holding was right, but for reasons which will be gone into in detail later, he should have applied the lex fori to reach the same result rather than the law of Portugal.

**Komlos on Appeal**

On appeal to the Court of Appeals for the Second Circuit, the decision of Judge Leibell was nominally reversed. In arriving at this conclusion, however, the Court (a) did not discuss the Warsaw Convention at all, (b) agreed with Judge Leibell that under the law of Portugal the right to sue for damages vested exclusively in Komlos' mother, but (c) disagreed with Judge Leibell that the claim had been assigned by operation of law to the insurance carrier. The basis of this latter holding was that under the law of Portugal "moral" damages were permitted; that such damages were unknown to New York law; that therefore the assignment statute was not intended to cover assignments of claims for such damages and in fact did not operate to assign such damages. The Court then reasoned that to allow assignment of the assignable damages, while leaving the claim for moral damages in the mother, would be to split the cause of action. To avoid this the Court held that the assignment statute did not operate at all, and thus the claim was left unassigned, remaining in the next of kin—decedent's mother.

In regard to our main line of inquiry, there is not even the slightest nod by the Court of Appeals either in favor of or against the dissertation by Judge Leibell on the cause of action under Warsaw. However the first sentence of the opinion reads "For the death of Emory Komlos there is a single indivisible cause of action with two items of damage." Thus by implication the Court of Appeals concurs with the opinion of Judge Leibell.

---

26 209 F. 2d 436, 438.
that the Warsaw Convention creates no cause of action. Here again the
statement of the Court goes beyond what was really required of it, since the
only claim in question was based on the law of Portugal, sounding in tort.
Consequently, this pronouncement, without discussion of any kind, may also
be regarded as dictum.

The Court of Appeals like the court below held that Komlos' mother had
the sole beneficial interest in any recovery for wrongful death both under
the Portuguese law and the law of New York. Consequently, as to choice of
beneficiary, it makes no difference in result whether the court followed the
law of the forum or the \textit{lex loci delicti}.

With respect to the issue of moral damage, application of the law of
Portugal makes a distinct difference in result. This matter will be discussed
more fully after discussion of the question of which law should be applied
in Convention cases on the choice of distributees. However, it can be stated
here that there is nothing in the Convention which precludes the award of
moral damages sustained by such a beneficiary, and that even if the New
York rule of damages were applied to contract causes of action, there is
nothing inconsistent in permitting recovery of such damages in an action
for tort.

\textit{Noel v. Linea Aeropostal Venezolana}\textsuperscript{27}

In this case death occurred either over or on the high seas. An action was
purportedly brought under the Federal Death on the High Seas Act.\textsuperscript{28} How-
ever, instead of being brought in admiralty, it was brought on the civil side
of the court. On motion to dismiss, based on the exclusive jurisdiction of
the admiralty court, the plaintiff was permitted to amend its complaint to
include a separate cause of action under the Warsaw Convention.

The court discussed the reasons for the plaintiff's bringing the case on
the civil side. The court said\textsuperscript{29}

"It should be noted that the ends the plaintiffs seek to gain by utilizing
the civil rather than the admiralty side of the Court are (1) a jury trial;
(2) broader discovery proceedings, and (3) probability of a less expensive
litigation proceeding. It is not contended that the admiralty forum would
deny to the plaintiffs their substantive cause of action for wrongful death.
Nowhere in the Convention is there any language which could be read to
assure any of the advantages sought by the plaintiffs."

The court then dismissed the complaint on the grounds that it did not
have jurisdiction of the subject matter of the suit as a civil action.

Although the court relied on and considered itself bound by the \textit{Komlos}
case, it is believed that the holding of the court is proper whether a cause
of action exists under the Warsaw Convention or not. The reasons for this
belief will be explained more fully subsequently, but it may be noted in
passing that the courts have held that Congress in enacting the Death on
the High Seas Act intended to make the admiralty forum the exclusive
jurisdiction with respect to the law of deaths occurring on the high seas.
Because of the supremacy of the Federal power in such instances, it has
been held that the state law must defer to the dominant Federal power.\textsuperscript{30}
Federal power to exercise admiralty jurisdiction in these cases would be
defeated if the state courts were permitted to entertain suits on the contract
of carriage, and award damages up to the limit provided by the Convention.
Once damages have been awarded up to that limit, no further damages may
be obtained, and if the state court could award such damages in accordance

\textsuperscript{27} 144 F. Supp. 359 (D.C.S.D.N.Y. 1956).
\textsuperscript{28} 46 U.S.C.A. 761-767.
\textsuperscript{29} 144 F. Supp. 359, 361.
\textsuperscript{30} Wilson v. Transocean Airlines, D.C.N.D. Cal. 1954, 121 F. Supp. 85; Higa
F. 2d 780.
with its law to the persons designated by it, it might defeat the rights of beneficiaries provided under the Death on the High Seas Act. Thus it seems perfectly patent that a suit relating to a death occurring on the high seas brought in the state court could be stayed by action of the admiralty court until the claim was tried in that forum. After the claim has been tried, of course, there would be nothing left for the state court to operate on.

The plaintiff again amended his complaint and again a motion to dismiss was made. In the opinion on the second motion the court affirmed its prior ruling. The amendment in the complaint to which the opinion was addressed was an allegation that death had occurred in the air and not on the high seas, that the Death on the High Seas Act did not apply and no other statute gave a right of action, and consequently Judge Leibell's exception did apply, and the Convention furnished the right of action.

The court held for the defendant on the motion and dismissed the complaint on the basis that neither the language of the Federal Death on the High Seas Act "nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the seas."

**The Noel Case on Appeal**

When the Noel case came before the Court of Appeals on the motion to dismiss there was a square holding for the first time that the Warsaw Convention did not create a cause of action. In reaching this decision the Court stated:

"In any event, we agree with our prior decision in Komlos v. Compagnie Nationale Air France, 2 C.I.R. 1953, 209 F. 2d 436, 438, which impliedly agreed with Judge Leibell's decision, Komlos v. Compagnie Nationale Air France, D.C.S.D.N.Y. 1952, 111 F. Supp. 393, that the Convention did not create an independent right of action."

Had the Court merely affirmed the District decision below, the ruling would have been that the Federal Death on the High Seas Act applied to deaths occurring over the high seas as well as on the high seas and that, since the admiralty jurisdiction was exclusive, suit on the civil side must be dismissed. However, the Court did not affirm on this ground but stated that it affirmed on a narrower ground. It expressly refused to rule on, or express an opinion as to, whether the Death on the High Seas Act applied to deaths occurring in the air space over the high seas. Rather, it based its action on the fact that the Warsaw Convention does not create a cause of action in regard to deaths occurring in the air space over the high seas.

**Summary of the Komlos and Noel Cases**

The main source of difficulty in both the Komlos and Noel cases is the language used rather than their holdings. In each case the result is the same as would have been reached if the court had held (a) the Convention creates a non-exclusive cause of action in contract; (b) such cause of action arises out of the municipal law of the forum, and questions of the persons who have the right to bring suit and their respective rights should be determined in accordance with the policy of the municipal law; (c) tort causes of action based on foreign law, while not eliminated, have been so far modified by the Convention that continued adherence in such cases to the traditional doctrines of conflict of laws is no longer necessary; (d) on the contrary, the

---

32 Id. p. 164.
33 247 F. 2d 677, 2 C.A. 1957.
34 Id. at 679.
policy against splitting causes of action for one death impels abandonment of such doctrine in favor of application of the law of the forum in selecting distributees; and (e) that the cause of action on contract will not be enforced when such enforcement conflicts with the policy of the Federal Death on the High Seas Act to retain exclusive jurisdiction in the admiralty courts.

But the language in the cases is dangerous. It presents too easy an answer for the next case which may arise, and which if woodenly followed could lead to an unjust result.

Is the Convention Self-Executing So Far as a Cause of Action Is Concerned?

Obviously if the provisions of the Warsaw Convention are not self-executing with respect to the cause of action under the Convention, there is no need to worry about the language of the courts in the Komlos and Noel cases. Even if the Convention purported to create a cause of action, unless the provisions regarding it were self-executing (or unless supplementary legislation had been adopted), the cause of action would not be effective in the United States. No statutory cause of action based on the Warsaw Convention has been adopted by the Congress.

By Article 6, Clause 2 of the United States Constitution all treaties made or which shall be made under the authority of the United States are the supreme law of the land. This has been interpreted to apply only to self-executing treaties which need no further act of Congress to make them effective. Where, however, some additional act of Congress, such as the appropriation of money, is necessary to give effect to the treaty, it is not operative.35

With respect to the Warsaw Convention, Indemnity Insurance Company of North America v. Pan American36 held that those provisions relating to limitations of liability were self-executing. In the course of his opinion, Rifkind J. said:37

"I do not reach the question whether it confers rights or creates causes of action. It has been said that a treaty may be self-executing in part and require legislation in part. Aguilar v. Standard Oil Co., 1943, 318 U.S. 724, 738, 75 S. Ct. 930, 937, 87 L. Ed. 1107 (concurring opinion by Stone, C. J.)."

The same reserved holding that the Warsaw Convention is self-executing is found in Judge Cashin's opinion in the Noel case at the district court level. There he says38

"While there was at first some doubt as to whether the Convention was self-executing to any extent, Choy v. Pan American, there is no doubt at this time that, at least insofar as the Convention creates a rebuttable presumption of liability upon the happening of the accident, Article 17, and a limitation thereof except upon the showing of willful misconduct, Article 25, that it is self-executing."

In view of the circumspect reserve with which the courts have held the Convention to be self-executing, limiting their holdings to the limitation of liability, it is vital to examine the Convention at close range on this point.

In examining Article 17 two omissions appear at first glance to require further statutory attention. First, the persons entitled to bring the action

37 Id. at 349.
38 144 F. Supp. 359, 360.
and share in the proceeds are not specified, nor is there any direction to the court as to how these persons should be determined. On the contrary, Article 24(2) in dealing with death and personal injury claims states that they may only be brought subject to the conditions and limits set out in the Convention, "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." (Italics added)

Secondly, if the right is a contractual right, is it not personal to the passenger requiring some sort of statutory inoculation to make it survive the passenger's death? Ordinarily personal contract rights abate upon the death on one of the parties. (As a matter of practice passenger tickets are not assignable.) Moreover, if Article 17 were to be construed as an implicit survival statute (because of the mention of the death of the passenger), no right would accrue in cases where death was instantaneous.

Thus at first blush it would appear that Article 17 provides at best an inchoate liability, needing statutory breath to give it substance. However, it is submitted that the foregoing views are too mechanistic, do violence to the intent of the draftsmen, and in some imaginable cases would make the United States default on its international commitments.

The initial criticism to be leveled at the argument of incompleteness is that it totally ignores the machinery of the Convention. In considering this machinery it is vital to keep continuously in mind the fact that the Convention does not purport to regulate carriers as such, or air passengers as such, or activities within any specified area or areas. The Convention regulates the terms of the contract of carriage for "international transportation" as defined in the Convention. Whether it applies at all is entirely dependent upon an intention of the parties to the specific contract to buy and sell "one undivided transportation" so defined.

If the transportation does satisfy the Conventional definition, and the parties intend it to be "undivided," the Convention applies to the contract, and nothing the parties can do can alter this fact. In reverse, if the Convention by its terms does not apply, the parties cannot effectively bring it into force.

The decisive effect of the expressed intention of the parties is shown by the following examples. Five passengers are flying aboard an airplane from Chicago to Miami. All intend for varying reasons to go on to Havana by different airplanes. Cuba is not a contracting state.

Passenger A is traveling on the return portion of an Havana-Chicago-Havana ticket. The Convention does not apply because the transportation starts and ends in Havana, a place in a non-contracting state.

Passenger B is traveling on a Chicago-Miami-Havana roundtrip ticket. He intends to go to Havana by the first plane he can catch out of Miami. The Convention applies.

Passenger C is traveling on a Chicago-Havana one-way ticket. The Convention does not apply.

Passenger D is traveling on a Chicago-Miami-Havana roundtrip ticket. His real destination is Miami, but he contemplates taking a side trip to Havana during the course of his stay in Miami. The Convention applies.

40 16 Am. Jur. 64 (Death § 84).
41 Suppose a foreign resident and national of a Warsaw Convention country buys a Warsaw ticket on a U.S.-flag carrier and dies in a crash in a country which gives no cause of action for wrongful death. A personal representative, suing in the United States would have no right to sue in tort, and if the contract cause of action is not self-executing, he would presumably be non-suited.
Passenger E intends to visit both Miami and Havana, but his secretary got confused and bought only a ticket from Chicago to Miami and return. He intends to purchase an additional ticket Miami-Havana-Miami upon arrival in Miami. The Convention does not apply.

The foregoing examples illustrate the overall importance of the contract of carriage in the application of the Convention.

Nationality, domicile or residence of the passengers make no difference in the result, nor is the result affected by the nationality of the carrier or by the fact that it may operate wholly domestically, or the points between which it carries.

If it had not been intended to make the liability rule operate through the contract of carriage, what an absolutely weird classification the Convention would create as to persons governed by its terms!

Article 3 of the Convention, in the most unequivocal terms provides that the ticket shall contain "A statement that the transportation is subject to the rules of liability established by this convention" (Article 3(1)(e)). And if the ticket does not contain such a statement, Article 3(2) provides that "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none-theless be subject to the rules of this convention." Certainly failure to include the statement required by Article 3(1)(e) is an irregularity!

There can be no doubt that these specific provisions are self-executing, and by them the rules relating to liability are made terms, conditions and undertakings in the contract of carriage. Since no deviations (except for higher limits (Article 22)) are permitted in the contract of carriage, it follows that the enforcement of these terms, conditions, and undertakings is not only in the public interest of the United States but all others are contrary to public policy.

Article 17 is thus an undertaking of the carrier that it "shall be liable for damage (not damages) sustained in the event of the death or wounding of a passenger . . ." Since Article 17 specifically mentions death, there is no doubt that the carrier and passenger "intended" such liability and that the states parties to the Convention intended that they should so intend.

Once the contractual nature of Article 17 is recognized, analysis becomes easy. The arrangement is not unlike a third party beneficiary contract. The promisee (by Conventional compulsion) is the passenger, but the beneficiaries will include every person who is damaged as a result of the passenger's death.

The all-inclusive nature of this undertaking worried the draftsmen of the Convention. Thus at the Madrid Meeting of the Citeja, the following colloquy took place (translation by the author):

"Mr. Richter (Germany) wondered in case of the deletion of the last words (by the persons to whom such action belongs in accordance with the national law of the deceased or, in the absence thereof, in accordance with that of his last permanent residence) if the draft would not be subject to this interpretation: Article 22 (now 17) says that the carrier shall be liable for the damage sustained, in case of death, wounding, etc . . . That is, he must bear all damages including those caused by death; for example, taking the case of a person having a regular monthly allotment paid by the deceased, if we strike the last words, will the Contracting States be in a position to specify the persons to whom the deceased owed support? If states are to be authorized to modify the Convention in this way, we ought to say so.

The Chairman. Classification of persons entitled to sue (ayants droit) is outside the Convention; it results from national law.

42 Arts. 23, 32.
43 Citeja, Minutes and Documents 3rd Session, pp. 55, 56.
Mr. Richter. That is certainly the intent of the Commission, but he did not know if that would follow from the text, if nothing were said, and if Article 22 (present 17) declared that the carrier shall be liable for any damage caused by death.

Mr. Ripert and the Chairman made the observation that we had reached the limit of conventional right.

Mr. Richter proposed putting an indication in the minutes which might appear in the protocol (of signature) reading 'The Contracting States are free in applying the Convention to determine the categories of persons entitled to sue and share in the proceeds (ayants droit).'

The reporter was of the opinion that since there was nothing in the text, national legislation would remain free to determine the categories of persons entitled to sue and that it would be better to say nothing."

Nothing was said at that stage, but at Warsaw, Mr. Richter again raised his point and without debate, the revision put forward by the drafting committee was adopted.

It is submitted that this action leaves the matter in this posture: the contractual liability of the carrier is to pay for all damage which anyone suffers as a result of a passenger's death (subject to the conditions and limits of course) but the fact that suit is brought subject to the conditions and limits set out in the Convention, does not make recovery mandatory by any Tom, Dick, or Harry, since cases covered by Article 17 are "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." In short, this provision permits the contracting states to restrict the persons who may sue and share in the recovery, but imposes no treaty obligation on them to do so.

The United Kingdom and Australia have specified the class of persons entitled to sue and have made the respective rights of such persons a jury question. The United States has not dealt with the matter, but neither has it undertaken to do so. Consequently on this aspect, the Convention is neither executory nor self-executing. There is simply an absence of treaty obligation.

By inaction on the part of the federal government, this void has been passed on to the courts. They are confronted with a treaty obligation to recognize a contractual liability to compensate anyone damaged, but with the privilege of restricting the right to sue to persons they find entitled. They are not forced to restrict. They can admit the claim of anyone or everyone who has been damaged. They can restrict the class of persons to those given the nod by the place where the accident occurred, they can apply the law of the place of contracting, although there is no compulsion to do so. They can apply the law of decedent's domicile, although it should be noted that the draftsmen of the Convention refused to require such an application.

Thus, though the court has a great deal of discretion in determining the distributees, the fact that it has that discretion does not make the provision so vague as to be meaningless.

**Determination of Distributees Under Contract Cause of Action**

The law which seems most sensible to apply is the court's own municipal law. Why go out seeking a law of a foreign jurisdiction when the legislature of the state in which the court is sitting has specified the persons entitled to share in proceeds of a wrongful death action? Such a statute is in pari materia. In the absence of any kind of compulsion to do so, why complicate matters by seeking out foreign law?

The only possible argument for applying a law other than the municipal law would be to apply the law of place of the accident so as to avoid splitting causes of action—a situation which might arise if different beneficiaries

---

44 Proposals of the German Delegation, Warsaw Conference Documents, p. 186.
45 Warsaw Conference Documents, pp. 139, 149.
were entitled to share in the proceeds of the contractual action from those similarly entitled in the action for tort for the same death. No doubt there is a strong policy against splitting causes of action. The Komlos decision in the Court of Appeals is an excellent example of this policy. However, to determine beneficiaries of the contract cause of action by reference to the tort cause of action is the tail wagging the judicial dog. The inconvenience of this course to litigants has already been pointed out.

Moreover, the logic for such a reference has largely disappeared. As heretofore discussed, the civil code countries have evolved the doctrine that the cause of action on the contract of carriage has entirely supplanted the former action based on tort. England, Canada, and Australia have reached the same result by statute. This leads to a jurisprudential quagmire when it comes to applying British law by a United States court. Take the following case: A passenger traveling from New York to Paris on an American carrier plans to stop over in London. The airplane crashes on landing in England and the passenger is killed. Suit is brought in New York, where the ticket was purchased. This situation is not unlikely.

The Warsaw Convention applies, but because of the forum limitations of Article 28, suit may not be brought in England. The court sitting in New York is faced with a contractual claim for liability under the Convention. The court holds that to avoid splitting causes of action, the beneficiaries will be determined as though the claim were one in tort, and the lex loci delicti will be applied. The court finds that all causes of action in England have been abolished except for the one under Article 17, that the Conventional cause of action may not be sued on in England because it is not an appropriate forum, and that the beneficiaries under that law are defined in relation to their entitlement to bring such a suit.

Apart from the particular example of England, the same unsatisfactory result would be approximated in every case where the place of accident (1) is in a contracting state and (2) is not a jurisdiction in which suit may be brought under Article 28. Whether or not all actions for wrongful death sounding in tort have been abolished, they are not enforceable in such jurisdictions. Ordinarily foreign law will not be enforced by the forum if to do so will impose on the defendant a more onerous burden than that imposed by the state which created the right.

The same questions may or may not arise in regard to accidents occurring in non-contracting states. If the country follows the doctrine that the contract of carriage is the basis for carrier liability to passengers, they will probably observe the provisions incorporated in the contract of carriage which restrict right to suit to a contracting state (Article 28). The Conflict of Laws rule is that a restriction in a contract limiting the right to sue to certain jurisdictions will ordinarily be enforced. Such a contract would therefore be a complete defense to an action brought in such a state.

Thus whenever the accident occurs in a jurisdiction which is not an appropriate forum under the Convention, the court hearing the case will be faced with the question of whether a tort cause of action for wrongful death is enforceable in the state where it arose. When the accident occurs in a non-contracting state proof of such fact will be immensely difficult. In any such case it seems a foolish policy to determine the distributees under a contract cause of action brought in an American court, in accordance with a treaty which is the supreme law of the land, by reference to the tort law

---

46 Supra, notes 6, 7, and 8.
47 Carriage by Air Act, 1932, Sec. (4). Note 6 supra.
48 Id., Second Schedule, para. 2. See supra p. 324.
49 Restatement, Conflicts, § 609.
50 Chile, for example. See Part I of this Article, 26 J.A.L.C. 220 (1959).
51 Restatement, Conflicts § 617, Comment a.
of a jurisdiction which will not enforce it. Since instances of this nature will frequently arise, it seems an equally foolish policy to determine the distributees by reference to the *lex loci* of a jurisdiction in which suit may be maintained under the Convention. The policy followed should be uniform if that is at all possible.

**Distributees in Tort Actions**

The only obstacle to such uniformity is the doubt whether courts are not still bound by their earlier rule of conflicts of law requiring the determination of distributees under a tort action for wrongful death in accordance with the *lex loci delicti* wherever such a tort cause of action still may be maintained.

Admittedly the Convention does not specify by what law distributees are to be determined.

Abandoning fictions for a minute, it is obvious that the court can apply only its own law—either its municipal law or its conflict of laws rules. The “without prejudice” language of Article 24(2) gives it no clue as to which of these legal pathways to follow. But it is submitted that the way in which tort actions for wrongful death are manhandled by the Convention leaves only a shell of a right to the *lex loci delicti* as such. It is further submitted that even where tort claims may legitimately be enforced under the Convention by courts of the place of accident, there has been such a merger of Conventional right with local right, that reference to local foreign law to determine distributees is no longer judicially sound.

A list of these Conventional factors (which ordinarily are regarded as substance controlled by the law of the place of accident) follows:

1. Traditional concepts of conflict of laws provide that the effect of contributory negligence as a matter of defense is determined by the law of the place of wrong. Article 21 places this determination in the forum.

2. Traditional concepts of conflict of laws provide that vicarious liability is determined by the place of wrong. This is overruled by Article 20(1) requiring that the carrier is liable unless he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to do so, and by Article 25(e), which imposes a Conventional rule of *respondeat superior* for willful misconduct.

3. Traditional concepts of conflict of laws provide that the state which created the right can modify or discharge it. The Convention prohibits this (Article 24(2)), Article (23). See also discussion in Part I of this Article.

4. Traditional concepts of conflict of laws provide that whether a cause of action survives the death of the tortfeasor depends on the law of the place of wrong. Article 27 provides for survival of such an action.

5. Traditional concepts of conflict of laws provide that the standard of care (responsibility depending on intent to harm, negligence, or absolute liability) is determined by the place of wrong. The Convention provides a uniform standard—Article 20, Article 25.

6. Traditional concepts of conflict of laws provide that a recovery under a death statute of the place of wrong cannot be had after the time fixed for bringing action has elapsed. Article 29 of the Convention extends this to

---

52 Restatement, Conflicts § 5.
53 Id., § 387.
54 Id., § 389.
55 Id., § 390.
56 26 J.A.L.C. 227, 228.
57 Restatement, Conflicts § 390.
58 Restatement, Conflicts § 379.
59 Restatement, Conflicts § 397.
two years, and provides that calculation of the period shall be in accord with the law of the forum.

Once all these incidents have been applied to the local cause of action, what is there left? Like the smile on the Cheshire cat, the only important aspect which remains of its cause of action is the designation of the beneficiaries. This, of course, the state should be at full liberty to accomplish with respect to actions brought in its courts, but to have this vestigial right ritualistically observed by foreign courts appears extreme.

One further comment may be in order. Judge Leibell, after referring to Article 28(2) ("Questions of procedure shall be governed by the law of the court to which the case is submitted") stated that:

"But who have the right of action and their respective right in any recovery is not a question of procedure. Under the New York conflict of laws doctrine it is a substantive question, which in an ordinary case, where the lex loci delicti creates the right of action, is determined by the lex loci." (Italics added)

The instrument he is construing, however, is a United States treaty, not a rule of conflict of laws. Consequently the word "procedure" must be construed in accordance with the meaning put on it by the draftsmen of the treaty rather than giving it the definition usually accorded the word by the law of New York.

There is good reason to believe that the word "procedure" as used in Article 28(2) includes the determination of the persons who have the right to bring suit. The Convention was drafted primarily by civilians, and their usage should be given the greatest weight; in the absence of any contrary intent, it should prevail. It should be noted that the law of Portugal—a civil code state—as found by Judge Leibell treats this question as a matter of procedure.

Time has not permitted any greater research on this point, and consequently it is advanced only as an educated guess that the civil law generally is the same as Portugal.

Moreover, the forum provisions support the above construction. The Convention forbids suit in the place where the accident happened, unless it is also one of the permissible forums for suit. Consequently, the lex loci delicti, as such, (in Contracting States at least) will be that no one can bring suit—an obvious absurdity. With the lex loci delicti out of the running, there is no other possible law to apply than that of the forum to determine who may bring suit.

Since it is only the "respective rights" of those who may bring suit that can be determined under Article 24(2), it is inconceivable that these respective rights would be determined by any other law than that of the forum.

*Moral Damages*

The elements which are to be included in determining damages sustained in the event of the death of a passenger in Warsaw carriage are not specified in the Convention. Whether the mental anguish and suffering of the spouse, parent, or child can be considered by the trier of the facts is not dealt with. Article 17 merely speaks of damage sustained. Obviously, the situation where this becomes important will not arise too frequently, since the elements of damage allowed in this country will usually exceed the limits, and whether mental anguish is taken into consideration would be academic.

However, it is conceivable in some cases that damage apart from mental anguish would not reach the liability limits; and where willful misconduct is proved, the inclusion of such an element might make substantial difference.

60 *Komlos*, 111 F. Supp. at 404 (point (3)).
As Komlos held on appeal, the elements of damage are to be determined in wrongful death cases by reference to the place of occurrence. On the other hand, the ordinary rule for measuring damages in contract actions is by reference to the law of the place of performance. 81

Whether the place of destination according to the passenger ticket or the place where the beneficiaries are determined (i.e., the forum) is to be regarded as the "place of performance" need not be discussed here. The issue is whether the existence of two separate sets of damage elements, one for each cause of action, produces such a legal monstrosity that they must be aligned at all costs.

No such necessity is seen. A person who qualifies for damages for mental anguish as a suitor under the wrongful death act need not be deprived of this recompense merely because he cannot recover for this same element in his capacity as suitor under the contract claim. Obviously if he does not sue on the tort claim, he could not recover unless such damages were allowed on the contract claim. What results is that the claimant has two strings to his damage bow, but that is neither unusual or harsh on the carrier.

Since the Convention neither directly nor indirectly affects this issue, and since no juridical mud pie would develop, there is no reason to hold that this aspect of the lex loci delicti has been overruled.

**Death on the High Seas**

A wholly different set of considerations arises when the place of wrong is the high seas. When death occurs on the high seas, a cause of action accrues under the Federal Death on the High Seas Act 62 to the personal representative of the decedent for the exclusive benefit of decedent's wife, husband, parent, child, or dependent relative, against the vessel, person, or corporation which would have been liable if death had not ensued. Jurisdiction to hear such cases is limited to courts of admiralty, and consequently federal district courts sitting on the civil side are without power to adjudicate cases arising under it. 63

Moreover, it has been held that the intent of the act was to establish an exclusive remedy for wrongful death arising on the high seas. Consequently, state causes of action which otherwise might apply are eclipsed by the federal act, because of the constitutional supremacy of the federal government in this field. 64

It is submitted that the policy of exclusivity of the admiralty forum should apply to the contract cause of action under Warsaw. Earlier in this article the writer urged that the local forum was free to apply, and should apply, its own law of distribution to proceeds of a Warsaw contract claim. If this is done, however, in cases where death occurs on the high seas, and state law provides for different beneficiaries than the federal act, a judgment in favor of the state law beneficiaries would effectively preclude recovery by the different federal law beneficiaries under the Death on the High Seas Act. Even if the interests of the several claimants were held to be sufficiently distinct as to allow institution of separate suits, the Warsaw limitation of liability would effectively deny recovery because of the earlier judgment in the state court. Consequently, the admiralty court, in order to protect its jurisdiction under the federal act, would have to stay proceedings in the state court (or local federal district court) until proceedings had terminated in admiralty. Thereafter suit in the state court would be useless.

No difficulties under the Convention would arise if the admiralty court

---

could hear both the contract claim and the tort claim in the same proceeding. As previously discussed the court would apply the policies of the tort act in determining the beneficiaries under the contract cause of action. They would be the same individuals, and merger of the two causes of action would result.

A possible difficulty in the path of such a joinder is the nature of the contract action. Contracts for passage on ocean surface carriers have been classified as maritime contracts, but classifying an air transportation ticket as a maritime contract appears much more difficult. Consequently it is possible that the court would hold it has no jurisdiction to hear a Warsaw contract claim.

If the Warsaw contract claim cannot be sued on in admiralty because of lack of jurisdiction of the subject matter and cannot be enforced in the state or corresponding federal court because of the supremacy of the Death on the High Seas Act, a technical violation of the Convention would result, for the contract cause of action would not be enforced at all. However, the breach would be philosophical only, inasmuch as the Federal Death on the High Seas Act as modified by the Warsaw Convention produces a substantive result identical to the contract cause of action in every respect except gravamen.

Since the basic policies of uniformity of forum and exclusiveness of remedy under the Federal Death on the High Seas Act may both be achieved without detracting from the substance of Warsaw, it is submitted that a reasonable construction of both the Convention and the Death Act would be to continue exclusive jurisdiction in the admiralty courts, whether a Warsaw contract claim is enforceable or not in admiralty.

Miscellaneous

On the basis of the discussion which has preceded, it is submitted that full recognition of the existence of a contractual cause of action under Warsaw by courts in the United States would involve no major hobgoblins. Rather, judicial reconsideration of current dogma in the light of the existence of such a cause of action could bring about a simpler, more straightforward and less costly administration of death actions.

One further word may be said about the nature of the contract claim. Since the carrier's undertaking to be responsible for all damage sustained by reason of the passenger's injury or death is one imposed by law as a term of the contract, that contingent liability could not be separately assigned in advance. Moreover, the undertaking, being "without prejudice as to who are the persons who have the right to bring suit and what are their respective rights," cannot be modified by the parties so as to entitle the passenger to designate a specific beneficiary or beneficiaries, broaden the class of persons who "sustain damage," or otherwise interfere with the right of the court to restrict the persons who are entitled to share in the proceeds. Since neither party to the contract has the power to specify who will get what, the right is similar to a right under a death statute, and accordingly would not pass by will (although in those states which provide that death benefits accrue to the "estate" of the deceased, presumably the same policy would be applied, and the estate would be the person entitled to distribution. Thus the residuary legatee in such cases would be the one to take, and the fund would also be available to creditors in such cases).

CONCLUSIONS

On the basis of all the foregoing, it is submitted that the following conclusions are inevitable:

---

1. The discussion of Judge Leibell in the Komlos case regarding the Warsaw Convention was largely unnecessary to its disposition, since the Convention does not preclude an action founded on the wrongful death act of the place where the accident occurred.

2. The discussion of Judge Leibell, referred to above, is not supported by the legislative history of the Convention, and is contrary to its basic philosophy, which is to impose the liability rules set out therein as terms of specific contracts of carriage.

3. To the extent that Komlos on appeal "impliedly" upheld the discussion of Judge Leibell, it is subject to the criticism set forth in paragraphs 1 and 2 above. However, for reasons set out in paragraph 9 below, the case is believed sound in result.

4. Provisions of the Warsaw Convention relating to the cause of action in contract are self-executing and are consequently the supreme law of the land, although they leave the determination of who has the right to sue on the contract and the respective rights of the suitors open.

5. Since the contract cause of action is founded on treaty, it is enforced as a part of the municipal law of the land rather than pursuant to doctrines of conflict of laws. Consequently, there is no compulsion and in fact no reason for a court hearing such a case to follow an inapplicable lex loci delicti in determining the persons entitled to bring suit and what are their respective rights in contract actions.

6. While courts, in determining the foregoing questions, are free to apply either their own municipal policy, as evidenced by their local wrongful death or survival statute, or their doctrines of conflicts of law, the more suitable choice would appear to be to apply municipal policy.

7. The Convention directly and indirectly has so modified rights arising under foreign death acts grounded in tort that courts are fully justified in re-examining their rules of conflict of laws applicable to Warsaw cases based on foreign torts in regard to the determination of the persons who may bring suit and what are their respective rights.

8. In determining the above matters, the courts should apply a rationale which will permit a uniform result for both contract and tort claims in all cases so that there will be a merger of all causes of action.

9. The need for uniformity does not apply to the question of what constitutes "damage." The Convention is silent on this point. Presumably the court would determine what constitutes actionable damage on the contract claim by applying municipal law, but this does not require application of the same law to the tort claim on this point. Thus, if "moral" damages are recoverable pursuant to the lex loci delicti, they could be recoverable by the distributees as determined by the law of the forum, provided that the distributee is a person who can sustain "moral" damage by law of the place of wrong.

10. Enforcement of the contract cause of action by a state court in respect of a death occurring on the high seas runs counter to the federal policy of exclusive jurisdiction in admiralty under the Federal Death on the High Seas Act. Consequently the contract cause of action is unenforceable in the United States except in admiralty for deaths also governed by that Act.

11. Whether a contract cause of action is enforceable in admiralty is doubtful, but if it is not enforceable, there is no material breach of the Convention by the United States, since the remedy, as modified by the Convention, is in all respects consistent in result, if not in philosophy.

12. The cause of action under Warsaw is not assignable by the passenger, does not pass by will, and does not abate by his death. He has no right to designate the beneficiary or expand the class of those entitled to share in the proceeds.
General Conclusion

The Warsaw Convention was designed to unify the law relating to carrier liability toward passengers traveling in international transportation. With its ratification by fifty-odd separate countries, containing points between which the overwhelming majority of international travel occurs, this objective has been almost fully realized. The Convention's machinery is a tribute to French legal thought, which by grounding liability in the contract of carriage, provided a simple means for determining liability of carrier to claimant. In the civil law states, the contract of carriage is the usual basis for liability, and the coming of the Convention required no radical change in their legal approach. For the United Kingdom, Canada, and Australia the same result was achieved by statute—a relatively easy matter for those countries, where statutory enactment of treaties is required.

Such a uniform statute has not been enacted by the United States, and its desirability is most questionable in view of the federal nature of our Union and the disparate types of death statutes in force in this country. But recognition of the true nature of the Convention would substantially ease the burden of claimants and carriers alike in eliminating need for proof of foreign law. The cost of such proof may be substantial, particularly when considered in the light of the limited liability involved.

Undoubtedly no atomic bomb will be dropped on our heads if we continue to worship exclusively at the altar of the lex loci delicti. But we will appear slightly foolish to the rest of the world.