The Role of The Flight Attendant in Air Carrier Liability*

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1. Introduction

At any given time, aircrafts of commercial airlines keep 1.2 million passengers aloft. In the process, these airlines carry thieves, pickpockets, drug addicts and con men, among other passengers. Most States do not have legislation to provide for crimes on board aircraft. At the time of writing, there was concern in the airline industry for a stewardess who was critically wounded with a knife by a drunken passenger who was a

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British subject, on board an aircraft flying over German territory and registered in the Middle East. When the aircraft landed in its destination, the offender was only fined $1,000 and released, as there were no laws in that country which would apply to the offence.

Little comfort, indeed, for the many thousands of flight attendants who attend to the slightest whim of the 1.2 million people who are airborne at any given moment. One could well ask the question, if there are "bouncers" at night clubs, railway security in the trains, and hotel security in hotels to protect hapless staff who serve customers, why is there no such protection for the "ministering angels" of the air transport industry? One would have thought that in commercial aviation, where the tyranny of distance is obviated by the most sophisticated aircraft and the ostentation of wining and dining in the most glamorous five star hotel in the world is made to look "run of the mill" by delectable cuisine served by highly professional flight kitchens of the world, there would be provision made to guide protect the airline staff on board who serve the passengers during a flight. After all, in a profession such as this, everyone is well cared for, from the humble "chap" in overalls who checks out the aircraft before the flight, to the confident captain who pilots the aircraft.

Of course, as lawyers, we could always argue that there is the Tokyo Convention of 1963 which in Article 1 makes the Convention applicable to offenses against penal law and acts which, inter alia may jeopardize the safety of persons on board. We can also argue that Article 6 of the Tokyo Convention empowers the captain to impose "reasonable measures" upon a person in order to protect persons or property therein. If the captain is of the view that a person has committed, or is about to commit an offence on a another, he is even empowered by Article 8 of the Convention to disembark the offender in a State in which the aircraft

lands.

The question is, how are all these "legal" provisions going to help a poor flight attendant who is assaulted by a drunk, a drug addict or thief? Does the captain run into the cabin and assist his fellow crew members before an act of violence is committed on them or does he take subsequent action as provided by the Tokyo Convention? What compensation can the poor crew member get from the complex and elaborate system of laws that apply to passengers say, under the Warsaw System?

There is no doubt that cabin crew form an integral part of commercial aviation, and they should also come under universal training methods and codes of conduct as do the pilots, mechanics, aeronautical engineers and other professionals who are involved with the successful operation of a commercial flight. There is a compelling need for the international aviation community to require a serious study relating to the feasibility of introducing a unified system of rules relating to the conduct of cabin crew, which could inter alia, include principles of protection of cabin crew and provide for compensation in case of injury. After all, they are the only ones who deal with the "human factor" of a flight, which could be most unpredictable at the best of times.

The lack of attention paid by the aviation community to the importance of the flight attendant's role in a commercial flight has led to recurring instances of breakdown of commnunication between cabin crew and technical crew. Inevitably, this anomaly may pose serious problems in the area of air carrier's liability. It is heartening to note, however, that there is now a growing awareness of the status of the flight attendant in commercial aviation. For instance, in 1994, the United States officially recognised that flight attendants have demonstrated a critical role in the safety of passengers, by limiting the length of their duty

times and introducing mandatory rest periods under federal law. Under Federal Aviation Administration (FAA) regulations, flight attendants must be given at least nine hours rest for duty periods lasting up to 14 hours in any 24 hours period. For longer periods, the FAA prescribes specific rest periods and larger cabin crews. The rules also give flight attendants a full 24 hours of rest for every seven calendar days. Federal law had previously mandated minimum rest periods for air traffic controllers and technical crew[1].

There have been innumerable complaints in the past by technical crews (pilots and flight engineers) relating to unacceptable cabin crew conduct that have allegedly jeopardized flight safety. A commentary published in March 1995 reported that during a hectic night approach to a busy airport in the United States, a flight attendant had opened the door to the flight deck to remove dinner trays, flooding the cockpit with light and distracting the flight crew. The flight attendant had refused the captain's earlier request to bring meals forward early in the flight, and the food was brought in only after the descent had begun[2]. In his report, the captain had written that "the approach was unsafe" and described a serious breakdown in communication between the cockpit crew and the cabin crew. Confirming a near miss with a smaller aircraft which was claimed by the captain to have occurred as a result of the commotion caused by the unfortunate entry of the flight attendant to the cockpit, the captain had gone on to record:

The captain is helpless to plan the approach any more. The flight attendants ignore requests and directions from the captain. They work for the marketing department and don't hesitate to tell pilots they don't have to listen to them.

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1) Air Letter, Wednesday, 17 August 1994, No. 13,060, at p. 1..
2) Rebecca D. Chute, On a Collision Course, Air Line Pilot, March 1995 at p. 20.

On this flight, the flight attendant's blatant disregard of the captain's request resulted in an unsafe approach. If the flight attendant had listened to the captain's request to bring meals up, she would not have been in the cockpit at low altitude causing a distraction[3].

There have also been instances where cabin crew members have been instrumental in causing involuntary injury to passengers. One such instance was when a passenger on board an American Airlines flight from Italy to Chicago was injured when a heavy tote bag fell on him from the overhead bin in the aircraft. This injury had been caused as a result of the flight attendant, opening the overhead bin to retrieve a pillow at the request of the passenger. One of the considerations the court had to decide upon was the plaintiff's contention that American Airlines had failed to provide adequate instructions to its crew on the operation of aircraft apparatus[4].

Clearly, the conduct of cabin crew members during the course of their employment would affect two classes of persons-passengers in the cabin and technical crew in the cockpit. In both instances, any adverse conduct on the part of cabin crew which would in turn result in claims for damages would impact the employer airline adversely, bringing to bear the intrinsic and incontrovertible link between the airline and its cabin crew members. Also, any liability that would arise out of the conduct of cabin crew would involve air carrier liability on principles of vicarious liability at tort. This paper will therefore examine the role of the flight attendant in air carrier liability, with emphasis on general principles of air carrier liability as they revolve round the conduct of the flight attendant. There will also be a discussion of the relationship of the

3) Ibid

4) Pasinato v. American Airlines, Inc., No. 93 C 1510, 1994 Westlaw 171522(N.D. ILL. MAY 2, 1994). For a more detailed report and analysis of this case see Lloyd's Aviation Law, Vol.13, No. 11, June 1 1994, at PP. 4-5.

flight attendant with the passenger on the one hand, and the pilot on the other, with a view to eliciting principles of air carrier liability in both instances where the conduct of the flight attendant precipitates a claim by a passenger or the representative of the passenger for injury by the air carrier.

2. Air Carrier Liability

A. General Principles

The Warsaw Convention of 1929[5] provides that for the transportation of passengers the carrier must deliver a passenger ticket which shall contain certain details[6]. The Convention also says that the absence, irregularity or loss of the passenger ticket shall not affect the existence of the validity of the contract of transportation which shall nonetheless be subject to the rules of the Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of the Convention that exclude his liability[7].

The Warsaw Convention imposes a presumption of liability on the carrier in the case of death or injury caused to a passenger. As a precaution against the possible "floodgates" of litigation that this presumption could give rise to, the Convention limits liability of a carrier to specified sums of money, unless it could be proved that the carrier did not take necessary precautions to avoid death or injury to its passengers or was guilty of wilful misconduct. Damage for death or injury under the Convention is linked to an "accident." An accident as envisaged in Article 17 of the Warsaw Convention has sometimes been

5) Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. Hereafter sometimes referred to as the Convention.
6) Id. Article 3. 1.
7) Id. Article 3. 2.

given a broader definition than in ordinary legal parlance. While in ordinary common law usage, an accident is an event which, under the circumstances is unusual and unexpected.[8] The Chicago Convention of 1944 defines an "accident" as an occurrence connected with the operation of an aircraft.[9] Article 17 of the Warsaw Convention speaks of liability of a carrier in the event of an accident which caused damage, reducing the accident to the cause rather than to the death or injury.[10]

The United States Supreme Court has held in Air France v. Saks[11] that an accident must be unexpected and external to the passenger. It is not sufficient that the plaintiff suffers injury as a result of his own internal reaction to the usual, normal, and expected operation of the aircraft.[12] In De Marines v. KLM Royal Dutch Airlines[13] - a case with identical facts as the Saks case, the court reasoned that :

An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event, on board the airplane is an ordinary, expected and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence

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8) Halsbury states that the word accident excludes the operation of a natural causes such as old age, congenital diseases, or insidious diseases, or the natural progression of some constitutional, physical or mental defect... Halsbury, Laws of England (3 ed. Vol. 22) Para 585, at page 293. The case of Fenton v. Thorley and Co. Ltd., 1903 A.C. 443, qualified this somewhat restrictive definition of the word 'accident' when Lord Lindley said :

the word 'accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended occurrence which produces hurt or loss... id. at 453.

A later case, The Board of Management of Trim Joint School v. Kelly, 1914 A.C. 667 held that an intentional act of third parties could also be considered an 'accident' at common law.

9) Annex 13, Convention on International Civil Aviation 1944.

10) Shawcross and Beaumont, Air Law, (4 ed, Reissue, 1988) V11, 153.

11) 105 S. Ct. 1338 (1985).

12) Ibid.

13) 580 F. 2d. 1193 (3rd Cir. 1978).

on board the aircraft must be unusual, an unexpected happening.[14]

At air law therefore, it is clear that an accident has to be an unexpected event, as at common law. The distinction lies in the cause, and the attendant circumstances thereupon that regard such incidents as bombings, hijacking, terrorist attacks to be considered as accidents, together with aircraft crashes[15] more on the grounds of the conduct of the airline based on the cause of the "accident" rather than on an incident itself. Arguably, the case which clearly and unequivocally brings out the contextual juridical application of the word accident in air carrier liability is Seguritan v. Northwest Airlines[16] where, in an instance where a passenger suffered a massive coronary seizure in flight, the court held that the accident was not the seizure itself but the failure on the part of the carrier to render medical assistance. The carrier's failure to render medical assistance was the accident "which caused the damage" inasmuch as, according to the court, a carrier's failure to provide adequate security to passengers in an instance of a terrorist attack.

The Day-Evangelinos test,[17] or as it is sometimes called the tripartite test evolved with the emerging difficulties of judicial interpretation of Article 17 of the Warsaw Convention.[18] The provision admits of

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14) Id. at 1052.

15) Husserl v. Swiss Air Transport Co. Ltd., 485 F. 2d. 1240, (2nd cir. 1975), Day v. Trans World Airlines Inc., 528 F. 2d. 31 (2nd Cir. 1975)., Evangelinos v. Trans World Airlines Inc., 550 F. 2d. 152 (3rd. Cir. 1976), Salerno v. Pan American World Airways, 19 Avi 17, 705 (SDNY 1985).

16) 86 A.D. 2d. 658.

17) This test is the result of decisions in Day v. Trans World Airlines Inc. 528 F. 2d. 31 (2nd Cir 1975) and Evangelinos v. Trans World Airlines Inc. 550 F. 2d. 152 (2nd Cir 1977).

18) Article 17 of the Warsaw Convention states : the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any

compensation being awarded only if an accident takes place " on board the aircraft or in the course of any of the operations of embarking or disembarking."[19] The arcane precision with which many accidents have occurred after the enactment of this provision, and their varied nature, has given rise to notable judicial fecundity in the interpretation of the words "embarking" and "disembarking." Although the words "on board the aircraft" do not present complex issues in lumine, there has been at least one instance where the time spent by passengers in a hotel consequent to a hijacking has been interpreted as time spent "on board", on the basis that if not for the novus actus interventions of a hijacking that impelled the passengers to seek solace in a hotel room, they would have been on board the aircraft anyway.[20]

One can just imagine therefore, the degree of concern the words "embarking and disembarking" would cause the fertile judicial mind. The words clearly meant the period of time during which the passenger ascends the steps of the aircraft or descends the aircraft after a flight.[21] The words 'any of the operations' however, extends the scope of this fundamental act and could well mean the time of check-in at the terminal, the period before of after security screening, and the time spent in the sterile area. Courts have, however, wavered between views and have finally accepted the Day-Evangelinos test which was developed as a consequence of a series of terrorist acts on passengers in airport lounges. This is for all purposes an objective tripartite test, so called because it takes into account three key-factors when considering whether a plaintiff was "embarking" or "disembarking". The three factors are:

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of the operations of embarking or disembarking.

19) loq. cit.

20) Husserl v. swiss Air Transport Co. Ltd. 388 F. supp. 1238 (S.D.N.Y. 1975).

21) Scarf v. Trans World Airlines Inc. 4 Avi 17,795 (S.D.N.Y. 1955). Also, Chutter v. K.L.M. Royal Dutch Airlines, 132 F.Supp. 611 (S.D.N.Y. 1954).

* the location of the passenger,
* the nature of his activity at the time of his accident, and
* the degree of control exercised by the airline at the relevant time.

The test, while clearly establishing that unless the passenger is under the control or direction of the airline there is no liability for the death or injury to a passenger, also demonstrates through a cogently analyzed curses curiae that there is a real danger of the test being subjectively applied in many circumstances.

To illustrate this, a Brussels court brought in the application of a test analogous to the tripartite test and held that a passenger who slipped on some ice and fell between the terminal building and the aircraft bus was not under the control of the airline, since the bus was operated by airport staff. No question was asked whether the airport staffs were the agents of the airline, or whether the bus service was part of the contract of carriage between the airline and the passenger.[22]

The significance of this test to the aviation lawyer is in an acquisition of a clear view of what "location," " activity" and "control" mean. really On the subject of "location," in the recent decision of Buonocore v. Trans World Airlines[23] the court held that TWA was not liable for the murder of a passenger by terrorists while waiting in the public area of da Vinci airport in Rome since the murder did not come within the terms "embarkation" or "disembarkation" under Article 17. The deceased had checked in and approached a snack cart in the main concourse area of the airport when he was struck down by terrorist fire. The main criterion on which the courts anchored their decision was that although Buanocore had checked in and received his seat assignment, he had not gone through security inspection.

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22) Adler v. Austrian Airlines, 78 S.C. Eu. 564 at 568.
23) 22 Av. Cas. (CCH 17,731 S.D.N.Y. 1990). Also cited in 900 F. 2d. at p.10.

In the earlier case of De La Cruz v. Domincana de Aviation[24] the court had held that a plaintiff who slipped and fell while on the way to a baggage claim area was not in the disembarkation process. He had descended a flight of steps from the aircraft to the ramp and entered the arrivals building, passed through immigration control, and while walking down the hallway, had slipped and fallen.

The position of the courts on the other two elements has also been somewhat inconsistent. In the case of Seidenfaden v. British Airways[25] the courts expressed the need for there to be a "clear manifestation of control"[26] for compensation to be awarded. In another case[27], the court held that an airline passenger could not claim when she fell at the immigration area which was just 300 yards away from the arrival gate. The rationale adopted by the court was that the area was not leased or under the control of the carrier, and therefore the passenger was out of the carrier's control. As for the activity of the passenger at the time of the accident, it is a fairly straight-forward proposition that almost any activity that a passenger would usually be involved in would be related to his travel under the circumstances.

The ambiguities of the tripartite test can be attributed to the original case of Day v. Trans World Airlines[28] where the court considered the activity of the passenger, the restrictions placed on the passenger's movement, the imminence of actual boarding and the physical proximity of the passenger to the gate[29] as criteria for establishing the test. It is time that a more realistic approach was taken by the courts, while taking into consideration the involvement of the airlines in today's

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24) 22 Av. Cas. (CCH 17,639 S.D.N.Y. 1989).
25) No. 83-5540 (ND-Cal. 1984).
26) Id. 5543.
27) Knoll v. Trans World Airlines Inc. 528 F.2d. 31 (2nd Cir. 1975)
28) Supra. note. 18.
29) Analyzed in Buonocore, 900 F. 2d. at 10.

security, the steps taken by airlines in securing their passengers, and the spirit of the Convention in introducing a rebuttable presumption of carrier liability and attendant limitation of liability.

The more recent case of Craig v. Compagnie Nationale Air France,[30] demonstrates that courts are now likely to interpret the word "accident" in the Warsaw Convention so as to prevent the likelihood of claims being brought for any injury that may seem to be an accident at first glance. In the Craig case, the United States Court of Appeal considered the claim for damages brought by a passenger who had tripped over a pair of shoes of the passenger seated next to her, while returning to her seat. The neighbour, who was fast asleep, had removed his shoes and had placed them in front of him. The plaintiff had been to the toilet and was returning to her seat at a time when the cabin crew had finished serving a meal and the main lights in the cabin had been switched off, in order that the passengers could sleep. The court observed:

It was the plaintiff's burden to demonstrate that the presence of shoes on the floor between two seats was unexpected or unusual event... Plaintiff did not submit or point to any evidence (such as an affidavit from a flight attendant) that finding shoes on the floor between two seats was unusual or unexpected. Nor did the plaintiff ask for a trial or further discovery to establish anything more than her own declaration.[31]

In a case[32] decided in Canada, where a 72 year old woman, who suffered from a severe case of osteoporosis claimed that she had suffered injury as a result of the aircraft in which she was travelling going through "expected" turbulence, Sutherland J. of the Ontario Court in

30) 45 F. 3d. 435, 1995.

31) Ibid.

32) Quinn v. Canadian Airlines International Ltd., Ontario Court, General Division, 18 O.R. (2d) 326, (rendered 30 May 1994), reported in Lloyd's Aviation Law, Vol. 13, No. 17, September 1 1994 at pp. 1-2.

Canada (General Division), dismissing the action observed:

Air turbulence itself is not unexpected or unusual. Up to some level of severity it is a commonplace of air travel... I find as fact that the turbulence encountered here on the flight in question, while greater than that previously experienced...did not amount to an "accident" within the meaning of Article 17 of the Warsaw Convention as the term accident is defined in Air France v. Saks. The degree of turbulence encountered on the flight cannot be said to have been unusual or unexpected[33].

This decision adds to the thrust of the recent trend adopted by courts where "accident" under the Warsaw Convention is interpreted in order to effectively preclude frivolous claims based on a lose interpretation of the word.

B. Conduct of the Flight Attendant Affecting the Passenger

In the 1994 case of Pasinato v. American Airlines[34] where the plaintiff alleged wilful misconduct on the part of the carrier when the act of opening an overhead bin by a flight attendant resulted in a tote bag falling on the plaintiff and injuring him as a result, the trial court accepted a definition of "wilful misconduct" of a previous case which identified it as :

The performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard for the consequences of its performance[35].

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33) Id. at 351-352.

34) Supra. n. 5.

35) In re Korean Airlines Disaster of September 1 1983, 932 F. 2d. 1475(D.C. Cir.), cert. denied, 112 s,Ct. 616(1991).

The court applied the above definition to the facts of the case and arrived at the conclusion that the American Airlines flight attendant's actions in no way constituted "wilful misconduct". The court explained:

There is no dispute that the flight attendant opened the overhead bin to get a pillow for another passenger. The flight attendant's deposition indicates that she opened the bin with one hand, in her customary manner, with the other placed defensively above her head near the bin to prevent an object from falling upon her or a passenger sitting below. Further, the flight attendant stated that she tried to catch the tote bag that fell from the bin (and may have touched it as it fell), but that it fell too quickly[36].

The plaintiffs claimed that repeated warnings were given over the public address system of the aircraft as to the innate hazardousness of the act of opening the overhead bins, which reminded passengers of the dangers of baggage shifting in the bins during flight. The plaintiffs further claimed that the flight attendant should have known or ought to have known the nature of the contents of the baggage in the bin in question. The court, however, was more inclined to accept the fact that incidents of objects falling from overhead bins were rare and that the flight attendant in question had been involved only in six such incidents during her seventeen years of tenure as a flight attendant, none of which had resulted in injury or inconvenience to passengers.

The court was also concerned with the formulation of an adequate and suitable definition of "wilful misconduct" which was basically known to be the quality of behaviour resulting in an act committed with the knowledge that such act will "probably result in an injury or damage"[37]. Another interpretation of "wilful misconduct" recognised an act performed

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36) Ibid.

37) Definition given in In re Korean Airlines Disaster, supra. note 36, at p. 1479.

in a manner indicating reckless disregard for the consequences of the act as reflecting wilful misconduct on the part of the person committing such act. Applying the second criterion to the case in issue, the court recognised the act of the flight attendant in placing her hand in a defensive posture and nearly catching the article of baggage as it fell, to be one which indicated the taking of sufficient care and precaution to preclude an accident from occurring.

Owing to the nature of cabin baggage which is now carried by passengers, courts place more stringent emphasis on the degree of care owed by the airline to the passenger in warning him of the inherent danger of injury from falling overhead baggage. In *Andrews v. United Airlines*[38] where upon arrival of the aircraft in which he was travelling, a passenger was hit by a piece of baggage descending from an overhead bin, it was the general view of the United States Court of Appeals for the Ninth Circuit, that airlines in the modern day context had a more serious responsibility than their counterparts of the past, to warn passengers of the increasing hazards of baggage falling from overhead baggage compartments. The court anchored its view on the fact that in the present context, passengers hand-carry much larger cabin baggage such as computers and musical instruments which barely fit in the overhead bins. Therefore, the court held that the airline's duty of care in cautioning passengers and taking adequate care against the cause of accidents relating to falling overhead baggage was of a higher standard than that which had been expected in the past. However, responsibility for the storage and retrieval of overhead cabin baggage is not always the sole responsibility of the flight attendant. Courts have held that a negligent passenger who stores his baggage carelessly is also responsible for overhead baggage. In *US Air Inc. v. United States*[39], the United

38) *See Lloyd's Aviation Law*, Vol. 13, No. 11, June 1, 1994, at pp. 1-3.
39) 14 F. 3d. 1410 (9th Cir. 1994).

States Court of Appeals for the Ninth Circuit, applying the law of California, held that a passenger who negligently stores baggage in an overhead bin must jointly share liability with the airline company, if such baggage causes injury to another passenger. The court further held that regardless of whether the offending passenger sought or received assistance from a flight attendant when storing his briefcase, he had a duty to use care in placing his luggage in the overhead compartment, and in this case, he had breached that duty. As the offending passenger was travelling on the business of his employer, his negligent act occurred during the scope of his employment and his employer was, therefore, responsible for the injuries caused by his negligent act. Also, although the court was able to trace the actual act of opening of the overhead bin to a flight attendant, it held that the negligent act of the flight attendant in opening the baggage compartment was not a superseding cause of the injury and did not exonerate the negligence of the passenger (and his employer) in storing the brief case in an "unstable" manner.

Lamkin v. Braniff Airlines, Inc.,[40] is an interesting litigation which considered the rights of a passenger on a flight from Miami to Boston who suffered second and third degree burns when a cup of coffee spilled in to her lap. Shortly after takeoff a flight attendant had served hot coffee to the passenger in a styrofoam coffee cup. The coffee spilled when the passenger placed the cup on the seat-back tray in front of her and the passenger seated in the front moved the seat backwards. The injured passenger sued Braniff Airlines alleging negligence in the hiring and training of cabin staff, and negligence in the use of an allegedly defective coffee maker, seats, cups and trays. A claim for failure to warn against the excessively high temperature of the coffee was also laid.

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40) 853 F. Suff. 30 (D. Mass. 1994).

The Federal Trial Court in Massachusetts which examined the case dismissed all claims alleged, holding that the passenger had failed to offer any evidence of negligence on the part of the airline with respect to the serving of hot coffee or treating the passenger's injury. The court also dismissed the claim of failure to warn on the ground that the passenger herself was aware that the coffee was hot, and, therefore, needed no warning as to that fact. Moreover, there was no showing that any of the airline's employee was aware that the coffee was hot enough to burn a passenger. Although the court had no difficulty in agreeing with the passenger that an airline was subject to a high degree of care and that the standard of care required may approach that of an insurer, it observed that nevertheless, a carrier is not strictly liable for accidents which befall its passengers and an injured person must prove negligence on the part of the carrier in order to recover.

One of the significant findings of the court in this case was that the application of the doctrine of *res ipsa loquitur*, which permits one on the facts of a case to "draw an inference of negligence" in the absence of a finding of a specific cause of the occurrence when an accident is of the kind that does not ordinarily happen unless the defendant was negligent, was inapplicable. The court found that neither the passenger's expert nor common knowledge supported a finding that the mere occurrence of the accident demonstrated negligence on the part of the carrier, particularly where the expert was not qualified to testify as to the cause of the injury and had no particular expertise regarding the proper functioning of a coffee machine.

C. Conduct of the Flight Attendant Affecting the Pilot

Several dramatic accidents have emphasised certain deficiencies which may exist in cockpit-cabin coordination and communication. The reasons

for poor communication between pilots and members of cabin crew are multifarious in that they are historical, organizational, environmental, psycho-social and regulatory. The basic problem between these two categories of airline staff who are thrust together on a flight involves the fact that the two crews represent two distinct and separate cultures which may often inhibit satisfactory teamwork. Although the role of the technical crew in flight safety has been well documented[41], the flight attendant's role on safety has been treated at best with ambivalence, where the flight attendant is considered as back-end crew (as opposed to front-end crew, referring to the pilot), keeping a fairly orderly cabin and serving coffee. Of course, the flight attendant may assist in instances involving terrorism or emergency evacuation, but customarily the role of the flight attendant has been feminized and often, trivialized. Perhaps the main reason for the perceived bifurcation of the two types of crew is their geographic locations, where the cockpit and the cabin remain as two distinct geographic and social environments[42]. As there are different areas of responsibility which devolve upon technical crew members and cabin crew members, it is inevitable that two separate cultures would exist in the aircraft. Often, through no fault of their own, and due to their particular responsibilities, the technical crew in the cockpit may isolate itself from the cabin crew, leading to serious lapses of communication between the two. Australian accident investigator David Adams observes:

If you look at almost any company (airline), you will usually find that the cabin attendants and the flight crew are very clearly separated. They work for different branches of the company in most cases. The culture is one of almost complete separation. Yet, the fact of the matter

41) See E.L. Wiener, Cockpit Automation, in E.L. Wiener and D.C. Nagel, *Haman Factors in Aviation,* San Diego: Academic Press, 1988, at pp. 433-459.

42) Rebecca D. Schute, Cockpit-Cabin Communication: I. A Table of two Cultures, *The International Journal of Aviation Psychology,* Volume 5, Number 3, 1995, 257 at p. 258.

is, in a safety situation, these two sections of the company have to work together. And the consequences of not working together quite often means a bunch of people get killed.[43]

One commentator's study of crew member's attitudes in flight reflects significant differences between personality dimensions of U.S. pilots and flight attendants. The study attributes these psycho-social differences to pilots being task-oriented and preferring a cognitive style of problem solving based on logic and systems oriented reasoning. Flight attendants, on the other hand, were identified as preferring an affective cognitive style and orientation to decision making.[44]

D. Wilful Misconduct

Whatever be the relationship between the flight attendant and passenger on the one hand, and flight attendant and pilot on the other, both relationships have a common denominator. Accidents caused as a direct or indirect result of the flight attendant's conduct be it an injury to a passenger or aircraft accident precipitated by the conduct of the flight attendant affecting pilot performance the legal consequences of air carrier liability would revolve round whether the act of the flight attendant or the pilot, as the case may be, was tantamount to wilful misconduct on the part of the carrier. Wilful misconduct as an exception to the limitation of liability rule appears in all three air law conventions that admit of liability limitations.[45] The original French text of the

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43) Cited in V. P. Moshansky, Commission of Inquiry into the Air Ontario Crash at Dryden, Ontario, Toronto, Canada: Minister of Supply and Services, 1992, at p. 1087.

44) See M.J. Vandermark, Should Flight Attendants be Included in CRM Training? A Discussion of Major Air Carrier's Approach to Total Crew Training, The International Journal of Aviation Psychology, Vol. 1, 1991 at pp. 87-94. See also, A. Merritt, Human factors on the Flight Deck; the Influence of National Culture, paper presented at the Seventh International Symposium on Aviation Psychology, Columbus, Oio, April 1993.

45) The Convention for the Unification of Certain Rules Relating to the Assistance and

Warsaw Convention provides that if the carrier causes the damage intentionally or wrongfully or by such fault as, in accordance with the court seized of the case, is equivalent thereto, he shall not be entitled to claim the limitation of liability.[46]

Drion[47] maintains that the English translation inaccurately states that the liability limitations of a carrier will be obviated if the damage is caused by his wilful misconduct or by such default.[48] The contentious issue in this question is what kind of misconduct is required? Drion is of the opinion that by approaching the issue in terms of conflicting concepts, the question whether faute lourde, as proposed originally in the French text and for which there was an English equivalent of gross negligence, was in fact more appropriate than the word dol which now occupies the document and for which no accurate English translation exists, has emerged as a critical one which needs resolution as to what standards may be used in extrapolating the words dol or wilful misconduct.[49] Miller[50] takes a similar view when she states that the evils of conceptualistic thinking that had pervaded the drafting of Article 25 which rendered it destitute of coherence, has now been rectified by the Hague Convention which has introduced the words "done with intent to cause damage or recklessly and with knowledge that the damage would probably result."[51]

This confusion was really the precursor to diverse interpretations and approaches to the concept of wilful misconduct under Article 25 of the

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salvage of Aircraft at Sea, Brussels, 1938, The Rome Convention 1933, and the Warsaw Convention 1929.

46) Article 25.

47) H. Drion, Limitation of Liabilities in International Air Law, Martinus Nijhoff, 1954, 195.

48) Ibid.

49) Op. Cit. at 200.

50) Georgette miller, Liability in International Air Transport, Deventer : Kluwer, 1977, at p. 200.

51) Hague Protocol 1955, Article X111.

Warsaw Convention. The French Government took steps by its Air Carrier Act of 1957 to rectify ambiguities in this area by interpreting dol in the Convention as faute inexcusable, or deliberate fault which implies knowledge of the probability of damage and its reckless acceptance without valid reason,[52] making a strong analogy with the Hague Protocol's contents. This interpretation, needless to say, brought out the question whether such reckless acceptance would be viewed subjectively or objectively.

The Belgian decision of Tondriau v. Air India[53] considered the issue of Article 25 of the Convention and the Hague interpretation. The facts of the case were usual, involving the death of a passenger and a consequent claim under the Convention by his dependents. The significance of the case lay, however, in the fact that the Belgian court followed the decision of Emery and others v. SABENA[54] and held that, in the consideration of the pilot's negligence under Article 25, an objective test would apply, and the normal behaviour of a good pilot would be the applicable criterion. The court held :

Whereas the plaintiffs need not prove, apart from the wrongful act, that the pilot of the aircraft personally had knowledge that damage would probably result from it; it is sufficient that they prove that a reasonably prudent pilot ought to have had this knowledge.[55]

The court rationalised that a good pilot ought in the circumstances to have known the existence of a risk and no pilot of an aircraft engaged in air transport ought to take any risk needlessly. The Brussels Court of Appeal however, reversed this judgment and applied a subjective test,

52) Miller, supra, note 51 at p. 202.
53) Revue Francaise de droit arien (R.F.D.A) 1977 at 193.
54) 5 December 1967; R.F.D.A. 184.
55) Transcript of judgement, p. 4.

asserting that the Hague Protocol called for "effective knowledge." Professor Bin Cheng seems to prefer the objective test in the interpretation of "wilful misconduct" in Article 25, on the grounds that a subjective test would defeat the spirit of the Convention and that judges would be "flying in the face of justice in search of absolute equity in individual cases".[56]

Peter Martin, analysing the Court of Appeal decision in Goldman v. Thai Airways International Ltd.,[57] agrees with Bin Cheng and criticizes the lower court decision which awarded Mr. Goldman substantial damages for injuring his hip as a result of being thrown around in his seat in turbulence, in an instance where the captain had not switched on the "fasten seat belt" sign.[58] Martin maintains that Mr. Goldman failed to prove that the pilot knew that damage would probably result from his act, as envisaged in the Hague Protocol principle. Being an aviation insurance lawyer, Martin is concerned that, while the English courts have a proclivity towards deciding Article 25 issues subjectively, insurance underwriters could view the breach of the limits stringently. Both on the count of the need for objectivity and on the count of the adverse effects on insurance, it is difficult to disagree with Cheng and Martin.

In the 1994 case of Saba v. Compagnie National Air France[59] - a case in which the Federal Courts of Washington examined a case relating to damage caused by rain water to persian rugs which were entrusted to a carrier for transport - the court considered evidence

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56) Bin Cheng, Wilful Misconduct, From Warsaw to the Hague and From Brusseles to Paris, 11 Annals. Air and Space L. 1977, 55 at 99.

57) (1983) Law Society's Gazette, 8 June 1983 at 1485.

58) Peter Martin, Intertional or Reckless Misconduct, From Kondon To Bangkok and Back Again, V111 Annals. Air and Space L. 1983, 145-149.

59) 866 F. Suff. 588(D.D.C. 1994).

presented that the carrier had disregarded its own cargo handling regulations as well as plain common sense. Following the interpretation of wilful misconduct adopted In re Korean Airlines Disaster of September 1 1983[60], which established:

Wilful misconduct is the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance.[61]

The court noted that it was also clear that a combination of factors can, taken together, amount to wilful misconduct. The court further observed that only the act needs to be intended, not the resulting injury or the wrongfulness of the act. Another significant finding of the court in this case was that evidence of wilful misconduct could be drawn from the determination of whether the carrier or its servants followed regulations adopted by the carrier in performing the alleged act. If regulations of the carrier were not followed, the court concluded that ipso facto such would reflect wilful misconduct on the part of the carrier.

E. Strict Liability or Fault Liability?

The question of whether strict liability or fault liability should obtain in the realm of air carrier liability becomes compelling in the context of considering the conduct of servants of the carrier in issues of liability. Clearly in such issues of litigation where the conduct of an individual is a causative factor of the accident in question, issues of negligence or wilful misconduct would be of paramount consideration in influencing adjudicators to view fault liability as a factor for consideration.

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60) 932 F.2d. 1475, 1479 (D.C. Cir. 1991).
61) Ibid.

Rationales for the limitation of liability in private air law had been discussed by Drion in 1954[62] where he discusses 9 reasons. These reasons are given elsewhere[63]. The operative question is whether private air law needs the concept of limited liability or whether another system could be recommended. The most compelling arguments for the limitation of liability in private air law are that it protects the financially weak aviation industry, unifies private air law against draconian domestic laws and expedites the payment of compensation. It is interesting to analyze these concepts in today's aviation context. We live in a world where complex litigation issues emerge, carefully thought out by contingency-fee lawyers who have an inexplicable capacity to produce a variety of defendants out of a hat. For instance, now, there is a conscious awareness that there are co-liable parties - manufacturers of component parts, air traffic controllers, and even government agencies such as airport-authorities. Would it be fair to limit the liability of the carrier and expose these three categories of defendants to unlimited liability? There may also be the instance where the deceased or injured may have had enormous capacity to earn during his working life, which would be interrupted or terminated by an air accident. Does it mean that such a defendant settles for a limited sum of money as compensation and bear his losses? Professor Bin Cheng claims that the 100,000 SDR's of the Montreal System is woefully inadequate and implies that a higher limit should be considered or the possibility of breakability of the limits should be endorsed, in the lines of the Warsaw Convention.[64]

It is prudent to approach this question with due emphasis laid on the economic ramifications of this strictly legal consideration since, at its core, the question addresses not principles of legal rectitude, nor issues

62) H. Drion, Limitation of Liabilities in International Air Law, Martinus Nijhoff 1954. at 12.
63) Infra. note 74.
64) Bin Cheng, What is wrong With the Montreal Additional Protocol No. 3? *Air. Law* Vol XIV Number 6 1989, 220 at 232.

of justice, but matters of financial interest to the parties concerned. It is inevitable therefore to consider the effect of limitation of liability as against unlimited liability and rationalise between the two and arrive at a synthesis of the concepts or, (if possible), a totally new concept. Therefore, a consideration of the Warsaw Convention, its principles of limitation of liability as coupled with unlimited liability in the event of gross negligence of the carrier ; the Montreal Protocols with their strict liability and higher limits of liability with no possibility to accommodate unlimited liability under any circumstances; and a pure instance of general liability with no inhibitions whatever, are alternatives that warrant discussion. Of course, it is needless to say that these three alternatives would be viewed from the standpoint of the plaintiff passenger or his dependant and the defendant airline. The operative theme of this inquiry would be money and not complex legal issues since, it is money that both parties are ultimately interested in.

It is incontrovertible that aviation insurers, when faced with increasing levels of claims and declining premium income would naturally increase their policy deductibles and seek to incorporate exclusions of cover. The aviation insurance market increasingly feels that there is no closeness at all between the underwriters and brokers on the one hand and the insured (airline) on the other.[65] One commentator recommends either a substantial increase in voluntary limits of liability or the total abandonment of limiting air carrier liability, implying that either would benefit both the plaintiff and the defendant.[66] Peter Martin suggests that the best future for the Warsaw System would be the abandonment of limitations.[67] He states :

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65) D. A. Kilbride, Six Decades of Insuring Liability Under Warsaw, *Air Law*, Vol XIV Number 4/5 183, at 191.

66) *Id.* 192.

67) Peter Martin 50 Years of the Warsaw Convention: A Practical Man's Guide, IV *Annals. Air and Space L.* 1979, 223, at 248.

There are very good reasons for imposing on carriers at least a very high standard of care, and even strict liability. Strict liability without limitations already applies in many States to third party liability to persons other than passengers and that is generally believed to be right...why should a passenger, therefore, be in a worse position than a person or owners of property on the ground?[68]

Insurance lawyers obviously need higher liability limits and specificity in this area. The steady disintegration of the Warsaw System, which is mainly attributable to its incompetence in providing for satisfactory compensatory limits, has been proved by figures released 6 years ago by the Rand Corporation that in a cross-section of cases studied, Warsaw-Montreal tickets obtained a per capita compensation of US$ 184,000 while non Warsaw-Montreal tickets had received double this amount. This amount has further increased over the years, demonstrating that the Warsaw Limits are being left behind rapidly.[69] It is clear therefore that the Warsaw Limits must be extended, and the first step towards this goal is the ratification by States of the Montreal Protocols. It is also imperative that the scope of the Convention be extended to third parties such as air traffic controllers and manufacturers of component parts of aircraft to seek consistency and to give the insurance market a clear picture and more accurate assessment. By bringing these parties under the Warsaw umbrella, both the plaintiff and the defendant would be well served in that the plaintiff would be assured of quick settlement and the defendant would be comfortable with the thought that his liability is limited. This could also preclude contingency-fee appearances by lawyers.

The most appropriate step to take at this juncture would be for States

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68) *Ibid.*

69) Werner Guldimann, A Future System of Liability in Air Carriage, XVI *Annals. Air and Space L.* 1991, 93, at 96.

to ratify the Montreal Protocols, considering the rapidly growing airline fleets and the even more rapid increases in traffic potential. Limitation of liability should be retained at least for now, as there has to be immediate protection of all concerned with the aviation industry, while, at the same time, maintaining a balance with the interest of the plaintiff, who would be assured of a reasonable sum in compensation without the hassle of litigation with third parties such as manufacturers.

The question of air carrier liability and the approach taken in its context by the Warsaw Convention has seen the emergence of the scholarly analysis of two issues : Should liability of the carrier be based on fault and consequently on the principles of negligence and limited liability or should liability be based on strict liability? Drion, in his 1954 treatise on liability[70] inquires into the various rationales and scenarios that may come up in an intellectual extrapolation of the subject. He examines the fact that an insurance system for liability, which would inextricably be linked to a strict liability concept, would be desirable, as a plaintiff would be able to claim compensation from an impecunious defendant through the latter's insurer, on the deep pocket theory[71], and that insurance underwriters may, in their own interest, be impelled to formulate aviation accident preventive schemes, strengthening the effects of accident prevention.[72] Drion also puts forward 9 rationales for the rebuttable limitation of liability presumption that appears in Article 17, quantified by Article 22 of the Convention. These are: maritime principles carry a limitation policy; the protection of the financially weak aviation industry; the risks should be borne by aviation alone; the existence of back-up insurance; the possibility of the claimants obtaining insurance; limitation of liability being imposed on *a quid pro quo* basis on both the

70) H. Drion, *supra.* note 63 at p. 7.
71) *Id.* at 8.
72) *Loq. Cit.*

carrier and operator; the possibility of quick settlement under a liability limitation in regime; and the ability to unify the law regarding damages.[73]

These rationales, and whatever else that form considerations of policy in the assessment whether a liability system should be based on negligence or strict liability, should be addressed with the conscious awareness that while the Convention imposes a rebuttable presumption of limited liability on the carrier, the contributory negligence of the plaintiff can exculpate the carrier and obviate or apportion compensation and more importantly, the wilful misconduct of the carrier as discussed in the previous answer, transcends liability limits and makes the liability of the carrier unlimited. Strict liability on the other hand, as proposed in the Montreal Protocols 3 and 4, does not admit of breaking liability limits; sets a maximum limit of compensation that the carrier has to pay; and makes this limit unbreakable by such extraneous factors as the carrier's wilful misconduct.

The ultimate question therefore is, what one keeps the Warsaw-Hague concept of fault and limited liability, or what one embraces a system of strict liability which assures the aggrieved party of pecuniary or reipersecutory recompense, while obviating the need for lengthy determinations of who was at fault after the fact. In other words, does one point a finger at the carrier in the first instance, then limit his liability and again break the limit if he is at fault? or make the carrier pay a sum of money, maximum limits of which have been set, with the assurance that such limits would not shoot up unconscionably if the carrier was negligent?

The Convention unified legal principles relating to air carrier liability, thus precluding the application of scores of differing domestic laws.[74]

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73) Drion, *supra*, note 63, at pp. 12-13.

However, it did not succeed in presenting to the world unequivocally objective and quantified rules of liability. This precludes a plaintiff from knowing that he would be, as a rule, compensated if he is injured in an air accident, since the Convention admits of challenge on the grounds of the plaintiff's conduct before, during or after the accident. The strict liability principle introduced by the Guatemala City Protocol and carried through by the Montreal Protocols on the other hand has been applauded on the grounds that :

First, it gets money into the hands of the passengers much more quickly. Second, it saves transaction expenses which includes legal fees and other substantial litigation costs. Third, it provides compensation to passengers in those factual situations where no responsible party is at fault, such as in an act of terrorism.[75]

Alexander Tobolewski points out very validly that actual aviation practice in terms of aviation insurance by the airlines has nothing to do with limitation of liability and claims, since airlines insure their fleets and liabilities for colossal amounts in the insurance market.[76] He suggests, therefore, the harmonisation of the law and actual practice (presumably by infusing more specific quantum in damages) and simplification of the system of recovery *inter alia,* both of which strongly suggests a regime such as the one envisaged in the Montreal Protocols.[77] Werner Guldimann endorses this view:

The most important and urgent matter in the present decade is the

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74) *Reed v. Wiser* 555 F. 2d. 1079 (2nd Cir) at 1090.

75) Nicholas Mateesco Matte, The Warsaw System and the Hesitation of the United States Senate, V111 *Annals. Air and Space L.* 1983, at 151 at 164.

76) Alezander Tobolewski, Against Limitation of Liability, A Radical Proposal, 111 *Annals. Air and Space L.* 1978, 261, at 263.

77) *Id.* 266.

continuation of the efforts undertaken by ICAO to re-establish the former universality and uniformity of the Warsaw System by having the Montreal Protocols No 3 and 4 rapidly ratified by the greatest possible number of contracting States.[78]

Although Professor Bin Cheng holds the view that the Montreal Protocols are: heavily weighted towards the carrier; the limits therein are inadequate; and that the unbreakeability of the limit of the SDR value is undesirable,[79] the view that strict liability should be embraced seems more sensible, in view of the inconceivable number of passengers carried every year by air, the possible eradication of legal contingency fees, and above all, giving teeth to the meaning and purpose of law - that it should be an instrument of solace, not an opportunity for debate.

In an evaluation of the Warsaw System[80] it has been said in 1979 that during the first 25 years of the existence of the Warsaw Convention, it had served the aviation community satisfactorily.[81] Peter Martin bases this observation on the argument that when the Hague Protocol was being drafted in 1955, it was recorded that only 55 Warsaw cases had been adjudicated, and that is a very small number of cases for an instrument of the stature of the Warsaw Convention.[82] The unifying

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78) Werner Guldimann, A future System of Liability in Air Carrige, XVI *Annals. Air and Space L.* 1991, 93 at 104.

79) Bin cheng, What is Wrong with the Montreal Additional Protocol No. 3? *Air Law* Vol. XIV Number 6 1989, 220, at 232.

80) The Warsaw Convention of 1929 was amended by : The Hauge Protocal 1955, the Guadalajara Convention 1961, The Guatemala City Protocol, 1971, and the Montreal Protocols 1, 2, 3, 4, of varying dates. It should also be noted that the Montreal Agreement of 1966,-a private arrangement between air carriers, also purported to amend the Warsaw Convention. Hereafter, joint references to all these instruments shall be referred to as the Warsaw system.

81) Peter Martin, 50 Years of the Warsaw Convention, A Pralticat Man's Guide, 1V Annals. Air and Space L. 1979, 233 at 234.

process of the liability of an air carrier, started by the Warsaw Convention, dealt with liability concepts, quantum of compensation, exceptions on liability, jurisdictional issues and prescription of action. It is said, however, that together with the original Warsaw Convention, there are now 7 other international agreements, few of which have ever seen the light of day. This means that the unification process started by the Warsaw Convention had been criticised and found wanting at various stages of its chequered history. The original document has been excoriated so many times, prompting Professor Cheng to call it the "Warsaw shambles"[83] although it remained, when these comments were made of it, the most widely implemented private international law convention.[84]

Ex facie, from a strictly practical standpoint, it would appear that many Facets of unification of the Warsaw Convention have come under interpretation by different philosophies, presumably due to the lack of specificity of the principles of unification and a fortiori, the language used. For instance, the delivery of the passenger ticket and the attendant carrier liability came under a series of confounding judicial thought processes, where in two cases[85] the courts decided that the ticket had to be delivered in such a manner as to afford the passenger a reasonable opportunity to take measures to protect against liability insurance, only to decide in Chan v. Korean Airlines[86] that the only requirement of Article 3 of the Convention was that a ticket be delivered. Goldman v.

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82) Ibid.

83) Bin Cheng,...From Warsaw to the Hague...11 Annals. Air and Space L. 1977 55. Rene Mankiewicz also uses the word 'shambles' when he describes the Warsaw convention. See, Rene Mankiewicz, From Warsaw to Montreal With Certain Intermediate Stops... Air Law, Volume XIV Number, 1989.

84) Peter Martin, supra. note 82 at p. 239.

85) Warren v. Flying Tiger Line Inc. 352F. 2d. 494(CA9 1965), Mertens v. Flying Tiger Line Inc., 341 F.2d.841 (CA2 1965).

86) 21 Avi 18,228, (1989).

Thai Airways International Limited[87] was another case where two confusing issues were decided upon. The first involved the question whether the concept of 'wilful misconduct' as reflected in Article 25 of the Convention was to be interpreted objectively or subjectively. The second issue concerned compensatory limits which were so confusing to both the courts and the parties to litigation that an outside settlement was effected on a mutually acceptable basis.[88] The issue regarding compensatory limits for death or personal injury has had a consistent evolution, starting from the Warsaw Convention at approximately 8,300/ US dollars, increased twofold by the Hague Protocol 1955, increased again by the Guatemala City Protocol to 100,000 special drawing rights (SDR) (about 130,000,000 US dollars) with the Montreal Protocols going even higher. The currency conversion to gold value has been anther contention of many parties to litigation and the case of Franklin Mint v. TWA[89] left the situation in fiscal anarchy by deciding that in the United States, the Poincare gold franc has to converted to the last official price of gold before the US left the gold market, and not the free market price of gold. This not only made the overall American attitude towards seeking enhanced compensation turn 360 degrees, but also awarded unrealistically low compensation to the plaintiff. Further, a case in Australia has given a new interpretation to the notion of carrier negligence in the carriage of cargo[90] and a New Zealand case has decided that any interested party can now claim compensation under a cargo claim[91].

The Montreal Agreement of 1966 - a private agreement between

87) 1983 3 All. E. R. 693.

88) D.A. Kilbride, Six Decades of Insuring liability Under Warsaw, Air Law, Volume XIV Number 4/5 183, at 187.

89) 18 Avi 17,778, 1984.

90) SS Pharmaceutical Co.Ltd., v. Qantas Airways Limited 1988 1 Lloyds Law Reports 319.

91) Tasman Pulp and Paper Co. Ltd., v. Pan American World Airways Inc. and others., see XI Annals. Air and Space L.1987 323 for a detailed account.

carriers flying the United States was the result of failure by contracting States to reach an international solution to the problem of unifying principles of liability, particularly insofar as the quantum of damages was concerned. The Montreal Agreement amply demonstrates, as an ICAO document[92] points out, that a private agreement between air carriers, sponsored by IATA can unhinge and question the credibility of a multilateral international treaty between sovereign States. Mankiewicz attributes this chaotic state of disagreement to the stand taken by the United States when he states :

Indeed, there is a real irony in the history of the Warsaw Convention. For more than thirty years, the United States of America has steadily and successfully fought for, and obtained and signed six protocols to amend the Warsaw Convention as well as a "Convention Supplementary to the Warsaw Convention." But she has ratified not one of these Warsaw instruments. In spite of the huge amounts of time and money spent all these years by ICAO and it's member States, the US judiciary is still saddled with the awkward task of applying, construing constructively or destructively, misinterpreting and circumventing a convention which is now 60 years old...[93]

There is only one viable alternative towards rectifying this anomaly and preserving the unification efforts of the Warsaw Convention, and that comes in the nature of ratifying the Montreal Protocols 3 and 4. As Professor Michael Milde States :

There is hardly any viable alternative to a determined effort to bring the Montreal Protocols Nos 3 and 4 into force. If that aim is not accomplished in the very near future, we may witness a trend to

92) Ref. LE 3/27, 3/28 - 91/3, at 5.
93) Mankiewicz, supra. note 84, at p. 259.

denunciation of the Warsaw System by several States with the ensuing chaotic conflicts of laws, conflicts of jurisdiction, unpredictably high compensation claims and skyrocketing increase in insurance premiums.[94]

It is inevitable therefore, that when one assesses the unification process of the Warsaw System, one has to view the package offered by the Montreal Protocols as one which is both clearly presented and meticulously thought out, taking into consideration the many grey areas such as the breakeability of the limit of liability, the uncertainty that a genuinely aggrieved plaintiff feels and the unrealistic compensation offered. The only factor lacking is the action needed by the States concerned to ratify these instruments as soon as possible.

F. Recent Developments on Compensable Limits

In November 1992 all international air carriers of Japan amended their conditions of carriage to accord with directives of the Ministry of Transport of Japan. These amendments waived passenger liability limits in international carriage by air as stipulated in the Warsaw Convention per se and as amended by the Hague Protocol of 1955. Accordingly, the Japanese carriers waived their right to invoke liability limits under the Convention's Article 20(1) for claims under 100,000 SDR for passenger injuries and deaths. In other words, the Japanese carriers waived their right under this category of claim to prove the absence of fault in order to rebut the presumption of liability imposed by the Convention under Article 17. This made the carriers of Japan strictly liable for claims under 100,000 SDR. As for claims above 100,000 SDR, the limitation of liability would be waived and fault would be presumed but rebuttable as in the original Convention. Professor Bin Cheng has commented:

This brave and enlightened initiative on the part of the Japanese

94) Michael Milde, ICAO Work on the Modernization of the Warsaw System,Air Law, Vol. XIV Number 4/5 1989, 193 at 206.

airlines, in being the first to remove the limit on carriers' liability for passenger death or injury...represents a historic landmark in the evolution of the Warsaw System. It provides an unmistakable signal to all other airlines and governments that it is now time to give up the pathetic struggle to bring life to the dismal 1971 Guatemala City Protocol in the form of the Montreal Additional Protocol No. 3 (MAP3). It should also hasten the end of what is in effect an international artel, that is already in tatters, of low compensation limit.[95]

George N. Tompkins Jr. endorses the Bin Cheng view and goes a step further in examining the Japanese amendments as suitable for the United States:

The Japanese Initiative approach presents the simple solution to the problem which has caused all of the perceived ills of the Warsaw Liability System. The simplicity of the approach is emphasised by the fact that no international convention or agreement would be required to adopt and put into place the Japanese Initiative approach in the United States... The focus of current and future attention, therefore, should be upon the Japanese Initiative approach and how to make it adaptable and acceptable in the United States and presumably thereafter, throughout the aviation world.[96]

Japan has publicly stated that it is totally dedicated to the preservation of the Warsaw System on the basis that the system eliminates "choice

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95) Bin Chang, Limit on Air Carriers Liability for Passenger Injury or Death: The Rising Sun Eclipses Guatemala City and Montreal - USA, Quo Vadis?, Lloyd's Aviation Law, Vol..13, No. 10, May 15, 1994.

96) George N. Tompkins Jr., The Case for Japanese Initiative Approach in the United States, Lloyd's Aviation Law, Vol. 13, No. 23, December 1 1994, at pp. 4-5. See also generally, Koichi Abe, The Warsaw Convention and the Waiver of Limitations of Liability by the Airlines of Japan, Lloyd's Aviation Law, Vol. 12 No. 12, June 15, 1993 at p.1.

of law" problems and retains unifying principles of liability. The Japanese Initiative approach complements the Warsaw System in that compensation is automatically guaranteed under the Japanese Initiative approach, without the claimant having to produce his passenger ticket. Also, compensation is assured without distinction as to origin, destination or nationality of the passenger concerned.[97]

Against the backdrop of a European initiative taken by the European Civil Aviation Conference (ECAC) urging member States of ECAC to participate in a European Intercarrier Arrangement setting up a new special contract which would contain liability limits of at least 250,000 SDR, the International Air Transport Association (IATA) convened its Airline Liability Conference in Washington D.C. in June 1995. The conference concluded inter alia that the Warsaw Convention System must be preserved; however, the existing passenger liability limits for international carriage by air are grossly inadequate in many jurisdictions and should be improved as a matter of urgency, urging governments at the same time through the International Civil Aviation Organization (ICAO), and in consultation with airlines, to act urgently to update the Warsaw Convention System, including liability issues.

The Conference also set up two working groups to assess and report on a suitable liability package and appropriate and effective measures to secure complete compensation for passengers. The findings of these working groups have resulted in agreement among IATA members to prepare a new inter-carrier agreement, to replace the Montreal Agreement of 1966, which will include the following elements:

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97) Opening Statement of Japan Airlines Delivered by Koichi Abe, Vice President, Legal Affairs, at the International Air Transport Association, Airline Liability Conference, 19-27 June 1995(Washington D. C.). See ALC - Item 7, WP 21-Doc II at pp. 2-4.

a) full compensatory damages, with no fixed liability figure;
b) no explicit waiver of the carrier's defences under the Warsaw/ Hague system;
c) explicit reservation of the carrier's rights against third parties; and,
d) promotion of widespread implementation of the Agreement by the airlines.

The IATA draft inter-carrier agreement, therefore, inter alia, provides for a single universal system without specified limits; the award of recoverable compensable damages to be in accordance with the law of domicile of the passenger; and an "umbrella accord" which would give carriers maximum flexibility to adjust their conditions of carriage, taking into account applicable government regulations.

The 31st Session of the ICAO Assembly, which held its deliberations from 29 September to 4 October 1995, considered the developments generated by the IATA conference of June 1995 and observed that although in the short term new limits might be accomplished through an inter-carrier agreement, most States may need a more substantive approach such as the adoption of a new protocol under the Warsaw system. Accordingly, the Assembly decided to direct the ICAO Council to continue its efforts to modernise the Warsaw system as expeditiously as possible. The Assembly also urged States to ratify Montreal Protocol No. 4, independently of the Additional Montreal Protocol No. 3.[98]

3. Conclusion

The role of the flight attendant in air carrier liability hinges upon whether or not the carrier could prove that it took necessary precautions to avoid causing injury or death to a passenger which may have been caused by the conduct of its cabin crew. Under the present liability

98) See ICAO papers, A31-WP/224, P/57, Report on Agenda Item 36.2, at 36.2-3.

regime, therefore, a carrier is prima facie liable up to prescribed limits and if it proves prudence in its professional conduct, it could avoid liability or seek mitigation thereof. If on the other hand, the plaintiff proves wilful misconduct, such limits could be transgressed, leading to unlimited liability of the carrier. Under the proposed unlimited liability scheme within the Japanese Initiative approach and under the IATA umbrella, however, the question of wilful misconduct of the carrier is obviated in the context of limitation of liability, in that the latter would not exist. The liability of the carrier would then hinge on the exception to liability which is based on the principle of good conduct, which the Warsaw system identifies as the taking of due measures and precautions by the carrier to ensure the avoidance of death or injury to a passenger or the impossibility of taking such precautions. In this sense, emerging trends in air carrier liability would hinge heavily on the specific conduct of airline crew. The conduct of flight attendants would therefore be subject to more minute judicial scrutiny under such a system.