

Comment

The IATA Inter-carrier Agreement: Finally, Justice for Victims of International Air Disasters?

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I. Introduction

On September 2, 1998, Swissair Flight 111 plunged into the icy waters off the coast of Nova Scotia on its way to Switzerland, killing all of the 229 passengers on board.¹ While the cause of the crash remains unknown, reports of smoke in the cockpit fueled speculation that wiring

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1. 229 Perish as Swissair Jet Plunges into Atlantic, H.K. STANDARD, Sept. 4, 1998, at A1.

problems may be to blame.²

In the past, international treaties imposed limits on damage liability creating substantial hurdles for recovery by grief stricken families of victims. Recent developments, however, have removed many of those limits, making it easier for victims' families to recover amounts similar to those in domestic crashes.

This comment explores the issue of damages in international air disasters. Section II of this comment discusses the Warsaw Convention and its effect on damages in relation to the crash of American Airlines Flight 965 in Cali, Colombia. Section III provides an overview of the substantive changes, in the form of the IATA Inter-carrier Agreement, which removed the outdated cap of the Warsaw Convention. Finally, Section IV examines the amendment's potential effects on the families of victims of Swissair Flight 111.³

II. THE WARSAW CONVENTION

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, also known as the Warsaw Convention, concluded on October 12, 1929.⁴ According to the language of the treaty, the convention recognized a need for uniform regulation of carrier liability and documents used for international air transportation.⁵ The purposes of the convention were to set limits on carriers' liability, thereby encouraging the growth of a fledgling industry,⁶ and to establish a set of uniform rules to govern international aviation.⁷ The convention, therefore, creates a framework of procedural rules and liability limits designed

2. Craig Turner & John J. Goldman, *60 Bodies Recovered From Site of Jet Crash Disaster: An O.C. Couple Taking a Delayed Honeymoon are Among 229 Victims.*, L.A. Times, Sept. 4, 1998, at A1.

3. The applicability of the Death on the High Seas Act (DOHSA) to Swissair Flight 111 is beyond the scope of this comment.

4. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, codified at 49 U.S.C. sec. 40105 (1994) [hereinafter Warsaw Convention].

5. *Id.* 49 Stat. at 3014, 137 L.T.N.S. at 15.

6. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, 104 S.Ct. 1776, 1784, 80 L.Ed.2d 273, 284 (1984), *rehearing denied*, 467 U.S. 1231, 104 S.Ct. 2691, 81 L.Ed.2d 885 (1984); See also James N. Fincher, *Watching Liability Limits Under the Warsaw Convention Fly Away, and the IATA Initiative*, 10 *TRANSNAT'L LAW.* 309, 310 (1997). Fincher states:

The Warsaw Convention occurred when the aviation industry was a mere infant. The international aviation industry needed the convention to provide a uniform system of law applicable to aircraft accidents and to protect the young fragile industry from the potential of high damage awards from a crash by limiting liability.

Id.

7. Paul Stephen Dempsey, *Pennies From Heaven: Breaking Through the Liability Ceilings of Warsaw*, 22 *ANNALS OF AIR & SPACE L.* 267, 270 (1997).

to create uniformity in international aviation.⁸

A. LIABILITY OF INTERNATIONAL AIR CARRIERS

Chapter III of the Warsaw Convention discusses the liability of carriers engaged in international air transportation. Article 17, the first provision in Chapter III, provides that carriers are liable for injuries suffered by passengers, including death, occurring on the aircraft or while embarking or disembarking.⁹ Article 21 establishes limitations on a carrier's liability for each passenger which cannot exceed 125,000 francs¹⁰ (approximately \$8300 U.S. dollars in 1929).¹¹ Article 21 also includes a provision which allows the international air carriers themselves to agree to higher liability limits by contracting with passengers.¹² Finally, Article 25 provides that the convention provisions excluding or limiting liability do not apply to carriers who caused damage by "wilful misconduct."¹³ "Wilful misconduct" is defined as acting "with knowledge that the act . . . could probably result in damage or injury, or in a manner that implicate[s] a reckless disregard of the probable consequences."¹⁴ The intentional omission of an act may also support a finding of wilful misconduct.¹⁵

8. *Id.*

9. Warsaw Convention, art. 17, 49 Stat. at 3018, 137 L.T.N.S. at 23. Article 17 states in relevant part:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id.

10. Warsaw Convention, art. 22(1), 49 Stat. at 3019, 137 L.T.N.S. at 25. Article 22(1) states in relevant part:

In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs.

Id.

11. Andrea L. Buff, *Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Inter-carrier Agreement Eliminate the Need to Amend the Convention?*, 20 FORDHAM INT'L L.J. 1768, 1777 (1997).

12. Warsaw Convention, art. 22(1), 49 Stat. at 3019, 137 L.T.N.S. at 25 ("Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."). *Id.*

13. Warsaw Convention, art. 25, 49 Stat. at 3020, 137 L.T.N.S. at 27. Article 25(1) states in relevant part:

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Id.

14. *Ospina v. Trans World Airlines, Inc.*, 975 F.2d 35, 37 (2d. Cir. 1992), *cert. denied*, 507 U.S. 1051, 113 S.Ct. 1944, 123 L.Ed.2d 650 (1993).

15. *Id.*

Acts or omissions constituting wilful misconduct include an airline crew's failure to discern that the execution of a 360° turn resulted in the aircraft heading into known dangerous terrain,¹⁶ as well as a crew's deactivation of radar equipment in spite of signs of bad weather and continued descent after losing visibility.¹⁷

The convention's stringent limits drew criticism almost from their inception.¹⁸ Over time, opponents of the low liability limits succeeded in raising the limits, first in 1955 through the Hague Protocol,¹⁹ and later in 1966 through the Montreal Interim Agreement.²⁰ The Hague Protocol doubled the Warsaw Convention's previous liability limit to 250,000 francs (approximately \$16,600 U.S. dollars).²¹ The Montreal Agreement, consisting of a contractual agreement between international air carriers and passengers as provided in Article 22 of the Warsaw Convention, imposed absolute liability upon carriers up to \$75,000.²² While efforts to raise the liability limits of the Warsaw Convention and the Montreal Interim Agreement continued, both agreements remain in force today.²³

B. APPLICATION OF THE WARSAW CONVENTION—AMERICAN AIRLINES FLIGHT 965

While a number of airline disasters in recent years have involved a finding of wilful misconduct,²⁴ the most recent example arose out of the crash of American Airlines Flight 965 near Cali, Colombia. The litigation resulting from the crash of Flight 965 occurred in two phases. The first phase related to the finding of liability. The second phase consisted of separate trials to determine damage awards for all remaining plaintiffs.

On the evening of December 20, 1995, Captain Nicholas Tafuri and First Officer Donnie Ray Williams, pilots of American Airlines Flight

16. *Koirala v. Thai Airways Intern, Ltd.*, 126 F.3d 1205, 1210 (9th Cir. 1997).

17. *Butler v. Aeromexico*, 774 F.2d 429, 431-32 (11th Cir.), *rehearing denied*, 781 F.2d 905 (1985).

18. *See Buff*, *supra* note 11, at 1779.

19. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371.

20. Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, CAB Agreement 18900, adopted May 13, 1966, 49 U.S.C. § 1502 (1988); *See also Dempsey*, *supra* note 7, at 272.

21. *See Buff*, *supra* note 11, at 1781.

22. *Id.* at 1785.

23. *Id.*

24. *See In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d. Cir. 1991), *cert. denied sub nom.*, *Rein v. Pan American World Airways, Inc.*, 502 U.S. 920, 112 S.Ct. 331, 116 L.Ed.2d 272 (1991); *See also In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1474 (D.C. Cir.), *cert. denied*, 502 U.S. 994, 112 S.Ct. 616, 116 L.Ed.2d 638 (1991).

965, discovered they were lost.²⁵ Both were experienced pilots, having logged over 2200 flight hours in the Boeing 757 aircraft.²⁶ While Captain Tafuri completed 13 previous flights on the Miami to Cali, Columbia route in the past and received his international line check only eleven days before, Williams had never flown an American Airlines airplane into Cali.²⁷ In an effort to find the proper runway, one of the pilots entered the incorrect code for a directional beacon into the aircraft's computer.²⁸ Instead of placing the aircraft on the proscribed approach route for the Alfonso Bonilla Aragon airport at Cali, flight 965 turned east, directly toward the summit of El Deluvio, with catastrophic results.²⁹

According to Flight 965's cockpit and flight data recorders, the aircraft's terrain warning alarm sounded at approximately 9:41.³⁰ The pilots tried to gain altitude, but it was too late.³¹ Thirteen seconds later, Flight 965 slammed into the Colombian mountainside, killing 159 of the 163 passengers and crewmembers on board.³²

The subsequent trial brought by relatives of victims and survivors of the crash was a consolidation of almost 160 lawsuits.³³ In their consolidated action, the plaintiffs essentially alleged four discrete acts, all of which involved pilot error.³⁴ First, plaintiffs' asserted that the pilots violated policies of American Airlines and the Federal Aviation Regulations by continuing their descent after the plane deviated from the proscribed approach path to the Cali Airport.³⁵ Second, they asserted that the pilots' knowing deviation from the flight plan and attempted shortcut to the Cali airport violated American Airlines policy.³⁶ Third, they alleged that the pilot's failure to verify the proper identifier for a waypoint prior to entering it on the FMC.³⁷ Finally, the plaintiffs asserted that the pilots violated American Airlines policy by ignoring the instructions of the Co-

25. In re Air Crash Near Cali, Colombia on December 20, 1995, 985 F.Supp. 1106, 1118 (S.D. Fla. 1997).

26. *Id.* at 1111.

27. *Id.*

28. *Id.* at 1119 (The district court found, based on information from the cockpit voice recorder and flight data recorder, that one of the pilots typed the letter 'R' into the keypad for the aircraft's flight management computer, apparently believing it was the proper abbreviation for the 'Rozo' waypoint beacon).

29. *Id.* at 1122 ("The aircraft hit close to the summit of El Deluvio, one of the peaks lining the east side of the valley."). *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1109.

33. *Id.* at 1109-10.

34. *Id.* at 1110.

35. *Id.*

36. *Id.*

37. *Id.*

lombian air traffic controller and attempting to bypass a required waypoint.³⁸

After an extensive trial on the liability issue, the court concluded, “[s]imply put, no reasonable jury could find that the acts of the pilots of Flight 965—and in particular the pilots decision to continue their descent at night from a grievously off course position in mountainous terrain—amounted to anything less than wilful misconduct.”³⁹

C. DAMAGES UNDER THE WARSAW CONVENTION

Under the limits proscribed under the Warsaw Convention, a plaintiff is limited to a maximum recovery of \$75,000 unless it is shown that the carrier engaged in wilful misconduct.⁴⁰ Once this showing is made, a jury may apportion damages in a manner limited only by the law of the forum.⁴¹

In the case of Flight 965, the finding of wilful misconduct has thus far opened the door for damages far in excess of the \$75,000 liability limit under the Warsaw Convention.⁴² Jamie and Lucy Montero, parents of Ernesto Montero, a college student killed in the crash, were awarded \$2.4 million dollars.⁴³ Similarly, a Miami jury awarded the family of Carmen Eliza Ruiz \$2.4 million.⁴⁴

III. AMENDMENTS TO THE WARSAW CONVENTION

The recent changes in liability limits with respect to air disasters covered by the Warsaw Convention comes after efforts to change the limits spanning over thirty years. Under the Warsaw Convention’s original provisions, a carrier’s liability was limited to approximately \$8300 per passenger.⁴⁵

While the Warsaw Convention places stringent limits on a victim’s ability to recover absent a showing of wilful misconduct⁴⁶ the convention does allow for the creation of more liberal limits short of amendment. Article 22 of the Convention provides that carriers and passengers may,

38. *Id.*

39. *Id.* at 1109.

40. See Warsaw Convention, *supra* note 13 and accompanying text.

41. *Id.*

42. Catherine Wilson, *N.J. Couple Awarded \$2.4M in Air Crash*, THE RECORD, NORTHERN NEW JERSEY, July 18, 1998 at A3.

43. *Id.*

44. Michael Connor, *Miami Jury orders \$2.4 million payment in air crash—COURTS: The Award is Another Stemming from an American Airlines Plane Slamming into a Mountain in Colombia*, THE ORANGE COUNTY REGISTER, Aug. 1, 1998 at A10.

45. See Fincher, *supra* note 6, at 310.

46. See Warsaw Convention, *supra* note 13 and accompanying text.

through a special contract, agree to a higher limit of liability.⁴⁷

In October 1995, pursuant to Article 22, the International Air Transport Association (IATA) adopted a contractual agreement among participating air carriers to voluntarily waive the liability limits provided by the Warsaw Convention.⁴⁸ The goal of the IATA agreement was to modernize the liability limits under the Warsaw Convention.⁴⁹ The United States Department of Transportation approved the IATA initiative, together with two implementation agreements, on November 12, 1996.⁵⁰

In essence, the IATA agreement relating to passenger liability is composed of two provisions.⁵¹ First, the IATA carriers agree to waive all liability limits relating to compensatory damages.⁵² Second, the IATA carriers agree that compensatory damages will be awarded based on the law of the passenger's domicile.⁵³

In addition to the liability provision of the IATA agreement, separate agreements concerning the implementation of the new liability limits were adopted.⁵⁴ One such agreement, the IATA Implementation Agreement,⁵⁵ includes a provision requiring air carriers to include in their conditions of carriage an additional waiver making them strictly liable for any claims up to \$145,000.⁵⁶

IV. EFFECTS OF THE IATA AGREEMENT

The IATA inter-carrier agreement paves the way for the families of victims of international airline disasters to recover damages consistent with those in domestic crashes. The families who lost loved ones to the Swissair Flight 111 tragedy will be the first to test the new limits. Swissair was one of a number of international air carriers who signed the IATA Inter-carrier Agreement.⁵⁷ The first suit arising out of the Swissair crash was filed September 9, 1997, by former boxer Jake LaMotta in federal district court in Brooklyn, New York.⁵⁸ LaMotta lost his 49-year-old son, Joseph, in the tragedy.⁵⁹ The suit names Swissair, Delta Airlines, which operated Flight 111 with Swissair, McDonnell Douglas, the manufacturer

47. See Warsaw Convention, *supra* note 10, and accompanying text.

48. See Buff, *supra* note 11, at 1812-14.

49. *Id.* at 1813.

50. *Id.* at 1814.

51. See Fincher, *supra* note 6, at 310.

52. *Id.*

53. *Id.*

54. See Buff, *supra* note 11, at 1815-17.

55. See Buff, *supra* note 11, at 1816 (*discussing the IATA Implementation Agreement*).

56. Lee S. Kreindler, *Goodbye to Liability Limitations*, 217 N.Y.L.J. 33 (1997).

57. Josh Karlen, *First Suit Filed Over Swissair Crash*, NAT'L L.J., Sept. 21, 1998 at A12.

58. *Id.*

59. *Id.*

of the MD-11 airplane, and Boeing, Co., the parent company of McDonnell Douglas.⁶⁰ The suit alleges claims of negligence, strict liability, breach of warranty, and seeks damages for pain and suffering of the decedent of \$50 million plus \$75 million in punitive damages.⁶¹ Unlike previous disasters however, the IATA agreement ensures that Mr. LaMotta will be spared the costly and time consuming burden of proving wilful misconduct in order to recover damages for the loss of his son.⁶²

While the passage of the IATA Inter-carrier Agreement lifted a substantial legal burden from the shoulders of victim's families, other remnants of the Warsaw Convention remain. Article 20(1) of the Warsaw Convention provides the carrier with a defense to liability if the carrier can show that all necessary measures were taken to avoid the resulting harm.⁶³ In addition, the passage of the IATA Inter-carrier Agreement re-opens the inquiry as to whether punitive damages are available under the Warsaw Convention.

V. CONCLUSION

While the results of the IATA Inter-carrier Agreements have yet to be applied, it appears the amendments will eliminate much of the inequity under the prior Warsaw Convention limits. It is unlikely that the families of victims of Swissair Flight 111 will be forced to subject themselves to the lengthy trial process for the purpose of satisfying an antiquated statutory provision.

However, with the application of the new agreements still untested, critics still contend that the Warsaw Convention requires a full overhaul. The patchwork of agreements developed over the past several decades to raise the liability limits seems to lack the uniformity and consistency the Warsaw Convention sought to provide.⁶⁴

Despite the legal complexities readily apparent in international air travel, perhaps the proper inquiry with respect to the families of airline disaster victims is whether justice has been done. Under the new liability regime created by the IATA Inter-carrier Agreement, the families of the 229 people aboard Swissair Flight 111 will be the first to find out.

60. *Id.*

61. *Id.*

62. *Id.*

63. See Warsaw Convention, *supra* note 4, art. 20, 49 Stat. at 3019, 137 L.T.N.S at 25 ("The carrier shall not be liable if 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 take such measures.")) *Id.*

64. See Buff, *supra* note 11, at 1834 (arguing that despite the IATA Agreement, the Warsaw Convention remains in need of amendment).